Access to Justice through Environmental Public Interest Litigation: Exploring Contemporary Trends in Nigeria

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Abstract: The constraint posed by the cost of litigating environmental issues has made public interest litigation (PIL) to be a veritable tool for environmental protection and the realization of the right to a healthy environment in Nigeria. Environmental PIL falls under public law litigation and hence, is affected by the procedural requirement of locus standi in Nigeria. Satisfying this requirement in instances of environmental degradation or non-compliance with provisions of environmental regulations, has hitherto proved burdensome for public-spirited individuals and non-governmental organizations (NGOs) interested in the overall protection of the environment in Nigeria. However, recent events seem to have changed the application of the locus standi rule to environmental PIL in Nigeria. This article majorly seeks to explore the contemporary trends in environmental PIL in Nigeria with regards to emerging statutory provisions and case law, and the implications of these changes for access to justice in environmental matters, environmental protection and the promotion of sustainable development in Nigeria.

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A. Introduction

This article majorly seeks to explore the contemporary trends in environmental public interest litigation (PIL) in Nigeria with regards to emerging statutory provisions and case law, and the implications of these changes for access to justice in environmental matters, environmental protection and the promotion of sustainable development in Nigeria. Indeed, access to court or judicial justice is increasingly emerging as a powerful tool for environmental protection. It affords an opportunity to aggrieved persons or public-spirited individ-

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uals or organizations that are concerned with the promotion of environmental integrity, 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.[1] Regarding the latter, access to judicial justice in instances of environmental degradation or pollution, constitutes an effective strategy for holding environmental polluters including transnational companies (TNCs) accountable for the adverse consequences of their activities.[2] However, access to judicial 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.[3]

The ability of a litigant to petition the court for judicial review is limited or dependent on the intersection of two factors vis-à-vis the legal rights and procedural gateways created in law, and the complaints and petitions brought mainly by private individuals.[4] The former implicates the issue of locus standi, a procedural requirement that is vital in public law litigations. 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.[5] 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.[6] Such resources are not available to the poor, who usually bear the brunt of environmental degradation in Nigeria.[7]

The constraint posed by the cost of litigating environmental issues has made PIL to be a veritable tool for environmental protection and the realization of the right to a healthy

1 See *EP Amechi*, Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development, African Journal of International and Comparative Law 21 (3) (2015), p. 383.

2 Ibid. See also *JG Frynas*, Social and Environmental Litigation against Transnational Firms in Africa, The Journal of Modern African Studies 42 (3) (2004), p. 363; and *M Anderson*, Environmental Protection in India, in: AE. Boyle / MR Anderson (eds.), Human Rights Approaches to Environmental Protection, Oxford 1998, pp. 199, 226.

3 See *M Anderson*, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC, paper for discussion at WDR Meeting, 16 17 August 1999, available at http://siteresources.worldbank.org/INTPOVERTY/ResourcesWDR/DfiD-Project-Papers/anderson.pdf (last accessed on 20 June 2020), p. 9.

4 Ibid.

5 Ibid, pp. 9-10.

6 Ibid.

7 See *E Emeseh*, The Limitation of Law in Promoting Synergy between Environment and Development Practices in Developing Countries: A Case Study of the Petroleum Industry in Nigeria, Journal of Energy Natural Resources Law 24 (4) (2006), pp. 601, 603-604; and World Resources Institute, UNDP, UNEP, & World Bank, The Wealth of the Poor: Managing Ecosystems to Fight Poverty, 1 September 2005, https://www.wri.org/research/world-resources-2005-wealth-poor (last accessed on 10 August 2021), p. 76.

environment in Nigeria.[8] PIL has been described as a legal tool that allows individuals, groups and communities to challenge government decisions and activities, and those of other entities, in a court of law or any other competent body with judicial power for the enforcement of public interest.[9] PIL usually deals with major environmental and social grievances and represents a departure from traditional judicial proceedings, as litigation is not necessarily filed by the aggrieved person.[10] Strategically, it is often deployed as part of a wider campaign on behalf of disadvantaged and vulnerable groups in society.[11] PIL can manifest in the form of representative standing which deals with infringement or threatened infringement of fundamental human rights including the right to a healthy environment, or as citizen suit dealing with neglect or default in performance of public duties including environmental duties. The latter is principally concerned with controlling unlawful inadequate enforcement of the law.

Environmental PIL as a concept can be understood as referring to any proceeding brought by either a public-spirited individual or an NGO seeking to enforce the rights or obligations created by environmental laws including constitutional environmental provisions.[12] Just like any other kind of PIL, environmental PIL falls under public law litigation and hence, is affected by the procedural requirement of locus standi in Nigeria. Satisfying this requirement in instances of environmental degradation or non-compliance with provisions of environmental regulations, has hitherto proved burdensome for public-spirited individuals and non-governmental organizations (NGOs) interested in the overall protection of the environment in Nigeria.[13] Indeed, the rule of locus standi, in its restrictive form, had always been employed by governments or their agencies to frustrate the actions of their citizens and NGOs when resorting to the courts to demand accountability including with regard to environmental public duties.[14] Such state of affairs does not augur well for environmental protection in a country like Nigeria where there is an overwhelming institutionalized apathy towards enforcement of environmental regulations by regulatory

8 *C Scwarte*, Public Interest Litigation: Profiles of Tools and Tactics for Environmental Mainstreaming, No 3' (20 October 2009), https://www.environmental-mainstreaming.org/documents/EM%20Profile% 20No%203%20-%20Public%20Interest %20Litigation%20(6%20Oct%2009).pdf (last accessed on 20 June 2020), p. 1.

9 Ibid.

10 Ibid.

11 Ibid.

12 See *JE DiMento*, Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research, Duke Law Journal (1977), p. 409.

13 For example, see *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others*, Unreported Suit No. FHC/CS/573/93, delivered on 17 February 1997.

14 Ibid. See also *AM Odje*, Locus Standi: Threat to Anti-Corruption Crusade and Good Governance in Nigeria (1) & (2), The Vanguard, 13 and 20 January 2006, Available at http//www.vanguardngr.com/articles/2002/features/law/law413012006.html; and http://www.vanguardngr.com/articles/2002/features/law/law620012006.html (last accessed on 11 March 2020).

agencies and other public bodies.[15] However, recent events – including statutory changes (with the establishment of both the Fundamental Rights (Enforcement Procedure) Rules, 2009,[16] and the National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations, 2009[17]) and judicial interventions (i.e. the judgement of the Nigerian Supreme Court in the case of *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)*[18]) – have changed the application of the locus standi rule to environmental PIL in Nigeria.

To achieve the aforementioned goal of this paper in exploring those recent statutory and judicial changes and their implications for access to justice in environmental matters in Nigeria, the next section will first lay an important foundation by clarify the history of locus standi in relation to PIL in environmental cases in Nigeria. The third section will proceed to explore the contemporary trends in environmental PIL in the country. The implications of this contemporary development will be analyzed in the fourth section, and the conclusion will be drawn in the fifth section.

B. Locus Standi and Public Interest Litigation in Environmental Matters in Nigeria: A Brief Historical Analysis

A discussion of the history of environmental PIL in Nigeria is invariably tied to the history of the enactment of express legislation dealing specifically with the protection of the environment in Nigeria. As argued by various scholars, the enactment of the erstwhile Federal Environmental Protection Agency (FEPA) Act on 30 December 1988[19] marked the advent of a comprehensive and non-piecemeal approach by the federal government to the issue of environmental protection.[20] However, neither the FEPA Act nor its replacement statute, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, provided for PIL. The implication is that since environmental law falls principally

15 See *Emeseh*, note 7, p. 606; and *O Ibeanu*, Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria, Environmental Change & Security Project Report 6 (2006), p. 32.

16 Available at: https://www.refworld.org/pdfid/54f97e064.pdf.

17 National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations, 2009 (S.I. 31 of 2009).

18 *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019) 5 NWLR (pt) 518.

19 Enacted as the Federal Environmental Protection Agency Decree no 58 of 1988, on 30 December 1988. Now Cap F10 Laws of the Federation of Nigeria 2004. However, it is no longer an existing law as it has been replaced by *the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* No 25 of 2007 (hereinafter NESREA Act).

20 See *EO Akanki*, Air Pollution Control Law, in: JA Omotola (ed.), Environmental Law in Nigeria Including Compensation, Lagos 1990, p. 202; *Y Osibanjo*, Some Public Law Considerations in Environmental Protection, in: Omotola (ed.), ibid, p. 129; *O Oyewo*, The Problem of Environmental Regulation in the Nigerian Federation, in: Omotola (ed.), ibid, p. 105; and *OA Bowen*, The Role of Private Citizens in the Enforcement of Environmental Laws, in: Omotola (ed.), ibid, p. 153.

within the realm of public law, the rule governing the institution of PIL by public-spirited individuals and environmental NGOs in Nigeria is basically the same as that applicable to any other citizen suits seeking to promote or protect public rights. Public rights are those rights that belong to the body politic and may include interests generally shared, such as those in the free navigation of waterways, passage on public highways, public health and living conditions, public education, public conservation/protection of the environment, regulation of trade and general compliance with regulatory law.[21]

Until recently, the restrictive rule of locus standi as applicable to public lawsuits in Nigerian courts was that concerned persons or environmental NGOs wishing to institute public interest suits must show that they are 'persons aggrieved', that is, persons whose private legal rights are infringed or threatened by, say, the state's act, neglect or default in the execution of any environmental law, duties or authority. This eligibility test which is known as the 'civil rights' test was derived from the opinion of Bello JSC, in *Adesanya v President of Nigeria*,[22] 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'.[23] The test reflects the view that section 6(6)(b) of the then 1979 Nigerian Constitution (which is similar to section 6(6)(c) of the present 1999 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'.[24] This construction was accepted by Nigerian courts and later affirmed by the Supreme Court of Nigeria as laying down a constitutional rule of standing applicable in all cases.[25]

One such notable decision from an environmental perspective is *Adediran and Anor v Interland Transport Limited*,[26] a public nuisance suit which was objected to by the defendants on the ground that in the absence of proof of special damage, the Attorney-General should have sued or permitted a relator action to be brought. The Supreme Court dismissed the argument and held that where the determination of the civil rights and obligations of a person is in issue, ‘any law which imposes conditions, is inconsistent with the free and

21 See *A Woolhandler and C Nelson*, Does History Defeat Standing Doctrine?, Michigan Law Review 102 (2004), p. 693; and *W Bray*, Locus Standi in Environmental Law, Comparative and International Law of Southern Africa 22 (1) (1989), p. 58.

22 *Adesanya v President of Nigeria* (1981) All NLR 1.

23 Ibid, at p. 39.

24 Ibid.

25 See *Attorney- General of Kaduna State v Hassan* (1985) 2 NWLR 483; *Inyangukwo v Akpan* (1985) 6 NCLR 770; *Irene Thomas and others v Reverend Olufosoye* (1986) 1 NWLR 669, *Fawehinmi v. Akilu* (1987) 4 NWLR. 797;

and *Odeneye v Efunuga* (1990) 7 NWLR 618. For a criticism of this position, see *TI Ogowewo*, Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria, Brooklyn Journal of International Law 26 (2000), p. 589.

26 *Adediran and Anor v Interland Transport Limited* (1991) 9 NWLR 155.

unrestrained exercise of that right, is void to the extent of such inconsistency. Thus the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void'.[27] For departing from previous decisions in which aggrieved litigants were denied redress in public nuisance,[28] 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.[29] However, the decision reiterates the rigid and overly restrictive civil rights doctrine for public law litigation as enunciated by Justice Bello in the Adesanya case, as the litigant still needs to prove the private legal rights affected or threatened by the public nuisance.[30]

This was evident in *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others*,[31] where the plaintiff, an environmental activist sought to compel the respondents to comply with provisions of the Environmental Impact Assessment Decree.[32] The suit was struck out on the grounds *inter alia* that the plaintiff has no legal standing to prosecute the action. As stated by the trial judge, Belgore, CJ, '... the claim is baseless, the plaintiff shows no prima facie evidence that his right was affected nor any direct injury caused to him. Furthermore, there was no personal right of the plaintiff infringed nor has he shown any injury suffered if he suffered anything at all more than the generality of the people'. On appeal, this decision was set aside and remitted back to the Federal High Court for retrial.[33] However, it did not change the rule of standing in environmental citizen suit in Nigeria as the Court of Appeal decision was based on the technical ground that it is erroneous to conclude that the appellant has no standing without looking at the statement of claim or in the absence of any evidence.[34]

The implication of the decision in the Oronto-Douglas case was the effective discouragement of public-spirited individuals and NGOs from litigating to enforce the provisions of environmental laws with adverse consequences for the development of a robust environmental jurisprudence in Nigeria (until the judicial and legislative events that have occurred

27 Ibid, at p. 180.

28 See *Lawani and ors v The West African Portland Cement Company Limited* (1973) 3 UILR (Part IV) 459; *Amos v Shell BP PD.C. Ltd* (1974) 4 ECSLR 48; *Seismograph service (Nigeria) Limited v Ogbeni* (1976) 4 SC 85; and *Ipadeola v Oshowole* (1987) 3 N.W.L.R. 18.

29 See *JG Frynas*, Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria, Journal of African Law 43 (1999), p. 121; and *OO Guobadia*, The Relevance of the Judiciary in A Democratic Nigeria, African Journal of International and Comparative Law 20 (2012), pp. 301-317. Cf *Ogowewo*, note 25, pp. 566-567 (criticizing the judgement by arguing that it could lead to the overloading of the court system).

30 See *Thomas v. Olufosoye* (1986) 1 NWLR 669 at 683A & 686C; and *Bamidele v. Commissioner for Local Government* (1994) 2 NWLR 568 at 583G.

31 *Oronto-Douglas v Shell Petroleum*, note 13.

32 Now Cap E12 LFN 2004.

33 See *Oronto-Douglas v Shell Petroleum Dev. Co. Ltd &Ors* (1999) 2 NWLR 466 (CA).

34 Ibid.

in contemporary Nigeria). This is not surprising as it has been noted by commentators that PIL, particularly citizen suits, rarely had the decisive role in shaping a body of law than it has had in the environmental field.[35] As stated by Bonine, 'In the field of environmental enforcement, societies all over the world are broadening the possibilities for citizen enforcement of the rule of law. That movement has grown so that it is impossible to think of modern environmental law without it.'[36]

C. Contemporary Trends in Environmental Public Interest Litigation in Nigeria

The present democratic dispensation in Nigeria, which started in May 1999, has influenced the adoption of rules and more recently, court decisions, which have been favorable to the institution of environmental public interest suits as will be explored below. This is not surprising as it is acknowledged by various scholars that the protection or conservation of the environment generally fares better under democratic governance than under autocratic governments.[37] Indeed, democratic governance, by encouraging political freedom and participation in the decisions that shape one's life, gives citizens a voice that allows them to be heard in public policy-making. The resultant public pressure can influence the decisions and actions of public officials as well as private agents with regard to environmental pollution and other environmental abuses.[38]

I. Express Enactment on Environmental Public Interest Litigation

Two significant subsidiary legislation were adopted in 2009 thatrecognise environmental PIL in Nigeria. These are:

1. The Fundamental Rights (Enforcement Procedure) Rules, 2009

The Fundamental Rights (Enforcement Procedure) Rules (FREP Rules) entered into force on 1 December 2009. The salient provisions of the Rules which improve access to court for victims of environmental degradation in Nigeria include the reinforcement of the applicability of the rights and freedoms contained under the African Charter on Human and

35 See *J Bonine*, Standing to Sue: The First Step in Access to Justice (Lecture delivered via Internet to Mercer University Law School Students, January 1999), available at https://www.law.uoregon .edu/faculty/jebonine/docs /boninelecture.pdf (last accessed on 10 May 2013); and *B Schwartz*, Administrative Law: A Textbook, New York 1984, p. 77.

36 Ibid.

37 See *R Peart / J Wilson*, Environmental Policy-making in the New South Africa, South African Journal of Environmental Law and Policy 5 (1998), pp. 238-240; and *Joshua Eaton*, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, Boston University International LJ 15 (1997), pp. 266-271.

38 See United Nations Development Programme (UNDP), Human Development Report 2002: Deepening democracy in a fragmented world (2002) at pp. 56-57.

Peoples' Rights (Ratification and Enforcement) Act,[39] including its article 24 right to a healthy environment in Nigeria. Indeed, the Rules expressly define fundamental rights in Nigeria as including 'any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.[40] By virtue of this definition which is arguable a reiteration of the various judgements supporting the justiciability of the provisions of the African Charter Ratification Act,[41] the Rules 'laid to rest any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment'.[42] This is supported by the fact that the constitutionality of FREP Rules 2009 can be supported by the decision of the Court of Appeal in *Abia State University v Anyaibe*,[43] 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. Furthermore, the Enugu State High Court in *Chukwunonso Daniel Ogbe v A-G, Enugu State & Anor*[44] recently held on the justiciability of the right to work under equitable and satisfactory conditions under the African Charter Ratification Act, as follows:

> *...I disagree...that the right to work under equitable and satisfactory condition, cannot be enforced by the instrumentality of the Fundamental Rights (Enforcement Procedure) Rules, 2009. Rather, pursuant to Order 1, rule 2 of the...Rules..., which defines fundamental right to mean any of the rights provided for in Chapter IV of the Constitution..., and includes any of the rights stipulated in the African Charter on Human and People's Rights (Ratification and Enforcement) Act, I am of the firm view that the right to work under equitable and satisfactory conditions can be enforced under the...Rules.*[45]

39 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, LFN 2004 (hereinafter African Charter Ratification Act).

40 FREP Rules, note 16, 1(2).

41 For instance, see *Abacha v Fawehinmi* (2000) FWLR 585G-P; 586A-C; & 653G; and *Ogugu v the State* (1994) 9 NWLR (Part 366) 1.

42 *EP Amechi*, Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation, Law, Environment and Development Journal 6 (3) (2010), p. 329. For arguments regarding the justiciability of the socio-economic provisions of the Act, see *HO Yusuf*, Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria, African Human Rights Law Journal 8 (2008), pp. 81, 93-96; *ST Ebobrah*, The Future of Economic, Social and Cultural Rights Litigation in Nigeria, Review of Nigerian Law and Practice 1 (2) (2007), pp. 114- 124; and *O Nnamuchi*, Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to HealthCare in Nigeria, Journal of African Law 52 (1) (2008), pp. 15-19.

43 *Abia State University v Anyaibe* (1996) 3 NWLR (Pt 439) 646.

44 *Chukwunonso Daniel Ogbe v A-G, Enugu State & Anor* (2016) All FWLR (pt 819) 1009.

45 Ibid at 1191D-F.

The Rules further mandate the Court to 'proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented'.[46] As earlier noted, achieving this objective in instances of degradation or threatened degradation of the environment invariably will include granting access to courts, to NGOs and other persons willing to represent these classes of people who usually lack the financial wherewithal to offset the cost involved in diligently prosecuting such lawsuits.[47] Thus, the Rules liberalize the restrictive locus standi rule by mandating the Court to 'encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi'.[48]

In addition, the Rules expanded the class of persons that can bring action in instances of human rights violation. These include anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest, and an association acting in the interest of its members or other individuals or groups.[49] By virtue of these provisions, representative standing in environmental PIL is now recognized. Thus, NGOs and other public-spirited individuals can now validly bring action to enforce the fundamental rights of persons affected or threatened by environmental degradation arising from any source or by any act, neglect or default of the Nigerian government in the execution of any environmental law, duties or authority.[50]

However, the anthropocentric or human rights focus of environmental representative standing makes it unsuitable to the achievement of other environmental goals such as general conservation of natural resources or the promotion of inter-generational equity. This is due to the fact that in order to succeed in such a suit, it must be proved that the act, neglect or default by any public or private authority adversely affected or threatened the health and well-being of the represented persons.[51] In addition, critics have questioned the justiciability of the socio-economic rights including the right to a healthy environment under the African Charter Ratification Act, as well as the validity of the 2009 FREP Rules, a subsidiary legislation, in endowing particularly the socio-economic rights in the Act with fundamental flavour.[52] Specifically, as it concerns the right to environment, the critics pointed to the supposedly inherent conflict between section 20 (in Chapter II) of

46 FREP Rules, note 16, 3(d).

47 See also *Amechi*, note 42, p. 331.

48 FREP Rules, note 16, 3(e).

49 Ibid, 3(e).

50 *Amechi*, note 42, p. 331.

51 See *Amechi*, note 1, pp. 386-87.

52 See *A Sanni*, Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform, African Human Rights Law Journal 11 (2011), pp. 524-527; and *E Nwauche*, The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the

the Nigerian Constitution which is generally unjusticiable,[53] and that of article 24 of the African Charter Ratification Act providing for the right to a healthy environment.[54] As argued by Atsegbua *et al*, 'it is doubtful if the [African] Charter [Ratification Act] can be used to elevate environmental rights from non-justiciable rights to justiciable rights.'[55]

Understandably, these criticisms make socio-economic rights provisions of the Act, including the right to a healthy environment, to be contentious. This breeds uncertainty in the mind of victims as well as those interested in championing the rights of persons affected by environmental pollution with regard to reliance on the provisions of the Act. However, the criticisms lack jurisprudential foundation as there should be no question of inconsistency of the provisions of the Constitution with the socio-economic rights under the African Charter Ratification Act.[56] Chapter II of the Constitution dealing with Fundamental Objectives and Directive Principles of State Policy, does not provide for socio-economic rights *per se*. Likewise, section 6(6) (c) of the 1999 Constitution which provides for the non-justiciability of the provisions of Chapter II, did not expressly seek to, and did not in fact render the provisions of the African Charter Ratification Act unjusticiable, despite being a latter statute.[57] The implication as evident from the decision of the Supreme Court in *Abacha v Fawehinmi*,[58] is that such latter statute should not be construed as implicitly overriding the explicit socio-economic rights provided under the Act.[59]

2. The National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations, 2009

The National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations, 2009, which were adopted pursuant to the NESREA Act, deal with environmental citizen suit. The Regulations provide for the right of any person or group

enforcement of human rights in Nigeria?, African Human Rights Law Journal 10 (2010), pp. 511-512.

53 See Constitution of the Federal Republic of Nigeria 1999, at s 6(6)(c) (section 20 provides for the duty of the state to protect and improve the environment and safeguard the water, air, forest and wildlife of Nigeria).

54 See *LA. Atsegbua, V Akpotaire / F Dimowo*, Environmental Law in Nigeria: Theory and Practice, Lagos 2010, p. 204.

55 Ibid.

56 See *DCJ Dakas*, The Implementation of the African Charter on Human and Peoples' Rights in Nigeria, University of Jos Law Journal 3 (1986 - 1990), p. 39; and *U Etemire*, A Fresh Perspective on the Human Rights to Political Participation and Environmental Decision-Making in Nigeria, African Journal of International and Comparative Law 26 (4) (2018), pp. 577-580.

57 See generally, *E Ekhator*, Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Role of NGOs in Nigeria, African Journal of International and Comparative Law 22 (1) (2014), p. 63.

58 *Abacha v Fawehinmi*, note 41, at 596C-E.

59 See *Ogbe v A-G, Enugu*, note 44, at 1190-1191 G-F.

of persons to bring an action in court to prevent, stop or control the contravention of the provisions.[60] The Regulations are sector specific and thus, the provisions are applicable to activities within the targeted industries. This means that the citizen's environmental standing provided therein is not of general application. The legality of such provision granting citizen standing is supported by the decision of the Nigerian Supreme Court in the case of *Fawehinmi v Akilu*,[61] that the limits imposed by Section 6(6)(b) of the Nigerian Constitution restricting the class of persons having standing in civil matters can be broadened by a subsequent legislation. Although such justification may no longer be necessary by virtue of the Supreme Court decision in the *COPW v NNPC* that section 6(6)(b) does not provide a benchmark for the determination of locus standi of a person wanting to invoke the judicial powers of the court in Nigeria.[62]

II. Case Law – Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC)

In the aftermaths of the Court of Appeal decision in *Oronto-Douglas v Shell* which remitted the case back to the Federal High Court for retrial, it was argued that 'Were the Federal High Court to reconsider the matter, the same result will be reached if the plaintiff fails to make a showing that his legal rights have been violated or threatened'.[63] In essence, the issue of locus standi would have militated against the retrial of the case at the Federal High Court. Indeed, this was the position of the Federal High Court and the Court of Appeal, both of the Lagos Judicial Division, in the case of *COPW* v *NNPC*, where both Courts held that the Plaintiff/Appellant, and environmental NGO, lacked the necessary locus standi to institute and maintain this action against the NNPC on the alleged oil spillage, at Acha Community of Isiukwuato Local Government Area of Abia State, from the facility of the Defendant/Respondent.[64] Delivering the lead Judgement at the Appeal Court, Amina Adamu Augie J.C.A, decided to ignore contemporary practices in other common law jurisdictions,[65] and reiterated the immutability of the 'civil rights' test even in environmental law litigation to wit: 'For a person to have locus standi, he must be able to show that his civil rights and obligations have been or are in danger of being infringed…'[66]

60 National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations 2009, note 17, Reg. 8(4).

61 *Fawehinmi v Akilu*, note 25, at 797.

62 Ibid, at 565C-E & 567A-D. See also *NNPC v Fawehinmi &Ors* (1998) 7 NWLR (pt 559) 598 at 612; *Owodunni v. Registered Trustees of Celestial Church and Bada and Ors* (2000) 6 S.C. (Part III) 60 at 82-83; and *Ogowewo*, note 25, pp. 557- 560.

63 *Ogomewo*, note 25, p. 543.

64 See *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2013) LPELR-20075(CA), at 15A-C & 27 D-F.

65 Ibid, at 26C-F.

66 Ibid, at 24 A-B.

However, on further appeal to the Supreme Court, the latter unanimously recognized the right of the plaintiff/appellant to institute and maintain the action against the NNPC for the environmental consequences of their oil spillage in the aforementioned community. Delivering the lead judgement, Justice C.C. Nweze J.S.C., subscribed to the view expressed by Ogundare J.S.C. (as he then was) in *Owodunni v. Registered Trustees of Celestial Church and Bada and Ors*, that *Adesanya v President of Nigeria* did not lay down the 'civil rights' test as there was no majority at the Supreme Court in favour of Bello JSC's interpretation of section 6(6) (b) of the Constitution.[67] The implication is that since section 6(6)(b) of the 1999 Nigerian Constitution is no longer regarded as the provenance of locus standi, the associated restrictive 'civil rights' test falls away and should no longer be used in the determination of locus standi in public law litigation in Nigeria. Even at that, this does not comprehensively deal with the burden of proving locus standi in public law litigation. Indeed, the Supreme Court noted that prior to the Adesanya's case, Nigerian courts had adopted a restrictive approach to the common law issue of locus standi in public law litigation.[68] 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' is whether the plaintiff seeking the redress or remedy will suffer some injury or hardship arising from the action of the defendant.[69]

In essence, the restrictive application of the 'sufficiency of interest' test under the common law would still give rise to the same outcome as the hitherto 'civil rights' test which was erroneously believed to have been laid down in *Adesanya v President of Nigeria*. To avoid this scenario, and to enhance environmental protection through public law litigation, the Supreme Court in this case of *COPW v NNPC,* decided to liberalize the locus standi rule.[70] Thus, Nigerian courts are now expected to apply a liberal rule in the determination of locus standi in public law litigation including those brought by NGOs and other public-spirited individuals. This is evident in the following statement by Nweze JSC, to wit:

> *The truth of the matter, as Diplock, LJ, held in Re v. I.R.C. Exp. Fed. of Self-Employed… is that is that the rules as to standing could not be found in any statute for they were made by judges of the Realm; "by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of law… True to that Diplockian prediction, English courts have extended the meaning of locus standi and the aforementioned determinant principles in appropriate cases,… R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Move-*

67 *COPW v NNPC*, note 18, at 567E.

68 Ibid, at 562A-G& 576 G-H.

69 Ibid, at 561G-H.

70 Ibid at 571-572 G-C, 575C, 591-592G-A & 597-598B-A.

> *ment Ltd… where an NGO was held to have locus standi. The English courts are not alone in this development. Other Common Law jurisdictions have followed that pattern. In India, the Supreme Court, without any statutory enactment, but rather the overall need to do justice, generally, liberalized the traditional rule on locus standi with respect to environmental degradation, since, in the court's view, maintaining a clean environment is the responsibility of all persons in the country…*[71]

The Supreme Court in liberalizing environmental standing in Nigeria, held that public-spirited individuals and organizations (who do not necessarily seek their own interest but the public good), can bring an action in court against relevant public authorities and corporations to demand their compliance with relevant laws and to ensure the remediation, restoration and protection of the environment.[72] In advocating for such liberalization of the locus standi rule particularly in environmental PIL, the Supreme Court was not unmindful of the important role of the PIL in protecting the interest of the vulnerable and marginalized in the society as well as a catalyst for the promotion of sustainable development.[73]

Thus, the test to be liberally applied in environmental PIL in Nigeria just like in other common law countries, is whether the plaintiff has some sufficient justiciable interest which may be affected by the action of the defendant. The 'sufficient interest' test depends on the facts and circumstances of each case from which the locus standi of the plaintiff or its absence can be gleaned.[74] It was on the basis of the application of this test that the Court held unanimously that the interest of the plaintiff/appellant as an environmental NGO is clear and unambiguous and thus, it has the locus standi to institute the present action.[75]

D. Implications of the Contemporary Trends for Access to Justice in Environmental Matters and Sustainable Development in Nigeria

The contemporary trend discussed above, clearly reflects the establishment of environmental PIL in Nigeria's environmental jurisprudence. It officially signifies a critical paradigm shift from the days of unduly restrictive access to justice in environmental matters in Nigeria, to an era of reasonably liberal access. The implications of this development are far-reaching, and some of the major ones – that will contribute to ensuring better environmental protection and, consequently, sustainable development in Nigeria – will be explored in this section.

First, the opportunity for environmental PIL could significantly improve access to justice in Nigeria, especially (but not only) for vulnerable and marginalized groups whose environmental rights and interests are being abused or threatened. This is because environ-

71 Ibid, at 568A-E. See also 571-572H-C (per Onnoghen CJN).

72 Ibid, at 580-581G-B & 591-592G-A.

73 Ibid, at 591-592C-A.

74 Ibid, at 563D-G& 576-577F-A.

75 Ibid, at 570-571A-D; 577C-G; 580-581G-B; 586-587A-H, 591-592G-A, & 601 C-H.

mental PIL constitutes a means for possibly surmounting historical socio-economic hurdles to access to justice in environmental matters in Nigeria. For example, high levels of poverty, widespread illiteracy, ignorance of legal rights, among others, have been shown to inhibit the ability of certain populations in Nigeria to access courts for the purpose of protecting their environmental rights or securing adequate remedies for the environmental wrongs done to them.[76] But PIL gives relevant NGOs and public-spirited individuals, with the requisite intellectual and financial resources, the opportunity to defend and secure the environmental interests of those groups of people that lack the wherewithal to access the courts. Okoro JSC in his concurring judgement in *COPW v NNPC* stated as much:

> *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.*[77] *(Emphasis added)*

Next, environmental PIL will help 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 where – because it is the mainstay of the Nigerian economy and the government, that is the regulator, also holds major stakes in the multinational companies operating in the industry[78] – the government is usually reluctant to properly monitor and hold polluting companies in the sector accountable for their environmental excesses in accordance with applicable environmental laws.[79] To be sure, Fagbonhun has argued that 'existing enforcement deficit prominent with environmental law [in Nigeria] could be tackled more successfully if more litigation rights exists' by making allowance for PIL.[80]

76 See generally *JG Frynas*, Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners, Social and Legal Studies 10 (3) (2001), p. 397.

77 *COPW v NNPC*, note 18, at 591C-D.

78 *T Okonkwo / U Etemire*, 'Oil Injustice" in Nigeria's Niger Delta Region: A Call for Responsive Governance, Journal of Environmental Protection 8 (2017) pp. 42, 51.

79 *BR Konne*, Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland, Cornell International Law Journal 47 (2014), p. 181.

80 *O Fagbohun*, Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability, Lagos 2012, p. 69.

Furthermore, at present, general voluntary compliance, by private and public entities, with environmental laws in Nigeria is arguably at its lowest ebb, resulting in their overall failure to reasonably achieve their collective aim of properly protecting and conserving the Nigerian environment.[81] However, the allowance of environmental PIL has the potential to not only induce better compliance with environmental laws, but engender behavioral changes in society that are more environmentally friendly, given the greater exposure to successful environmental law suits that PIL offers against potential polluters and environmental law violators.[82] 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.'[83]

What is more, it is felt that environmental PIL will also contribute to the entrenchment of environmental democracy in Nigeria, as it is likely to induce government and corporations to encourage and allow for better public access to environmental information and participation in environmental decision-making, given the greater powers of the public to litigate the final decisions and actions of public authorities and corporations.[84] With particular reference to law-making (though generally applicable), this view, by implication, was largely shared and supported by a former Deputy Senate President of Nigeria who stressed the need for public participation in the law-making process in Nigeria thus:

> *If we must get better laws, then we must first endeavour to get the lawmaking processes right and in tandem with global best practices. If we must also get our law making processes right, then, we must necessarily…enrich interface between it [the legislature] and other critical stakeholders such as the…civil society, etc… It serves the general interest of the polity if inputs are made into laws while they are in the making rather than practically ambushing them in the courts… If we must tag our laws as people's laws, it is only reasonable and moral for the process to be a [sic] truly people-driven.*[85] *(Emphasis added)*

81 See *BA Usami / LL Adefule*, Nigerian Forestry, Wildlife and Protected Areas: Status Report, Biodiversity 11 (3 & 4) (2010), p. 44; *AA Ogunjinmi*, The Challenges to Nigeria National Parks Conservation Efforts: Key Informants Approach, Nigerian Journal of Wildlife Management 1 (1) (2017), p. 25; and *NE Ojukwu-Ogba*, Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth, International Energy Law and Taxation Review 8 (9) (2006), p. 208.

82 *U Etemire / NU Sobere*, Improving Public Compliance with Modern Environmental Laws in Nigeria: Looking to Traditional African Norms and Practices, Journal of Energy & Natural Resources Law 38 (3) (2020), p. 321. See also *S Stec / S Casey-Lefkowitz*, The Aarhus Convention: An Implementation Guide, New York 2000, p. 123.

83 *Fagbohun*, note 80, p. 69.

84 Ibid.

85 *I Ekweremadu*, Opening Address, delivered at the International Conference on Law Reform and Law-making Process in Nigeria, held in Abuja, Nigeria, on 16 July 2012, available at: http://www.nassnig.org/nass/news.php?id=366 (last accessed on 10 October 2020).

The overall effect of the diverse implications of environmental PIL in possibly reducing environmental conflicts in Nigeria, thus preserving and enabling sustainable development, must be highlighted as well. For instance, in the Niger Delta region, much of the violent environmental conflicts that have come to characterize the region are borne out of the inability of affected parties and communities to participate meaningfully in decision-making processes affecting them, access justice and secure adequate remedies for environmental wrongs done to them as a result of the various unduly restrictive legal requirements (such as the former limiting environmental standing rule) and certain socio-economic hurdles.[86] Thus, environmental PIL which enables better access to justice by sidestepping several socio-economic hurdles, as well as contributes towards the entrenchment of public participation in environmental decision-making, will help avoid several environmental conflicts in the region.

Nonetheless, while environmental PIL holds major benefits for Nigeria in terms of enabling better access to justice and consequently ensuring sustainable development, it raises a few concerns that should receive some consideration. First, some fear that environmental PIL opens the door for busybodies to harass other entities with frivolous lawsuits, thereby placing undue pressure on the judiciary.[87] However, this fear is largely unfounded and is insufficient to discourage the adoption of environmental PIL. This is because there are several factors to discourage any meaningful amount of frivolous legal actions, such as the fact that lawsuits in Nigeria are notoriously expensive to prosecute, as well as heavily time consuming, among other hurdles;[88] there is also the possibility of judicial sanctions against parties that file frivolous lawsuits. With these, it is thus unlikely that anyone, including public-spirited individuals and NGOs, will take advantage of their new access rights to deliberately expend scarce resources, time and energy to prosecute a frivolous lawsuit. In other words, there is no significant threat of an avalanche of frivolous court actions arising from the access opportunity offered by environmental PIL, especially in the Nigerian context.

Another point is that, it is reasonable to expect that the allowance of environmental PIL in Nigeria will 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 entertainable by the courts given the erstwhile restrictive standing rule. Already, as earlier noted, excessive delay in the disposal of court cases is one of the major hurdles to access to justice in

86 See generally *ET Bristol-Alagbariya*, Participation in Petroleum Development: Towards Sustainable Community Development in Niger Delta, Dundee, 2009, pp. 6-8; and *KSA Ebeku*, Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective, Journal of Asian and African Studies 43 (2008), p. 415.

87 This fear was partly expressed in the *COPW v NNPC* case by the Respondent's counsel, Victor Ogude, and Wole Olanipekun SAN, one of the amici curiae in the case, both of whom urged the Supreme Court not to allow for environmental PIL in Nigeria. See *COPW v NNPC*, note 18, at 555–558B-C.

88 *Frynas*, note 76, pp. 406–411.

environmental matters in Nigeria, and there is the likelihood that this challenge might be compounded by, as well as inhibit in some cases the benefits derivable from, the wider access offered by environmental PIL. Thus, the relevant public authorities must take steps to address the issues causing delay in the disposal of court cases in Nigeria. Those steps, among others, will necessarily include reviewing and improving existing court rules to ensure fair but speedy disposal of cases, as well as employing more judges and establishing more courts as the size of Nigerian judiciary is presently inadequate to timeously dispense with the volume of cases it receives.

E. Conclusion

This article sought to explore the contemporary trends in environmental PIL in Nigeria, and the implications of these changes for access to justice in environmental matters, environmental protection and the promotion of sustainable development in Nigeria. It revealed that while access to justice in environmental matters in Nigeria has historically been unduly curtailed with the adoption of an unusually restrictive locus standi rule in environmental cases, statutory provisions and case law have emerged with a paradigm shift that have liberalized standing in environmental matters by clearly making allowance for environmental PIL in the country. With this, Nigeria effectively joins a host of countries around the world where the opportunity for environmental PIL has enabled greater public access to justice in environmental matters which, consequently, have led to better environmental protection and stronger progress on the path of sustainable development.

Importantly, the article also specifically appreciated the fact that the opportunity for environmental PIL in Nigeria will help give voice to, and protect the environmental interests of poor, vulnerable and marginalized groups of people in Nigeria who were hitherto largely shut out from the courts by a variety of legal and socio-economic hurdles. The implications of environmental PIL in enabling better enforcement and compliance with environmental laws, as well as contributing to the reduction of environmental conflicts and engendering environmentally friendly behaviours in the society at large, were also highlighted. However, as alluded to in the paper, for litigants and the wide public to continue to reap the benefits of environmental PIL in its full measure, and in the long run, the issues causing excessive delays in the disposal of cases in Nigerian courts must be urgently resolved by the relevant authorities. This will also prevent the wider access to court, enabled by PIL, from compounding the problem.

Overall, the effective entry of environmental PIL into environmental jurisprudence in Nigeria is a major win for all those interested in environmental protection and conservation. Thus, it is hoped that, just as in the case of *COPW v NNPC,* more public-spirited individuals and NGOs in Nigeria will rise to the challenge of utilizing the wide access to court offered by environmental PIL, to hold public and private entities accountable for the environmental decisions, actions and omissions, to the ultimate benefit of the environment and the society at large.