PLUGGING THE DRAIN:

PROMOTING ENVIRONMENTAL JUSTICE IN THE NIGER DELTA THROUGH JUDICIAL INDEPENDENCE

by

Sarah Tamunonengioforie Itamunoala

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The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the Thesis entitled:


submitted by Sarah Tamunonengioforie Itamunoala in partial fulfillment of the degree of Master of Laws in Law

Examining Committee:

Jocelyn Stacey, Professor, Peter A. Allard School of Law, UBC

Supervisor
Karin Mickelson, Professor, Peter A. Allard School of Law, UBC

Supervisory Committee Member
Abstract

This thesis highlights the multiple forms of injustice that are experienced in the Niger Delta using the concept of environmental justice. It discusses prominent cases such as *Gbemre v. Shell* and *Bodo v. Shell* and identifies judicial independence as a crucial component of attaining justice for Niger Deltans. Using the branches of environmental justice, it explains the risks and harms that have occurred within this region and the kinds of remedies that are required for an improvement. In particular, it reveals disproportionate arrangements in the shares of benefits and burdens of the environmental resources in the country and highlights several social and political arrangements which promote these disparities. The thesis further highlights the need for a remedy and the reasons why these remedies have been far-fetched and this leads to the discussion about the best ways to achieve these remedies.

In considering the best ways forward from the environmental injustice, this thesis discusses the topic of judicial independence, which it highlights as a crucial factor for the attainment of environmental justice. It views this as a plug to a drain, which ensures that the good efforts which are made towards the attainment of environmental justice, in the form of reformed laws and better processes amongst others, do not go to waste. Conversely, it argues that the lack of judicial independence undoes any good efforts and frustrates the attempts of the Niger Deltans to attain environmental justice.

An independent, impartial and competent court is therefore shown to be an essential requirement, if environmental justice is to be achieved and sustained in the Niger Delta.
Lay Summary

This thesis discusses the risks and harms that the people of the Niger Delta in Nigeria face as a result of unsustainable oil and gas exploration and production in their region. It shows that there are three forms of injustice experienced by Niger Deltans: first they experience significant environmental risks and harms due to oil and gas development. Second, they are denied access to information about these risks and are denied an opportunity to participate and contest environmental decisions that affect them. Third, existing laws make it extremely difficult for Niger Deltans to get compensation for harms experienced.

The thesis argues that all efforts to improve these three sources of injustice require courts and judges to make independent decisions, free from pressure from the government or the petroleum industry. The courts are the plug that ensures that hard fought efforts by Niger Deltans do not get washed down the drain.
Preface

This thesis is original, unpublished, independent work by the author, Sarah Tamunonengiofore Itamunoala.
# Table of Contents

Abstract ................................................................................................................................. iii
Lay Summary ........................................................................................................................ iv
Preface .................................................................................................................................... v
Table of Contents .................................................................................................................. vi
List of Abbreviations ........................................................................................................... ix
Acknowledgements ............................................................................................................. x
Dedication ............................................................................................................................... xii

CHAPTER 1: INTRODUCTION .......................................................................................... 1
1.0. Overview ....................................................................................................................... 1
1.1. THE NIGER DELTA .................................................................................................... 2

CHAPTER 2: WHAT IS ENVIRONMENTAL JUSTICE? ......................................................... 9
2.0. INTRODUCTION ........................................................................................................... 9
2.1. THE WARREN COUNTY STRUGGLE ......................................................................... 11
2.2. DISTRIBUTIVE JUSTICE .......................................................................................... 16
2.2.1. The Executive Order ............................................................................................... 18
2.2.2. Burdens and Benefits in Distributive Justice ......................................................... 19
2.2.3. Privileged and Underprivileged Groups in Distributive Justice .......................... 21
2.3. PROCEDURAL JUSTICE ........................................................................................... 22
2.3.1. Establishing Fair Processes, Procedures and Laws ................................................. 24
2.3.2. The Public Right of Access to Participation .......................................................... 25
2.3.3. Access to Information ............................................................................................ 32
2.3.4. Access to Justice ..................................................................................................... 35
2.4. CORRECTIVE JUSTICE ............................................................................................ 37

CHAPTER 3: ENVIRONMENTAL INJUSTICE IN THE NIGER DELTA .............................. 41
3.0. INTRODUCTION .......................................................................................................... 41
3.1. THE GBEMRE AND BODO CASES .......................................................................... 42
3.1.1. GBEMRE V. SHELL PETROLEUM DEVELOPMENT COMPANY AND OTHERS 43
3.1.2. BODO V. SHELL ....................................................................................................... 54
## 3.2. PROCEDURAL INJUSTICE IN THE NIGER DELTA

- **3.2.1.** Exclusion in Political Participation ................................................................. 59
- **3.2.2.** Denial of Access through the Laws ................................................................. 61
- **3.2.3.** Denial of Access in Processes ........................................................................... 70

## 3.3. THE DISTRIBUTIVE INJUSTICES IN THE NIGER DELTA ........................................ 74

- **3.3.1.** The Disparity in Burdens ................................................................................... 75
- **3.3.2.** The Disparity in Benefits .................................................................................... 79

## 3.4. CORRECTIVE INJUSTICE IN THE NIGER DELTA ..................................................... 82

- **3.4.1.** Human and Environmental Rights ..................................................................... 83
- **3.4.2.** Common Law Remedies .................................................................................... 85
- **3.4.3.** Barriers to Corrective Justice in the Niger Delta ............................................... 89

## 3.5. The Way Forward ....................................................................................................... 93

## CHAPTER 4: PLUGGING THE DRAIN: THE COMPETENT AND INDEPENDENT COURT AS AN ACTOR IN ENVIRONMENTAL JUSTICE ............................................................. 94

- **4.0.** INTRODUCTION ....................................................................................................... 94
- **4.1.** THE COURTS AS ACTORS IN ENVIRONMENTAL JUSTICE .................................. 96
  - **4.1.1.** The Role of the Court in Providing Access to Justice ........................................... 98
  - **4.1.2.** Enforcement and Implementation ..................................................................... 103
  - **4.1.3.** The General Development and Contributions to Environmental Justice .......... 105

## CHAPTER 5: PLUGGING THE DRAIN THROUGH JUDICIAL INDEPENDENCE: THE WAY FORWARD .................................................................................................................. 109

- **5.0.** INTRODUCTION ....................................................................................................... 109
- **5.1.** WHAT IS JUDICIAL INDEPENDENCE? ................................................................. 111
  - **5.1.1.** Judicial Independence as Freedom ..................................................................... 112
- **5.2.** JUDICIAL INDEPENDENCE IN THE NIGER DELTA AND THE NIGERIAN JUDICIARY .......................................................................................................................... 115
  - **5.2.1.** Judicial Independence and the Access to Justice for Aggrieved Parties in Nigeria 116
  - **5.2.2.** Judicial Independence and a Fair Judicial Decision Making in the Niger Delta .. 118
  - **5.2.3.** Judicial Independence and the Ability to Access the Remedy at Law in the Niger Delta 120
- **5.3.** CONCLUSION: LESSONS FOR MITIGATING THE IDENTIFIED PROBLEMS .... 122
List of Abbreviations

A.C. – Appeal Cases
AHRLR- African Human Rights Law Reports
AIR- All India Reporter
ALL ER- All England Law Reports
ALL NLR- All Nigeria Law Report
CCHCJ- Cyclostyled Copies of the High Court Judgments
ECHR- European Court of Human Rights
EHRR- European Human Rights Reports
EWHC- England and Wales High Court
F. SUPP- Federal Supplement
LPELR- Law Pavilion Electronic Law Report
NgHC- Nigerian High Court
NWLR- Nigerian Weekly Law Report
RSLR- Rivers State Law report
SC- Supreme Court
TCC- Technology and Construction Court


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**Dedication**

To God Almighty, who stayed with me through every step of this journey and kept every single promise that he made to me (Psalm 32:8; Phil. 1:6)
1.0. Overview

This thesis uses the concept of environmental justice to highlight the multiple forms of injustice that are experienced in the Niger Delta and identifies judicial independence as a crucial component of attaining justice for Niger Deltans. As we will see, the Niger Deltans experience significant environmental risks and harms due to extensive oil and gas developments in the region and this thesis explains how these risks and harms can be understood as environmental injustices. This concept of environmental justice helps highlight how law contributes to the creation of these risks and imposes barriers to attaining environmental justice. In particular, the thesis identifies three relevant dimensions of environmental justice: distributive justice, procedural justice and corrective justice. Using prominent examples of litigation involving the Niger Delta, the thesis explains how all three forms of justice are lacking for Niger Deltans.

The thesis then turns to judicial independence. It highlights the important role of the judiciary amongst other efforts towards environmental justice. This thesis, therefore, argues that judicial independence is needed to plug the draining of all the good efforts made towards environmental justice.

This thesis recognizes the fact that there is a need for a concerted effort of many actors -including all the arms of government, the oil companies and the Niger Deltans themselves, in addition to other factors such as better laws and processes in general- to be able to attain a true state of environmental justice in the Niger Delta. Plugging the drain in this work, however, pinpoints the issue of judicial independence as a key issue that could lead to a loss of all these other efforts, if
not properly addressed. This work, therefore, argues that while there is a functioning judiciary in the Niger Delta, there is still some more work necessary, in order to make it a court that is able to aid the attainment of environmental justice.

As the Niger Delta forms the focal point of this work, a brief introduction is provided below.

1.1. THE NIGER DELTA

The Niger Delta is a collection of towns and communities located in the southern part of Nigeria, along the Atlantic Ocean.\(^1\) Politically, it is comprised of nine out of the thirty-six states of Nigeria, namely, Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers State; and demographically, it is made up of a few large cities and more than 3000 small and often remote communities, many of which are isolated and only accessible by water transportation.\(^2\) The inhabitants of this region are members of over 40 minority ethnic groups which include, the Ijaws, the Ogonis, the Itsekiris, and several others who are jointly referred to as the Niger Deltans.\(^3\)

Geographically, the Niger Delta hosts the largest delta and wetland in Africa\(^5\) and falls within the tropical rainforest zone which consists of various rivers, creeks, estuaries, swamps and the largest mangrove forest in West Africa.\(^6\) These peculiar attributes have also enabled the existence of an


\(^{4}\) Ibid at 20.

\(^{5}\) Obi, supra note 1 at 222.

abundance of flora and fauna and a rich ecological and biodiversity system,\(^7\) which does not exist anywhere else in the country. Thus, many of the inhabitants of this region earn their livelihood from fishing, farming and trading, amongst others.\(^8\)

In addition to these resources, this region has been found to have large stores of hydrocarbons\(^9\) and oil and gas resources, which have quickly become a huge source of revenue for the country of Nigeria, and which has sustained the country for the last six decades.\(^10\) Thus, between 1958 when oil was first discovered in the region,\(^11\) and now, Nigeria has quickly grown to be one of the largest producers of oil in the world\(^12\) and the country, its governments and the oil companies in the region have also enjoyed tremendous wealth as a result.\(^13\)

Unfortunately, the reverse has been the case for the local people in the Niger Delta. While the financial resources of the country have grown over the years, the living conditions of the people in the Niger Delta region have steadily declined.\(^14\) Thus, the more profit, the country has made,

\(^8\) Uyigue et al., *supra* note 3 at 20.
\(^9\) Olawuyi, *supra* note 7 at 146.
the more sufferings the Niger Deltans have had to endure.\(^15\) Thus, the Niger Deltans have been said to be victims of the ‘resource curse’,\(^16\) or the “paradox of poverty in the midst of plenty”,\(^17\) as their wealth has become a curse to them, even as it has brought profit for others.

A major reason for this has been the unsustainable oil and gas exploration and production practices\(^18\) which have resulted in environmental pollution and degradation and the resulting adverse effects on the lives of members of such communities.\(^19\) It has also been exacerbated by the lack of corrective measures,\(^20\) which have resulted in new harms compounding existing harms, which leads to a generally terrible and increasingly worsening state of life for the Niger Deltans. Confirming this poor state of affairs in the Niger Delta, a research carried out by the United Nations Environment Programme (UNEP) on Ogoniland in the Niger Delta\(^21\) reveals that:

- “The findings in the report underline that there are, in a significant number of locations, serious threats to human health from contaminated drinking water to concerns over the


\(^{16}\) A situation where countries with oil or other natural resource wealth have failed to grow and rather have poor living conditions usually as a result of their resources. See “Resource abundance and economic development” edited by Richard M. Auty. (Oxford: Oxford University Press, for UNU/WIDER Studies in Development Economics (2001) at 3 Online <http://dx.doi.org/10.1002/jid.1015> Accessed March 4, 2020.


\(^{18}\) For instance, oil spillage, gas flaring and improper effluent and waste discharge amongst others. Supra note 7 at 148, 157 and 160.


\(^{20}\) That is, the failure of the government to respond to the need for remediation and reparation of the environment, or the failure of the law to provide for a remedy. See generally, Gbemre case, Ibid.

viability and productivity of ecosystems. In addition that pollution has perhaps gone further and penetrated deeper than many may have previously supposed... The study concludes that the environmental restoration of Ogoniland is possible but may take 25 to 30 years.”

High profile lawsuits brought by Niger Deltans against the Nigerian government and oil companies have also highlighted this damage to health, livelihood and the environment from gas flaring and oil spills, and these lawsuits, discussed in detail in this thesis, provide important context for understanding the severity of the harms experienced in the Niger Delta, as well as, the possibilities for and limits to legal remedies.

As a result of these issues, there have been several calls - by members of the Niger Delta, from environmental rights organizations and from other concerned parties around the world-, for a change and an improvement of the state of affairs in the Niger Delta, but unfortunately, many of these calls have often fallen on deaf ears. Instead, the government has, on several occasions, traded the health and wellbeing of the Niger Delta people, in return for profit, including several cases where the government went further to take the lives of innocent and unarmed citizens who dared to ask for a better state of living.

________________________________________________________________________

22 Ibid.
This thesis therefore lends an extra voice to this call for a better state of affairs for the Niger Deltans, by carrying out two major objectives. First, it establishes the existence of an environmental justice problem in the Niger Delta, which is necessary, in order to proceed to discussing the problems and possible remedies. It argues that the plight of the Niger Deltans could be explained through the concept of environmental justice and its dimensions of distributive, procedural and corrective justice. It, thereafter, shows how the problems suffered by the Niger Deltans could be situated within the environmental justice framework. Clarifying these injustices experienced in the Niger Delta, then allows the thesis to identify underlying contributors to environmental injustice and possible remedies.

Having identified the environmental injustice, this work then moves on to the second objective, which is, the focus on a correction or amelioration of the environmental injustices now identified. Several steps are found to be necessary, including the need for new laws, the establishment of better systems and the amendment of faulty processes that enable environmental injustice. Thus, this work finds that the attainment of environmental justice would require a combined effort of all the arms of government and a combination of several methods and processes for an effective and sustained state of environmental justice. However, this work contributes specifically by examining the role of the courts in all these processes prescribed; and discusses the ways through which the improvement of the court systems and specifically, the independence of the judiciary, could help to improve environmental justice.

This thesis, therefore, examines the roles which the courts play as actors in the attainment of environmental justice and considers the reasons why the courts have not yet fully attained this potential in the Niger Delta. It, thereafter, makes recommendations for the correction of these concerns. This work, therefore, makes a contribution to the environmental justice literature by
examining the impact of the courts and court cases on the advancement or stifling of environmental justice in the Niger Delta.

This thesis also links the topics of environmental justice and judicial independence and answers the question of ‘why’. Rather than merely suggest the need for judicial independence, for instance, this thesis shows why and how judicial independence affects environmental justice. It also shows that it is only a competent, impartial and independent court that can make the improvements suggested by this work and other works on environmental justice. By doing so, it also answers the question of what ‘better’ means when people ask for better laws and policies for the attainment of environmental justice. Ultimately, it highlights the presence of a strong and independent judiciary as a vital part of any environmental justice movement, regardless of whether they seem to be at the forefront of the movement or not.

This work will use a doctrinal methodology which will focus on case law, statues and other legal documents for the discussion of the topics within this work. A major focus will be on the Niger Delta and therefore, various Nigerian cases, laws and examples would be used to illustrate the points and arguments made in this work. Two major cases will however form the crux of this work. These are the cases of Gbemre v. Shell25 and Bodo v. Shell.26 These cases have been chosen, as they demonstrate each of the specific environmental justice issues suffered by the Niger Deltans and prove the existence of environmental injustice in the Niger Delta. They also highlight the role

25 See Gbemre case, supra note 19.
of the judiciary, as well as the need for judicial independence, and show how an independent court could make a huge difference in the attainment or nonattainment of environmental justice.

The *Gbemre case* will throw more light on the problem of gas flaring, the lack of an environmental right and some of the barriers to environmental justice that may exist within the Nigerian laws and the judiciary. The *Bodo case* will highlight the problem of oil spillage and will show the limited legal remedies when compared with what is actually required for a true state of environmental justice for the affected people. These cases will, however, also show how a group focus of environmental justice could be beneficial in bringing about a better state of environmental justice for victims of environmental injustice. Ultimately, both cases reveal the need for distributive, procedural and corrective justice in the Niger Delta.

This thesis now moves on to discuss the concept of environmental justice in the next chapter.
CHAPTER 2: WHAT IS ENVIRONMENTAL JUSTICE?

2.0. INTRODUCTION

The term environmental justice holds diverse meanings\(^{27}\) for various people, and there is no universal definition of the term. For this reason, this work will approach the description of environmental justice, by looking at the history and the emergence of the movement. This will help to throw some light on the factors that led to the emergence of the environmental justice movement, and consequently, the concerns as well, which environmental justice addresses.

One of the most notable definitions of the term is that of the United States Environmental Protection Agency\(^ {28}\) which defines Environmental justice as, “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”\(^ {29}\). It goes further to explain that this state of environmental justice will be achieved, “when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work”.

The report also provides clarification about the meaning of the terms ‘fair treatment and meaningful involvement’. It states that “fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial,
governmental and commercial operations or policies.” Meaningful involvement on the other hand, means that “people have an opportunity to participate in decisions about activities that may affect their environment and/or health.” It also means that “the public's contribution can influence the regulatory agency's decision; community concerns will be considered in the decision-making process; and decision makers will seek out and facilitate the involvement of those potentially affected.”30 While this definition may not be the ultimate meaning of environmental justice, given the diverse forms and needs of environmental justice in different situations, it provides a good guide about the meaning of environmental justice.

Many scholarly works on environmental justice31 also refer to the U.S. Warren County protests32 as the origin of the environmental justice movement33 and therefore, this case will be used to provide the framework and meaning of environmental justice, as it is used within this thesis. This will also be supported by other documents, such as the Executive Order 12898 of 199434 and the Aarhus Convention.35 Although the Aarhus Convention governs the relationship of the countries within the United Nations Economic Commission for Europe and focuses mainly on right of the public in relation to the environment, it bears many similarities with the USA Executive Order and

30 Ibid.
33 The US Environmental Protection Agency also refers to the Warren case as the initial environmental justice spark. See ‘Environmental Justice History’ Online <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> Accessed 17th February 2020.
is relevant for any environmental justice movement around the world. It will, therefore, play a huge role in discussing the needs and requirements for environmental justice.

These will ultimately provide an idea of what environmental justice means, as well as, a clear picture of the existence and adverse effects of environmental injustice, which will be crucial later on in the assessment of the state of affairs of the Niger Delta.

This chapter now commences with the Warren County Struggle.

2.1. THE WARREN COUNTY STRUGGLE

The Warren county struggle refers to a mass protest that occurred in Warren County of North Carolina in 1982. This protest was against the government’s decision to dump 60,000 tons of PCB-contaminated soil - a substance which had been proven to be harmful to human health and the environment- in the county. While this protest was not successful in stopping the government’s action, it served as a catalyst for the emergence of the environmental justice movement and brought to the fore, three major concerns of environmental justice.

The first concern it highlighted was the issue of distributive injustice. This issue was highlighted in the absence of a fair treatment for all groups of people, which was evident from the presence of

36 See Warren County Protests, supra note 32.
37 supra note 33.
39 See the Love Canal Tragedy which occurred in the early to late 1900s- where industrial toxins in the environment were found to have caused devastating health and environmental consequences for the inhabitants. This had been a major eye-opener for many communities about the effects of hazardous substances in their neighborhoods. See Eckardt, C. Beck, “The Love Canal Tragedy” (January 1979) EPA Journal Online <https://archive.epa.gov/epa/aboutepa/love-canal-tragedy.html> Accessed March 8, 2020 [love canal tragedy].
40 Ibid.
disparities in the sharing of benefits and burdens of environmental resources, between different
groups in the society. The members of the Warren County had alleged that the choice of their
county for this use had been based on discriminatory grounds;\textsuperscript{42} that is, the fact that this County
consisted mostly of people of color and low-income households who were also marginalized-
minorities, even though there were other feasible sites available.\textsuperscript{43} They also alleged that this
treatment contrasted starkly with the better treatment given to white affluent communities, who
bore less of the burdens and enjoyed more of the benefits of the environmental resources.

This allegation was confirmed by two studies undertaken at the time, namely, the report of the
General Accounting Office,\textsuperscript{44} USA and the ‘Toxic Wastes And Race In The United States’\textsuperscript{45} report
of 1987 carried out by the United Church of Christ Commission for Racial Justice. These reports
showed an overwhelming evidence of colored and minority communities being targeted for
undesirable land uses, while white and high-income communities, were both overlooked in these
choices, as well as, provided with more benefits than the minority communities.

For instance, the report of the General Accounting Office, USA, showed that three out of four
hazardous waste landfills in the region- which was made up of eight states-, were assigned to
African-American Communities alone, even though African-Americans only made up 20\% of the

\begin{footnotes}
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entire population. The United Church of Christ Commission for Racial Justice report also established, that race was the “most potent variable” and the most significant predictor of the location of toxic wastes facilities - more powerful than poverty, land values and home ownership.

This, according to Bullard, revealed the existence of discrimination in governmental environmental decisions. An example of this in this case, was the fact that the government allowed the dumping of these contaminated wastes at only 7 feet above the ground water table, rather than the 50 feet required for PCB’s, thereby, putting the lives, health and wellbeing of the people and the environment at risk. Thus there was an unevenness in the treatment of members of this community, as well as in the allocation of societal goods and burdens. This unevenness in treatment led to a call for fairness in the treatment of ‘all people’ on the basis of the civil right to freedom from discrimination. Thus, environmental justice at this time was merged with civil rights and social justice.

This disparity also gave rise to the next issue, namely, procedural justice. This referred to legal, social and institutional structures in the society that encouraged or caused disproportionate levels of protection for different groups in the society, which, resulted in the application of lower standards for some groups or people. This also, often resulted in a lack of meaningful involvement

46 See GAO Report, supra note 44.
47 See Toxic Wastes, supra note 45.
48 See Toxic Wastes, supra note 45.
49 See Bullard, 2005, supra note 31.
53 Young argues that distributional injustice arises from a social structure, cultural beliefs and institutional contexts that privileges some and puts others at a disadvantage. See Iris Marion Young, Justice and the Politics of Difference (Princeton, NJ: Princeton University Press, 1990) at 40-41 [Young].
for these minority or marginalized people which in turn, led to their voices and opinions being drowned out, causing them to bear higher burdens. Thus, the concern of procedural justice here, was the amendment of these legal, social and institutional structures, through the establishment of better processes and procedures that prevented the disparities and treated every group and person fairly.

The final concern of environmental justice, which summed up the other concerns of environmental justice in this case, was the need for corrective justice. This referred to the need for the correction of any wrongs or harm which had arisen from the distributive or procedural injustices; or wrongs and harms which had occurred as a result of a prolonged failure to achieve corrective justice for the victims of environmental injustice.\textsuperscript{54} The ‘wrongs’, in this Warren County situation were diverse, but included the feeling of discrimination and marginalization, as well as, the problem of public nuisance -in relation to the harmful effects of PCB. Thus, the members of Warren County asked the court for an injunction, to stop the PCB landfill, while they also sought for a correction to the discriminatory processes that resulted in their marginalization and the resulting disparities.\textsuperscript{55}

At this time, therefore, environmental justice focused on the attainment of distributive, procedural and corrective justice through the provision of a fair treatment for all, and meaningful involvement, without any social limitations.\textsuperscript{56} It also sought to remove those structural and societal barriers that led to the existence and continuation of the injustice.

\textsuperscript{54} Aristotle referred to this aspect of justice as “rectificatory” as “it treats the parties as equals and asks only whether one has done and the other suffered wrong, and whether one has done and the other has suffered damage”; if so, it attempts to restore the victim to the condition they were in before the unjust activity occurred. See Izhak Englard. ‘Corrective and Distributive Justice: From Aristotle to Modern Times’. (Oxford University Press: Oxford, 2009) at 5; See also Kuehn, \textit{supra} Note 27 at 10694.

\textsuperscript{55} See Warren County Protests, \textit{supra} note 32.

\textsuperscript{56} \textit{Supra} note 28.
This awareness about environmental justice and injustice, resulted in several legal processes, scientific research and conventions, with the aims of identifying and properly addressing the existing environmental injustices. Two of these which will be used in this work, are, the Executive Order 12898 of 1994\textsuperscript{57} and the Aarhus Convention of 1998.\textsuperscript{58} Although the Aarhus Convention focuses more on public rights in relation to the environment, than on environmental justice, it has been chosen along with the Executive Order, because it articulates the idea of environmental justice which this work considers. These documents will therefore be used in the discussion about environmental justice in this chapter.

The Executive Order\textsuperscript{59} highlights the distributive justice focus highlighted in the Warren county case, through its emphasis on disparity, burdens and the adverse effects of governmental processes. It also shows procedural justice, through its focus on governmental processes and procedures as the source of environmental injustice and its call for better access to information and participation for the affected people. The Aarhus Convention,\textsuperscript{60} on the other hand, emphasizes procedural justice and aims at providing a more thorough way of attaining environmental justice. It targets some of the barriers that often prevent environmental justice and lays out specific recommendations for surmounting these barriers. Although the Aarhus Convention governs the relationship of the countries within the United Nations Economic Commission for Europe, it also bears many similarities with the USA Executive Order and is relevant for any environmental justice movement around the world. It makes three major recommendations for the attainment of environmental justice, namely, a right of access to justice, a public right of access to participation and a public

\textsuperscript{57} See Executive Order, \textit{supra} note 34.
\textsuperscript{58} See generally \textit{‘The Aarhus Convention: An Implementation Guide’}, United Nations Economic Convention for Europe (2nd ed.) 2014 [The Aarhus Convention]; See also The Aarhus Convention, \textit{supra} note 35.
\textsuperscript{59} See Executive Order, \textit{supra} note 34.
\textsuperscript{60} See the Aarhus Convention, \textit{supra} note 35.
right of access to information regarding environmental decision-making, and all of these aim at the correction of social, institutional and legal structures that allow environmental injustice.\textsuperscript{61} The Aarhus Convention will therefore be a very important document in the discussions about procedural justice in this chapter and in chapter 3.

This work now moves on to answer the question of ‘what is environmental justice’, and does this by examining the branches of environmental justice identified above, namely, distributive justice, procedural justice and corrective justice. These identify and highlight those specific issues whose existence signal or indicate the existence of environmental injustice and discussing them this way, helps to identify the specific remedies needed for each specific type of environmental injustice. Distributive justice is the first branch discussed, after which procedural justice and corrective justice are addressed.

As there are several works and contributions relating to these topics, this work will focus on those issues which directly relate to the Niger Delta and environmental justice and does not give a comprehensive account of theories of justice.

The next section commences the discussion about the branches of environmental justice.

2.2. DISTRIBUTIVE JUSTICE

Distributive justice is concerned with the unequal allocation of goods and services in the society. Scholars of this branch of justice view distributive justice as a set of rules, which determine and in turn govern the distributional relationships and allocations within the society.\textsuperscript{62} Under

\textsuperscript{61} Ibid.; See also the Aarhus convention, supra note 35.
environmental justice, distributive justice specifically applies to examine the distribution and allocation of burdens and benefits which result from the society’s use of their environmental resources. Distributive justice therefore, looks to identify unequal allocations of benefits and burdens and seeks to establish fair rules and standards which should govern the distributional relationship of members of each society in relation to these allocations.

Distributive justice is often the first identifier of the existence of an environmental injustice, as it lends itself to clearly observable measurements and scientific analysis, which could be noticed and confirmed more easily, than some of the other branches of environmental justice. It therefore serves as a foundational aspect of environmental justice and a major basis by which environmental injustice could be alleged. Distributive justice also focuses on the attainment of a just and equal outcome, which means that it also serves as a means of identifying whether the problem has been resolved or not. Thus, it works with other branches of environmental justice to ensure that justice is attained on all sides. Distributive Justice therefore forms a very important aspect of environmental justice.

In the Warren county case, for instance, distributive injustice could be seen in the complaints about disparity in the treatment of two sets of society - namely the colored and low-income minorities.

\[\text{Referenced Sources:} \]

63 See Yang, supra note 42.
65 In the Warren County Protests for instance, distributive justice identified the variance in the amounts of allocations between different segments of the society, which was also the first indicator that there was an environmental injustice. Supra note 43.
66 Supra note 64.
67 See ‘Prima Facie Equality’ in Shrader-Frechette, Supra note 50 at 24.
and the white affluent communities\textsuperscript{68} which resulted in a disproportionate allocation of burdens and benefits between these two groups in the society.\textsuperscript{69} This complaint therefore, highlighted a problem with the distributional relationship and with the actual allocation itself. Correcting this disparity and ensuring equality in the treatment of all groups of people was therefore a major aim of distributive justice in this case.

2.2.1. The Executive Order

In response to this complaint, the Executive Order 12898 of February 11, 1994\textsuperscript{70} titled, ‘Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations’ was established. This was set up with the aim of “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.”\textsuperscript{71} Thus, like the definition of distributive justice above,\textsuperscript{72} the aim of the Executive Order was to identify the unequal allocations, and then to seek out fair rules, standards, laws and policies, that would govern the distributional relationships in order to address disproportionately high and adverse effects of these laws, policies.

From this, some major points regarding distributive justice could be gleaned. The first point is the recognition of the existence of disproportionately high disparities between different segments of the society. The second is the recognition of the adverse effects of these disparities on both human health and the environment- as against a solely human or environmental protection focus. The third point is the recognition of government policies, programs and activities as the source of these

\textsuperscript{68} See Yang, \textit{supra} note 42.
\textsuperscript{69} See Been, \textit{supra} note 43.
\textsuperscript{70} See Executive Order, \textit{supra} note 34.
\textsuperscript{71} See Executive Order, \textit{supra} note 34 at section 1-101.
\textsuperscript{72} See Rawls, \textit{supra} note 62.
adverse effects; and the fourth is the recognition of the concentration of these risks and resulting adverse effects on minority and low-income populations. This encompasses the concerns of distributive justice and highlights the areas where remedies are required in order to attain distributive justice.

2.2.2. Burdens and Benefits in Distributive Justice

The adverse effects and risks that arise as a result of distributive injustice have been referred to as burdens, while the gains that accrue from the use of environmental resources are referred to as benefits. Thus, the aim of distributive justice, could be said to be the fair allocation of burdens and benefits. In order to fairly allocate the burdens and benefits, however, distributive justice must first of all identify what issues count as burdens and what areas count as benefits. It must also determine where the disparity is and on whom the bulk of the burdens - and conversely, the benefits - fall. In relation to this therefore, the executive order, recommends the identification and addressing of ‘disproportionately high’ and ‘adverse’ human health or environmental effects. This therefore, highlights disproportionately high and adverse effects as major parameters in determining what counts as a burden and where the disparities in burden and benefit sharing could be found.

In relation to the classification between burdens and benefits, Brighouse states that, “the fundamental question is this: how and to what end should a just society distribute the various benefits (resources, opportunities and freedoms) it produces and the burdens (costs, freedoms and

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74 See Executive Order, supra note 71.
unfreedoms) required to maintain it?75 Thus, like the executive order implies, the burdens generally fall into the category of those undesirable or at least less pleasant aspects of society’s environmental processes and usages, while the benefits are the desirable and beneficial aspects of these processes. Therefore, one can find the burdens by identifying those high and adverse effects on human health and the environment, and can determine where the disparity in treatment lies by identifying the disproportionately high distributions of either benefits or burdens and on whom these allocations fall.

Examples of burdens could usually be seen when one group is made to suffer from factors such as environmental pollution, proximity to undesirable land uses, the resulting disruption of lifestyle and livelihood, as well as, several other related losses that could arise from this, such as reduced property values.76 Benefits on the other hand could be seen in a higher share of the wealth accruing from environmental usage, the general distance of a community from undesirable and hazardous land usages,77 as well as, the presence of better social amenities, amongst others. It also usually results in better access and a stronger voice in environmental decision-making processes for such groups and could count as a distributive injustice in that more is allocated to one segment of the society, over the other.78 Thus, distributive justice works here not merely to equalize these burdens and benefits, but more importantly, to provide access for all people to these benefits.

75 See Brighouse, supra note 73.
76 See Been, supra note 43.
77 In the case of Chester Residents Concerned for Quality Living v. Seif for instance, the Delaware County had a population of 91% whites, yet, over 70% of the hazardous facilities were sited in the Black-American town of Chester. See generally, Chester Residents Concerned for Quality Living v. Seif 28 944 F. Supp. 413 (E.D. Pa. 1996); Nos. 7-1125, Online <https://caselaw.findlaw.com/us-3rd-circuit/1255283.html>.
2.2.3. Privileged and Underprivileged Groups in Distributive Justice

The next point which is highlighted in the Warren County struggle which relates to distributive justice, is the existence of a classification of members of society into a privileged group and an underprivileged group of people. The underprivileged group usually comprised of those who were marginalized for being part of a minority group, as well as, for other discriminatory reasons such as, levels of income or class, color of skin and others, which resulted in higher burdens and lower benefits for them. They were also often burdened with the negative consequences of environmental usage without any regard for their health and wellbeing, while other groups in the society took all the profit. The unfairness therefore arises, when the share of these burdens and benefits is disproportionate, which puts the underprivileged people at a disadvantage.

It is important to note that a major aspect of marginalization, such as its reasons and effects on distribution, fall under procedural justice. However, it is important to make note of it under distributive justice for the purpose of identifying the disparity and the areas where it exists; that is, between marginalized and non-marginalized groups. Thus, the concern of distributive justice here becomes, how to apply the right standard of distribution in order to ensure that there is fairness in the distribution of these burdens and benefits without any disparity, marginalization or discrimination.

Having provided a brief idea of the meaning of distributive justice in this work, the next section discusses procedural justice.

2.3. **PROCEDURAL JUSTICE**

This branch of environmental justice is concerned with the procedures and processes for attaining and maintaining environmental justice. Schlosberg defines it as the ‘fair and equitable institutional processes of the state’,\(^\text{80}\) while Dworkin makes reference to “the right to treatment as an equal”.\(^\text{81}\) Thus, it generally refers to the provision of an ‘equal opportunity’ for all people - regardless of any differences in race, ethnicity, income, national origin or educational level - to have a “meaningful involvement”\(^\text{82}\) in environmental decision-making processes.

While distributive justice often highlights disproportionately high and adverse outcomes of wrong processes on the lives of people and the environment, procedural justice argues that a purely distributive paradigm, while important, may not adequately cover all aspects necessary for the attainment of justice and it emphasizes that this is an oversight of distributive justice.\(^\text{83}\) It argues that there are legal, social and institutional structures\(^\text{84}\) which result in the unfair outcomes, and which if left unattended to, will continue to lead to more unfair outcomes that would require correction. It advocates therefore, instead, for a focus on achieving fairness and equality in the procedures and processes as against a total focus on the outcome alone.\(^\text{85}\)

By focusing on the correction of these legal, social and institutional procedures and processes that cause injustice - rather than merely areas where the injustice is manifested – procedural justice argues that an understanding of the reasons for injustice is essential for finding the areas where

\(^{80}\) See Schlosberg, *supra* note 52 at 25.


\(^{82}\) *Supra* note 28.

\(^{83}\) See Young, *supra* note 53 at 3.

\(^{84}\) *Ibid*.

\(^{85}\) See Schlosberg, *supra* note 52 at 14.
injustice occurs\textsuperscript{86} and through that, the best ways to stop it. For this reason, procedural justice could be said to be a pivotal aspect of environmental justice.

Furthermore, while distributive justice and corrective justice could be used to measure the existence of an environmental injustice, as well as, to indicate its resolution, procedural justice mainly acts as the process that links the beginning and existence of the problem to its resolution. Thus, without procedural justice, getting to the resolution of the injustice would be difficult and sometimes even impossible. Thus, procedural justice addresses the injustice at the source and by so doing, prevents the next injustice from occurring. At the same time, it also has the potential to eliminate the current and existing injustice which leads overall, to a true state of environmental justice.

Solum, therefore, identifies two main aims of procedural justice which are classified into ex ante and ex post goals.\textsuperscript{87} Ex post goals focus on the attainment of fairness in the final outcome, which requires the elimination of the underlying factors that inhibit the attainment of fair processes, procedures and laws; while ex ante goals scrutinize the intent and procedures applied towards the attainment of procedural justice and focus on the establishment of fair processes, procedures and laws in environmental and political decision-making processes.

These are discussed in more detail below, starting first with a focus on the legal, social and institutional barriers in processes and procedures which need to be eliminated or at least, attended to and then moving on, to discuss those factors which need to be present in environmental procedures and processes, in order to attain environmental justice. It is important to note however,

\textsuperscript{86} \textit{Ibid.}
that some topics under these headings may overlap, as the provision for or remediation of one factor – for instance the elimination of barriers to participation- could inevitably lead to the existence of the other– in this case, the presence of better participation and therefore, better access to environmental justice.

2.3.1. Establishing Fair Processes, Procedures and Laws

As already stated above, procedural justice seeks to correct the structural, legal and institutional processes that cause and continue environmental injustice. However, to attain an actual state of fairness, there is a need to first identify the required standards by which the existing processes and procedures could be measured. As the requirements of environmental justice often differ from one situation to the other - for instance, pollution, preservation of ancestral lands,\textsuperscript{88} and access to clean water, amongst others-, there is no universal standard by which all environmental justice situations could be measured. There are however, some minimum standards which must be met, in order to facilitate the attainment of environmental justice.

A major document in this regard, is the Aarhus convention.\textsuperscript{89} It prescribes access to participation, to information and to justice and enumerates what each of these require for their true attainment. It will therefore form the backdrop against which these topics will be discussed. This will also be supported by other scholarly works, such as the works of Bullard and Schlosberg and the executive order, in relation to this topic. The first requirement discussed is the right of Access to Participation.


\textsuperscript{89} Supra note 58.
2.3.2. The Public Right of Access to Participation

As the name implies, participation refers to the inclusion and partaking, of all members of the society in the environmental decision-making processes that affect their lives and wellbeing. Thus, a major focus of procedural justice is on the right of all people to participate as equals in these decision-making processes. The emphasis here is on the right and the ability to participate, as well as, an access to the right type of participation. Under the EPA’s definition of environmental justice, this right kind of participation is called meaningful involvement and this is a necessary ground, for the attainment of the other aspects of procedural justice discussed in this chapter. Schlosberg’s work on respect and recognition in relation to the topic of participation will be discussed in this section as a prerequisite for the attainment of a true state of participation and it is established here, that for there to be a true and meaningful participation, a right standard of respect and recognition must first of all exist. These are discussed below.

2.3.2.1. Recognition and Respect

Recognition and respect deal with the identification of a group of people as a relevant part of a society, with the right value also being ascribed to them. The right value here, refers to a view of each group as equals in worth- in this case as human beings with the same level of rights and entitlements- as well as the giving of equal regard. An absence of this acknowledgement –also called, “non-recognition or misrecognition”- often leads to “various forms of insults,

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90 See Kaswan, supra note 43 at 229.
92 Supra note 28.
93 See Schlosberg, supra note 52 at 58.
94 Supra note 91 at 4.
95 Nancy Fraser. 'Rethinking Recognition', (2000) 3 New Left Review at 109; See also Schlosberg at 15.
degradations and devaluations96 which makes this recognition, a necessary prerequisite before the steps of inclusion and participation can occur.

Recognition, first of all, requires the identification of individual groups in a society, which requires the possession of a specific knowledge of the existence of each of the different groups, as well as the acknowledgement of these groups, as an important part of the society.97 This way, these groups are not lumped together or omitted in the plans for the provision of environmental justice,98 as non-acknowledgements of small groups have been shown to result in them losing out on many benefits.99 Political participation and remedial processes, such as jobs, political positions, monetary compensation and others, are often only given to the major groups.100 Thus, in environmental justice cases, the requirement of participation necessitates the paying of attention to all groups concerned.

Paying attention to all groups is especially necessary when dealing with groups with unique concerns whose voices could be drowned out when merged with other groups, as they could miss out on procedural opportunities and benefits. This could be true, for instance, in the cases of minorities in democratic states, as these minorities could miss the opportunity to have a representative who could be elected to participate in decision making processes on their behalf,

97 See Taylor, supra note 96 at 37-38.
98 Several projects often fail to identify the minority people as included amongst those who would be affected by their projects, thus leading to their neglect. See the Pehuenche people’s case, where they were denied opportunities for effective participation as a result of non-recognition. See Lorenzo Nesti, “The Mapuche—Pehuenche and the Ralco Dam on the Biobío River: The Challenge of Protecting Indigenous Land Rights” (2002) 9:1 International Journal on Minority and Group Rights at 1, 10 and 16 Online <https://www.jstor.org/stable/24675088> Accessed March 9, 2020.
100 Ibid.
when they are merged with larger groups. For this reason, Taylor\textsuperscript{101} states that, “recognition is not just a courtesy” owed to people, but is instead, “a vital human need.”\textsuperscript{102} Schlosberg therefore, recommends complete and equal political rights for all, as well as freedom from disparagements and threats, for the full attainment of this recognition.\textsuperscript{103}

Respect on the other hand, refers to the esteem, dignity, appreciation and regard for all people’s cultures, ways of life, peculiar circumstances and the people or groups themselves.\textsuperscript{104} It also goes beyond mere inclusion and tolerance, to demand that attention is actually paid to the concerns and voices of all groups of people and that all people are treated as important.\textsuperscript{105} Thus, recognizing and then ascribing the right level of respect to these groups lays the groundwork for their meaningful involvement.

On the other hand, a lack of respect, or a lack of the right level of recognition and respect leads to marginalization and injustice, because, the opinions and concerns of the group are considered to be unimportant, since they are not considered worthy of that courtesy.\textsuperscript{106} This leads to decisions of the majority or of the oppressor being imposed on them, thereby taking away their choices;

\begin{footnotes}
\footnote{\textsuperscript{101} See Taylor, \textit{supra} note 96.}
\footnote{\textsuperscript{102} \textit{Ibid} note at 25-26.}
\footnote{\textsuperscript{103} See Schlosberg, \textit{Supra} note 52 at 15.}
\footnote{\textsuperscript{104} Charles Taylor calls this, the ‘Politics of difference’. See Taylor, \textit{Supra} note 96 at 37-38.}
\footnote{\textsuperscript{106} For instance, in the case of the Occidental Petroleum Corporation’s invasion of traditional U’wa Lands in Columbia, the justification was that “you can’t compare the interests of 38 million Columbians with the worries of an indigenous community”. Thus, their worries were not considered relevant due to their small size. See \textit{supra} note 88; See also A. Gedicks. ‘Resource Wars against Native People’ in R.D. Bullard, ed., \textit{The Quest for Environmental Justice: Human Rights and the Politics of Pollution} (San Francisco: Sierra Club Books, 2005) at 169.}
\end{footnotes}
which also makes these groups an easy choice and target for environmental injustices, as was evident in the Warren County situation discussed earlier.\(^{107}\)

For fairness and the right type of participation to be attained, therefore, recognition and respect must be present. This must also exist at an individual level and at a group level, in order to sufficiently address those injuries which may only be experienced at a group level, such as, issues of identity; or to provide for cases of communal injuries that affect people in similar ways, but at varying levels- such as cases of pollution that could affect everyone in a community, but would bring about varying degrees of impact.\(^{108}\)

Having recognized the rights and needs of all groups, and having ascribed the right value and respect to them and their needs, the next thing to be ensured is the access of each group to meaningful participation.

### 2.3.2.2. Participation, Inclusion and Meaningful Involvement\(^{109}\)

Participation, as already stated above, refers to the inclusion and meaningful involvement, amongst others, of people and communities in the decision-making processes affecting their lives, health and wellbeing and their environment in general.\(^{110}\) This is the opportunity for people to be able to participate by being able to give their consent to or to disagree with a decision, having had all the information about this that they would need or want to know and this requires both the opportunity

\(^{107}\) See Warren County Protests, *supra* note 32.

\(^{108}\) See the ‘Love Canal’ tragedy which occurred in the early to late 1900s- where industrial toxins in the environment were found to have caused devastating health and environmental consequences for the inhabitants. *Supra* note 39.

\(^{109}\) See the Aarhus Convention, *supra* Note 35 at Pillar 2, Article 6-8.

\(^{110}\) See Kaswan, *supra* note 43 at 229.
and access to participate, as well as the actual participation of all members of the society in the decision-making processes affecting them.

In support of this, Young states that, “for a norm to be just, everyone who follows it must in principle, have an ‘effective’ voice in its consideration and be able to agree to it without coercion.” Bullard also says that, “speaking for ourselves is the empowerment of disenfranchised people”. Thus, participation requires having a say that counts. For this requirement to be met, there must be access to adequate, timeous and accurate information, access to justice and access to platforms that enable and facilitate participation. This involvement must also be a meaningful one that arises from respect and due consideration of the concerns of all members of the society, with no group being viewed as less or more deserving, which would result in an effective and fair decision making process that prevents disparities in the standards applied to different groups within the community.

The Aarhus convention makes provision for this kind of participation through the provision of two major classes of participation. The first class of participation, is the access to participate in specific activities, which would usually be in those matters that specifically affect the members of a community. Topics covered under this heading, include, the energy sector, chemical and mineral industries, waste management and activities that generally have a ‘significant effect’ on the

111 See Young, supra note 53 at 23.
112 Robert Bullard, Confronting Environmental Racism: Voices from the Grassroots (Boston, MA: South End Press, 1993) at 13; See Schlosberg, supra note 52 at 65.
114 See generally, The Aarhus Convention, supra note 58.
115 Ibid. at Article 6.
environment, amongst others.\textsuperscript{116} Dellinger states that, this helps to provide ‘hidden knowledge’ about specific projects, which may not be within the knowledge of the government and other decision-makers, which is valuable in decision making processes. It also helps to address problems early on, before projects proceed, rather than later when the amendment of the licenses and procedures, would be lengthier and more laborious.\textsuperscript{117} Participation here, therefore helps to ensure that the perspectives and concerns of members of the community are taken into account and also ensures that they can give or withhold their consent to decisions that adversely affect them. Access in this place will therefore require a conscious and intentional creation and provision for this process of communication and participation.

The second type of participation relates to the development, and preparation of plans, policies, laws and programs relating to the environment.\textsuperscript{119} It does not require the existence of a problem for participation to occur. Instead, it focuses on the general molding of the environmental arena and the determination of norms and procedures that would be continuously followed and adhered to, which in turn would help to ensure a constant state of environmental justice. This could drastically reduce the need for new actions in resolving and remedying new injustices, as the system put in place would prevent the problems from arising, and even when they do, would provide effective methods for addressing the problem. This would also be acceptable to all, or at least, to many more people, since all stakeholders would have planned and agreed on the methods and procedures contained in these policies.

\begin{itemize}
\item \textsuperscript{116} See Aarhus Convention, \textit{supra} note 35 at Article 6 (1) (a), (b).
\item \textsuperscript{118} \textit{Ibid}.
\item \textsuperscript{119} See Aarhus Convention, \textit{supra} note 35 at Article 7.
\end{itemize}
In this case of participation, inclusion would occur, not only by the creation of avenues for communication, but also by ensuring that these avenues are effective. Thus, public participation would require an opportunity for the public to submit their own recommendations, but would also require the translation of crucial public documents, notices and hearings, to enable people to participate effectively and make well informed decisions. Bullard recommends that, issues such as the location of meetings, compositions of decision making committees and the language used in communicating vital public information must be done in such a way that it doesn’t cut out groups or classes of people indirectly. It will also require the assurance that these contributions are meaningful and impactful, as against a participation that is non-consequential.

A good illustration of this need for access to meaningful participation, is the Warren County struggle. Dworkin’s states that “protests are not mainly about the material distribution but about the justice of the decision-making power and procedures”, and the Warren county case confirms this point. In this case, while the protest was caused by the noticeable outcome of a disproportionate protection and distribution, the actual reason behind the protest was the idea that was evinced by the final outcome, which was the lack of respect for this set of people and the lack of meaningful participation in their own affairs. It was this lack of respect and lack of meaningful participation that led to the distributive injustice outcome. Thus, the claims of environmental

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120 See Bulgaria’s E-representation Technique, where civil society representatives are elected who provide input and feedback between the people, the government and the ministries, through an online platform that is available for this purpose. See The Aarhus Convention, supra note 58 at page 180.
122 Ibid.
123 See Warren County Protests, supra note 32.
124 See Shrader-Frechette, supra note 50 at 27.
racism and discrimination could be seen as rooted in procedural justice because, the disproportionate treatment represented both a lack of an equal value for this group of people, as well as a flawed application of procedures to different segments of society. Thus, procedural justice calls for the correction of these underlying problems through the allocation of the right standards of participation, recognition and respect for all people, as a way to correct the eventual distributive injustice. This helps to eliminate institutional, social and structural biases and provides all people with equal opportunity and access for the protection of their health and wellbeing.

The next requirement for procedural justice is access to information.

2.3.3. Access to Information

The right of access to information provides for the right to seek information from public authorities, as well as, the corresponding obligation of public authorities to provide information in response to this request. It however also goes further to impose a duty on the government authorities to receive and collect information on environmental matters, as well as, a duty to disseminate this information without the need for a specific request and this is important for various reasons.

First of all, information plays a vital role in the attainment of environmental justice, as it provides groups with information about decisions being made in relation to their lives, as well as, the effects

125 In the case of the difference in groundwater requirement applications. *Ibid.*
126 See Aarhus Convention, *supra* note 35 at Pillar 1, Article 4-5.
127 *Ibid.* at Pillar 1, Article 4.
128 *Ibid.* at Pillar 1, Article 5.
of the details contained in this information.\textsuperscript{129} This availability of information is the only way people could truly be said to have made a choice, otherwise, they would merely have been deceived and therefore, someone else would have made a choice for them. Thus, access to information and the subsequent ability to choose is very important as sometimes, people have stayed in unsafe conditions and suffered irreparable damage to their health and well-being before receiving the information that would have been necessary to save their lives, had it come earlier. An example of this is the \textit{Love Canal tragedy} where people were not informed that the houses they lived in had been built within a toxic dump environment. Thus, they had already suffered several health problems and defects before the information was revealed, by which time, a lot of the damage was irreparable.\textsuperscript{130} Similarly, the court also held the State liable in the case of \textit{Guerra v. Italy},\textsuperscript{131} for failure to provide information to the people of the Manfredonia community about the risk factors relating to a high-risk chemical factory in their community, and information about appropriate steps to take regarding this.

The U.S. Executive Order also recommends access to information in environmental matters, through its calls for an active strategy to identify and combat the effects of programs, policies and activities on the affected people, in federal and governmental agencies, and corporations.\textsuperscript{132} Thus, they are not merely to provide information about their activities, but are to go further to seek out information on the effects of their activities and programs, and the best ways to combat this. Thus, people would potentially have information about the activities of these organizations and the

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\begin{itemize}
  \item \textsuperscript{130} See the Love Canal tragedy, \textit{supra} note 39.
  \item \textsuperscript{131} See \textit{Guerra case}, \textit{supra} note 129.
  \item \textsuperscript{132} See \textit{Executive Order}, \textit{supra} note 34 at section 1-102 (3) (4) (5) and 1-103.
\end{itemize}
effects of these activities, as well as, the reasons behind any negligence or consequences of this negligence. This is important and could ensure that no offender or polluter can escape liability, as the state, corporations and agencies would have the duty imposed on them to check for harm and would be liable when harm occurs due to their negligence or even their omission. This would also lead to higher standards of protection for people and would ensure the use of best practices at least, rather than just the most profitable methods. Unfortunately, some critiques on the executive order seem to suggest that these have not been effective or fully adhered to. Nevertheless, the recommendations, made here are valid and have great potential for the attainment of environmental justice, if adhered to.

Access to information also provides resources for environmental justice battles at the court or other procedural systems, which people would ordinarily not have access to, and which, if denied could lead to injustice in various forms. Thus, making provision for access to information facilitates justice by providing information for people to fight properly for their rights; it also serves to deter some acts of injustice –such as violations of laid down procedures- since there could be consequences for the actions which are not positive.

For this purpose, the executive order also necessitates the conducting of research, the collection and maintenance of data on the risks, as well as, the publication and availability of this information for the public’s use. Thus, this is to be a continual process of checks and balances for environmentally adverse activities. Schlosberg also explains that this access to information requires full disclosure of risks, as well as, the competence of the group members to be able to

134 See Executive Order, supra note 34 at section 1-102 and 1-103 Executive order.
evaluate the information provided and to understand the dangers involved. Only then could they voluntarily accept these risks if they chose to, without any coercion.

The last requirement for procedural justice which is discussed in this chapter is the need for access to justice.

2.3.4. Access to Justice

Access to justice is the third pillar of the Aarhus Convention, and it provides for the enforcement of the above pillars of information and participation. This helps to provide a remedy for the breach of any of the pillars of environmental justice, such as, in cases where the government does not fulfill its obligations to provide access to participation or information, amongst others. Access to justice in this case, is achieved through the use of judicial mechanisms, which include the courts, tribunals and other adjudicatory bodies; but which also includes general legal processes, laws and procedures that facilitate access to environmental justice.

For instance, the executive order 12898 provides for the promotion of the enforcement of all health and environmental statutes in areas of minority populations and this is very important, because, protection for environmental justice often comes from other areas of law as well, such as tort law, criminal law, and human rights law amongst others. Thus, enforcing all laws relating to health and

135 See Schlosberg, supra note 52 at 68-69.
136 Ibid. at 69.
137 See Generally, Aarhus Convention, supra note 35 at Article 9.
138 See for instance Claude Reyes et al. v. Chile, Petition to the Court, Inter-Am. Comm’n H.R., Case No. 12.108 (July 8, 2005) Online <https://iachr.lls.edu/sites/default/files/iachr/Cases/Reyes_et_al_v_Chile/hall_reyes_v._chile.pdf> Accessed March 12, 2020 [where the state of Chile was held liable for failing to provide information about a deforestation project that would have an impact on the environment, and for failing provide access to a judicial remedy for this].
139 See Aarhus Convention, supra note 35 at Preamble.
140 Ibid at Article 9, Section 1.
141 See Executive Order, supra note 34 at Article 1-103 (a) (1).
environmental statutes, first, prevents the harm from happening, and then provides legal protection in the event of a breach. If, for instance, the right standards regarding the water level for PCB dumps had been followed in the Warren county case, the risk of contamination would have been less or even non-existent and the health and wellbeing of the people would have been better protected. Thus, attaining environmental justice would require an overlap of all the branches of law in the aspects of implementation, redistribution, laws and processes and court judgments, amongst others.

In rounding up this section on procedural justice, it is important to recognize that, these pillars of environmental justice stated above, greatly contribute to the protection of human and environmental rights. This is because, they provide a mechanism for holding governments and corporations accountable, since information on wrong actions by corporations and governments could be accessed, while the right to bring a claim would also be available. They also enable and empower the courts for the attainment of environmental justice through the provision of rights and obligations of parties and the right to redress for the aggrieved. Participation, respect and recognition and fair decision making processes also reduce the potential of high risks and damages to humans and the environment that may require huge costs or lengthy court action.

Ultimately, procedural justice requires the establishment of laws and procedures that enable and facilitate environmental justice, without which, the outcome would always continue to be environmental injustice. It is important to note that the government plays a major role in the attainment of these three pillars, chiefly because they are the only ones with the power to both

142 See Shrader-Frechette, supra note 50.
carry out and enforce these duties; but also because of the fact that, by neglecting to provide for these pillars of environmental justice, they also become the major perpetrators of the injustice.

This chapter now addresses the final branch of environmental justice considered in this chapter, which is corrective justice.

2.4. **CORRECTIVE JUSTICE**

Distributive and Procedural Justice often provide the entry point into environmental justice, as they are usually one of the first ways to identify an environmental injustice in a community. However, when these problems have been identified, while measures are being taken to ensure that the factors leading to these are corrected or amended, there is also the need to ensure that harms or losses which have already occurred as a result of these injustices are also dealt with, in order to prevent a continuation of the wrongs. For instance, it is not enough to merely change the law in order to halt a further dumping of hazardous wastes, if there are already existing wastes causing harm to human health and the environment. Instead, environmental justice requires that this high risk be corrected and reduced and that all harms that have resulted be remedied. Theories of corrective justice, therefore, provide frameworks for assessing the harms and the risks and for providing an effective and commensurate remedy.

Corrective justice is the branch of environmental justice that focuses on identifying the harms, losses or wrongs which have arisen from environmental injustices and the correction of these losses or wrongs through remediation, reparation, restoration or retribution, amongst others. It

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143 For instance, see the Warren County Protests, *supra* note 32.
144 See generally Kuehn, *supra* note 27 at 10694.
is concerned with fairness in both meting out punishment or sanctions to offenders, as well as in a fair compensation for aggrieved persons. Its major aim is to restore the aggrieved parties to the state they were in before the loss occurred. From this, it could be observed that there are two major aspects of corrective justice, namely, the existence of a wrong, loss or harm and the provision of a remedy for this wrong. Thus, while procedural and distributive justice may sometimes be preemptive, in that they provide provisions before a wrong occurs or at least re-occurs, corrective justice usually acts only after the wrong has occurred.

There are many different kinds of wrongs that may result from environmental injustice. These include human rights violations, losses to health and life, and the general destruction of property and the environment amongst others, which often leave aggrieved people in its wake, who continue to suffer without adequate correction or compensation. Models of corrective justice seek to right these wrongs by ensuring that those that have been harmed can get a remedy from those who have caused the harm. Accordingly, Aristotle states that corrective justice looks “only at the nature of the damage, treating the parties as equal and merely asking whether one has done and the other suffered injustice and whether one inflicted and the other sustained damages”.  

In relation to the attainment of environmental justice however, there is more to the meaning of a wrong than the mere presence of some pain, loss or harm. For a wrong to be successfully remedied at the court, there are several requirements that must first be fulfilled. The first requirement is that this wrong must exist at law. For this to happen, that wrong must be specifically defined in an

145 Ibid.
existing law, which shows the type of actions and situations which would be deemed to fall under this wrong. There must also be parameters and measures which would determine when an action comes under this class.\textsuperscript{148} This could also exist as the creation of a right which would then entitle a person to an action in the event of a breach.

After the existence of this wrong has been proven at law, the particular claim brought before the court would have to be identified as a wrong that falls within this class of wrongs, after which, one would have to determine the measure of loss that has occurred and what measures of remedy the law prescribes for such measures of loss.\textsuperscript{149}

Thus, it is only after these processes have been established that a remedy can be accessed at law. This means that in cases where there are no available laws, remedy may be denied, despite the obvious suffering of loss or damage, due to the absence of a legal wrong. Thus, environmental justice cases are often lost because the law fails to recognize certain harms.

It is important to note that the wrongs that occur under environmental justice are diverse and therefore usually encompass different areas of law at the same time. However, some major areas where losses often arise as a result of environmental injustices include, loss of health, life, property and well-being. Violation of human and environmental rights and the general violation of existing rules and regulations, are also common and often necessitate retribution or sanctions in addition to compensation for the victims. Thus, for the purpose of this work, three major areas of law will be


\textsuperscript{149} Ibid.
used to discuss the focus of corrective environmental justice. These are criminal justice law, the law of torts and human rights law (including environmental rights).

To avoid a repetition, the Niger Delta is used in the next chapter to discuss these issues in more detail, as well as, the shortcomings that often lead to a continuation of environmental injustice in affected communities. This work now moves on to the Niger Delta environmental justice situation.
CHAPTER 3: ENVIRONMENTAL INJUSTICE IN THE NIGER DELTA

3.0. INTRODUCTION

The Niger Delta was briefly introduced in the first chapter of this thesis, as a collection of towns and communities, in the southern part of Nigeria, whose resource-rich environment had provided a living for several decades now, for both its native people and the country of Nigeria as a whole.\textsuperscript{150} The problem of environmental pollution and degradation in this region, was also mentioned, which revealed the problem of unsustainable oil and gas production practices and the adverse effects of this, on the people of the Niger Delta.\textsuperscript{151} The second chapter went on to discuss the meanings and forms of environmental justice and identified various factors that could signal the presence of an environmental injustice, which provided parameters and examples by which the Niger Deltan situation could be examined.

In this chapter, the Niger Delta situation is examined within this scope of environmental justice, in order to highlight the environmental injustices and the factors responsible for this. It finds that there are existing procedural, political and institutional arrangements that lead to the exclusion of the Niger Deltans, which puts them at a disadvantage and at the receiving end of disproportionately high burdens. It also shows that these disproportionately high burdens, in turn, lead to adverse effects on the health, lives and well-being of the Niger Deltans and on the environment.\textsuperscript{152} Furthermore, these disproportionate procedural arrangements, also prevent the attainment of

\textsuperscript{150} See, generally, Alphonsus Isidiho & Mohammad S. Sabran, “Socio-Economic Impact of Niger Delta Development Commission (NDDC) Infrastructural Projects in Selected Communities in IMO State Nigeria” (2015) 3 Asian Journal of Humanities and Social Sciences at 109 – 113 [Isidiho et al.].


\textsuperscript{152} See Isidiho et al., supra note 150 at 110-112.
justice and remediation for the adverse effects and disparity, which leads to a continuous cycle of harm for the Niger Deltans. Thus, the Niger Deltans are found to suffer indeed, from procedural, distributive and corrective environmental injustices.

In discussing these environmental injustices in the Niger Delta, several examples are provided, including defective laws and processes and court cases that support and highlight the existence of these injustices in the Niger Delta. Two major cases, however, stand out amongst these. These are the cases of Gbemre v. Shell\textsuperscript{153} and Bodo v. Shell.\textsuperscript{154} These are used specifically, as they provide real illustrations of the burdens borne by Niger Deltans and the resulting adverse effects of this. These cases also illustrate how the lack of enabling procedures and processes help to facilitate procedural injustice, which results in corrective injustice; and thus help to lay a groundwork for the questions that would be addressed in the next chapter, namely, what should/could be done and what can the courts do about this. This chapter thus, commences with the Gbemre and Bodo cases, below.

3.1. THE GBEMRE AND BODO CASES

The Gbemre v. Shell\textsuperscript{155} and Bodo v. Shell\textsuperscript{156} cases play very important roles in this chapter and in this work as a whole for three major reasons. First of all, these cases are important because, they help to answer the question of, ‘what is the state of environmental justice in the Niger Delta’. They do this by highlighting some examples of the burdens borne by the Niger Deltans and the resulting adverse effects of these burdens on the lives of the Niger Deltans, through the claims, complaints

\textsuperscript{153} See Gbemre case, \textit{supra} note 25.
\textsuperscript{154} See Bodo case, \textit{supra} note 26.
\textsuperscript{155} See Gbemre case, \textit{supra} note 25.
\textsuperscript{156} See Bodo case, \textit{supra} note 26.
and allegations contained in each of these cases. Second, they go on to show the procedural inadequacies and inhibitions that serve as a barrier to corrective justice and to the attainment of environmental justice as a whole. Finally, they highlight the judiciary’s role in the attainment of justice and show how these are deficient in relation to the Niger Delta situation.

The Gbemre case focuses more on the problem of gas flaring, the lack of a right to a healthy environment and other hindrances to environmental justice that may exist within the Nigerian laws and the judiciary, while the Bodo case on the other hand highlights the problem of oil spillage and shows the limited areas covered by the law when compared with what is actually required for a true state of environmental justice for the affected people. The Bodo case, however, also shows how a group focus of environmental justice could be beneficial in bringing about a better state of environmental justice. Ultimately, both cases reveal the need for distributive, procedural and corrective justice in the Niger Delta and the important role the courts play in the attainment of these. The first case discussed here is the case of Gbemre v. Shell.

3.1.1. GBEMRE V. SHELL PETROLEUM DEVELOPMENT COMPANY AND OTHERS157

The applicants in this case were the members, individuals and residents of Iwherekan community in Delta State, who were represented by Mr. Jonah Gbemre -having been granted leave to commence the proceedings for himself and for his community in a representative capacity. The respondents were Shell Petroleum Development Company, Nigerian National Petroleum Company and the Attorney-General of the Federation of Nigeria.

157 See Gbemre case, supra note 25.
Shell Petroleum Development Company (SPDC), was an oil and gas company – the subsidiary of Royal Dutch Shell-, which was engaged in the exploration and production of crude oil and other petroleum products in the Niger Delta Region; while the Nigerian National Petroleum Company (NNPC) was the Nigerian government owned Oil and Gas Company.158 At this time, NNPC performed the role and function of a regulator of the oil and gas industry, as well as a joint venture partner with SPDC in their oil and gas exploration and production activities.159 The case against SPDC was therefore, indirectly, a case against NNPC. The third respondent, the Attorney General of the Federation of Nigeria, was merely joined to this case because the legality of a federal law was in question.

3.1.1.1. Details of the case160

This case revolved around the problem of gas flaring, which had resulted in various adverse effects on the lives and wellbeing of the applicants, who now sought a way to address this problem, through the courts. Unfortunately, the Nigerian law did not, provide for an enforceable right to a good environment, nor any real protection from gas flaring, which inhibited legal protection for the applicants. A major concern in this regard, was the fact that, the lack of a right to a good environment often resulted in victims of gas flaring needing to seek remedies from other areas of law, such as criminal law, common law (the law of torts) and other statutory provisions. Where, however, these were lacking or where the law permitted gas flaring under certain conditions, as it was in this case, the victims were often left with no avenue for a redress.

159 See Olawuyi, supra note 7 at 173.
The applicants in this case, therefore, tried to overcome this barrier by enforcing their fundamental right to life, which was guaranteed by the Constitution of the Federal Republic of Nigeria.\textsuperscript{161} They argued that this right was linked to the need for a healthy environment, regardless of whether this existed as a right or not. They therefore argued that gas flaring, and the detrimental effect it had on their lives and well-being, was a violation of their fundamental human right to life and dignity of the human person as provided for by the Constitution.\textsuperscript{162}

In addition, the applicants claimed that this action of gas flaring, also violated the provisions of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act,\textsuperscript{163} which expressly provides for, the right to respect for life and the dignity of the human person; the right to enjoy the best attainable state of physical and mental health; and the right to a general satisfactory environment favorable to development.\textsuperscript{164} This is an international human rights document to which Nigeria is a signatory, and which, as required by section 12 of the Nigerian Constitution,\textsuperscript{165} had been domesticated and passed into law, by the Nigerian legislature which therefore gave the force of law to this document. However, the issue of environmental rights had often met a stone wall at the judiciary due to the fact that, although stated to be a right under the African Charter, it was not clear whether it could be enforced as one of the fundamental human rights guaranteed by the constitution,\textsuperscript{166} as the African Charter did not have the same status as the constitution. Bringing this case under these headings, that is, the right to life and the need for a

\begin{flushright}
\textsuperscript{162} \textit{Ibid.} at sections 22(1) and 34(1).
\textsuperscript{164} \textit{Ibid.}
\textsuperscript{165} Which requires the National Assembly to pass any treaty into law, before it can have the force of law in Nigeria
\end{flushright}
good environment in relation to this right, therefore, provided the court with the opportunity to make decisions regarding the right to a good environment, the status of the African Charter in relation to environmental rights, and the problem of gas flaring.

In relation to environmental justice, the complaints of the applicants fell under three major groupings, namely, the disproportionate burdens and adverse effects of Shell’s gas flaring activities, the failure of the law to provide full protection for the local people and the failure of the regulating bodies to enforce the laid down regulations and obligations. The burdens from the gas flaring activities arose in the form of air pollution, which had resulted in various adverse effects including ill health, destruction of crop and property and even death in some cases, which had also been compounded by the lack of adequate medical facilities to cope with the adverse and harmful effects of this gas flaring.\(^{167}\)

The applicants also argued that the law failed to respect their right to life, through the permission granted by the law that allowed gas flaring to occur in their community, which was also compounded by the failure of the regulating bodies to enforce other regulations relating to environmental protection. In this regard, the applicants alleged that no environmental impact assessment had been carried out by the first and second respondents concerning their gas flaring activities in the applicant’s community as required by the Environmental Impact Assessment Act.\(^{168}\) In addition, they also alleged that no valid ministerial gas flaring certificates had been obtained by either the first and second respondents authorizing the gas flaring in the applicant’s community, which was a violation of the provisions of the Associated Gas Reinjection Act.\(^{169}\)

\(^{167}\) See grounds 11-13 of Gbemre case summary, supra note 160 at 6.

\(^{168}\) See Environmental Impact Assessment Act, Cap E12 Vol 6, Laws of the Federation of Nigeria, 2004, s. 2(2) [EIA].

\(^{169}\) See Associated Gas Reinjection Act, Cap A25 Vol 1, Laws of the Federation of Nigeria, 2004, s. 3(2) [Gas Reinjection Act].
Finally, they argued that, the provisions of the Federal Environmental Protection Agency Act (FEPA)\textsuperscript{170} which made the gas flaring activities of the first and second respondents a crime, had not been enforced.

On this basis, the applicants sought five forms of relief.\textsuperscript{171} The first was a declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999\textsuperscript{172} and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act,\textsuperscript{173} inevitably included the right to clean poison-free, pollution-free and healthy environment. On the basis of this first declaration, they also asked the court to make a declaration stating that the actions of the first and second respondents in continuing to flare gas in the course of their exploration and production activities in the applicant’s community was a violation of their fundamental rights to life (which necessitated a healthy environment) and dignity of human person guaranteed by the Constitution and the African Charter.

Next, they asked for a third declaration stating that the failure of the first and second respondents to carry out an environmental impact assessment in the applicant’s community concerning the effects of their gas flaring activities was a violation of section 2(2) of the Environment Impact Assessment Act,\textsuperscript{174} and contributed to the violation of the applicant’s said fundamental rights to life and dignity of human person. Finally, they asked for a declaration, that the provisions of

\textsuperscript{170} See \textit{Federal Environmental Protection Agency Act} Cap F10 Vol 1 Laws of the Federation of Nigeria, 2004 ss. 21(1) and (2) [FEPA].
\textsuperscript{171} See Gbemre case summary, \textit{supra} note 160 at 2.
\textsuperscript{172} See The Constitution, \textit{supra} note 161.
\textsuperscript{173} See The African Charter, \textit{supra} note163.
\textsuperscript{174} See EIA Act, \textit{supra} note 168.
section 3(2) (a) and (b) of the Associated Gas Re-injection Act and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations under which the continued flaring of gas in Nigeria could be allowed were inconsistent with the applicant’s right to life and/or dignity of human person enshrined in the Constitution and the African Charter and were therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution. In the light of these declarations, they therefore, asked for an order of perpetual injunction restraining the first and second respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicants’ community.

The respondents denied flaring gas and stated that their gas plant was in a different location, which had not caused any harm to any person or property. They also argued that their activities of gas exploitation and processing were carried out in accordance with the laws, regulations and policies of the federal government of Nigeria and in conformity with international standards and practices. These, they claimed, had no ruinous or adverse consequences and did not pollute the air or cause any respiratory disease or endanger or impair the health of anybody. Furthermore, they argued that there was no causal link between these incidents of ill health, death or otherwise, and the gas and oil exploration activities. They also argued that, 37 years ago, when they commenced operation in the area, it was not the requirement of the law to carry out environmental impact assessment and there had been no oil and gas development in the community which required carrying out any environmental impact assessment. Moreover, notwithstanding the fact that their operations posed no present or future danger, they contributed and supported a sustainable development program in

175 See Gas Reinjection Act, supra note 169.
the area, such as, a youth model farm, cassava processing mill, water scheme, post-primary school scholarship, teachers’ quarters, community bus, and a primary health care delivery scheme.

They finally, argued, that this was not a fundamental rights cause, as the African Charter did not create rights enforceable by the fundamental rights enforcement rules, nor was gas flaring a matter contemplated by section 34 of the constitution relating to the right to life, which denies the court jurisdiction.

3.1.1.2. The Court’s Decision

SPDC and their lawyers repeatedly refused to reply to the claims brought against them and instead, kept using various delay tactics, including asking for adjournments, seeking to transfer the case to a different judge, and filing appeals at the court of appeal, in order to stifle case.177 Eventually, after five months of such delays, the judge on this case decided to enter judgment in favor of the applicants, as he reasoned that SPDC’s failure to make an argument for their case was as a result of a lack of any proper defense.178 The court, thereafter entered into judgment and made a decision granting all the reliefs and declarations sought by the applicants.

Thus, the court ordered the first and second respondents to take immediate steps to stop further flaring of gas in the applicant’s community and also ordered, the 3rd respondent to immediately set into motion, necessary processes for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made thereunder. Accordingly, the case as put forward by the first and second respondents as well as their various preliminary objections

177 See Gbemre case summary, supra note 160 at 24-25.
178 See Gbemre case summary, supra note 160 at 28-29.
were dismissed as lacking merit. The court however, made no award of damages, costs or compensation whatsoever.

3.1.1.3. The Aftermath

A month after the judgement, the applicant discovered that SPDC had still not taken any steps to carry out the court’s judgment, which led them to file for contempt of court and for enforcement of compliance with the court’s ruling. In response to this, the court granted SPDC a conditional stay of execution, and allowed them instead, a period of one year in which to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of the Court. They were ordered to “submit a detailed phase-by-phase technical scheme of arrangement”, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations one year from the date. Finally, these four individuals were to appear before the judge to present their plans in open court. Shell and NNPC appealed the conditional stay of execution, and the conditions and after this, there were several interruptions to the case.

First, an adjournment was made by the court staff without any notice of said adjournment being given to the applicants or their lawyers. The court of appeal also stopped the federal high court from sitting on the day set for Shell’s appearances - presumably on the basis of an appeal before it - but there was no record of any further decision from the court of appeal on any of the said appeals before it in relation to the Gbemre case. Thereafter, Mr. Gbemre and his counsel were

180 Ibid at page 109.
182 Ibid.
183 Ibid.
arrested and harassed by soldiers\textsuperscript{184} and the case files were suddenly missing from the federal high court’s registry, which in effect, meant that, there was no longer a record on which to base an enforcement, nor one on which to base an appeal, thereby leaving the case at a standstill.\textsuperscript{185} In addition, the judge in this case was transferred out of the jurisdiction to a rural area.\textsuperscript{186} This effectively quelled any attempt at enforcement measures against Shell and also prevented the case from moving forward. Unfortunately, there was no attempt to enforce compliance with the court’s ruling after this and till date, no further action has been taken with regards to the \textit{Gbemre case}.

Despite this damper to justice, the \textit{Gbemre case} made a huge contribution to environmental justice in Nigeria in the following ways. First of all, it revealed the distributive justice problems which the Niger Deltans suffered in the midst of the huge profits amassed by Shell and the Nigerian government, which revealed the damaging activities of SPDC in the Niger Delta and the need for improvement. It also revealed the absence of protective laws and processes to ensure environmental justice and showed how these inhibitions in the laws and processes, stifled the attainment of environmental justice for the Niger Deltans.

This put pressure on the Nigerian government to make better laws in this regard and attracted the partnership of environmental organizations such as Friends of the Earth International and international organizations such as the United Nations Environment Programme.\textsuperscript{187} As a result,

\footnotesize{\begin{itemize}
\item See Ukala, \textit{supra} note 179 at page 117.
\item See for instance, the UNEP report on Ogoniland that followed after this. \textit{Supra} note \textbf{Error! Bookmark not defined.}.
\end{itemize}}
there were several attempts after this, to make better policies relating to gas flaring,\textsuperscript{188} and a press release by the World Bank, shows that this has resulted in some reduction of gas flaring levels in Nigeria.\textsuperscript{189} Furthermore, an awareness about the need for environmental justice in the Niger Delta increased nationally and internationally and it was after this time that the United Nations Environment Programme issued its report on Ogoniland in 2011 that led to the revelation and documentation of the gross devastation and damage to the environment, health and lives of the people in the Niger Delta.\textsuperscript{190}

Ultimately, while the \textit{Gbemre case} did not do much to improve the environmental justice situation in the Niger Delta, it was one of the first cases to have a focus on environmental protection and group wellbeing, and one of the first cases as well, to look beyond pecuniary compensation, to a remedy instead, that was more long-lasting and available for all people. It was also seen as a landmark case for environmental justice in Nigeria, as it addressed the issue of environmental rights and established the need for a healthy environment for the furtherance of the right to life.

The \textit{Bodo case}, which will be discussed next, is another example of the problem of environmental injustice in the Niger Delta. It is similar to the \textit{Gbemre case} in that it showcases the presence of burdens in the use of environmental resources in the Niger Delta as well as the need for procedural justice, through adherence to laid down laws and regulations, and a more effective participatory mechanism for the Niger Deltans. It also reflects the need for corrective justice.


\textsuperscript{190} See generally, UNEP Report, \textit{supra} note \textbf{Error! Bookmark not defined.}
The *Bodo case*, however, also shows a marked difference from the *Gbemre case* through its use of a Technology and Construction Court (TCC) and a Group Litigation Order (GLO). The Technology and Construction Court was a specialized court that was provided for a more efficient process for cases that fell under the heading of technology and construction, under which the topic of pipelines was deemed to fall. This court ensured that less time was consumed and more expertise was employed, which allowed the cases to be handled more quickly than the regular court processes, due to the provision for procedures in this court that were designed to handle cases like this, where urgency was required. It was also more experienced and better prepared to handle the Group Litigation Order (GLO).

The Group Litigation Order (GLO) was a court process that provided an opportunity for both individual and group concerns to be addressed together by allowing all the litigants to be joined together and registered as one group under a common name. This allowed the generic problems suffered by all to be addressed, while also providing for specific or personal damages for others, such as for people with a higher level of impact of the oil pollution. This was a provision that was necessary for the attainment of true environmental justice in the Niger Delta, due to the diverse levels of harm that could be suffered by members of the same community, from one act of pollution. This GLO also provided a joint way to address areas of cost that would have been

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191 See Martyn Day, Kate Gonzalez & Oliver Holland, "Justice at Last for the Ogoni People" (2015) 4 Environmental L & Practice Rev 137 [Day et al.].
192 Ibid. at page 136.
193 Ibid. at page 137.
194 Ibid. at page 137.
195 Ibid. at page 138.
196 Ibid. at page 138.
unmanageable for an individual, such as the costs needed to obtain expert evidence, or the costs needed for the actual assessment of the situation.\textsuperscript{197}

The \textit{Bodo case} also had a better aftermath than the Shell case, through its provision for compensation and remediation, which addressed the immediate need, while preventing the future reoccurrence of the problem and which therefore addressed environmental justice on all fronts. These are discussed in more detail below.

3.1.2. BODO V. SHELL\textsuperscript{198}

The \textit{Bodo v. Shell} case revolves around the problem of oil spillage and was a claim brought by members of the Bodo community in the Niger Delta.\textsuperscript{199} The Bodo community is a rural coastal settlement in the Niger Delta whose creeks and mangrove forests are relied on by the local people for sustenance. The majority of its inhabitants live as fishermen and farmers and many others are craftsmen who rely on the diverse resources of the mangrove forests. This was the case, until two oil spills occurred from the pipelines of Shell Petroleum Development Company’s (SPDC) which damaged the mangrove forests and prevented the villagers from being able to fish locally in order to make a living.\textsuperscript{200}

\begin{flushleft}
\textsuperscript{197} Ibid. at page 138.
\textsuperscript{198} See Bodo case, \textit{supra} note 26.
\end{flushleft}
3.1.2.1. Facts of the Case

The Members of Bodo Community brought a claim against SPDC in the London High Court on 23 March 2012, seeking compensation for two oil spills, which had occurred in their community. They alleged that SPDC’s pipelines had caused the spills because they were over 50 years old and were poorly maintained, and that SPDC had reacted too slowly after being alerted to the spills.\(^{201}\) This, they claimed, resulted in a massive contamination of the creek, rivers and waterways in the Bodo area and devastated the local mangroves, fauna, wildlife and fishing stocks,\(^{202}\) as both spills continued to pour oil out into the environment for several weeks, even after SPDC had been alerted to the oil spills. As a result, they were seeking compensation for losses suffered to their health, livelihoods and land, and were asking for a clean-up of the oil pollution.

SPDC, on the other hand, admitted liability, for the oil spills, due to the strict liability nature of the case, under the Nigerian Oil Pipelines Act of 1990\(^{203}\) and also due to the fact that their pipelines were 50 years old, had suffered serious erosion, and were thus, subject to equipment failure and a tendency to fracture.\(^{204}\) They however, claimed only partial liability and claimed that a major bulk of responsibility was not theirs, but was caused instead by oil theft and bunkering,\(^{205}\) for which they ought not to be held liable. They therefore, tried at first to settle out of court, but had offered

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\(^{202}\) See Leigh Day, supra note 199.

\(^{203}\) See Oil Pipelines Act, Chapter 338, Laws of the Federation of Nigeria 1990.

\(^{204}\) Supra note 191 at 139.

a meagre £4,000 in compensation to the whole community, in addition to bags of rice, beans, sugar and tomatoes as relief which was deemed by the Bodo community, to be insufficient.

The case was then taken to the High Court in London to seek adequate compensation for members of the Bodo community and also to seek a full and effective clean-up of the impacted areas. This jurisdiction of the court in London was achieved, by including the parent company, Royal Dutch Shell to the claim. This was later dropped, however, on the condition that SPDC would not challenge the jurisdiction of the court after this. Thereafter, the case was moved to the TCC court, which specialized in cases of this nature and had better procedural steps to handle such cases.

When the case came before the court, the following issues arose. First, although SPDC had admitted liability for the clean-up, it still had to determine the quantum of damages, if any, which it would have to pay out. This meant that the court would have to decide on the quantity of the oil spilled and the magnitude of the areas affected. The court would also have to determine if the law held SPDC liable, for an oil spill that was caused by illegal oil bunkering and refining. Finally, it would have to determine under what headings, compensation could be paid; for instance, whether the law covered such claims as shock and fear; annoyance, inconvenience, discomfort and illness or distress and anxiety amongst others. This would also require the determination of the applicable laws for each claim and dispute and the type and amount of compensation that the plaintiffs would be entitled to if they won the case. The court therefore considered the case on its merits and made the decision provided below.

206 Ibid.
3.1.2.2. **The Court’s Decisions**

The court considered the issues before it, including SPDC’s duty to take reasonable steps to prevent spillage from their pipelines – whether from malfunction or from oil theft - and SPDC won on almost all the issues and points raised. For instance, it was not held liable to pay compensation for the oil spilled as a result of oil bunkering and could not be held to be negligent in that regard. The court also held that the claimants were not entitled to claim compensation under the headings of shock and fear; annoyance, inconvenience, discomfort and illness or distress and anxiety amongst others.

Whilst this reduced SPDC’s liability drastically and the quantum of damages for which it could be held liable, the court held that SPDC was still liable to pay compensation for damage and disturbance to the claimants and/or their living, resulting from the oil spills, due to the strict liability of responsibility for oil clean-up under the Oil Pipelines Act of 1956. This was also in part due to the age of the oil pipelines, from which some negligence on the part of Shell could be inferred, although negligence was not argued in this case.

3.1.2.3. **The Aftermath of the Bodo case**

After the court’s ruling, Shell accepted its responsibility and agreed to a £55 million out of court settlement to pay for cleaning up the oil spill which led to the formulation of the Bodo Mediation Initiative. This was an internationally recognized clean-up operation in partnership with the

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207 See the Bodo Case, *supra* note 26 at paragraphs 1-10 of the Judgment, Per Justice Akenhead.
Dutch government, which was set up by Bert Bonhaar, the former Dutch ambassador to Nigeria, who had taken an interest in the case. Its goal was threefold. The first goal was, the clean-up and remediation of the Bodo creek to international standards, while the second goal was the training and deployment of the youths from Bodo community for the clean-up project. The last goal was a $7-million goodwill fund for developmental projects in the community.\(^{211}\) Thus, from Shell’s first compensation offer of £4,000 in 2009, Shell gave a final payout of £55M in 2015, which led to an estimated payment of £2,200 each to 15,600 people in Bodo community.\(^{212}\) As a result, the members of the community received compensation which addressed their immediate needs, such as the need for funds for the costs of living in the meantime, while work commenced to start the reparation of the damage that was done. Thus, corrective justice was achieved in this case to make up for the existing problems, as well as to address the past and possible future issues. The judicial precedent that arose from this case also created, to an extent, a procedural justice route that could allow more victims of pipeline spillage to achieve environmental justice at the courts in the future.

Having discussed the facts of these cases above, this work now moves on to discuss the ways in which environmental injustice occur in the Niger Delta, using the above stated cases. Procedural justice in the Niger Delta is discussed first in this section, which helps to highlight the underlying inadequacies, and political arrangements which eventually result in distributive and corrective injustice. Thereafter, the distributive and corrective injustices are also discussed.


3.2. **PROCEDURAL INJUSTICE IN THE NIGER DELTA**

As discussed in the previous chapter, procedural injustice refers to the presence or absence of processes which contribute to environmental injustice by denying marginalized groups access to environmental information, participation in decision-making and access to legal remedies. These are underlying issues which are present in the political and institutional settings, and which affect the ways in which different groups are treated.

In the Niger Delta, this injustice is facilitated by three major factors and these are discussed below. The first is a general exclusion or absence of the Niger Deltans from political participation. The second is a denial of access to participation through the framing of exclusionary laws; and the final factor is the denial of access to participation through procedures and processes that prevent or discourage participation. These are discussed in more detail below.

**3.2.1. Exclusion in Political Participation**

The first factor which facilitates procedural injustice in the Niger Delta is the exclusion of the Niger Deltans from political participation. This exclusion could be attributed to several things, chief amongst which is, the nature of the political arrangement that exists between the Niger Deltans and the other groups in the country of Nigeria. These groups, for the purpose of this work, include, the majority tribes, the government, and the oil and gas companies, which are the groups that form a majority in the social and political arrangements in the country of Nigeria. These

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213 See Section 2.3, *infra.* [PROCEDURAL JUSTICE].
arrangements are also the ones that have the most direct impact on the environmental injustices faced by the Niger Deltans.

The Niger Deltans rank as a minority in relation to the three major ethnic groups in Nigeria, namely, the Hausas, the Igbos and the Yorubas.\(^{214}\) As required for groups to qualify as minorities,\(^ {215}\) the Niger Deltans share a common ethnicity and history, and although there are many separate tribes, they also share a sense of solidarity which is the basis on which they have sought for environmental justice for several decades now.\(^ {216}\) Numerically, they are also fewer in number than the majority groups, which leads to a non-dominant position for them in the democratic political scene of Nigeria.

The majority groups are greater in number than the Niger Deltans and have therefore, under both democratic governments and military regimes of Nigeria, often won the upper hand in the making and execution of laws due to their large numbers. Thus, all presidents from the time of Nigeria’s independence, with the exception of one, have often come from the dominant groups.\(^ {217}\) The legislative houses are also often dominated by a larger portion of majority groups, as a result of which, the efforts of the Niger Deltans at making any changes have often been ineffective, due to their restricted participation and involvement at many decision-making levels. This has resulted in


their marginalization and a lack of attention to their concerns. The continuation of this for many decades has also led to a situation where the ownership of the resources in the Niger delta, has been ceded to non-natives, with the Niger Deltans losing total control over their resources.\(^{218}\) Thus, they are often passed over in ownership, employment and several opportunities. This arrangement has resulted in the next factor, which is the framing of laws in a way that is exclusionary for the aggrieved victims.

### 3.2.2. Denial of Access through the Laws

Since the Niger Deltans do not have sufficient participation to make their voices heard, the decision-making processes and outcomes often favor those who are powerful enough to make their voices heard, which includes the oil and gas companies and the Nigerian government. This has also been worsened by the fact that Nigeria had a military dictatorship during the framing of many of the currently existing laws, including the constitution, which vests power in the hands of the dictator and leaves little to no room for a challenge or contribution by external parties.\(^{219}\) Thus, as the *Gbemre v. Shell* case shows, there is no right to a good environment provided by law, and this effectively denies aggrieved parties the ability to seek and enforce a remedy to the unfair arrangements. Two major factors in the law are responsible for this continued denial of access for the Niger Deltans. The first is the non-justiciability of the right to a good environment and the second is the law vesting control over all oil and gas resources in the hand of the Federal government.

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3.2.2.1. Non-Justiciability of the Right to a Healthy Environment

Non-justiciability of the right to a healthy environment refers to the restriction of the court’s jurisdiction in matters relating to environmental rights enforcement, and in the Niger Delta, a major factor responsible for this is the provision of Section 6 (6) (c) of the Constitution of the Federal Republic of Nigeria\(^{220}\) which states that:

- “The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”\(^{221}\)

For clarity, the Nigerian Constitution provides for fundamental human rights under Chapter IV of the Constitution, which provides rights, according to section 46(1) of the constitution of the Federal Republic of Nigeria, for anyone “who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to them” to “apply to a High Court in that State for redress”. The Constitution also provides for Fundamental Objectives and Directive Principles of State Policy, which according to section 13:

- “...shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply ....”

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\(^{221}\) *Ibid.*
Thus, while the rights under Chapter IV\textsuperscript{222} are categorized as “Fundamental Human Rights” and are enforceable by virtue of Section 46 thereof, the rights under Chapter II\textsuperscript{223} are categorized as “Fundamental Objectives and Directive Principles of State Policy” and are non-justiciable. Although these are duties and obligations as well, unlike the fundamental human rights, these do not provide the same right to seek a redress which the fundamental rights provide for and the power to enforce this section is barred by virtue of Section 6(6) (c) of the constitution, stated above. Thus, although environmental protection is provided for under section 20, as it falls under the non-justiciable section, it cannot be enforced against the government or the organizations authorized by the government. This results in a situation in which there is no enforcement power against the government, to compel them to take steps to protect the environment, or to take steps to prevent actions that destroy the environment. There is also, neither a right nor even an opportunity for the citizens to protect their environment.

While there are laws that provide for people to protect their private interest in land, such as trespass, nuisance or negligence, these laws often require the harm to have been done first and do not provide for a right to protect the environment, for the sake of the environment itself. Thus, the right to a healthy environment is denied, as well as an access to participate in environmental protection. With no one playing these roles, the environment has been exploited to the point of degradation, with no consequence for the exploiters, while the environment and the people that depend on the environment are left to suffer.

This right to a healthy environment is important because it provides the entitlement to be included in the decision-making processes regarding one’s life, health and environment, and a right to

\textsuperscript{222} Which comprises of sections 33 – 46. See The Constitution, \textit{supra} note 161.

\textsuperscript{223} Which comprises of sections 13 – 24. \textit{Ibid.}
enforce this in a court of law when breached.\textsuperscript{224} This also imposes a duty on the decision makers to ensure that there is no breach of this right. Thus, this right provides a minimum standard of treatment which applies equally to all people, and which must not be violated.\textsuperscript{225} Conversely, the lack of this right also enables the decision makers to apply the lowest standard possible in their activities regarding the people and the environment. It also denies the people a right of action against poor standards of treatment in relation to their environmental resources before a court of law.

This lack of environmental rights has had far reaching consequences for the Niger Deltans, as the courts are often reluctant to enforce any claims against the government in relation to the protection of the environment.\textsuperscript{226} In the case of \textit{A. G. Ondo v. A. G. Federation}\textsuperscript{227} for instance, where the constitutionality of an Act in respect of a matter under Chapter II was challenged, the Supreme Court upheld the enactment and held that:

- The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List.
  
  By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the…National Assembly to give expression to any one of them through appropriate enactment as occasion may demand … The Courts cannot enforce any of the provisions of Chapter II of the constitution until the National Assembly has enacted specific laws for their enforcement.\textsuperscript{228}

\textsuperscript{227} See \textit{A. G. Ondo v. A. G. Federation} (2002) 9 NWLR (Pt 772) 222 Per Uwaifo, JSC.
\textsuperscript{228} \textit{Ibid.}
Thus, this could be interpreted to mean that no topic under this restricted section could be a ground for action at the court, until the National assembly has passed such a topic into law; and conversely, that when such a topic has been passed into law, that it may now be justiciable. Unfortunately, the positive aspect of this interpretation has not been the case in relation to the environmental rights provided for by the African Charter for the reasons discussed below.\textsuperscript{229}

Section 12 (1) of the Nigerian constitution provides that “no treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly”. Thus, the African Charter, being an international law, ordinarily falls under this provision. However, the African Charter has now been ratified and passed into law by the National Assembly, in accordance with section 12 of the Constitution which now gives it a force of law before the court. Supporting this fact, the Supreme Court held in the case of Abacha v. Fawehinmi\textsuperscript{230} that “the African Charter, having been enacted by the National Assembly, is a part of our domestic laws and its provisions are enforceable in the Nigerian Courts”. Despite this however, the enforcement of the environmental rights provided for by the African charter,\textsuperscript{231} has still remained a challenge due to a lack of clarity and a deemed clash between the status of the rights in the African Charter and those in the Constitution.\textsuperscript{232}

It is submitted in this work, however, that the domestic implementation of the African Charter is enforceable by the Nigerian courts and does not clash with the Constitution. This is because the Constitution’s exception to justiciability appears only to cover challenges on the basis of the


\textsuperscript{230} See the case of Abacha & Ors v. Fawehinmi (2000) LPELR-14(SC) 247 per Uwaifo JSC.

\textsuperscript{231} See Banjul African Charter, supra note 229 at Article 24.

\textsuperscript{232} This was also one of the defences raised by the counsel for Shell Petroleum Development Company, Nigeria, in the Gbemre v. Shell case, supra note 25.
Fundamental Objectives and Directive Principles of State Policy. This means that legislation such as the African Charter implementation legislation is justiciable because it provides a ground for enforcement that is not based on the breach of the duties provided for by the Fundamental Objectives and Directive Principles of State Policy. It provides instead, a ground in itself, and therefore, the parties which rely on it, would rely on it solely, and would not need to rely on the issue of ‘non-conformity’ with the Fundamental Objectives and Directive Principles of State Policy.

For a better understanding of this, it is important to look at the provisions of Section 6(6) (c) of the Constitution which provides that:

- “the judicial powers … shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy.”

From this provision, we can see that this restriction only applies to questions that are based on the issue of ‘conformity or non-conformity’ with the fundamental objectives and not to ‘all topics’ that are covered under the fundamental objectives. Thus, claims relating to the need for a healthy environment should only be non-justiciable, ‘if’ parties intend to rely on the provision of section 20 which states that, “the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria”. Where however, the reliance was on a different law enacted by the legislature, this should not be non-justiciable, as there would be no need to address the question of conformity or otherwise, ‘with’ the fundamental objectives. It is thus submitted that, this section should not apply as a total ban on all environmental protection.
enforcement claims, but instead, only to those occurring on the basis of the Fundamental Objectives and Directive Principles of State Policy.

The above submission is in line with the decision of the Supreme Court in the case of A. G. Ondo v. A. G. Federation. In this case, the constitutionality of an Act in respect of a matter under Chapter II was challenged and the Supreme Court upheld the enactment and held that:

- “The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the…National Assembly to give expression to any one of them through appropriate enactment as occasion may demand … The Courts cannot enforce any of the provisions of Chapter II of the constitution until the National Assembly has enacted specific laws for their enforcement.”

Thus, as section 20 of the Constitution imposes a duty on the state to “protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria”, bringing an action thereunder and alleging the failure of the government to protect the environment would be non-justiciable. However, a claim brought under the African Charter or other human rights laws, for the protection of the lives and dignity of the people through the provision of a safe environment should not be non-justiciable as the action in such a case is not founded on the government’s duty to protect the environment, under the fundamental objectives. This was the

233 See A.G. Ondo, supra note 227.
234 Ibid.
235 See the Constitution (Nigeria), supra note 161.
237 Ibid.
approach used in the case of *Gbemre v. Shell*, where the need for a healthy environment, in relation to the right to life was upheld by the ruling judge.

3.2.2.2. **Vesting of Control over All Oil and Gas Resources in the Federal government**

Another factor in the law that prevents access for the Niger Deltans is the vesting of control over all oil and gas resources in the hands of the Federal government. This is facilitated through the Land Use Act and the Petroleum Act. These vest control over the mineral resources in Nigeria, in the Federal Government and do not provide a right or any opportunity for participation for the Niger Deltans. This also means that victims of environmental pollution often lack *locus standi* in environmental pollution cases affecting entire communities, as this usually falls under the purview of the public and therefore, the Attorney-General, rather than private individuals.

Nigeria operates a federal system of government, in which there is a Federal Government, a State Government and several Local Governments, with each having clearly defined powers, functions and limitations. These powers and functions are enshrined in the Constitution, which governs these relationships. In line with this, the area of oil and gas resources and the determination of its usage is clearly designated to the Federal Government through Section 44 (3) of the Constitution which provides that:

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238 See Section 3.1.1, infra [GBEMRE V. SHELL PETROLEUM DEVELOPMENT COMPANY AND OTHERS]
242 See, generally, Emmanuel U. Onyeabor, “Expanding the Scope of Locus Standi in Environmental Litigation” (2010) 7: 1 Nnamdi Azikiwe University Law Journal at 77 online: <https://www.academia.edu/26218719/expanding_the_scope_of_locus_standi_in_environmental_litigation>; See, also, the case of *Centre for Oil Pollution Watch v NNPC*, (2013) LPELR-20075(CA) 26-27, paragraphs C-C[Centre for oil pollution case]; Also *Dumez (Nig.) Ltd. v. Ogboli* (1972) ALL NLR 241.
243 See The Constitution, Supra note 161 at section 2 (2).
“Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”

This constitutional provision is also supported by section 1 of the Petroleum Act, which vests ownership and control of all petroleum in the state, and Section 1 of the Land Use Act which vests the ownership of the entire land of Nigeria in the governor of the state. Thus, both the land, as well as the minerals and resources contained in the land of Nigeria, are vested in the government. This arrangement effectively leaves out the States, Local Governments and the affected people in the decision-making and licensing processes regarding oil and gas resources, which also gives the government an imposing power over the Niger Deltans in relation to the oil and gas and environmental resources.

The Minister of Petroleum Resources is also empowered by virtue of section 1 of the Petroleum (Drilling and Production) Regulations to give out licenses and leases to oil and gas corporations for oil exploration and production. This process often involves the creation of joint venture agreements and production sharing contracts, which provides the government with a share and an

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244 Ibid. at Section 44 (3).
245 See Petroleum Act, supra note 241.
246 See Land Use Act, supra note 240.
247 See Petroleum Act, supra note 241 at Preamble.
248 See Petroleum Act, supra note 241 at Section 4 (2) (3); also Part 1 Second Schedule No 39.
interest in the proceeds of these processes.\textsuperscript{250} Thus, the activities of the oil and gas companies are also indirectly the activities of the Nigerian government, which makes a strong coalition that prevents the participation of the Niger Deltans in the decision-making processes and this leads on to the final procedural injustice, which is, the presence of procedures and processes which inhibit access to justice, participation and information and this is discussed below.

3.2.3. Denial of Access in Processes

Environmental justice cases often require discussions and meetings, before the cases even go on to the court and after the case is over. For instance, the Bodo and Gbemre cases went through several consultation processes with the villagers and other stakeholders, before it came to the finalized representative action stage at the court.\textsuperscript{251} It is therefore necessary at this point, to ensure the participation of all people and the addressing of the complaints of all people.

3.2.3.1. Denial of Access in Participatory Processes

In addition to the denial of access through the laws, there are also processes and procedures, which by design, limit or totally inhibit the ability of the Niger Deltans to have access to justice or participation; and it is important to pay attention to these areas as well. These include, the lack of a provision for participatory procedures in environmental decision-making laws,\textsuperscript{252} the presence of inhibitions at the court, and a lack of enforcement of laid down provisions for access to participation. This also includes poor participatory processes,\textsuperscript{253} such as the location of meetings

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\textsuperscript{251} See Leigh Day, \textit{supra} note 199.
\textsuperscript{253} See Schlosberg, \textit{supra} note 52 at 68-69.
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in distant places, the restriction of the numbers or classes of people that are included or informed in stakeholder meetings\(^{254}\) and the lack of an actual access to participation, such as where the court is in a distant location. Thus, there is a need for methods of participation that include consultation with the people, having meetings with them, as well as, processes that include them directly in the decision making bodies.\(^{255}\)

It can also be suggested that by enabling access to the courts, the people can indirectly participate in the framing of legal laws and policies affecting environmental justice. Therefore, any law or procedure that reduces inclusion in the decision-making bodies or that cuts off access to justice or that doesn’t make provisions for consultation with the people before the making and enforcement of environmental laws and policies, cuts off their access to participate.

In the Niger Delta, these processes for access to participation or justice are often non-existent or, are designed in such a way that they often exclude many of the relevant stakeholders. This is more especially so, in the case of the Niger Delta, where many villages are completely surrounded by water and are isolated from the rest of the country due to the poor transportation systems and the lack of social amenities. This may also make it difficult for help to get to them or for them to go for help. For instance, access to justice and participation could been inhibited by the location of Federal high courts in major cities,\(^{256}\) which is the court with jurisdiction in oil and gas matters; and this affects access to justice due to the high costs required, as well as, the inconvenience of travelling very far for an unsure cause. Finally, groups such as women, youths and children could

\(^{254}\) See Bullard 1993, *supra* note 121 at 34-35.


often also be excluded and many deals could be carried out without the knowledge of community members.\textsuperscript{257}

3.2.3.2. \textbf{Denial of Access to Information Processes}

Finally, a lack of access to information also plays a major role in the lack of access to justice and participation for the Niger Deltans in the following ways. First of all, it inhibits their ability to successfully bring a claim before the courts, to enforce any negligence or breach of their fundamental rights and thereby, also prevents their ability to receive adequate compensation and reparation for damage done to them and their environment.

In the \textit{Gbemre case}\textsuperscript{258} for instance, Shell argued that there was no causal link between their activities and the ill health experienced in the Niger Delta. However, the UNEP report\textsuperscript{259} later issued on the Niger Delta, revealed high levels of toxins in the environment, which were shown to be adverse to human health and the environment. Thus, access to information in this case could - depending on the court’s interpretation- reveal a breach of the right to life and dignity of the human person, and the need for reparation and remediation, and could also provide grounds for a claim and an entitlement to a remedy for the aggrieved parties, before the court.

There is also often a lack of transparency and a lack information about the activities of the oil and gas companies or the government,\textsuperscript{260} or even general plans for group actions involving the entire community, and these could all interfere with access to justice. In the \textit{Bodo case} for instance, the judge observed several miscommunications between the lawyers and the clients and also noticed

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\textsuperscript{257} See Salleh, \textit{supra} note 252 at 233-234.
\textsuperscript{258} See Gbemre case, \textit{supra} note 25.
\textsuperscript{259} See UNEP Report, \textit{supra} note Error! Bookmark not defined.
\textsuperscript{260} See Salleh, \textit{supra} note 252 at 233-234.
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some disparities in the signatures which led to some suspicion about the documents.\textsuperscript{261} In the case of \textit{SERAC v. Nigeria},\textsuperscript{262} the complaints brought against the Nigerian government, also fell along these lines, viz:

- “The government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The government has withheld from Ogoni communities information on the dangers created by oil activities. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland. The government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organizations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders. The communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands”.\textsuperscript{263}

Thus, the Nigerian government often denies access to participation and information, through its failure to actively obtain, to keep and to release important information to the Niger Deltans; as well as, through its stifling of their own efforts to provide this information for themselves. This

\textsuperscript{261} See Bodo case, \textit{supra} note 26 at Paragraph 31-39.
\textsuperscript{262} See \textit{SERAC case}, \textit{supra} note 23.
\textsuperscript{263} \textit{Ibid} at Para. 4, 5, 6.
violates the commitments to access to information and participation as necessary components of 
environmental justice, which are recommended by the Aarhus convention and by the Executive 
Order. Most importantly however, this lack of access to information takes away the ability of the 
Niger Deltans to be informed about the risks they face by being in such polluted environments. 
This denial of the necessary information about the consequences of the government and 
corporation’s action, was also held to be a violation of the “right to respect for private and family 
life’ in the case of Guerra v. Italy\(^{264}\) above.

This work now moves on to discuss the distributive injustice in the Niger Delta, which has arisen 
as a result of these unfair procedural arrangements.

### 3.3. THE DISTRIBUTIVE INJUSTICES IN THE NIGER DELTA

Distributive justice as identified in the previous chapter, refers to the distributional relationship 
and measures of allocation that exist between different groups in the society\(^{265}\) and in relation to 
environmental justice, it relates to the shares of burdens and benefits that each group in the society 
bears in relation to their use of environmental resources. In relation to this, the Executive Order 
12898\(^{266}\) emphasizes disproportionately high and adverse effects of unjust programs, policies and 
activities on the affected groups,\(^{267}\) as a signal of an environmental injustice, and one can see this 
manifesting in the Niger Delta in the following ways.

\(^{264}\) See Guerra case, supra note 129.
\(^{265}\) See Section 2.2, infra [DISTRIBUTIVE JUSTICE].
\(^{266}\) See Executive Order, supra note 34.
\(^{267}\) Ibid. at Section 1-101.
3.3.1. The Disparity in Burdens

In relation to environmental justice, the disparity between the Niger Deltans and the rest of Nigeria, may not seem so obvious at first, due to high rates of poverty within Nigeria, which may even indicate those in the Southern Niger Deltan region to be on a higher scale of wealth than those in the North.\(^{268}\) However, these figures could often be measuring the general average, which when balanced out with the share of oil wealth revenue to the states would indicate the Niger Deltans to be faring better. It would however, miss out on those people, on the other end of the scale, who do not receive any share of this oil wealth, including those who may not have oil companies in their communities from which to receive royalties, but who suffer anyway, because the rivers, mangrove forests and ways of life and livelihood, in general, have been affected.

These reports would also miss out on the risks and actual harms that the Niger Deltans face from very high levels of exposure to toxins from pollution, whose levels when compared with the rest of the country are disproportionately high with those of other states and communities, merely by reason of their proximity to these facilities.\(^{269}\) Thus, although the available data may not reflect these so much, these are major areas where the distributive justice concerns between the Niger Deltans and the rest of Nigeria, exists.

The unjust procedural arrangements discussed above, have resulted in several adverse effects for the Niger Deltans which has led to a lower life expectancy, higher poverty rates and several other consequences.\(^{270}\) Other factors such as, oil spillage, gas flaring, effluent and waste discharge, poor


\(^{269}\) See UNEP Report, supra note Error! Bookmark not defined..

decommissioning of oil wells and a lack of proper maintenance of oil pipelines, have also led to gross environmental destruction.\textsuperscript{271} For instance, in December 2011, over 40,000 barrels of crude oil were spilled in one day;\textsuperscript{272} and gas flaring continues, unabated in the region, so much so, that Nigeria holds a record\textsuperscript{273} for one of the highest gas flaring rates in the world;\textsuperscript{274} and this has been the case for over 6 decades, since the onset of oil and gas production in the region.\textsuperscript{275}

Ripple effects from these include acid rain,\textsuperscript{276} health problems, a loss of livelihood, low standards of living and a poor quality of life, amongst others. Destruction of livelihood has also occurred due to farm lands becoming infertile and unfit for agricultural purposes; and seafood becoming scarce, or even when found, unfit for human consumption. This results in fishermen, farmers and traders, amongst others - which constitutes the major portion of Niger Deltans - losing their sources of livelihood, with no viable alternatives.\textsuperscript{277} Many of the people also have no jobs and no job prospects either, and common facilities like schools, pipe-borne water and electricity are still unavailable.

The pollution of the environment, combined with poverty and poor infrastructural facilities has also led to a high rate of illnesses of diverse kinds and a higher mortality rate amongst the Niger

\begin{footnotes}
\item[271] See Olawuyi, \textit{supra} note 7 at 148, 157, 160.
\item[272] \textit{Ibid.} at 149.
\item[276] See Uyigue et al., \textit{supra} note 3 at 7.
\end{footnotes}
Deltans as a result of ingesting toxins from the air, food and water. All these have resulted in the region being one of the poorest and most underdeveloped regions in the country. Thus, overall, the Niger Delta seems to be bearing a heavy weight and paying a very high cost from which there has been no relief.

This narrative is also supported by the ‘Environmental Assessment of Ogoniland’ report by the United Nations Environment Programme in 2011, which revealed extensive damage to the environment, and revealed several threats to public health, including the exposure to carcinogens, the presence of high levels of toxins in the drinking water and severe air pollution amongst others. It was also revealed that Shell Petroleum Development Company’s failure to follow its own safety guidelines for oilfields had led to gross damage to the environment and had reduced the quality of life of the community. The report also stated that clean-up and restoration would take up to 25-30 years with an initial capital injection of 30 million dollars including $1 billion for the first 5 years. It was however also based on the condition that the pollution was stopped now and reparation immediately begun. In other words, if the pollution continued, these figures would be higher, and reparation could even become impossible. Unfortunately, very little has been done since then to ameliorate the situation.

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279 Se Ifedi et al., supra note 14 at 92.
280 See UNEP Report, supra note Error! Bookmark not defined..
281 Ibid.
282 Ibid.
284 See UNEP Report, supra note Error! Bookmark not defined.
The Preamble to the Universal Declaration of Human Rights provides that, “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”. This implies a corresponding violent response or rebellion to a failure to protect human rights and this has been the case in the Niger Delta. Since the beginning of these polluting activities, the Niger Deltans have often been unable to access justice due to the barriers in the legal processes, and due also to the lack of a political will of the government to make the situation better. Thus, this has resulted in several uprisings, including the current problem of militancy in which aggrieved native people use guerilla tactics to attack the government, the oil companies and the general public in an attempt to get the government to meet their demands, as well as, in an attempt to make ends meet. This has also resulted in the current state of oil bunkering and theft, where oil is illegally obtained from damaged oil pipelines. This has led to the worsening of the oil pollution problems of the Niger Delta. In the case of Bodo v. Shell for instance, this was held to be a major cause of the oil spill in the region.

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285 See UDHR, supra note 51.
286 See UDHR, supra note 51 at Preamble.
290 See Bodo case, supra note 26.
3.3.2. The Disparity in Benefits

On the other hand, the government and the oil companies have been made richer over the years through their successful exploitation of the resources of the Niger Deltans. For instance, the total tax and royalties paid by Shell to the Nigerian government, from 2014 to 2018 is shown in their report to be around 17.8 billion US dollars, which shows a huge profit for both Shell and the Nigerian government. Thus, they have earned huge profits, but the wealth has not flowed back to the Niger Deltans, due to the exclusionary processes stated above, and due to high levels of corruption in the country.

The proceeds of these processes are often large in terms of economic value and therefore, the Nigerian government has come to rely on these resources which have quickly become a mainstay of the country of Nigeria. For instance the oil and gas resources provide 85% of Nigeria’s gross domestic product (GDP) and over 95% of the national budget, thus providing over 80% of the nation’s wealth. Oil companies therefore play huge roles in Nigeria and their existence and continued stay at this moment has become imperative for Nigeria’s continued existence as a nation, due to the lack of diversification of Nigeria’s revenue sources. This, puts this industry in a very vital and almost irreplaceable position and therefore on a higher ranking and scale of importance.

than the Niger Deltans. Thus, the Nigerian government has often been willing to put the demands of this industry before that of the Niger Deltans and have carried out several human rights violations in order to allow the companies continue their businesses, despite the grievous harm this brings to the Niger Deltans. Some major examples of this include, the killing of the environmental activist, Ken Saro Wiwa, by the military government, on trumped-up charges of treason, for condemning the state of pollution in the Niger Delta which was caused by the activities of Shell Petroleum Development Company. Others include the Odi-Bayelsa and the Umuechem massacres, where the military personnel opened fire on harmless, peaceful demonstrations, and burned houses in these Niger Delta communities.

Although the oil companies often offer some sort of reward, profit or benefit in relation to the burdens they will be imposing, this often manifests instead, as a situation which has been termed ‘economic blackmail’. This is a circumstance whereby the company offers some economic benefits such as employment, scholarships, revenue and other things in exchange for the burdens they bring. However, as the focus of environmental justice is on the wellbeing of all people, this has been condemned, as it has been argued that the health and wellbeing of the people should not be put at stake for economic benefits which they should be entitled to in the first place under a good government. This tradeoff of life and wellbeing is seen as too big a price to pay in exchange for some money. Rather than this, in such situations the company ought to bear the burdens - which could also be shared between the companies and the government- in such a way that the best practices for the safety of the members of the community members as well as other stakeholders,

296 See Ken Saro Wiwa case, supra note 24.
297 Ibid.; See also SERAC v. Nigeria, supra note 262.
298 See Bullard 2001, supra note 79 at 158.
299 Ibid.
would be ensured. While this would require an adherence to higher standards and the expenditure of higher sums of money, it would also lead to wellbeing for all - that is, profit for the companies, revenue for the government and the society at large and wellbeing for the Niger Deltan people.

Unfortunately, this has not been the case in the Niger Delta. Rather, a clear case of economic blackmail has been the practice from the very beginning. The oil companies in the Niger Delta often offer very juicy rewards to communities that allow them to drill oil in their location, such as employment and business opportunities, access to energy and educational scholarships for natives amongst others. However, as the UNEP report shows, there has been a tradeoff, in the areas of health, life and wellbeing of the very people who ought to be enjoying the benefits. To make matters worse, there are hardly any social infrastructure and amenities to ameliorate the negative effects of these actions of the oil companies and Bullard has identified this as a contributing factor to environmental injustice in general. Thus, the environmental injustice against the Niger Deltans -as defined within the scope of environmental justice in this work- could be summarized into the problem of disparity in the share of burdens and benefits, the unfair exposure of the Niger Deltans to risk and harm and, the skewed distributional relationship that has allowed these disparities and harms to both occur, as well as to continue unabated for over 6 decades now.

In the light of this, the next section considers the available means of remediation, reparation or compensation, amongst others, for the Niger Deltans.

301 See Akpomuvie, supra note 151 at 213; See also, the complaints in the Gbenre case supra note 25.
3.4. CORRECTIVE INJUSTICE IN THE NIGER DELTA

Corrective justice, has been identified as the branch of environmental justice that focuses on identifying the harms, losses or wrongs which have arisen from environmental injustices, and the correction of these losses or wrongs through remediation, reparation, restoration or retribution, amongst others. Its major aim is to restore the aggrieved parties to the state they were in before the loss occurred and it attempts to fairly assign sanctions or compensation, depending on what each party justly requires or deserves.

In the Niger Delta, the lack of procedural and distributive environmental justice has often left space for the occurrence of corrective injustices in the Niger Delta, which are problems that necessitate correction or some form of remedy, but for which a remedy is often unavailable. A major example of this is the UNEP environmental assessment report on Ogoniland discussed above, which showed the existence of several harms and risks to the environment, and to the people living in such environments. It however, also reported that this would require a remediation process that would take up to 30 years. This means that the people in the Niger Delta would have to continuously suffer through these harms for another 3 decades, despite any corrective measures taken and this highlights the need for a combination of several types of remedies for a true resolution of the damage and harms in the Niger Delta. For instance, while there is a need for reparation of the environmental damage, there must also be adequate provisions through monetary compensations, as well as prohibitive injunctions that prevent the re-occurrence of more harm.

303 See Section 2.4, infra [CORRECTIVE JUSTICE].
304 See Gonzalez, supra note 146.
305 Supra note 54.
306 See UNEP Report, supra note Error! Bookmark not defined.
This section therefore, discusses the wrongs and harms that have occurred in the Niger Delta, and the commensurate remedies which would be required to right these wrongs. There are several forms of these wrongs— including the violation of the right to a good environment, although this is not directly provided for in Nigerian law. However, within the limits of the currently existing laws in Nigeria, there are three major areas where legal wrongs arise in relation to environmental justice in the Niger Delta. These are the areas of violation of human rights, breach of statutory provisions and the breach of common law provisions under the law of tort and these are discussed in further detail below.

3.4.1. Human and Environmental Rights

As discussed above under procedural justice, the Nigerian constitution does not provide for an enforceable right to a good environment. 307 It, however, provides for other fundamental rights such as the right to life,308 dignity of the human person309 and the right to possession and enjoyment of property,310 amongst others and activities that result from environmental injustices could often be found to breach some of these existing fundamental rights. It has been established for instance, that exposure to environmental pollution puts the lives and wellbeing of people at risk311 and Honneth312 argues that environmental pollution violates the dignity of the human person, through

308 See The Constitution, supra note 161 at Section 33.
309 Ibid. at section 34.
310 Ibid. at section 41.
312 See Honneth, supra note 91 at 4.
the denial of an ability to escape from it. Environmental pollution has therefore increasingly been ruled to be a violation of the right to life, as was the case in the Gbemre case above and in the Indian case of Subhash Kumar vs State Of Bihar And Ors\textsuperscript{313} amongst several others. These direct rights have also often been contravened directly, by the government’s use of military force against the Niger Deltans, as seen in the Odi-Bayelsa and Umuechem massacre discussed above.\textsuperscript{314}

The right to freedom from discrimination is also violated whenever the economic interests of the oil companies or other communities are put over and above the life, health and wellbeing of the Niger Deltans, in line with the provisions of Section 42 of the Constitution;\textsuperscript{315} and the destruction of property which arises from environmental pollution is also a contravention of the right to property contained in section 43 of the constitution.\textsuperscript{316}

When acts like these occur, they often require various forms of remedy. Destruction of property for instance, could require both reparation or restoration and a compensation for the damage, while a violation of the right to life could go further to require punitive measures like sanctions against the violators. Declaratory judgments as well, like those in the case of Gbemre v. Shell,\textsuperscript{317} help to ensure that the acts are stated to be wrongful actions, which also provides a form of respect and recognition for the aggrieved parties. Therefore, these are areas where corrective measures are required for the Niger Deltans, the denial of which leads to a lack of environmental justice.

Apart from these provisions of the Constitution, there are also several statutory provisions that establish a legal wrong against acts of environmental pollution. However, the enforcement of many

\textsuperscript{313} See Subhash Kumar vs State Of Bihar And Ors 1991 AIR 420, 1991 SCR (1) 5.
\textsuperscript{314} See Ifedi et al., supra note 14; See also Ken Saro Wiwa case, supra note 24.
\textsuperscript{315} See The Constitution, supra note 161 at section 42.
\textsuperscript{316} See The Constitution, supra note 161 at section 43.
\textsuperscript{317} See Gbemre case, supra note 19.
of these statutes fall within the purview of the Minister of Petroleum Resources,\textsuperscript{318} or the Attorney-General, when these violations count as criminal offences. Private individuals are therefore often reluctant or unable to bring civil suits based solely on these grounds. The common law however provides some other measures through which remedies could be accessed.

3.4.2. Common Law Remedies

The law of tort creates legally defined civil wrongs by which liability could be imposed on violators, and remedies accessed for the aggrieved. These usually relate to private interests such as interference with the right to ownership and enjoyment of property, amongst others and these therefore provide an avenue against environmental pollution. Environmental pollution in the Niger Delta has been shown above to occur as a result of oil spillage into the water bodies, lands and properties of private individuals;\textsuperscript{319} as well as, through gas flaring, which pollutes the air and leads to high risks to the life, health and wellbeing of people within the Niger Delta.\textsuperscript{320} Thus, the legal principles which apply to these usually fall within the areas of trespass, nuisance, negligence and the general rule of strict liability found in the case of \textit{Ryland v. Fletcher}.\textsuperscript{321}

Trespass refers to an “unjustifiable interference by one person with the possession of land of another”\textsuperscript{322} and is basically “the interference with possession”.\textsuperscript{323} To successfully bring this claim, one would have to prove that someone either physically entered a property, or that someone caused

\textsuperscript{318} See Nigerian Department of Petroleum Resources, “Functions of DPR” Online <https://www.dpr.gov.ng/functions-of-dpr/>; See also E. Daly & J. May (Eds.), Implementing Environmental Constitutionalism: Current Global Challenges (Cambridge: Cambridge University Press, 2018) at 188.
\textsuperscript{319} See Ubani, \textit{supra} note 273.
\textsuperscript{320} See Gbemre case, \textit{supra} note 19.
\textsuperscript{321} See \textit{Ryland v. Fletcher} (1866) L.R. 1 Ex. 265; See also Okonmah, \textit{supra} note 250 at 48.
\textsuperscript{322} See Okonmah, \textit{supra} note 250 at 48.
\textsuperscript{323} See \textit{Mrs. Jarin Adegbite v. Chief MK Ogunfaolu \\& Anr} SC 141/1987 Per Wali J.S.C.
an object to intrude into a land due to an act or omission. In this case, proof of intention and negligence would be unnecessary. Physical objects, noxious substances and oil spills on one’s land could qualify for this cause of action, as the oil could be said to intrude on one’s land. This right of action however requires a personal right to the property affected and a direct contact with the property and mere communal ownership of shared areas will not suffice. It also excludes industrial or human waste discharges that are not directly introduced into the plaintiff’s premises by the defendant.

Another common law remedy is the tort of nuisance. This could either be a public or private nuisance. It is a public nuisance when an act or omission interferes with, disturbs, or annoys a person in the exercise or enjoyment of his right as a member of the public, and it is private when this interference is with one’s private ownership or occupation of land. Environmental pollution easily falls under either of these headings as it often interferes with one’s right generally to enjoy the environment, including water bodies, clean air and vegetation. It also often destroys private property and interferes with the use and enjoyment of some easement, profit or other right used or enjoyed in connection with land.

Public nuisance also qualifies as a crime under the Nigerian criminal code, which in Nigeria, requires the office of the attorney-general to prosecute this offence. In the case of Adeniran v. Interland Transport Ltd however, the court granted leave to private individuals to bring an

324 See Onasanya v. Emmanuel (1973) 4 CCHJ 1477 at 1481 Per Omolulu Thomas J. [Onasanya case].
325 See Okonmah, supra note 250.
326 See Onasanya case, supra note 324.
328 See Amos v. Shell, Ibid.
action for public nuisance without the consent or inclusion of the attorney-general. When this tort has been successfully proven, remedies for nuisance often include injunctions which prohibit the act from continuing and an award of damages where the nuisance resulted in some loss or harm to the plaintiff.

The rule in *Rylands vs. Fletcher*[^332] is also another tort that could be applicable in environmental pollution cases. This rule states that "a person who for his own purposes, brings on his land, collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damages which are the natural consequences of its escape"[^333]. This rule has also been held to apply only to a non-natural use of land, and pipelines fall under this category in Nigeria, per the case of *Ikpede v. Shell-BP*[^334]. It was also used to hold a defendant liable for the escape of oil into the plaintiff's pond and lake, in the case of *Umudje V Shell-BP*[^335]. If successfully proven, this rule imposes strict liability without the need to prove fault or negligence as established in the case of *S.P.D.C. (Nig.) Ltd. v Tiegbo VII*,[^336] where the plaintiffs sued the defendant for negligence arising from spillage of crude oil which deprived them of the use of the rivers and creeks. The trial judge in the case, applying the Rule in *Rylands v. Fletcher* gave judgment to the plaintiffs. He stated that:

- "The crude oil which passed through the pipelines could not naturally have been there, the defendant gathered the crude oil into the pipes, and it was a substance which was dangerous

and likely to escape. It was not a natural user of land but was brought there by the act of
the defendant. Since therefore it had escaped and caused damages the defendant is liable”.

Thus, this case provides an avenue for corrective justice in oil spillage cases. It has however been
held that the user has to be unreasonable in the use, and this may cause barriers for its success
at the court in Niger Delta since the oil and gas companies are adequately licensed to carry out
their activities and also because oil spillage is not necessarily unexpected in oil exploration.

The final tortious liability discussed here is the principle of negligence. This was established in the
case of Donoghue vs. Stevenson. To successfully bring a cause of action under this heading, one
would need to prove that there was a duty of care and that this duty of care was breached, which
resulted in harm to the plaintiff. To prove this fact in oil and gas cases, one would require
information about the exact method that was followed, as well as information about the standard
that ought to be followed.

While this level of information is often absent in the Niger Deltan cases, lawmakers could take a
leaf from the U.S. Executive Order and the UNECE Aarhus Convention which provides for the
right of access to information, from the companies and from the government; and necessitates the
collection and maintenance of relevant information through continuous research. In the absence of
this however, it could be difficult for the plaintiff to prove negligence. Thus, although negligence
provides one of the best methods for enforcing environmental justice under common law, there are
many hurdles to its success.

337 Cambridge Water v. Eastern Counties Leather (1994) 1 All ER.
338 Donoghue v Stevenson A.C. 562 (26 May 1932).
Despite the existence of these avenues for corrective justice, several barriers have kept the Niger Deltans from successfully using these methods and these are discussed below.

### 3.4.3. Barriers to Corrective Justice in the Niger Delta

While the above common law remedies have been used successfully in some situations to obtain remedies at the courts, there have also been many cases which have failed and this has led to a continuation of corrective injustices, leaving the Niger Deltans with no remedies to the harmful situations they live in. Some of these barriers are discussed below.

The first problem applies in the cases of toxic pollution. Regarding this, Collins\(^{340}\) identifies the traditional approach to causation as a major deterrence to environmental justice.\(^{341}\) These traditional approaches include the need for proof of negligence, as well as the need for proof of a causal link between the negligent act and the damage. While this could be more easily proven in cases of direct damage to property, it is often difficult to prove in allegations of risks to health and life as in the *Bodo* and *Gbemre cases* and a major reason for this is the lack of information or access to information.

Collins refers to this problem as the ‘all or nothing approach’,\(^{342}\) which refers to situations whereby the “absence of evidence of harm is deemed to be evidence of absence of harm”.\(^{343}\) Thus, where scientific data is not readily available to prove a claim, the plaintiff’s action often fails. This also


\(^{341}\) *Ibid.* at page 567.

\(^{342}\) *Ibid.*

\(^{343}\) *Ibid.* at 569.
applies to cases of toxic chemicals which are present in toxic pollution cases but which have not yet been studied completely to determine the full effect on the lives and health of people.

Another problem which Collins identifies, is the problem of indeterminacy. This could either apply to the defendant, whereby there is an evidence of pollution, but an uncertainty about which defendant caused it;\textsuperscript{344} or in the case of the plaintiff, where the presence of toxic pollution increases one’s risk of harm, without necessarily causing the harm itself.\textsuperscript{345} This especially applies to the ‘but-for-test’ which requires the plaintiff to prove that, but for the defendant’s action, harm would not have occurred. In the absence of expert research and data, as well as information about the company’s activities, it may be difficult for common citizens to prove this link to health and death of members of a community. Thus, in such cases, justice could be denied.\textsuperscript{346}

In the Niger Delta, another barrier to environmental justice is the law’s focus on individual and private rights which creates problems for group rights. An example of this is the need to prove sufficient interest or special damage.\textsuperscript{347} While the above common remedies will often avail a plaintiff who proves some harm to their private property, it may often be difficult to bring this same claim in cases where the affected property is one which is shared and enjoyed by groups. In the case of water bodies for instance, these could be shared by a community, but according to the land use act, all lands belong to the government. Thus, this could be a barrier.\textsuperscript{348}

\textsuperscript{344}Ibid. at 572.
\textsuperscript{345}See Collins, \textit{supra} note 340.
\textsuperscript{346}See \textit{Siesmograph Services (Nigeria) Ltd v. R.K. Ogbeni (1976) 4 SC 85, 52 SC} [Siesmograph].
\textsuperscript{348}See Amos V. Shell, \textit{supra} note 327.
Even when the court grants leave to institute an action, an individual will often have to prove that they suffered over and above the others, or, the group would have to prove that they were all affected in the same way.\textsuperscript{349} Thus, the plaintiff’s claim failed in the case of \textit{Amos v. Shell BP P.D.C. Ltd},\textsuperscript{350} as he could not show that he suffered a special damage from the interference with this public right. This often leads to the denial of cases at the court, since plaintiffs would often have suffered different levels of damage, such as in cases of ill health, but would also have such shared experiences that it would be difficult to prove that they suffered over and above the other members of the group. This leads to a situation of an impasse where the Niger Deltans cannot access any remedy and are left in their state of harm. This was an area where the GLO judicial approach in the \textit{Bodo v. Shell} case helped to bring an improvement in the attainment of environmental justice for the Niger Deltans.

The strictness of this rule which has led to several lost environmental justice cases over the years has been ameliorated a little by the provisions of paragraph 3 (e) of the preamble to the Fundamental Rights Enforcement Procedure (FREP) Rules, 2009.\textsuperscript{351} This states that:-

- “The Court shall 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. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant.”

\textsuperscript{349} See, for instance, the \textit{Centre for Oil Pollution} case at 26-27, paragraphs C-C, \textit{supra} note 242.

\textsuperscript{350} See \textit{Amos V. Shell}, \textit{supra} note 327.

Thus, the courts are permitted to allow such public interest litigations. This would however only be applicable in human rights cases and where it is not so, this barrier could still prevent the attainment of environmental justice.

The third barrier is the need for a willing plaintiff. For a case to be decided on, it has to first of all be brought before a judge. Unfortunately, there are so many barriers in the judicial process – including high costs of litigation, location of courts, and procedural barriers amongst others – that victims of environmental injustice are often reluctant or unable to take their cases to the court. This results in a lack of access to participation, as well as a lack of access to justice, which leaves many victims in the place of risk and actual harm to their lives and wellbeing.

Finally, corrective justice, due to its dependence on the existence of a legal wrong and remedy, often overlooks some other important areas which ought to be remedied as well, for the attainment of environmental justice. Thus, issues like loss of livelihood, culture, social life and others may not receive any form of remediation, since there is no provision for a remedy for them at law. The mental discomfort suffered by victims may also be overlooked, as was the case in *Bodo v. Shell*, where the court held that these were not issues for which a remedy was provided under the law.

These faults notwithstanding, it is obvious that the importance of corrective justice cannot be overemphasized. Consequently, a distributive and procedural justice approach that does not include a corrective justice approach will hardly succeed in attaining environmental justice.

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especially due to the fact that attaining the right state of affairs would often require a correction of the currently existing wrongs.

It is also obvious from the foregoing, that the Niger Deltans have suffered various forms of environmental injustice, from which there is a need for a remedy. Various forms of these problems have been identified and from this, some types of solutions required could be deduced and this forms the focus of the next chapter.

3.5. The Way Forward

In the light of the wrongs and harms identified in this chapter, it is obvious that there is a need for some steps towards remediation. While distributive and corrective justice focus on the remediation of existing harms, procedural justice looks to right the systemic imbalances and those underlying factors which the law may not recognize. To achieve this, many factors must be brought into consideration.

The first areas to examine, are those areas where the problems have arisen in the first place, which include the faulty laws, the courts and the processes for environmental decision-making. Thus, there is an observed need to ensure the amendments of the laws, processes and available remedies, with the goal of ensuring better access to justice, participation and information, as well as access to effective remedies.

Doing this will require several actors including the courts, the legislative, the executive and the victims themselves; however, this work highlights the role of the court in this regard and this will form the focus of the next chapter. The next chapter therefore discusses the role of the courts in the attainment of environment justice for the Niger Deltans.
CHAPTER 4: PLUGGING THE DRAIN: THE COMPETENT AND INDEPENDENT COURT AS AN ACTOR IN ENVIRONMENTAL JUSTICE

- “What then is this "something"? My answer is, that it is nothing else than the force of the law... the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is in fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.” - A.V. Dicey

4.0. INTRODUCTION

The judiciary has often been an important actor in the advancement of the environmental justice movement, due most especially, to its role in providing remedies for aggrieved victims of environmental injustice. At times, this has helped in shaping environmental laws and policies, through judicial precedents, while at other times, it has merely served as a tool or strategy in the resistance against environmental inequities.

In the previous chapters the need for better laws, policies and systems that enable the attainment of environmental justice were identified, as well as, the need for better enforcement of these

policies. In this chapter however, the role of the judiciary towards the attainment of these better laws, systems and policies is discussed. While this thesis recognizes the need for a concerted effort of the legislative, the judiciary, the executive arms of government and the general public for the attainment of environmental justice, this work emphasizes the importance of the judiciary in enforcing and maintaining adherence to these laid down laws and procedures.

In relation to this role of the judiciary, this thesis argues that the judiciary plays such a vital role in the attainment of environmental justice, that it is important to ensure that it is well enabled to fully satisfy its functions. This thesis therefore makes an argument for the need for judicial independence in the fulfillment of these functions and as a means to enhance the state of environmental justice in the Niger Delta. This work approaches the requirement of a competent and independent judiciary as a vital necessity for environmental justice. It views the judiciary, and specifically, judicial independence as a plug which prevents the draining of the efforts made towards distributive, procedural, and corrective environmental justice. Thus, this thesis argues that, while efforts towards the attainment of better laws, standards and rights, as well as better enforcements are important, judicial independence in the right measure must exist if such things are to have any effect on environmental justice or injustice. A competent and independent court is therefore found to be necessary for the upholding and enforcement of good laws and procedures, and the absence of competence or independence is shown to lead to a forfeit, regardless of the existence of good laws and policies.

The Niger Delta is used as a focal point here, to highlight the arguments made in this work and to show specifically, the need for judicial independence in correcting the environmental injustices
identified in the preceding chapter. Using the *Gbemre v. Shell*\(^{358}\) and *Bodo v. Shell* cases,\(^{359}\) from the preceding chapter, this chapter will highlight the role of the courts as actors in environmental justice. It will also highlight the factors that undermine the attainment of environmental justice in the Niger Delta and will provide lessons for mitigating these concerns. This will also throw light on problems relating to the absence of judicial independence in the Niger Delta.

The major focus of this chapter therefore, will be on access to justice, enforcement and the power of the court, which together serve to plug the draining of the good efforts made towards the attainment of environmental justice. Providing access to justice plugs the drain by ensuring that the good laws and processes which are put in place, are utilized effectively by all people, while enforcement ensure that the laws and processes which are put in place are applied in the most effective and efficient ways, to arrive at environmental justice. Finally, protecting the power of the court, through judicial independence, plugs the drain by ensuring constant access to justice, enforcement and redress for the breach of any laid down laws or processes. Thus, these are shown to be of high value to the realization of environmental justice.

4.1. **THE COURTS AS ACTORS IN ENVIRONMENTAL JUSTICE**

The Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium, South Africa\(^{360}\) emphasize the importance of an independent judiciary and judicial process, in environmental law. In its preamble, it is stated that: -

\(^{358}\) See *Gbemre case, supra* note 19.
\(^{359}\) See *Bodo case, supra* note 26.
- “We affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of international and national environmental law.”

This important role of the judiciary is also affirmed by the provisions of Article 8 and 10, of the Universal Declaration of Human Rights. Article 8 provides that “everyone has the right to an effective remedy by the ‘competent national tribunals’ for acts violating the fundamental rights granted to them by the constitution or by law”. Article 10 further provides that “everyone is entitled in full equality to a fair and public hearing by an ‘independent and impartial tribunal’, in the determination of their rights and obligations and of any criminal charge against them”. Thus these provisions highlight the vital role of the courts in promoting and implementing environmental law and human rights, which are vital necessities for the attainment of environmental justice; and also emphasize the multifunctional roles which the courts play in this process.

In this regard, one can identify three major roles of the court in relation to environmental justice. The first role is that, the courts contribute to distributive justice by recognizing and protecting universal rights, which ensures that everyone is guaranteed some minimal quality of life/environment. Secondly, they contribute to procedural justice in that, they are a forum in which aggrieved parties can bring their claims and be heard. This also provides the aggrieved parties with the opportunity to frame their claims on their own terms. Finally, they contribute to corrective

\[361\] See UDHR, supra note 51 at article 8.
\[362\] Ibid. at art. 10.
justice through the provision of a remedy that rectifies past, present and recurring legal harms. This work therefore discusses these roles of the courts and classifies them under three subheadings, namely, access to justice; enforcement and implementation; and the general development and contributions to environmental justice.

These are discussed below, beginning with the Access to justice and participation.

4.1.1. The Role of the Court in Providing Access to Justice

The United Nations describes access to justice as, “a basic principle of the rule of law, in the absence of which, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.” Justice, in this work, refers to the need for distributive, procedural and corrective justice, which have been discussed in preceding chapters; while access refers to the ability to realize this justice and their different requirements. Access to environmental justice, therefore, refers to the ability to realize and attain distributive, procedural and corrective justice, through the ability to be heard, to exercise rights and to challenge or hold decision-makers accountable; and the courts play a major role in this.

The Aarhus Convention highlights the need for access to effective judicial mechanisms as a necessity for the attainment of access to justice in environmental matters. Thus, it shows the need, not just for a judicial mechanism to exist, but for there to be access as well, to these judicial

364 See Aarhus Convention, supra note 35.
365 Ibid. at “Preamble”.

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mechanisms. This also emphasizes the court’s importance, generally, in the facilitation and the attainment of environmental justice.

In ensuring this access to justice, there are several requirements, including, the creation of enabling laws, the provision of procedures and forums for people to be heard, and the reduction of high costs and other barriers that prevent access to the courts,\textsuperscript{366} amongst others. However, for the purpose of this chapter, ‘access’ to justice focuses on the ability of all parties to be brought before a fair and impartial court of law,\textsuperscript{367} where they are guaranteed a fair hearing on the basis of the facts of the case and provisions of law, absent any bias or external interference. It also includes the ability to access any remedy provided by law.\textsuperscript{368} The next question to answer then, is, ‘how do the courts facilitate access to justice by this’? Thus, the role of the courts will be examined here to show the ways by which the court contributes to access to distributive justice, procedural justice and participation and finally, corrective justice. The first role discussed is the court’s function in distributive justice.

4.1.1.1. Managing Allocations and Distributive Relationships (Rights and Obligations)

The courts play a vital role in distributive justice through its ability to manage the allocations and distributive relationships between various members of the society in order to highlight and correct disparities and it does this by determining the rights and obligations of each party. By this process, the court determines the rights of each party, a breach thereof, and a corresponding need for

\textsuperscript{366} Ibid. at Article 9.
\textsuperscript{367} See UDHR, supra note 51 at Article 10.
\textsuperscript{368} Ibid. at Article 8, 10.
protection for the aggrieved party, which, in turn, facilitates access to justice as the aggrieved parties can now have a claim to a remedy and a resulting compensation or reparation as the case may require.

This determination of rights, also plays a great role in facilitating access to environmental justice, through the court’s ability to reach into uncharted areas in order to establish areas of protection which the law makers or governmental oppressors may not be willing to directly provide for and it does this, through its ability to interpret laws and form judicial precedents. In the Gbemre case for instance, the Nigerian Constitution failed to provide directly for an environmental right and even went on to bar the court from having any jurisdiction in matters relating to the government's failure to fulfill its duty to protect the environment. This cut off access to a remedy and barred the route towards seeking for one. The members of Iwherekan community were however, able to make a case for the need for a safe environment, through the argument for a right to life, which was guaranteed by the constitution. The court examined this right to life and found that the attainment of this right to life necessitated a healthy environment and therefore, the court was able to provide a remedy for the aggrieved parties -in an area that was not directly available- without necessarily going against the provisions of the law.


371 See Gbemre case, supra note 19.
4.1.1.2. Access to a Fair Ground for All Parties

The courts also provide for access to procedural justice and participation through the provision of a just, fair, impartial and equal ground for all parties and this is very important in democratic states like Nigeria. In democracies, the legislative and executive arms are often dominated by the majority groups, which often cuts off the minorities and skews environmental policies to the disadvantage of the minorities. At the courts however, minorities can challenge oppressive laws and processes, and can push for a better state of affairs for themselves, because, the court would be independent and free of bias, which would provide equal footing for all people. Thus, clearly unjust laws could be challenged by the court and the right state of affairs could be prescribed. This also changes the circumstances to become a rule of law, rather than the rule of a majority, an oppressor or a more powerful body. Thus, at the courts, the minorities could be said to have a say.

The courts also facilitate access to participation whenever they provide the aggrieved parties with an avenue to register their complaints, as the decisions in these cases—in this case, especially when favorable—become established rules for future cases and therefore contribute to the framing of the laws and policies. Thus, where unfair processes are corrected at the courts, they inevitably become the new law and the new guide for conduct and because, the powerful parties also have the same say as the minorities, at the court, this helps to point out biases and to eliminate discriminatory policies. Thus, the decision of the judge in the Gbemre case established the need

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373 See generally Rosenbluth, Frances McCall & Ian Shapiro, "Vulnerable Minorities" in Responsible Parties: Saving Democracy from Itself (New Haven; London: Yale University Press, 2018) at 49-50 [Rosenbluth et al.]
375 See generally, Ibid.
376 See generally, Rosenbluth et al., supra note 373.
for a healthy environment in relation to the protection of the right to life, which established a new precedent that could be argued in future cases.

4.1.1.3. Access to an Effective remedy

The final aspect of access which the courts provide, is the access to an effective remedy for the aggrieved parties; and beyond the enablement of a fair trial, this access to a final remedy is a major reason for the need for access to justice, as this signifies or provides the justice being sought for. Thus, the courts provide access to justice through the provision of remediation, compensation, reparation or sanctions, amongst others, as the case may require. The provision of this remedy halts the continuation of harm for the aggrieved parties and ensures that they have access to an effective remedy that is commensurate to the harm they are facing. This especially plays an important role in a place like the Niger Delta, as a lack of perceived fairness in the courts or the lack of access to remedies has often been the reason for communities and individuals resorting to violence as a way of self-help.\(^{377}\) Thus, this helps to quell uprisings and violence which have arisen due to several years of failure to achieve an adequate remedy.\(^ {378}\) Corrective justice therefore, in this way, halts the continuation of harm.

The question of an effective remedy is also one that must not be overlooked under this heading, as the courts help to provide a remedy that is both attainable, as well as one that meets the current need at hand. In the Bodo case for instance, Shell was required to carry out clean-up activities in addition to compensation paid out,\(^{379}\) which ensured that the immediate need for compensation for


\(^{378}\) See Ajodo-Adebanjoko, supra note 288.

\(^{379}\) See Shirbon, supra note 209.
the harms which had arisen from environmental pollution was met, while the actual problem of oil spillage would still be resolved. The *Gbemre case* also showed the courts focus on an effective remedy, where the courts provided a step-by-step one-year action plan for Shell, which would be more feasible than insisting on an immediate action that would be impossible.\textsuperscript{380}

After the provision of access to a fair trial participation and an effective remedy at the court, the next requirement for the attainment of environmental justice, is the enforcement and implementation of these decisions and this is discussed next.

### 4.1.2. Enforcement and Implementation

Another major requirement for the attainment of environmental justice is the enforcement of regulations, courts decisions and remedies prescribed by the courts. This is important, as the provision for fairness and impartiality in political and court’s decision-making processes would be of no effect if the court’s decisions were not enforced. Enforcement and implementation, therefore play a major role in the attainment of environmental justice.

Enforcement here, refers to the ability of the regulatory bodies and the courts to be able to monitor and ensure the carrying out of the laid down processes, procedures, remedies and sanctions, where applicable. It also requires the ability to ensure compliance, as well as, the power and ability to impose and enforce sanctions for contempt of court wherever there is non-compliance. This is important because it ensures access to the justice that has been provided by the courts and the law, and works as well, to ensure self-enforcement.

\textsuperscript{380} See Ukala, *supra* note 179.
Self-enforcement\textsuperscript{381} in this case works when a redress is provided and enforced against an offender to deter others in the same situation from carrying out the same acts. Thus, the presence and possibility of enforcement alone, in this case, could be sufficient to ensure compliance with the laid down regulatory processes.\textsuperscript{382} This reduces the risk of injustice, environmental pollution and the subsequent need for redress, since the violators would be forced to take steps to prevent the violations, in order to prevent the sanctions. An example of this is the 1996 Shintech Plant case of James Parish, Louisiana.\textsuperscript{383}

This case refers to a predominantly minority population in James Parish, Louisiana, where there were already high pollution levels. In addition to this, new factories were to be built close to schools and homes which would increase the already dangerous levels of pollution and would emit toxic air contaminants each year, many of them known to be potent carcinogens”\textsuperscript{384} This would drastically increase the exposure of people in this region to more health risks in addition to its already current dangerous levels and therefore, this action was vehemently resisted. In the long run, the resistance and pressure from the members of the locality made the company abandon its plans, even without any real court case, in order to avoid the inconvenience that would follow.

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Thus, in this case, they self-enforced to avoid inconveniences and sanctions and thereby saved the future victims from the harms and costs that would have arisen from their activities.

Thus, in summary, enforcement aids the attainment of environmental justice by providing for three major needs. First of all, it ensures self-enforcement by all relevant parties by keeping people in check due to the presence of enforceable sanctions. This prevents the harm before it even happens and saves people from even having to need a remedy. Secondly, enforcement also ensures the attainment of the actual remedy which the law or the courts provide, as it ensures that those who do not adhere to the court’s decisions could be sanctioned for contempt of court. Finally, it ensures that the processes and agreements from the court processes are adhered to, rather than just being ceremonial. In this way, environmental justice could truly be said to have been attained, and this also helps to preserve the justice that has been attained.

Finally, the courts also make some other general contributions to environmental justice which are relevant to the Niger Delta situation and these are discussed below.

4.1.3. The General Development and Contributions to Environmental Justice

Outside of the courts adjudicatory functions, there are also several other contributions which the courts make to environmental justice, just by their existence and in the performance of their functions, which provide a vital tool in the resistance against environmental injustices. In the Bean v. South Western Corporation case\(^ {385} \) for instance, Bullard comments that although the case did

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\(^ {385} \) This was the first case to challenge environmental racism using civil rights law at the courts. See Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) [Bean case].
not prevail in court, it was a ‘turning point’ for the people.386 Thus, although the case was lost, there were still benefits to be had by taking the case to the court and these are discussed below.

The courts traditionally play the adjudicatory role of mediating between parties and have the power to make circumstance and life altering decisions.387 Courts also have regulating and policing powers over all parties that may come before them, including governments, organizations, individuals and even states, which gives them a power that is inaccessible to other parties and therefore puts them in the best position to be the mediator, arbiter and determiners of disputes; and the court’s indirect contribution to environmental justice also stems from this role.

A major indirect result of the court’s adjudicatory process, is the effect on the social and legal state of affairs in the society, as seen in the Warren County and Bean v. South Western Corporation cases388 for instance, which resulted in revolutions in the law and social values relating to environmental injustice, regardless of the losses at the court. Thus, a positive consequence of this process is the changing of the dynamics of oppressive regimes, which occurs, by drawing attention to and throwing light on bad laws and policies, which helps to push for a change.

An example of this in the Niger Delta is the case of Ken Saro-Wiwa389 an environmental activist who campaigned for an end to environmental pollution and the adoption of better laws and policies in relation to the Niger Deltans. He was sentenced to death, along with 8 others, by an unfair tribunal which was set up by the military government at the time. False allegations and trumped

388 See Bean case, supra note 385.
389 See Ken Saro-Wiwa case, supra note 24.
up charges were made up against them and they were executed without provision for a fair hearing.\textsuperscript{390} This exposed the oppressive nature of the Nigerian military government at the time, and led to a worldwide outrage and a backlash against the government and Shell. Thus, although the victims had been killed, the occurrence of this before a tribunal which ought to uphold the rule of law and justice, led to a reaction that may not have been so, had it merely been an executive action by the military government. The fact that this unfairness was facilitated by the court exacerbated the feelings of injustice, which became the catalyst for change in this area, where previous actions had failed.\textsuperscript{391} Thus, the courts contribute indirectly to procedural justice, by providing a public forum in which to bring the environmental justice claims which amplify and shine light on rights violations, regardless of the end result of the case.

The result of a court’s decision, whether negative or positive (affirmative or non-affirmative) also has a huge impact on the lives of people and can lead to either positive or devastating consequences, as seen in the Ken Saro-Wiwa case.\textsuperscript{392} Thus, it is important that at all times the court should be fair and impartial, as one court decision could bar the route to justice for a very long time, or could open up a new path for the attainment of environmental justice.

Bringing a public claim at the courts, also helps to set the circumstances in motion towards the attainment of change, through the judicial pronouncements and clarification about different issues; and through the resulting judicial precedents. This was a factor that was denied in the \textit{Gbemre}

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\textsuperscript{391} \textit{Ibid} note 390.
\textsuperscript{392} See Ken Saro-Wiwa case, \textit{supra} note 24.
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case,\textsuperscript{393} when the case files were lost, as the case failed to get through to the Courts of Appeal and the Supreme Court - where the court would have had the opportunity to make a clear stance about gas flaring, the right to life and a safe environment and several other aspects of the case that could help future efforts towards the attainment of environmental justice. Court cases also bring increased awareness locally and internationally, which in turn brings more people to join the fight and encourages and empowers the victims to speak up to solve the problem. The judiciary is therefore, a very vital part of environmental justice and this is discussed in further detail in the next chapter.

\textsuperscript{393} See Ukala, \textit{supra} note 179; See also Section 3.1.1 \textit{infra} [GBEMRE V. SHELL PETROLEUM DEVELOPMENT COMPANY AND OTHERS].
CHAPTER 5: PLUGGING THE DRAIN THROUGH JUDICIAL INDEPENDENCE:

THE WAY FORWARD

5.0. INTRODUCTION

Having established the important role of the courts in the attainment of environmental justice in the previous chapter, the next question one may ask is, “why then have the courts not achieved this remedy despite their existence in the environmental justice situations around the world”? However, the answer to this lies in the existence of several factors. First of all, as already stated before, the attainment of environmental justice lies in a concerted effort of several other factors, and the courts alone cannot achieve this. This requires, for instance, the law-making efforts of the legislative and the enforcement power of the executive, and also requires the victims to bring their cases before the court, amongst others. In relation to the courts however, there are some specific factors that affect or promote the court’s ability to promote the attainment of environmental justice and these are discussed below.

The first role of the court identified above, was the access to justice which required the ability for people to be able to come before the courts in the first place, as well as the guarantee that they were standing before a fair, just, impartial and independent court.394 Secondly, there was the need for the ability to receive an effective remedy once the courts had determined the rights and obligations of the parties and this required the fair and competent assessment of the quantum of compensation and sanctions, as well as, the court’s ability to enforce the decision that was made.395

394 See UDHR, supra note 51 at article 10.
395 Ibid. at art. 8.
Thus, like A.V. Dicey identified, this required a court with enough “force of law” and sanctions that would “constrain the boldest political adventurer”. 396

The court that could help the attainment of environmental justice therefore, had to be one that was fair, just, impartial and independent; one that was competent in the facts and laws governing each case before it; and one that was able to enforce its remedies. Therefore, an absence of any of these factors could lead to the non-attainment of environmental justice and could undermine the court’s role in the attainment of environmental justice. To ensure all of this, therefore, a major requirement which this thesis considers is the topic of judicial independence. This combines the requirement of impartiality, fairness and competence and forms the broad heading for the discussions in this chapter.

It is argued that, the mere existence of a court is not sufficient to bring about environmental justice, neither a mere presence of some level of judicial independence. Thus, it is only a court with sufficiently high levels of judicial independence that can achieve the above stated aims. It is however, important to note that this work does not state that there is no judicial independence in the Nigerian courts. It rather, argues that, while there is some level of judicial independence in the Niger Delta, it is not yet sufficient to fully enable the force of law that is needed to attain environmental justice. Thus, this thesis argues that, there is a need to improve this judicial independence by removing interferences with the courts and by improving the judiciary’s ability to competently admit and oversee environmental justice cases. The meaning of judicial independence

396 See Dicey, supra note 355.
independence, its role in the attainment of environmental justice with reference to plugging the drain, and the impediments to this judicial independence in the Niger Delta, are discussed below.

5.1. **WHAT IS JUDICIAL INDEPENDENCE?**

There is no generally accepted definition of judicial independence. Rather, there is a consensus on an idea, whenever reference is made to the term. This consensus is on the idea of judicial independence as the freedom from external or inappropriate influences; however, the standard for what is appropriate and the required extents for judicial freedom, are still in dispute. Despite any disagreements about the meaning of the term, there is a general agreement that judicial independence leads to the preservation of the rule of law, as well as the protection of human rights, amongst others. In support of this idea, Cox states that “an independent judiciary is the best guarantee of liberty and impartial justice against executive oppression and other executive or bureaucratic abuse.”

To be such a court, there are various standards which the judiciary must meet and these standards are diverse and differ according to the unique situation of each place. There are however, some basic minimum standards which are generally accepted as parameters for measuring judicial independence. These parameters are both necessary for, as well as, indicative of the existence

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398 Ibid.

399 See Dicey, *supra* note 355.


401 There are various suggestions and recommendations by different scholars on this. However, the UN Basic principles on judicial independence provide a guideline, which though very basic, is agreed to be a standard requirement for judicial independence. See UNGA “*Basic Principles on the Independence of the Judiciary*”, UNGA 40/32 (11/29/1985) and 40/146 (12/13/1985) [Basic Principles].
of judicial independence in a state and they answer the questions of what judicial independence requires, as well as, the question of what factors have to be absent for judicial independence to exist. There are two distinct forms of these measurements and these are discussed below.

5.1.1. Judicial Independence as Freedom

Freedom or liberty generally refers to the absence of a restraint. In relation to judicial independence however, there is more to the meaning of these terms. Berlin’s classification of the two types of liberties402 will be used here in the description of judicial independence and many other scholars adopt a similar approach as well.403 Berlin classifies liberty as either positive or negative, where positive liberty is the power to act or perform a function,404 and negative liberty is the absence of a hamper on that power to act.405 Thus, judicial independence in this case, could be seen both as the freedom from certain factors or circumstances -that is, negative freedom-, as well as, the freedom to carry out certain powers or obligations, which is a positive freedom.

Negative liberty refers to those factors which judges ought to be free of, in order to correctly carry out their judicial functions, which include freedom from physical compulsion or fear for personal safety;406 freedom from fear for economic and financial interests407 and freedom from the constraints of law.408 It also includes the freedom from political influences409 such as, political

403 Ibid.
404 Ibid. at 3.
405 Ibid. at 8.
407 Ibid. at Article 10-15.
408 See Cross, supra note 397 at 3.
interference from other arms of governments, personal ties, biases and allegiances, \(^{410}\) as well as, interferences from within the judiciary itself. \(^{411}\) Negative liberty also requires the absence of bribes, corruption or obligations that compromise judicial independence and requires freedom from attacks by litigants and from the media. \(^{412}\) Thus, under this heading, judicial independence becomes freedom from fear, as well as, the absence of those factors that could either constitute fears or any other interferences with judicial decision making.

This fact is important because, one might not often be able prove that a judge had an overhanging threat which influenced a judicial decision, since these acts could be covert, and since the judge’s decision is often discretionary. However, the presence of certain factors could help one to make an informed inference about influences that could have the potential to skew the court’s judgment. For instance, the ICJ’s\(^ {413}\) Centre for the Independence of Judges and Lawyers (CIJL) observes that lawyers and judges are under severe pressure in many countries, including threats of death, kidnap and torture amongst others. \(^{414}\) Thus, the presence of these factors indicate a lack of judicial independence, while a lack of them could be an indication of the presence of judicial independence in such places. \(^{415}\)

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\(^{410}\) See Cox, *supra* note 400 at 566.

\(^{411}\) See IBA Minimum Standards, *supra* note 406 at Article 46.

\(^{412}\) Ibid. at section E.


\(^{414}\) The Seventh annual report states that “In the 1995 CIJL survey it was noted that 572 jurists suffered reprisals for having performed their professional duties. Amongst them, 26 were assassinated, 2 were “disappeared”, 97 were persecuted, arrested, detained or even tortured, 32 were physically attacked, 91 received verbal threats of violence and 324 were professionally sanctioned or dismissed without due consideration of their right to defense.” See Marie-Jose Crespin. “A note on the CIJL Protection Work” in *The Judiciary in a Globalized World* (1999) Vol. 7 CIJL at 110.

\(^{415}\) See Basic Principles, *supra* note 401 at Article 4. It lists freedom from inappropriate or unwarranted interference with the judicial process as a requirement for judicial independence.
The freedom to act, which is also called positive liberty is the next aspect of judicial independence. This is the power to ‘act judicially’, as Cross\textsuperscript{416} says and requires the removal of any hamper on this ability. Cross also states that judicial independence implies an “empowering function”,\textsuperscript{417} which works against tyranny by being able to recognize, stand against and push back against tyranny and this applies to several factors.

The first is the capacity of the judiciary to resist encroachment as identified by Geyh\textsuperscript{418} and this has often been the measurement of the independence of a judiciary, by both scholars and the general public at large. This could be measured by a judiciary’s ability to decide cases without threat or intimidation as well as its ability to resist any “extraneous influence” that could impair its ability to decide cases on the basis of law and facts before the court. While this ability could be difficult to prove,\textsuperscript{419} a major measure for this, is the power of a judiciary to issue anti-government decisions without retribution.\textsuperscript{420}

An important point to draw from this is that judicial independence is not merely the absence of threats. It is the ability of the judiciary as well, to resist and decide fairly, regardless of the presence or lack thereof of these threats. For instance, there may be cases where a judiciary has a level of threats, but still carries out its judicial functions regardless of these threats; this may imply a higher independence than one without threats but with a decision-making that is based on a political

\begin{footnotesize}
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  \item \textsuperscript{416} See Cross, \textit{supra} note 397397 at page 5.
  \item \textsuperscript{417} \textit{Ibid.} at page 5.
  \item \textsuperscript{418} See Geyh, \textit{supra} note 409.
  \item \textsuperscript{419} In developing communities like Niger Delta for instance, judicial independence is even more difficult to observe or measure due to missing or unavailable data and technology. See Drew A. Linzer & Jeffrey K. Staton. “A Global Measure of Judicial Independence, 1948–2012” (2015) 3:2 Journal of Law and Courts at 224, 230.
  \item \textsuperscript{420} Hilbink states that this aspect of judicial independence can only be measured empirically, by observing what judges do in cases involving politically powerful actors, in other words, judicial assertiveness. See Lisa Hilbink, “Judicial Independence” (2012) 64:4 World Politics Journal at 587–621.
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influence. Cross for instance gives the example of Spain under Franco and Chile under Pinochet, where “the judiciary had a relatively high level of independence from outside control but had so little power of enforcement that its independence was trivial”. 421 This shows the importance of the presence of both the freedom from interference, as well as the freedom to act and carry out judicial functions. Thus, it is of no use if there is no threat to judicial independence, if there is also no ability for judges to act within their judicial capacity, such as when there are no enabling laws for the judiciary.

This freedom is therefore, both the power of the judiciary to stand firm in the face of encroachment, as well as their ability to carry out their functions and it is measured by both the surrounding circumstances, such as security and corruption, as well as the internal power and enforcement authority of the judiciary. The absence therefore, of judicial independence in a judiciary would have several negative effects and would impede the attainment of environmental justice in various ways. This is evident in the Niger Delta and will form the discussion below.

5.2. JUDICIAL INDEPENDENCE IN THE NIGER DELTA AND THE NIGERIAN JUDICIARY

Several indicators and measurements have been provided above to help in determining the existence of judicial independence in a judiciary, and these act as the basic standards for judicial independence. Some of these include the freedom to act judicially and the freedom from interferences while others exist in the form of basic guidelines and procedures that must be in place to safeguard the independence of the judiciary. In relation to these basic guidelines, some relevant

421 See Cross, supra note 397 at 5.
ones in relation to the Nigerian judiciary include,\textsuperscript{422} the need for separation of powers, exclusive authority and finality of decisions of the courts and the ban against exceptional or military courts. This also requires clearly enumerated qualifications, guaranteed terms, and fiscal autonomy in relation to the office of the judges. While the Nigerian constitution makes provisions for several of these factors, which ordinarily would mean a very high level of judicial independence, unfortunately, several of these laid down provisions are often flouted by the same government who ought to enforce its adherence. This affects judicial independence and in turn, prevents the attainment of environmental justice.

Having identified the roles of the court and the need for an independent court, for the attainment of environmental justice, this section examines the ways in which judicial independence acts as a plug to the drain for environmental justice and identifies those factors that impair these functions in the Niger Delta. The first role discussed is the role of judicial independence in the access to justice, while the second is the role of judicial independence in the courts decision making process. The last is the role of judicial independence in the actual access or attainment of the remedy provided by the courts.

\textbf{5.2.1. Judicial Independence and the Access to Justice for Aggrieved Parties in Nigeria}

Access to justice refers to the ability of aggrieved party to come before the court and this is a very important need for the Niger Deltans. In their case, the access is even needed before the court case begins and this is the first means by which judicial independence facilitates environmental justice. Access to justice in this case, requires the removal of interferences at the preliminary stages which

could be in the form of the loss of case files or by the refusal of a judge to allow a particular claim to proceed for trial and the *Gbemre v. Shell* case provides a good example. In this case, it was the consent of the high court judge, which allowed the case to proceed in a representative capacity and as a human rights cause, which was a new approach that had not been tried before and was neither allowed nor disallowed by the law. Thus, the judge’s discretion was a major determinant of the initial advancement of this case for trial. This is a very important point for the following reasons.

First, while the rules of the court generally govern the admittance and allocation of cases within the Nigerian judiciary, there is still a large portion of this process that is left to the judge’s discretion and this is especially relevant in environmental justice cases, where the law does not sufficiently provide for a route to justice. In such cases the judges often have to make a decision on whether or not to admit a case, as they have to determine first of all that they have the jurisdiction to entertain the case. Thus, a judge with an unfavorable opinion or without the right training to handle such matters could decide otherwise and this was an area where the *Bodo case* did better, through the provision of the TCC court, which had the right training, a better process and an ability to entertain such cases, even though this was a case from another jurisdiction. This also provides a loophole for judges to evade high profile or controversial environmental justice cases, which may bring the wrath of the government, the public or other powerful entities on them. Judicial independence works here however, to ensure that, in collaboration with the existing laws and processes, the litigants can have a true and fair access to the court, without any

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423 See Eze, *supra* note 185.
424 *Supra* note 19.25
427 See Day et al., *supra* note 191.
inappropriate interference or impediment, as judges would be able to entertain cases without fear or favor.

Likewise, the *Gbemre case* was also prevented from advancing to the court of appeal thereafter, through the inexplicable and highly unethical loss of the case file from the court registry which has made the case to remain at a standstill since then. This therefore shows the need for an absence of an interference or undue influence at every level of the judiciary. Thus, interferences like this could be a big impediment to environmental justice, as they both prevent the access to justice, as well as the access to the remedy provided by the court.

The next role of judicial independence is in the actual court process before the court.

**5.2.2. Judicial Independence and a Fair Judicial Decision Making in the Niger Delta**

This is a major area, where scholars of judicial independence focus and is a major place where the effects of a lack of judicial independence could be felt. A lack of judicial independence works here to prevent the judge from making a fair ruling regarding the rights and obligations of the parties or could lead to a lower sanction or lower compensation than what is actually deserved by both parties. The power of discretion is also important here, if judicial independence is to act as a plug to the drain of the good efforts towards environmental justice, as it determines what remedies and what quantum of remedies are to be available for the aggrieved parties. Therefore, where there is an interference with this discretion, it could lead to a lot of wrongs, since it may not often be easily proven or rebutted, and since the court’s decision is often final and irrevocable after all the processes have been exhausted.

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428 See Eze, *supra* note 185.
A major way in which this happens in Nigeria, is through executive interferences with the judiciary and its processes. This occurs, through the removal of judges who have opinions that are unfavorable to the government, as well as those who have made unfavorable decisions before, even if these were correctly made in line with the law and the fact before the case. It is also worsened by the fact that, despite the laid down guarantees and processes of the constitution in relation to the removal and appointment of judges, the executive still breaches the rules and imposes their own decisions. In the last few years, there have been many instances of this, including the most recent one when the Chief Justice of the Supreme Court, Walter Onnoghen, was removed by the President without due process. A governor also shut down the entire judiciary of a state for almost two years, due to his disapproval with the person to be chosen as chief judge. This ability to take such drastic measures without any punitive consequences, reflects a huge problem with judicial independence in the country and shows that no judge or judicial personnel is untouchable and this could constitute a threat in itself.

This was also the case in the Gbemre case, where the judge was suddenly transferred after his decision, to a remote area, which was viewed generally, both as a punishment for making a right but unfavorable decision, as well as, a way to hinder the court’s ability to enforce the ruling it had made. The judge’s ruling against Shell was thereafter, never adhered to, enforced or followed up

430 The highest court in the whole country.
433 See Eze, supra note 185.
and this could serve as a threat to other judges, even in the absence of a direct threat, and could deter any future unfavorable decisions, even if that is the right decision to make.

Thus, judicial independence ensures true liberty from an oppressive government, as the judicial arm could truly be separate from other arms of government and would always give a fair ruling regardless of the parties before it. It also ensures that the will of the majority which could be detrimental to the minority, is not imposed.434 It instead ensures equality of all before the law and the protection of the rights of all groups.

Finally, the ability to provide the right quantum of sanctions or compensation is also important, otherwise, the injustice will continue while the plaintiffs would have a victory on paper, but none in reality. This leads to the final role of judicial independence in relation to environmental justice in this work.

5.2.3. Judicial Independence and the Ability to Access the Remedy at Law in the Niger Delta

Having ensured a good judicial decision-making process, the final aspect where judicial independence aids environmental justice is by providing access to the actual remedies provided by the courts. This requires the ability and willingness of the executive arm of government to fulfill and adhere to the rulings and orders of the court. Where the court makes a fair decision, but the executive does not obey, this undermines environmental justice. The presence of judicial independence therefore enables this access while a lack of it denies environmental justice.

434 See Garcia-Bolivar, supra note 373.
A prerequisite for accessing these remedies provided by the courts is the ability to place sanctions on defaulters no matter how powerful they are and the ability as well, to access and distribute or properly manage, the compensation provided. An example of this is shown in the Gbemre and *Bodo cases* which reveal the contrast between what happens within the Nigerian Courts and in courts in other countries that have a better state of judicial independence. In the *Gbemre case*, Shell was able to defy the court’s ruling, and the judge was also sanctioned for his bold ruling. On the other hand, Shell adhered to the judicial ruling in the case of *Bodo v. Shell* which was made by a British court. This shows a varying level of respect for the two courts and affects the access to justice.

Enforcement also requires the cooperation of the executive arm of government, as well as the right tools to measure adherence. A failure to have either of these would prevent the attainment of justice in the cases. In the *Gbemre case*, for instance, having stated that the issue of gas flaring was adverse to the right to life of the Niger Deltans, the executive and legislative arms took no steps to remedy this. The court’s ruling asking Shell to take steps to reach ameliorative efforts were also ignored and Shell continued its flaring of gas. In the *Bodo case* as well, although Shell obeyed the court’s ruling, there were still impediments when it came to the enforcement of the clean-up which shows the need for overseeing mechanisms and tools.

Finally, Dicey states that the court must be able to have a ‘force of law and sanctions’ that compels obedience by all parties. Therefore, when this is missing, regardless of the good laws and

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435 See Dicey, *supra* note 355.
437 See Bodo case, *supra* note 26; See also Section 3.1.2.3 *infra* [The Aftermath of the Bodo case].
438 See Dicey, *supra* note 355.
procedures, violators can easily breach the rules or refuse to obey, knowing that there would be no consequences to them and this leads to a drain of all the efforts towards environmental justice.

The next section considers the recommendations for mitigating the problems of judicial independence which have been identified in this chapter, in order to facilitate the attainment of environmental justice for the Niger Deltans.

5.3. **CONCLUSION: LESSONS FOR MITIGATING THE IDENTIFIED PROBLEMS**

The need for and the importance of judicial independence in the attainment of environmental justice has been established above, which shows the need to mitigate those factors that impair or impede the courts’ ability to carry out its judicial functions in relation to environmental justice. Certain areas have been highlighted, as those areas which enable the attainment of environmental justice, and for which there is a need at the courts and these include access to justice, access to information, a more inclusive process and the protection of the court’s judicial independence, amongst various others.

The lack of access to information was shown to be a major impediment to the attainment of environmental justice in the Niger Delta, which denies access to the information about the nature of environmental pollution, the extents, the effects and costs of reparation and the causal link, whenever there is a negative effect on the lives of people and the environment. This therefore was said to prevent the people of Niger Delta from making informed decisions about their lives and families and from getting the right remedy, as well as the right quantum of remedy at the court.\(^{439}\)

For this requirement to be met, research is to be carried out consistently and results made available

\(^{439}\) See Guerra case, *supra* note 129; See also the love canal tragedy, *supra* note 39.
to the public;\textsuperscript{440} while companies are also to be monitored consistently and to provide frequent and accurate reports on their activities. This is the only way in which the citizens, who ordinarily would not have the knowledge, data or expertise to determine what is happening around them, would be able to be truly informed. This information must also be made available in easily accessible places and in a language that they can understand.\textsuperscript{441}

The second necessity identified for the remediation of the environmental injustice was the amendment of the existing laws and processes. This was identified as a major factor in the lack of access to the courts, as well as a major reason for the lack of many victories in the field of environmental justice. Issues under this topic included the lack of a right to a healthy and clean environment for the Niger Deltans and a corresponding restraint placed on the judges by the Constitution with regards to the right to a healthy environment. In relation to procedures and processes therefore, the need for more inclusive processes was highlighted in order to increase participation and to provide a justice that was for all, rather than for a select few. It is therefore recommended, that the identified laws within this work that prevent this lack of access to justice and participation should be amended, while proactive steps must also be taken to put inclusive and participatory measures in place.

The laws must be amended to provide better access to the courts for the victims of environmental justice to fight for their rights and must also provide for more inclusion for the victims and better laws that provide for environmental justice. The current laws that cut out the Niger Deltan people from participation or even from making any contribution to how their affairs will be run, must be amended, and provisions must be made for better consultative processes that include the people in

\textsuperscript{440} See Executive order, \textit{supra} note 34 at ss. 1-102 (3) (4) (5) and 1-103.
\textsuperscript{441} See Schlosberg, \textit{supra} note 52 at 69.
the decision-making processes. These must also be adhered to, instead of being merely ceremonial. Thus, participation must occur, before the decision-making process, and in addition, opportunity must be provided for feedback during and after the process.

Furthermore, the laws must also make adequate provisions for remedial processes whenever any damage arises. Specifically, group rights must be provided for and there should be a shift of focus from merely the protection of the private property, to the protection of both the humans and the environment. Prevention, rather than reactive remedies must also be a large focus of the new laws and when necessary, remediation, rather than merely compensation must be a focus of the laws and the judicial decisions. That way, environmental justice could truly be attained at the courts.

In addition to the provision of better laws and processes, there must also be the provision for the rule of law and enforcement. The rule of law will ensure that the good laws and processes that have been made, are respected and adhered to by all parties, and judicial independence is a very important factor in this area. Judicial independence ensures that all parties are equal before the law and ensures that all parties are bound by the law. The enforcement power of the court also ensures that all parties will be bound by the sanctions provided in the law, and all remedies will be enforced as well. This leads to respect for the laid down procedures and leads to self-enforcement as even the ‘boldest political adventurer’ as Dicey states, would be constrained to obedience. Outside of this, the making of new processes and laws would hardly be of any effect.

Finally, to truly access justice within the courts, there must be training programs for both the judges and lawyers, as well as, the provision of specialized courts and court processes for environmental cases. This will help the lawyers bring better arguments before the court, in conjunction with the information, facts and laws, that are in existence and it will help the judges arrive at better analysis
and final decisions in environmental justice cases. A specialized court and court process is also necessary, as in the *Bodo case*, as it helps to ensure that the cases do not drag on for several years without remedy and it utilizes judges who are knowledgeable in this field, which fulfills the requirement for a competent court.\textsuperscript{442}

In conclusion, the courts, provide one of the best ways to address the problem of environmental injustice in the Niger Delta through the myriad of roles they play in the society generally. Their ability to determine the rights and obligations of parties and their ability to have overseeing powers over all members of the society, including themselves, makes them a very powerful tool in this process. They can however, only fully function when the clogs in their wheels in the forms of various inappropriate threats and interferences, have been removed. Enabling judicial independence at the courts, therefore ensures or at least, facilitates, in turn, the attainment of environmental justice and justice in general.

This must therefore be a major focus in the Niger Delta, even as they fight for better laws and processes. Doing this ensures that all good efforts work together effectively, and that no good effort goes down the drain.

\textsuperscript{442} See UDHR, *supra* note 51.
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