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Access to Justice for Victims of Oil Pollution in the Niger Delta Region of Nigeria: Exploring Contemporary Judicial Trends and Implications for Sustainable Development

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Abstract
The rich natural environment of the Niger Delta region of Nigeria has been devastated by oil pollution arising from the activities of oil companies operating within the region. This is promoted or aided mostly by the ineffective implementation and enforcement of environmental regulations in Nigeria, a state of affairs that oil companies have taken advantage of in focusing exclusively on profits while disregarding the impacts of their activities on the fragile ecosystem of the Niger Delta region. The inability of the relevant authorities to effectively implement and enforce compliance with environmental regulations should necessitate the intervention of private citizens and non-governmental organizations in seeking the enforcement of environmental regulations in order to protect human health and well-being from the adverse impacts of environmental pollution. However, this is subject to their ability to have access to court for judicial redress. This article explores the recent judicial trend in enhancing access to justice for victims of oil pollution and the implication for the sustainable development of the Niger Delta region of Nigeria.
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1. Introduction

The Niger Delta region of Nigeria, which is otherwise rich in flora and fauna including some rare species of wild flowers, birds, ants, aquatic and wild animals, now hosts an increasing variety of heavily polluting industries operating within the oil sector. The intricate processes of aerial survey, exploration drilling, appraisal drilling, and production of oil and gas characteristic of the petroleum industry, for instance, have impacted negatively on the Niger Delta environment (Worika 2001). The effects include soil degradation, water contamination and pollution, deforestation resulting from oil infrastructural damage, air and noise pollution, distortion of the ecology and loss of biodiversity, and general despoliation of the environment. The combined effect of deprivation and despoliation is destitution. The Niger Delta is now synonymous with poverty resulting from socio-economic and environmental dislocation. The impact of frequent oil spills, gas flares and other chemicals introduced into the Niger Delta environment is to render the soil infertile and at the same time polluting the creeks, rivers and rivulets. The people's basic livelihood of farming and fishing is thereby undermined, a situation that further impacts their morale, including their spiritual and ethical values, especially when juxtaposed with the affluence exhibited by oil and gas industry workers. It is no wonder that the Niger Delta's teeming unemployed youths have become increasingly restive (Worika 2001).

Presently, environmental pollution due to the activities of oil companies in the Niger Delta region of Nigeria has acquired world-wide notoriety (ERA/FoE Nigeria 2005; Human Rights Watch 1995; Human Rights Watch 2002, Pegg & Zabbey 2013). Such notoriety is promoted or aided mostly by the ineffective implementation and enforcement of environmental regulations in Nigeria, a state of affairs that oil companies have taken advantage of in focusing exclusively on profits while disregarding the impacts of their activities on the fragile ecosystem of the Niger Delta region. The inability of the relevant authorities to effectively implement and enforce compliance with environmental regulations should necessitate the intervention of private citizens and non-governmental organizations in seeking the enforcement of environmental regulations in order to protect human health and well-being from the adverse impacts of environmental pollution. However, this is subject to their ability to have access to court for judicial redress. Access to court for judicial redress or simply, access to justice, is increasingly emerging as a powerful tool for environmental protection as it affords an opportunity to aggrieved persons or public-spirited individuals or organizations to protect their procedural rights relating to access to environmental information and participation in decisions affecting their environment. Likewise, it enables them to challenge environmental decisions or actions by governments or private bodies that adversely

affect or would affect their interests, or be in breach of existing environmental laws (Amechi 2015). Regarding the latter, access to justice in instances of oil pollution, constitutes an effective strategy for holding environmental polluters including transnational companies (TNCs) accountable for the adverse consequences of their activities (Frynas 2004; Anderson 1996). However, access to justice is limited by the fact that the court system is essentially reactive and is driven by social forces as in most cases, the court will only commence proceedings, receive evidence and give judgement once a litigant has petitioned it (Anderson 1999). Equally important to access to justice for victims of oil pollution is the attitude of judges towards the protection of the environment. The attitude of the judiciary towards the protection of the environment becomes more important in instances where the legal rights and procedural gateways created in law are not very explicit and thus, would need the courts to be proactive in the role of interpreting and applying the words and phrases which appear in common law principles and legislation (Shelton & Kiss 2005).

This article explores the recent judicial trend in enhancing access to justice for victims of oil pollution and the implication for the sustainable development of the Niger Delta region of Nigeria. It starts by examining the various legal pathways to accessing justice for victims of oil pollution in the Niger Delta region and the limitations associated with these pathways. This is followed by a discussion of the contemporary legal trends in ensuring access to justice for victims of oil pollution. Finally, the article examines the implication of the contemporary judicial trend in promoting sustainable development of the Niger Delta region. The article adopted a doctrinal methodology. Hence, primary and secondary sources of information were relied upon for the content analysis for this article. The primary sources include laws including the constitution, and cases containing judicial decisions, on environmental protection and access to justice for victims of environmental pollution in Nigeria. The secondary sources comprised of books, scholarly peer-reviewed journals (including articles previously written by the authors), online publications, and newspaper articles dealing issues relating to environmental protection, pollution and access to justice.

2. Legal Pathways to Accessing Justice for Victims of Oil Pollution in Nigeria

Access to court for victims of oil pollution within the Niger Delta region of Nigeria, is usually dependent on the intersection of two factors vis-à-vis the legal rights and procedural gateways which are created in law, and the complaints and petitions brought mainly by private individuals and businesses (Anderson 1999). Regarding the first factor which is essentially institutional, oil pollution disputes can be brought before the court in Nigeria as tortuous cases seeking compensation for damages under the common law; public interest litigation under statutory laws; or as writ petitions under the fundamental human right enforcement procedure rules.

2.1 Common Law Torts

Oil pollution disputes in the Niger Delta region are mostly brought to the court in Nigeria as tortious cases seeking compensation for damages (Frynas 1999). Essentially, the tort remedies are available to an individual claiming damages for infringement of his or her private rights as the interests protected by the tort system are always direct harms to an individual or legally recognised entity (*Hunter v. Canary Wharf Ltd* 1997). In essence, the tort system has never provided a remedy for 'harm to environmental interests in the absence of a direct injury, and has been reluctant to recognize a harm suffered where the injury alleged is marginal or highly attenuated from the plaintiff' (Latham et al 2011). What is paramount in the mind of the court is not so much the threat or hazard posed by a particular activity to the environment, but whether in that particular instance, it should be regarded as a threat to the enjoyment of a private right (Fagbohun 2010). Hence, harms to public land, wildlife and the ecosystem generally, as well as harms to the atmosphere, lakes and oceans cannot give rise to a law suit by private persons and thus cannot be well protected by the tort remedies (Dewees 1992).

Regarding these torts, the tort of trespass which implicates the direct and intentional deposit of polluting substances or wastes upon land in the possession of another (Armitage 1969), has not proved popular amongst victims of environmental pollution in Nigeria. A state of affairs decried by Okonma (1997), who argued that the fact that the tort is actionable per se without proof of negligence or obvious damage, should have made it relevant to victims of environmental problems particularly those associated with oil exploratory activities in the Niger Delta region of Nigeria. Consequently, this article focuses on the rules of tort that have been popularly utilised by victims of oil pollution in litigations.

2.1.1. Negligence

Negligence is 'the breach of a legal duty to take care which results in damages undesired by the defendant to the plaintiff' (Rogers 1988). The landmark cases regarding the use of the tort of negligence to hold environmental polluters liable for breach of duty of care can be seen in *Mon v. Shell-BP* (1970-72), *Onajoke v. Seismograph Services Ltd* (1967), and *Seismograph Service v. Mark* (1993). However, using the tort of negligence to hold environmental polluters liable for the resulting damages may not be too helpful to litigants where the loss suffered is 'purely economic or psychiatric; or the alleged negligence consists of an omission rather than a positive act' (Amokaye 2014). There are three elements to ground liability under the tort vis-à-vis a duty of care;

breach of that duty by the defendant; and damage to the plaintiff resulting from the breach (*Osigwe v. Unipetrol* 2005). Proving these elements is essentially a question of fact, and not law. To succeed, the plaintiff must prove his case on the balance of 'probabilities' or on the preponderance of evidence (Evidence Act 2004; *SPDC Nig Ltd* v. *Chief G.B.A. Tiebo VII & Ors* 2005). Discharging this onus has frequently proved insurmountable to aggrieved plaintiffs in oil pollution cases as they must establish the trinity requirements of duty, breach and damage (Osipitan 1990). For instance, the plaintiffs must be able to convey in technical or scientific terms how an oil company has violated a pre-existing duty of care towards them. Achieving this requires the deployment of expert witnesses as credible scientific evidence can hardly be dispensed with in environmental tort litigation. These are usually out of the reach of most litigants as they are 'hardly able to muster enough financial resources to procure the services of experts' (Osipitan 1990), thereby leading to the risk of their cases being dismissed for lack of cogent evidence (*Chinda v. Shell BP* 1977). Unsurprising, the pollutters (usually TNC with enormous economic powers), whose polluting conducts are directly in issue 'encounter no difficulty in procuring the services of experts to testify on their behalf in a manner indicative of their non-negligence' (Osipitan 1990).

Furthermore, the plaintiffs must prove that the damages suffered were wholly and exclusively caused by the negligent conducts of the defendant. In essence, the harm would not have occurred but for the negligence of the defendant. Proving causation is quite onerous since it necessarily requires scientific evidence of experts in the particular field as to the existence and magnitude of harm occassioned by the pollution (*Seismogragh Services v. Onokpasa* 1972). Such services as earlier noted are usually unaffordable to most agrieved plaintiffs while easily at the disposal of the defendants. It should be noted when expert evidence are not controverted, the court must act on such evidence (*Seismogragh Services v. Akpruoyo* 1974).

The most successful cases based on the tort, appear to be those where the courts have held that the defendant holds a clear duty of care to the plaintiff in the conduct of their operations, which if breached, constitutes an unmistakable act of negligence. Oil pollution cases are likely to succeed on this basis as the burden of proof falls on the defendant, who must show that their operations constituted no harm to the plaintiff (*Mon v. Shell-BP* 1970-72). Evidence may not be sought from the plaintiff in these cases as the legal principle of *res ipsa loquitor*, (which literally means the 'facts speak for themselves') is invoked (Frynas 1999). The doctrine will come into operation vis-a-vis the proof of the happening of an unexplained occurrence; the occurrence is one which could not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and the circumstances point to the negligence in question being that of the defendant rather than of any other person. However, the maxim has its limitation when applied to environmental tort of negligence because as aptly observed by Osipitan (1990), '...due to the financial powers, potential defendants in environmental law suits are in vantage positions to procure the services of experts to give uncontradicted evidence in rebuttal of the presumption of Negligence.'

2.1.2. Nuisance

The tort of nuisance has historically been the main avenue for redress against pollution in Nigeria, and many common law countries (Mowoe 1990). The attraction 'lies in the fact that unlike negligence, it dispenses with requirement of proof by the plaintiff of a duty of care, and its breach by the defendant' (Osipitan 1990). Despite this, the success of nuisance claims against polluters particularly TNCs in Nigeria is uncertain, due to reluctance within the court system to assign damages to individuals or communities as a whole (Frynas 1999). Nuisance claims can be made if the activities of the wrongdoer or polluter cause interference with the enjoyment of public or private rights over lands. Private claims are more likely to succeed on this basis if the plaintiff can prove that the damage to their property and way of life was the direct result of the company's operations (*Abiola v. Ijeoma* 1970; *Tebite v. Nigerian Marine and Trading Company Ltd* 1971). In spite of its attraction, the utility of private nuisance is limited by the burden of proof imposed on the plaintiff as he has to prove that the defendant's act caused damage to him (Osipitan 1997). Failure to prove this causal link will be detrimental to the case. The plaintiff must also prove that the defendant was unreasonable in his interference with the use and enjoyment of the defendant's premises. In the determination of unreasonable interference, the court usually seeks to strike a balance between the competing rights of the plaintiff and the defendant (Osipitan 1997). In environmental tort cases, the court considers reasonable use of property by the defendant against the backdrop of the social utility of the defendant's conduct. Within the context of the exploration of crude oil upon which the economy of Nigeria is principally based (Udeh 2002), the court usually consider the social utility of the defendant's (oil company) conduct against the competing rights of the plaintiff, and tends to lean in favour of the defendant especially in instances where injunctive reliefs are sought, thereby 'prioritising the economic interests of the state over the environment' (Emeseh 2006).

The requirement of reasonable use of land does not apply to action in public nuisance. Hence, once there is an injury to the enjoyment of property, an action will obtain irrespective of whether or not the use of the land by the defendant had been objectively reasonable (*Richard v. Lothian* 1913). Nevertheless, the attraction of public nuisance lies in the fact that, it covers 'multiple of sins great or small' (*Southport Corp v. Esso Petroleum* 1954). Previously, action in public nuisance was constrained by the plaintiff having to prove special or peculiar damage

suffered by him or her or in the alternative, institute the action with the consent of the Attorney-General (*Amos v. Shell BP* 1974: *Lawani v. Nigerian Portland Cement* 1977). Presently, this is no longer necessary by virtue of the Supreme Court decision in *Adediran and Anor v. Interland Transport Limited* (1992) where the Court held that by virtue of section 6(6) (b) of the 1979 Constitution of Nigeria (now 1999 Constitution), a private person may commence an action in public nuisance without the consent of the Attorney-General, and without joining him or her as a party. The liberalization of this rule has greatly enhanced the right of victims of environmental pollution in seeking judicial remedy in Nigeria, even though as aptly observed by Amokaye (2014), the tort of public nuisance plays only a residual role in the control of pollution, which is now the subject of extensive statutory control.

2.1.3. Rule in *Ryland v. Fletcher*

The notion of strict liability in tort is longstanding or, to be more accurate, the notion that liability in tort is not necessarily strict is relatively modern (Armitage 1969). The most important instance of strict liability, and perhaps the strictest, is the rule in *Rylands v. Fletcher* (1868). It states that 'the person who brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his perils, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.' Since its formulation, the rule has made a significant impact in tort, especially in the sphere of environmental litigation (Osipitan 1990). A plaintiff wanting to rely on the rule must not only prove non-natural use of land by the defendant, but also, must prove the escape of materials or objects from the defendant's land to his or her own land. Proving a non-natural use is usually a stumbling block to plaintiffs wanting to rely on this rule. This is due to the fact that although the concept is 'associated with some special use bringing with it increased danger to others and must not merely be ordinary use of land or such as is proper for the benefit of the community, nevertheless, non-natural use of land changes from time to time depending on the circumstances' (Osipitan 1990). Presently, it appears that an unusual, extraordinary or outlandish use of land will come within the meaning of this concept (*Cambridge Water Works v. Eastern Leather County Plc* 1994). Nigerian courts have consistently held that storage of crude oil and its wastes amounts to a non-natural use of land (*SPDC Nig. Ltd v. Ambah* 1999; *SPDC Nig Ltd v. Anaro* 2000). Another limitation of the rule is that it aims at the protection of property and not persons. Hence, it will not avail persons who suffer injuries as a result of the negligent conduct of companies or their agents (*Read v. Lyons* 1947). Despite these limitations, the Rule has been invoked successfully against oil polluters within the Nigerian oil sector (*Umudje v. Shell-BP* 1975).

Nevertheless, there are various defences to the rule that would affect its effectiveness to victims of environmental pollution. This is due to the fact that strict liability does not apply if the damage was due to an act of God; a default or with the consent of the plaintiff; statutory authority; or an act of a stranger or sabotage (Kodilionye 1982). Although sabotage per se does not ground a defence where negligence can be proved on the part of the polluter, his servants or agents (Oil Pipeline Act 2004), it has frequently been successfully pleaded by oil companies in a number of environmental tort litigations (*Shell v. Otoko* 1990).

2.2. Statutory Laws/Citizen's Suits

To effectively address incidences of oil pollution and ensure good industry practices within the Nigerian oil sector, the Federal government adopted various laws. Foremost amongst these laws is the Petroleum Act (2004), and the various regulations adopted under the Act. Other relevant laws include the Oil Pipeline Act (2004) which requires the holder of a pipeline permit to take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or economic trees thereon; the Oil Terminal Dues Act (2004) which prohibits the discharge of oil or mixture containing oil from any pipeline or vessel into any part of the Nigerian sea; the Associated Gas Re-injection Act (2004) which prohibits the flaring of gas associated with oil production activities except under a permit issued by the Minister; and the National Oil Spill Detection and Response Agency (Establishment) Act (2006), which established the National Oil Spill, Detection and Response Agency (NOSDRA) with the overall responsibility of detecting and cleaning oil spill in the country. Likewise, some federal agencies regulating specific sectors whose activities adversely affect the environment, have also adopted environmental regulations. Foremost amongst such regulations is the Environmental Guidelines and Standards in the Petroleum Industry in Nigeria (EGASPIN, 2002) adopted by Department of Petroleum Resources (DPR), which not only prohibits the dumping of wastes from oil production of activities into the environment, but also, provides for the compulsory installation of pollution abatement facilities by oil companies.

These environmental regulations are mostly concerned with the prevention and deterrence of future environmental harms by the stipulation of administrative and criminal sanctions for their violations. However, they can be used to promote other objectives such as corrective justice. Such statutory remedies are not limited to compensatory redress in the form of personal and proprietary damages but also, could be in the form of restitution 'where an award is made to restore the damaged environment to its original position or restore the victim to the status quo ante insofar as it is possible to do so through payment of monetary compensation' (Amokaye 2014). For instance, section 11(5) (c) of the Oil Pipeline Act (2004) provides that the holder of a

licence shall pay compensation to 'any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of, or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.' In the instant case, parties only have recourse to court when there is a dispute as to 'whether any compensation is payable under any provision of this Act or if so as to the amount thereof, or as to persons to whom such compensation should be paid...' (section 18). These provisions as well as the compensatory provisions of paragraph 36 of schedule 1 of the Petroleum Act (2004), and regulation 23 of the Petroleum (Drilling and Production) Regulations (2004), cater only to any injury arising from oil pollution and hence, are not applicable to any act of pollution outside the oil industry.

The advantage inherent in these statutory provisions for victims of oil pollution is that considering the onerous nature of tort actions as well as the time and financial burden associated with litigating in Nigerian courts, it would make a more practicable economic sense for victims of environmental pollution to rely on the provisions of these environmental regulations for appropriate redress. However, the effectiveness of these regulations in providing such relief is dependent on their adequate enforcement by the relevant agencies of the Federal government. This is a herculean task considering the generally poor enforcement records of governmental agencies against environmental polluters in Nigeria (Emeseh 2006). Thus, it is not surprising that most victims of oil pollution would rather prefer to take their fate into their own hands by resorting to tort actions in order to obtain any form of any form of redress for their personal and proprietary losses. This was exacerbated by the hitherto strict application of the locus standi in environmental litigation in Nigeria which deprived public spirited individual and non-governmental organizations (NGOs) of the opportunity to compel these agencies to enforce environmental regulations against oil polluters (*Oronto-Douglas v. SPDC Ltd* 1997; *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* 2013).

2.3. Fundamental Human Rights Suits

The Constitution of the Federal Republic of Nigeria (1999) does not explicitly provide for a right to a healthy environment. Rather, it 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' (section 20). Following the precedent laid down by the Indian Supreme Court, this provision arguably provide for an implicit right to a healthy environment. Hence, when confronted with a similar situation, Nigerian 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 a healthy environment (Amechi 2022). On the other hand, the right to a healthy environment is explicitly provided under article 24 of The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (2004), which transformed the provisions of the African Charter on Human and Peoples' Rights (1982), into municipal law in Nigeria. The implication is that victims of oil pollution can rely on the right in their litigation against oil polluters. The procedure to be used is the same as those provided for the enforcement of fundamental rights under Chapter IV of the Constitution. This is due to the fact that the 2009 Fundamental Rights Enforcement Procedure Rules in its preamble stated as one of its overriding objectives, the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act with 'a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them' (para 3(a).

Furthermore, the preamble defines fundamental rights as including 'any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act' (order 1(2). Such explicit definition under the Rules should have rested any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment. This assertion finds support in the fact that prior to the adoption of the 2009 FREP Rules, it has already been held by the Court of Appeal in *Abia State University v. Anyaibe* (1996), that since the erstwhile 1979 Rules were made pursuant to section 42(3) of the 1979 Constitution (now section 46(3) of the 1999 Constitution), they form part of the Constitution and have the same force of law as the Constitution. It should be noted that despite such lofty objective stated in the preamble to the FREP Rules 2009, article 24 and other provisions of the Act are still subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it. In essence, the definition of a fundamental right under the Rules to include any right under the African Charter Ratification Act does not place rights under the Act on the same fundamental level with rights guaranteed under Chapter IV of the Nigerian Constitution. This is due to the fact that, unlike constitutional rights, rights under the Act are still not immune from alteration, modification, or suspension by the Legislature in the ordinary process of legislation (Amechi 2010).

The validity of the 2009 FREP Rules, a subsidiary legislation in endowing particularly the socio-economic rights in the Act including the right to a healthy environment with fundamental flavour, has been questioned. However, this appears has been laid to rest by the Nigerian Supreme Court in *the Centre for Oil Pollution Watch*

v. Nigerian National Petroleum Corporation (2019).

3. Contemporary Judicial Trends in Access to Justice for Victims of Oil Pollution

The Nigerian Supreme Court judgement *in the Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019), is the only relatively recent judgement of the Nigerian Courts dealing with access to justice for victims of oil pollution. The suit arose as appeal against the decision of the Court of Appeal which upheld the decision of the Federal High Court that the appellant had no standing to institute the suit, as it had not suffered any injury at all from the oil spillage attributed to the defendants. The suit which was decided by a full panel of the Supreme Court (comprising seven justices) unanimously allowed the appeal by holding that the appellant had the locus standi to institute the action. Although the suit dealt principally with the locus standi of an NGO or public spirited individual to bring environmental citizen suit, the Court in the course of the judgment, also considered the provisions of Article 24 of the African Charter Ratification Act and Sections 20 and 33(1) of the Constitution on the right to a healthy environment in Nigeria.

3.1. Locus standi as judge-made rule rather than a constitutional prescription

Previously, Nigerian courts have consistently held that concerned persons or environmental NGOs wishing to institute citizen suits must show that they are 'person aggrieved', that is persons whose private legal rights are infringed or threatened by the state's act, neglect or default in the execution of any environmental law, duties or authority. This test for eligibility which is known as the 'civil rights' test was derived from the opinion of Bello JSC, in *Adesanya v. President of Nigeria* (1981), that 'standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or in danger of being violated or adversely affected by the act complained of.' The test reflects his view that section 6(6)(b) of the then 1979 (now1999) Nigerian Constitution laid down a standing requirement and hence, '...it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked'. This construction was accepted by Nigerian Courts and later affirmed by the Supreme Court as laying down a constitutional rule of standing applicable in all cases (*Attorney- General of Kaduna State v. Hassan* 1985; *Inyangukwo v. Akpan* 1985; *Irene Thomas and others v. Reverend Olufosoye* 1986). One such notable decision from an environmental perspective is the earlier mentioned public nuisance case of *Adediran and anor v. Interland Transport Limited* (1991). Although this decision was rightly lauded by many commentators as evidence of environmental judicial activism as it expanded access to court for victims of public nuisance (Frynas 1999), and was even cited approvingly by one of the *amici curiae* in the *COPW v. NNPC* (2019), the fact remains that the decision reiterates the civil rights doctrine in public law litigation as enunciated by Justice Bello in the *Adesanya* case, as the litigant still needs to prove *locus standi* by showing private legal rights affected or threatened by the public nuisance (Ogomewo 2000).

In departing from the general belief on the constitutional prescription of *locus standi*, Nweze, JSC, in his lead judgment in *COPW v. NNPC* (2019), stated that it is not correct to say that the Supreme Court in the *Adesanya* case decided that that section 6(6) (b) of the 1979 Constitution, prescribed the *locus standi* of a person wanting to invoke the judicial powers of the court. In coming to this decision, his Lordship traced the trajectory of the *locus standi* rule from its ancient beginning as a common law precept to the adoption in Nigeria by virtue of its common law legacies; extensively reviewed the plethora of Nigerian case law on *locus standi*, and concluded that the authorities did not support the assumption of a constitutional basis for the rule. His conclusion that *locus standi* is a strictly judges-made rule rather than a constitutional prescription in Nigeria, were unanimously endorsed by other members of the Panel. Thus, being of a common law origin, the rule could also be unmade or liberalized by judges to '…meet the need to preserve the integrity of the rule of law…' (*COPW v. NNPC* 2019 at 568).

3.2. Recognition of the locus standi of NGOs in environmental citizen suits

The Court also recognized that Nigerian courts had always adopted a restrictive approach to the issue of *locus standi* in public law litigation. This was due to the insistence that the plaintiff must by his claim, show sufficient interest in the subject matter of the suit, which interest would be affected by the action of the defendant against whom the action is instituted. The criterion for determining 'sufficiency of interest' was whether the plaintiff seeking the redress or remedy will suffer some injury or hardship arising from the action of the defendant. Thus, assuming that the Supreme Court in the instant case pronounced exclusively on the non-constitutional foundation of *locus standi*, it would be highly unlikely and without more that an NGO or any public spirited individual would have succeed in any environmental citizen litigation due to the inability to satisfy the 'interest' or 'injury' test under the common law. As noted by Muhammad JSC:

> '… In the sphere of public law as occurred in *Olawoyin v. Attorney-General of Northern Nigeria*…, [the Supreme Court] has insisted that for a plaintiff to have the *locus standi* to maintain an action, it must, by its claim, demonstrate the injury it suffers from the conduct of

> the defendant against whom the action is instituted. *In this case at hand, it would appear that the appellant does not squarely satisfy the criteria*.' (*COPW v. NNPC* 2019 at 576G-H)

Thus, to uphold the standing of NGOs or any public spirited individuals in public law litigation particularly in environmental matters in Nigeria, there should be a judicial departure from the hitherto narrow or restrictive common law approach to *locus standi* which has perpetuated injustices against victims of oil pollution in Nigeria. Hence, the Court's decision to adopt the liberally contemporary from other common law jurisdiction by unanimously upheld the *locus standi* of environmental NGOs and other public spirited in environmental public law litigation. In his lead judgement, Nweze, JSC, found a basis for the decision in the judicial function test and adopted the approach of Bhagwati, J, in *Gupta v. President of India* (1982), '…that it is by liberalizing the rule of *locus standi* that it is possible to effectively police the corridors of power and prevent violations of law'. Likewise, in upholding the *locus standi* of NGOs and public spirited individuals in environmental litigation, Onnoghen, CJN, stated:

> 'It is therefore my considered opinion that from the facts pleaded in the amended statement of claim… and the law, the lower courts are in error in holding that the appellant has no *locus standi* in instituting the present action which is aimed at saving the environment and lives of the people. The plaintiff, cannot, in any way, be described as a busy body or interloper. This is a public interest litigation in which the chambers of the Honourable Attorney-General of the Federation holds sway but the law on *locus standi* in that regard has grown beyond that and now encompasses public spirited individuals and NGOs .. The issue in this case, from the facts disclosed… is… whether appellant can be said to have disclosed sufficient interest in the subject matter to be accorded a standing to initiate the proceedings to remedy the wrongs caused by the action/inaction of the defendant' (*COPW v. NNPC* 2019 at 575B-D).

3.3. Fundamental Nature of the Right to a Healthy Environment

It must be stated that the justiciability of the right to a healthy environment was not in contention in the court of first instance as this was a purely environmental citizen suit. However, it is inevitably that a citizen suit of this nature, would inevitably result in a discussion of the right to a healthy environment particularly where human health and well-being is concerned. Thus, it was not surprising that the Supreme Court seized the opportunity provided by this case to pronounce on the fundamental nature or justiciability of the right to a healthy environment in Nigeria. This is apparent in the statement of Kukere-Ekun to wit:

> Section 33 of the 1999 Constitution guarantees the right to life while Section 20… provides that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country". See also article 24 of the African Charter on Human and Peoples' Rights, which provides "All people shall have the right to a general satisfactory environment favourable to their development". These provisions show that the Constitution, the Legislature and the African Charter on Human and Peoples' Rights, to which Nigeria is a signatory, recognize the right to a clean and healthy environment to sustain life' (*COPW v. NNPC* 2019 at 587 D-F).

Similarly, Eko stated:

> '… and I agree, that in order to broadly determine locus standi, under environmental rights as human rights, article 24 of the African Charter on Human and Peoples' Rights should be read together with sections 33(1) and 20 of the 'Constitution on the role of the State in preserving the environment for the health and by extension (lives) of Nigerians", and that "it is apparent that the right to a healthy environment is a human right in Nigeria". … The African Charter on Human and Peoples' Rights, an international treaty, having been domesticated, forms part of our corpus juris' (*COPW v. NNPC* 2019 at 597-598 H-C).

4. Implications of the Recent Judicial Trend for Sustainable Development of the Niger Delta Region

The judgement of the Supreme Court in *COPW v. NNPC* has diverse implications not only in ensuring access to justice for victims of oil pollution, but also in ensuring good environmental practices and overall sustainable development of the Niger Delta region. This is evident in the Supreme Court's recognition of environmental citizen suit. It should be noted that environmental citizens suit which is an aspect of PIL is usually instituted either to challenge government efforts or failures to manage or regulate the environment, or to sue statutory or private entities to enjoin the latter's activities on public or private lands that violate specific statutory standards (DiMento 1977). The latter, which aims at complementing existing regulatory enforcement efforts, has been described as giving real enforcement 'teeth' to public law. In environmental citizen suit, there is usually no need to prove actual harm to the environment or human health provided that it can be proved that the emission limit values or any other provision of environmental regulations have been breached by the activities of the regulated parties (Adler 2001). Thus, it gives relevant NGOs and public-spirited individuals, with the requisite intellectual

and financial resources, the opportunity to defend and secure the Niger Delta environment against the rampaging activities of oil polluters. It would also engender better enforcement of environmental laws in Nigeria, as the concept effectively recognizes the public as an enforcer of laws especially (but not only) where governmental agencies fail for whatever reason to enforce the law. This point is particularly important in areas like the oil and gas sector which is the mainstay of the Nigerian economy and in which the government -the regulator- also holds major stakes in the oil exploration and production activities of the multinational companies operating in the industry (Okonkwo & Etemire 2017). Thus, the government is usually reluctant to properly monitor and hold polluting companies in the sector accountable for the environmental excesses in accordance with applicable environmental laws (Konne 2014).

Furthermore, the Supreme Court's recognition of both the justiciability of the right to a healthy environment and representative standing for NGOs and public spirited individuals in environmental litigation, could significantly improve access to justice in Nigeria, especially for vulnerable and marginalized groups whose environmental rights and interests are being abused or threatened. This is because environmental representative suit which is usually instituted to challenge the infringement or threatened infringement of the right to a healthy environment, constitutes a means for possibly surmounting socio-economic hurdles to access to justice in oil pollution matters in Nigeria. As earlier noted, apart from the legal rights and procedural gateways which are created in law, the complaints and petitions brought mainly by private individuals and businesses, is another important determinant of access to justice. The latter factor involves the effect of per capita income on environmental litigation as access to court is dependent on the litigants being able to afford it. This invariably means having the financial wherewithal to hire lawyers and use legal institutions as well as offsetting the opportunity cost generated by being away from income generating activities in the course of the litigation. Such resources are not available to the poor, who usually bear the brunt of oil pollution in the Niger Delta region (Emeseh 2006). Thus, the high levels of poverty when coupled with other factors such as widespread illiteracy and ignorance of legal rights have been shown to inhibit the ability of most inhabitants of the Niger Delta to use the courts for the purpose of protecting their environmental rights or securing adequate remedies for the environmental wrongs done to them (Frynas 2001).

Flowing from the above, it can be argued that the cumulative impacts of the judgement in *COPW v. NNPC* is the explicit recognition and concretisation of PIL in all its manifestations in Nigeria, and this signifies a critical paradigm shift from the days of unduly restrictive access to justice in oil pollution cases in Nigeria, to an era of reasonably liberal access. It is expected that with this development, environmental NGOs and public-spirited individuals, have been given the opportunity to defend and secure the environmental interests of those groups of people that lack the wherewithal to access the courts in the Niger Delta region. The anticipated involvement of NGOs and public spirited individuals in environmental litigation has the potential to restore the confidence of the mostly poor victims of oil pollution in the region, who are wary of approaching the courts due to the onerous burden of proof associated with tort rules, and the hitherto restrictive approach to the application of the locus standi rules. Such wariness as evident from the Study conducted by Worika and Amechi (Unpublished manuscript), had made them to see the courts as 'always on the side of the polluters' in environmental litigation cases. Likewise, such involvement of NGOs and public spirited individuals would not only induces better compliance with environmental laws, but also, but engender behavioral changes in society that are more environmentally friendly, given the greater exposure to successful environmental law suits including the grant of injunctive reliefs that PIL offers against potential polluters and environmental law violators (Etemire & Sobere 2020). It should noted that Nigerian courts are reluctant particularly oil pollution cases to grant injunctions, which offer the best avenue for preventing actual or threatened degradation of the environment (May & Daly 2019). This reluctance has given an unfair leeway to operators in the Nigerian oil sector as evidenced in the statement made by a Shell Manager in 1998 that 'the law is on our side because in the case of a dispute, we don't have to stop operations' (Emeseh 2006).

Indeed, it has been rightly argued that the 'possibility that a polluter can be sued [by a wide spectrum of actors in the society] will itself have a positive effect by inducing public authorities and business enterprises to examine more carefully the compatibility of their decisions and activities with environmental law stipulations' (Fagbohun 2010). This would result in sustainable exploitation of natural resources and ultimately, engender sustainable development of the region. This was aptly noted by Okoro JSC in his concurring judgement in *COPW v. NNPC* when he stated:

> However, in public interest litigation, it is instituted in the interest of the general public… [it] is initiated by one or more persons on behalf of some victims who cannot apply to the court for redress for themselves due to one reason or the other. *It is intended to improve access to justice* to the poor when their rights are infringed and the protection of the public affected. Again, such public interest litigation serves as a medium for protecting, liberating and transforming the interest of marginalized groups. It raises issues against non-personal interest of the applicant and *I agree that public interest litigation is a catalyst for*

sustainable development (*COPW v. NNPC* 2019 at 5991 C-D).

Perhaps, the only issue with the judgement in *COPW v. NNPC* is that Supreme Court failed to pronounce itself on the core content and minimum obligations imposed by the right to a healthy environment on the government and private persons such as the oil MNCs operating within the Niger Delta region of Nigeria. This might be due to the fact that it was instituted as an environmental citizen suit, and hence, the perfunctory manner in which the right was dealt with in the concurring judgements of only two out of the seven justices that decided the case. Nevertheless, this failure might not augur well for the use of the right in environmental litigation as lawyers would still prefer to take their chances with the onerous tort rules which at least, they are conversant with their nature and limitations. It should be noted that tort rules due to the various limitations and defenses open to the defendants in environmental tort litigations are regarded at best as 'a blunt instrument for remedying harms to the environment' (Latham et al 2011).

5. Conclusion

The attitude of the judiciary towards the protection of the environment is vital in enhancing access to justice for victims of oil pollution in the Niger Delta region of Nigeria. This attitude becomes more important in instances where the legal rights and procedural gateways created in law are not very explicit and thus, would need the courts to be proactive in its interpretation and application of common law principles and legislation relating to environmental protection. Previously, the Nigerian judiciary had not been positively disposed towards environmental matters particularly as it concerns the issue of locus standi. This engenders a state of affairs in which not only had many poor victims of oil pollution been denied access to justice in Nigerian courts; but also promoted flagrant disregard for the observance of environmental regulations by operators in the Nigerian oil and gas sector. This position appears to have changed with the Supreme Court decision in *COPW v. NNPC* which recognises the concept of PIL as well as the fundamental nature of the right to a healthy environment in Nigeria. Hence, it is reasonable to expect that this judicial trend would result in increased court cases, as it broadens access to justice by offering the opportunity to bring before the courts, matters that were hitherto not entertained by the courts given the erstwhile restrictive standing rule and non-recognition of the right to a healthy environment.

Understandably, the Supreme Court in *COPW v. NNPC* didn't pronounce on the core content and minimum obligations imposed by the right. However, this is not fatal and shouldn't detract from the significance of the judgement as it was based on an environmental citizen suit. Though, it is advocated that when presented with the opportunity by litigants, there is a need for deepening the recognition of the right in Nigeria by detailed judicial pronouncements on the nature of the right, particularly on its substantive contents such as the kind of conservation and degree of environmental quality envisaged by the right. Likewise, there is the need for a positive judicial pronouncement on whether the range of remedies in PIL and human rights suits particularly injunctive remedies are available to victims of oil pollution in the Niger Delta region. Such pronouncements when made induce behavioral changes and consequent compliance with environmental laws by operators within the oil and gas sector. This would result in sustainable exploitation of natural resources and ultimately, engender sustainable development of the region.

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