

**Constitutionalizing an *Eco-Anthropocentric* Ethic in Nigeria:  
Its Implications for  
Sustainable Development in the Niger Delta Region**

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by

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To the hope of future generations - the Universal Entity of Nature.

# **Constitutionalizing an *Eco-Anthropocentric* Ethic in Nigeria: Implications for Sustainable Development in the Niger Delta Region**

by  
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## **ABSTRACT**

This thesis argues that an effective way to curb the significant problem of environmental degradation in Nigeria's Niger Delta region and preserve its environment for posterity is by changing the ethic underlying environmental protection laws in Nigeria to a less anthropocentric one.

The wanton degradation has several causes including an overly anthropocentric view of law, life and the natural world. The Nigerian environmental legal order is flawed in the following ways: non-justiciability of Constitutional provisions on environmental matters; insufficient deterrence of some sanctions or inadequate enforcement of others; inadequate compensation; insufficient use of injunctive relief; and difficulty of victims of environmental degradation in the region to be availed by relevant foreign regimes due to lack of financial resources, ignorance, poor education, insufficiency of legal and scientific resources and inadequate action by Government law officers.

The thesis explores some improvements that have been suggested in existing literature which should be adopted to make the extant system work better. It however argues that the impact of such reforms would be enhanced if the ethic underlying the Nigerian environmental protection laws is changed to a less anthropocentric one; and one way of doing so is to constitutionalize nature's right to exist for posterity. This right will be enforceable by individuals, Non-Governmental Organisations and Environmental Protection Agencies, any or all of whom will act as a 'guardian' for nature in a specialist environmental court. This is the 'new' contribution of this thesis as regards Nigeria.

This proposal will however not be a 'magic bullet' but can help promote social change so long as there is genuine involvement of all categories of stakeholders - government and non-governmental institutions, communities and private sector organizations.

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# TABLE OF CONTENTS

Dedication	i
Abstract	ii
Acknowledgements	iii
Table of Contents	iv
Table of Cases	viii
Table of Statutes	xii
Abbreviations	xiv

## INTRODUCTION

The Thesis : An Overview	1
Research Questions	4
Contribution to Knowledge	4
Methodology	5
Structure of the Thesis	5

## CHAPTER ONE

### **JUSTIFYING THE EFFECTIVENESS OF A CONSTITUTIONALISED *ECO-ANTHROPOCENTRIC* ETHIC IN ACHIEVING SUATANABLE DEVELOPMENT**

1.1	Introduction	10
1.2	The Principle of Sustainable Development	11
1.3	The Right of Future Generations to a Clean Environment	13
1.4	Theoretical Underpinnings of Environmental Law	20
1.5	Analysis of Scholarly Opinions	28
1.6	Justifying <i>Eco-Anthropocentrism</i>	33
1.6.1	<i>Nature as a Right Holder</i>	36
1.6.2	<i>Nature's Right in a Relational Context</i>	39
1.7	Law as an Instrument of Social Change	41
1.8	Conclusion	49

## **CHAPTER TWO**

### **NIGERIA, THE NIGER DELTA PEOPLES AND ENVIRONMENTAL DEGRADATION**

2.1	Introduction	50
2.2	The Nigerian Constitution and Political System	51
2.3	The Socio-Economic Environment of the Niger Delta Peoples	58
2.4	Environmental Degradation in the Niger Delta Region	63
2.4.1	<i>Waste Disposal</i>	65
2.4.2	<i>Gas Flaring</i>	66
2.4.3	<i>Seismic Surveys and the Construction of Roads and Pipelines</i>	67
2.4.4	<i>Dredging</i>	68
2.4.5	<i>Inadequate Clean Up</i>	69
2.5	Conclusion	70

## **CHAPTER THREE**

### **RELEVANT ENVIRONMENTAL LEGAL REGIMES AND THEIR EFFECTIVENESS IN ACHIEVING SUSTAINABLE DEVELOPMENT IN THE NIGER DELTA REGION**

3.1	Introduction	72
3.2	The 1999 Constitution and Environmental Protection	74
3.3	National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 and Associated Agencies	76
3.4	Nigerian Environmental Protection Statutes	78
3.4.1	<i>Civil Liability Statutes</i>	79
3.4.2	<i>Criminal Liability Statutes</i>	81
3.5	Customary Laws	87
3.6	Common Law (Tort) Remedies	88
3.7	The African Charter on Human and Peoples Rights 1981	100
3.8	Environmental Litigations Brought Under Foreign Laws	105
3.9	Conclusion	108

## **CHAPTER FOUR**

### **ACRITIQUE OF PROPOSED REFORMS FOR THE RELEVANT ENVIRONMENTAL LEGAL REGIMES IN NIGERIA: JUSTIFYING AN ETHICAL CHANGE**

4.1	Introduction	110
4.2	Particular Reforms	111
4.2.1	<i>Adopting a Justiciable Environmental Right in Nigeria</i>	111
4.2.2	<i>Revising Inadequate Punishment/Deterrence</i>	111
4.2.3	<i>Involvement of NESREA in Oil and Gas Activities</i>	113
4.2.4	<i>Formulation of Compensation Guidelines</i>	113
4.2.5	<i>Decentralization of Ownership of Natural Resources</i>	115
4.2.6	<i>Amending the Laws on Proof and Causation</i>	118
4.2.7	<i>Expanding Claims in Environmental Litigation under Foreign Laws</i>	121
4.3	General Reforms	122
4.3.1	<i>The Imperative of Good Governance</i>	122
4.3.1.1	<u>Improving Public Awareness and Participation</u>	123
4.3.1.2	<u>Managing Corruption</u>	126
4.3.2	<i>Consolidation of Laws</i>	129
4.3.3	<i>Judicial Reforms</i>	130
4.3.4	<i>Appointment of Independent Litigators</i>	132
4.3.5	<i>Introducing Hybrid Enforcement Mechanisms</i>	133
4.4	Analysis of the Efficacy of the Proposed Reforms: Towards an Effective Ethic for Sustainable Development in Nigeria	135
4.4.1	<i>Religious Assumptions</i>	136
4.4.2	<i>Economic Values</i>	144
4.5	Conclusion	147

## **CHAPTER FIVE**

### **ESTABLISHING THE PRACTICABILITY OF A JUSTICIABLE RIGHT FOR NATURE IN THE NIGERIAN CONSTITUTION**

5.1	Introduction	149
5.2	Arguing for the Justiciability of Environmental Rights in Nigeria	150
5.3	The Imperative of Constitutionalising Environmental Rights in Nigeria	164
5.4	A Practical Example of Nature's Constitutional Right	170

5.5	Justifying Nigeria's Constitutional Borrowing	173
5.6	Pragmatic Pathway to the Establishment of a Potent Right for Nature in Nigeria	178
5.6.1	<i>The Proposed Substantive Right</i>	179
5.6.1.1	<u>Imposing Negative and Positive Duties On the State and Individuals</u>	179
5.6.1.2	<u>Standing Rules</u>	182
5.6.1.3	<u>Mechanisms for Injunctive Reliefs and Damages</u>	187
5.6.2	<i>The Proposed Procedural Right</i>	189
5.7	Conclusion	191

## CHAPTER SIX

### THE *ECO-ANTHROPOCENTRIC* RIGHT, ITS ENFORCEMENT AND CONCOMITANT GOVERNMENT REFORMS

6.1	Introduction	195
6.2	The <i>Eco-Anthropocentric</i> Right	196
6.3	The Need for an Environmental Court	198
6.4	The Nature of the Proposed Environmental Court	203
6.5	Conclusion	206

## CONCLUSION

Summary of Argument	207
A Projection of the Impact of the Ethical Change in Nigeria's Niger Delta Region	210
Concluding Remarks	212

## BIBLIOGRAPHY

Books	216
Encyclopaedia's and Dictionaries	228
Articles	228
Working Papers	246
Official Reports	247
Conference Papers	248
Websites	250
Magazines/Newspapers	256
United Nations Resolutions	257



## TABLE OF CASES

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Adams v LSDPC [2002] 5 NWLR (Pt 656) 291

Airobuyi v Nigerian Pipeline Limited (1976) 6 ECSLR 53

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(Ratification and Enforcement) Act 1983

Alien Tort Claims Act, 1789

Convention on Biological Diversity 1992

Earth Charter 2000

Rio Declaration 1992

Universal Declaration of Human Rights 1948

## ABBREVIATIONS

AECEN	Asian Environmental Compliance and Enforcement Network
AJCL	American Journal of Comparative Law
AJEPH	African Journal of Environmental Pollution and Health
AJIL	American Journal of International Law
AJLT	African Journal of Legal Theory
All ER	All England Reports
All NLR	All Nigeria Law Reports
Ambio.	A Journal of Human Environment
AREJ	Australian Resources Energy Law Journal
Aust YBIL	Australian Yearbook of International Law
B C Intl & Comp L R	Boston College International and Comparative Law Review
C D Cal	Central District of California
CA	Court of Appeal
Cal W Intl L J	California Western International Law Journal
CEPMLP	Centre for Energy, Petroleum and Mineral Law and Policy
CJChE	Canadian Journal of Chemical Engineering
CJIL	Chicago Journal of International Law
CLJ	Cambridge Law Journal
ECSLR	East Central States Law Reports
EECR	Eastern European Constitutional Review
EJLR	European Journal of Law Reform
Env L R	Environmental Law Review
Fla L Rev	Florida Law Review
FME	Federal Ministry of Environment
GIELR	Georgetown International Environmental Law Review
HELR	Harvard Environmental Law Review
HL	House of Lords
HRQ	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
IJCON	International Journal of Constitutional Law
IJCL	International Journal of Constitutional Law
IJDL	International Journal of Discrimination and the Law
IIEA	International Judicial Institute for Environmental Adjudication
IJEL	International Journal of Environmental Law
IJEM	Journal of Economics and Management
IJEP	International Journal of Environment and Pollution
IJMS	Indian Journal of Marine Sciences
Ind L J	Indiana Law Journal
INEA	International Environmental Agreements
IPPC	Integrated Pollution Prevention and Control
IRERE	International Review of Environmental and Resource Economics
IRJFE	International Research Journal of Finance and Economics
IRRC	International Review of the Red Cross
IUCN	International Union for Conservation of Nature
JAL	Journal of African Law
JAMA	Journal of American Medical Affairs
JAPSS	Journal of Alternative Perspectives in the Social Sciences

JBS	Journal of Black Studies
JEL	Journal of Environmental Law
JEM	Journal of Environmental Management
JENRL	Journal of Energy Law and Natural Resources
JEPM	Journal of Environmental Planning and Management
JEQ	Journal of Environmental Quality
JLCP	Journal of Law and Contemporary Problems
JLS	Journal of Legal Studies
JPL	Journal of Politics and Law
JSDA	Journal of Sustainable Development in Africa
JSEAS	Journal of South East Asian Studies
LFN	Laws of the Federation of Nigeria
LQR	Law Quarterly Review
MJECL	Maastricht Journal of European and Comparative Law
MJSC	Monthly Judgements of the Supreme Court
MPJFIL	Modern Practice Journal of Finance and Investment Law
MqJICEL	Macquarie Journal of International and Comparative Environmental Law
NIALS	Nigerian Institute of Advanced Legal Studies
NCF	Nigerian Conservation Foundation
NCLR	Nigerian Constitutional Law Reports
NJCL	Nigerian Journal of Constitutional Law
NMLR	Nigerian Monthly Law Reports
NWLR	Nigeria Weekly Law Reports
NWULR	North Western University Law Review
OJLS	Oxford Journal of Legal Studies
PELJ	Pace Environmental Law Journal
PELR	Pace Environmental Law Review
PL	Public Law
REC	Regional Environmental Center for Central and Eastern Europe
RECIEL	Review of European Community and International Environmental Law
RSLR	Rivers State law Reports
SAIIC	South and Meso American Indian Rights Center
SAJHR	South African Journal of Human Rights
S C Env'tl L J	South Carolina Environmental Law Journal
SC	Supreme Court
SCI AM	Scientific American
SEEN	Sustainable Energy and Economic Network
SJIL	Stanford Journal of International Law
Sw J L & Trade Am	South-western Journal of Law and Trade in the Americas
Tex L Rev	Texas Law review
U PA J Const J L	University of Pennsylvania Journal of Constitutional Law
UCLA	University of California, Los Angeles
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UMLJ	University of Maiduguri Law Journal
USAID	United States Agency for International Development
US/AFAJ	United States Air force Affairs Journal
Va L Rev	Vanderbilt Law Review



Web JCLI  
WWF  
YLJ

Web Journal of Current Legal Studies  
World Wide Fund for Nature  
Yale Law Journal



# INTRODUCTION

*Only from an extremely limited viewpoint can it be maintained that the defence of the interests of nature is contrary to human interests. Since humankind is part of nature in a wide sense, human fate is indissolubly linked to that of the entire natural world. The conservation of a complete and healthy nature is, consequently, in the interest of humankind, which means that the defenders of nature are also the defenders of humanity; on the contrary, those who attack nature, moved by short-sighted human interests, in the end attack humankind itself, threatening its future together with the future of all nature.<sup>1</sup>*

## **The Thesis: An Overview**

Nigeria's Niger Delta region is the hardest hit by environmentally harmful activities in the country.<sup>2</sup> This significant problem of environmental degradation in the region has immediate and underlying causes thus impeding sustainable development in the region. Its immediate causes include oil and gas exploration, mineral extraction, disposal of associated waste and oil bunkering. Its underlying causes comprise the pursuit of economic growth, greed, corruption, ignorance, weakness in the existing laws or ability to access them as well as strict anthropocentric view of law, life and the natural world.<sup>3</sup>

This thesis anchors on one of these major underlying causes – the strict anthropocentric ethic that underlies the current environmental protection regime in Nigeria. Beyond canvassing for a change of the current ethic by the inclusion of a less anthropocentric one in Nigeria's Constitution, it will show (in chapters four and five) that in the process of getting this proposed ethic to work in Nigeria, the other underlying causes as well as the immediate causes of degradation in the region can better be managed.

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<sup>1</sup> G Stutzin, 'Nature's Rights' *Resurgence Magazine* (Devon, Jan/Feb 2002)3 <<http://www.resurgence.org.uk>> accessed 15 November 2012

<sup>2</sup> S Omofonmwan and L Odia, 'Oil Exploitation and Conflict in the Niger Delta Region of Nigeria (2009) 26(1) *J Hum Ecol* 25, 26

<sup>3</sup> W Owabukeruyele, 'Hydrocarbon Exploitation, Environmental Degradation and Poverty in the Niger Delta Region of Nigeria' <<http://www.waado.org/Environment/Petrolpollution/EnvEconomics.htm>> accessed 20 September 2012; see also H Saliu, S Luqman and A Abdullahi, 'Environmental Degradation, Rising Poverty and Conflict: Towards an Explanation of the Niger-Delta Crisis' (2007) 9(4) *JSDA* 275, 285

The Nigerian environmental legal order is flawed in a number of respects. First, constitutional environmental protection is non-justiciable and thus largely hortatory (although occasional use has been made of other human rights provisions to protect the environment); second, the regulatory oversight system deliberately does not apply to oil and gas activities; third, some legal restrictions are rendered inapplicable by ministerial certificates; fourth, where criminal sanctions apply most times, they are insufficiently deterrent or punitive or the laws inadequately enforced by governmental authorities; fifth, while civil liability exists and can cover some areas, compensation may be inadequate; sixth, there is insufficient use of injunctive relief; and, finally, due to lack of financial resources, ignorance, poor education, insufficiency of legal and scientific resources and inadequate action by Government law officers, it is difficult to use the legal regimes that exist.

Important improvements have been suggested by others (for example on more specific issues like making fines more deterrent, having specific guidelines for compensation, creating a justiciable environmental right; and generally on managing corruption, encouraging public participation, introducing hybrid enforcement models and so on) and should be adopted to make the extant system work better positively to impact on the problem of environmental degradation in the Niger Delta, this thesis argues that to effectively achieve sustainable development, such reforms will however be enhanced using a preservationist ethic to preserve the environment for future generations.

Some writers have argued that the preservation of the environment can be achieved when there is a guaranteed *human* (anthropocentric) right to a clean and healthy environment;<sup>4</sup> others (including this author) believe that the environment can be better preserved when *nature's* (ecocentric) rights are guaranteed<sup>5</sup>.

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<sup>4</sup> See E Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational/United Nations University 1989) 25-26; E Weiss, 'Our Rights

Merely guaranteeing *man's* right to a clean and healthy environment will not be as forward looking in preserving the environment for future generations as guaranteeing nature's right to exist will. This thesis therefore proposes that nature's right (ecocentric) be used to protect the environment for posterity (anthropocentric). That is, using an ecocentric method to achieve an anthropocentric objective, since anthropocentrism is the ultimate objective of sustainable development. It is at this point of objective that this thesis differs from the ecocentrists – the objective of the ecocentrists is to preserve nature for itself;<sup>6</sup> while this thesis proposes the preservation of nature for posterity (weak anthropocentrism).<sup>7</sup>

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<sup>5</sup> See C Stone, 'Should Trees Have Standing? – Toward Legal Rights For Natural Objects' (1972) 45 S Cal L Rev 450, 456; L Tribe, 'Ways Not To Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83 YLJ. 1315, 1343; J Feinberg, 'The Rights of animals and Future Generations' in W Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press 1974). C Stone, 'Should Trees Have Standing? Revisited: How Far Will Law And Morals Reach?' (1985) 59 S Cal L Rev 1; T Regan, 'The Case for Animal Rights' in T Regan and P Singer (eds), *Animal Rights and Human Obligations* (2<sup>nd</sup> edn, Englewood Cliffs 1989) 1-4 ; S Emmeneger and A Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (Summer 1994) 6 (3) Georgetown Intl Env L Rev 545 , 571; T Berry, *The Great Work: Our Way Into the Future* (Bell Tower 1999) 18-22. T Berry, 'Rights of the Earth: Recognising the Rights of all Living Things' (September/October 2002) 214 *Resurgence* <[www.resurgence.org/magazine/author2-thomas-berry.html](http://www.resurgence.org/magazine/author2-thomas-berry.html)> accessed 20 March 2012; C Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books 2003) 32; M Bell, 'Thomas Berry and an Earth Jurisprudence: An Exploratory Essay' (2003) 19 (1) Trumpeter [www.rainforestinfo.org.au/deep-eco/earth%20jurisprudence/Earth520justice.htm](http://www.rainforestinfo.org.au/deep-eco/earth%20jurisprudence/Earth520justice.htm) accessed 20 March 2012

<sup>6</sup> See for example, A Leopold, *A Sand County Almanac* (Sierra Club/Ballantine 1970) xviii-xix; J Karp, 'Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development law?' (1988-1989) 19 Env Law 737, 740; S Zeki and H Kawabata, 'Neural Correlation of Beauty' (2004) Journal of Neurophysiology 1699; J Muir, *Steep Trails* (Cosimo 2006) 42; J Evans, *With Respect for Nature: Living as Part of the Natural World* (SUNY 2005) 16; B Norton and D Noonan, 'Ecology and Valuation: Big Changes Needed' (2007) 63 Ecological Economics 664; J Rowe, 'Ecocentricism: the Chord that Harmonizes Humans and Earth' (1994) 11(2) The Trumpeter 106

<sup>7</sup> The weak anthropocentric view bestrides the ecocentric and *strict* anthropocentric view. They are in agreement with the *strict* anthropocentrists to the extent that all the moral duties we have towards the environment are derived from our direct duties to its human inhabitants. They however maintain that the practical purpose of environmental ethics is to provide moral grounds for social policies aimed at protecting the earth's environment and remedying environmental degradation. See J Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' [2008] 86 Texas L Rev 616; B Norton, 'Environmental Ethics and Weak Anthropocentrism' (1984) 6 Env Ethics 131; B Norton, *Why Preserve Natural Variety?* (Princeton University Press 1987); B Norton and B Minter, 'From Environmental Ethics to Environmental Public Philosophy: Ethicists and Economists, 1973–Future' in T Tietenberg and H Folmer (eds), *International Yearbook of Environmental and Resource Economics* (Edward Elgar 2002/2003); B Norton, *Toward Unity among Environmentalists* (OUP 1991); E Hargrove, 'Weak Anthropocentric Intrinsic Value' (1992) 75 The Monist 183

Thus, building on the work of Bruckerhoff, Norton, Hargrove and others who have argued for ‘enlightened/weak anthropocentrism’,<sup>8</sup> this thesis renames it *eco-anthropocentrism* in order to place focus on nature’s right to exist. This right (as has been done elsewhere), will be a justiciable environmental right for nature – a corporate or group right which will be engrafted into Nigeria’s written, higher law (constitution) - making it enforceable by individuals, NGOs, and the Environmental Protection Agency (any or all of whom can act as a ‘guardian’ for nature in a specialist environmental court consisting of appropriately trained and independent judges).

### **Research Questions**

The argument in this thesis will be built by tackling three major questions:

- (1) Is the existence of a comatose anthropocentric legal framework a major cause of the nagging menace of environmental degradation in Nigeria’s Niger Delta Region; or is it due to the complete absence of a preservationist ethic in the environmental protection regime in Nigeria?
- (2) Will the preservation of the Niger Delta environment for posterity be more effective by constitutionalizing nature’s right to exist?
- (3) What kind of institutional reform will be imperative for the effective implementation of nature’s right in Nigeria?

### **Contribution to Knowledge**

The originality of this thesis is found in taking an existing concept – enlightened (weak) anthropocentrism, calling it *eco anthropocentrism* so as to further emphasize the right of nature and its prominence in achieving sustainable development *in Nigeria*; by putting

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<sup>8</sup> Ibid

forward a proposed model of constitutional protection of a justiciable right for man and nature<sup>9</sup> that would be effectively enforced by nature's 'guardian' in special environmental courts.

## **Methodology**

This thesis deploys doctrinal and socio-legal methods. The doctrinal method is used to examine the extant laws on environmental protection in Nigeria, as well as the laws of other countries which this thesis will at one time or the other use as models. The socio-legal method will be applied mainly because of the multidisciplinary nature of environmental law and ethics. This research will include inputs from the core philosophical, social science and science fields; environmental law cuts across disciplines, and if the laws and enforcement mechanisms proposed are going to be balanced and effective, then such laws must contemplate environment - related dynamics in the above fields.

## **Structure of the Thesis**

Apart from this introduction, this thesis consists of six substantive chapters and a conclusion. The following chapter summaries show how the central argument of the thesis is justified and developed.

### ***Chapter One – Justifying the Effectiveness of a Constitutionalised Eco-anthropocentric Ethic in Achieving Sustainable Development***

This chapter will establish the general premise on which the central argument of this thesis is based, namely, laws based on a *weak* anthropocentric ethic will achieve sustainable development more effectively than those based on a *strict* anthropocentric ethic. Thus it proposes a *weak* anthropocentric ethic (which it will name *eco-anthropocentrism*) in a

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<sup>9</sup> Although this thesis will occasionally discuss man's aspect of the right, it will however emphasize nature's right because it argues that it has more potential to effectively achieve sustainable development.

primary law (usually, a Constitution) in the form of nature's right to exist for posterity; arguing that this will be an effective way of achieving sustainable development - protecting the moral right of future generations to a clean environment. It will demonstrate that where legislative efforts made to achieve sustainable development are based on an ethic that is not a less (*weak*) anthropocentric one, then a shift in the existing ethic becomes imperative. Usually, it argues, this shift is done by amending the primary law to reflect the new ethic; crucially, it argues that the change to the new ethic *and* the change envisaged when the ethic has been amended will not be achieved without complementary social, economic, political and cultural reforms carried out by state and non-state actors like the Government, Non – Governmental Organisations, Communities and private individuals.

## ***Chapter Two – Nigeria, the Niger Delta Peoples and Environmental Degradation***

This thesis will use Nigeria's Niger Delta Region as the case study to which the general premise of chapter one will be applied. In view of this, chapter two will describe the general political environment of Nigeria, the socio-economic status of the Niger Delta indigenes and the nature and extent of the problem of environmental degradation in Nigeria's Niger Delta Region.

The objective of this chapter is to first demonstrate that, due to the Federalist nature of the Nigerian Political System and consequently its rigid constitution, it will be quite difficult (though not impossible) to effect an amendment to accommodate the change in ethic which chapter one argues for. Secondly, it will show how much the Niger Delta indigenes depend on the degraded environment for their sustenance and how, as a result of their penury, access to justice is elusive. Thirdly and crucially, it will prove that the extent of environmental degradation in the region (which contains oil, Nigeria's major source of revenue) requires more effective legislative attention.



### ***Chapter Three –An Examination of Relevant Environmental Legal Regimes and their Effectiveness in Achieving Sustainable Development in the Niger Delta***

This chapter will critically assess the existing legal framework on environmental protection in Nigeria's Niger Delta Region and its effect in achieving sustainable development therein. Thus, it will examine the 1999 Constitution, local statutes, the rules of Common Law the African Charter on Human and People's Rights (1981), the Alien Tort Claims Act (1789) and tort law in the United Kingdom as they affect environmental protection in Nigeria. Its role in this thesis is to establish that there are a range of problems in the existing regimes which have made them largely defective and thus requiring reform. It will use this as a platform to establish the need for an ethical change in addition to suggested reforms of the defective laws.

### ***Chapter Four – A Critique of Proposed Reforms for the Relevant Environmental Legal Regimes in Nigeria: Justifying an Ethical Change***

While examining some suggested reforms to the defective regimes discussed in chapter three (like improved fines, better compensation scheme, a justiciable environmental right, curbing corruption, improved public participation, hybrid enforcement mechanisms and so on), Chapter four demonstrates that the legal regimes discussed in chapter three are *strictly* anthropocentric and consequently (based on the premise in chapter one) ineffective in achieving sustainable development in Nigeria's Niger Delta region. Thus it contends that even where the identified defects in the legal regimes discussed in chapter three are rectified using the same *strict anthropocentric* ethic, the objective of sustainable development will less readily be achieved in Nigeria's Niger Delta Region without a concomitant change to the *eco-anthropocentric* ethic.

## ***Chapter Five – Establishing the Practicability of a justiciable Right for Nature in the Nigerian Constitution***

After testing the general premise of chapter one in chapters three and four and finding it to be credible, this chapter will, with a view to proving the practicability of the premise in Nigeria's Niger Delta Region, propose, justify (based on comparative constitutionalism) and develop a substantive and procedural *eco-anthropocentric* right to a 'healthful and ecologically balanced environment' for Nigeria, thus establishing that a constitutional right of nature to exist will, in addition to the reforms suggested in chapter four enhance the achievement of sustainable development in Nigeria's Niger Delta Region.

## ***Chapter Six – The Eco-Anthropocentric Right and Its Concomitant Reform***

With the objective of enhancing the practicability of the proposed *eco-anthropocentric* right, this chapter will, after attempting a draft of the right, argue for an institutional reform that must necessarily follow the entrenchment of nature's right in Nigeria's Constitution. Consequently, it proposes the enforcement of the right in a specialist environmental court. Although the precise operations of the court is a matter of further research, the justification for the proposal of its establishment will be founded on the difficulties that the regular courts will likely encounter from addressing the nuances that will arise from the administration of nature's right in Nigeria.

## ***Conclusion***

Having established the need for a more effective legislative scheme on environmental protection in Nigeria that derives its potency from the Constitution, this thesis will conclude with a summary of the core argument in the work, with a view to emphasizing the logic of the ethical shift which was established in chapter one, tested in chapters three and four (having projected the situation of the Niger Delta region in chapter two) and found to be valid and thereafter applied in chapters five and six.

# CHAPTER ONE

## **JUSTIFYING THE EFFECTIVENESS OF A CONSTITUTIONALISED *ECO-ANTHROPOCENTRIC* ETHIC IN ACHIEVING SUSTAINABLE DEVELOPMENT**

*Topics and situations that challenge our ethical impulses, requiring us to apply laws and ethics to new situations, frequently provoke... debate.<sup>1</sup>*

### **1.1 Introduction**

This chapter establishes the general premise which the contribution of this thesis builds on, namely, a less anthropocentric ethic is more effective in achieving the objective of sustainable development. It does this by examining several themes that would run through the thesis - ‘sustainable development’, ‘future generations’, ‘eco-anthropocentrism’ and ‘law as an instrument for social change’. The chapter demonstrates that the principle of sustainable development promotes the protection of the environment for future generations. This can however only be achieved if there is a balance between environmental protection and economic development. Thus it argues that where an ethic underlying environmental protection laws is not characterised by this balance, the sustainable development objective will be hardly achieved.

Consequent upon the examination of theoretical underpinnings of environmental law and scholarly opinions on an effective ethic for future generations, it will be argued that although sustainable development has an anthropocentric objective, *strict* anthropocentric laws are not an option for achieving it. Thus it establishes that a less anthropocentric ethic (weak/enlightened) is more adaptable to achieving sustainable development. In demonstrating how this is so, it re names this ethic and calls it *eco-anthropocentric* arguing that an effective way of using a less anthropocentric ethic to achieve sustainable

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<sup>1</sup> A Flournoy, ‘In Search of an Environmental Ethic’ (2003) 28 Colum J Env L 63

development is by using nature's legal right to exist (ecocentric) to protect future generations' moral rights to a clean environment (anthropocentric).

It further demonstrates that law is a major instrument for social change contending that a shift from a less effective ethic to an *eco-anthropocentric* ethic can effectively be done through a primary law (most times, a constitution). Law however cannot bring about the change without complementary social, political, cultural and economic reforms which reforms are also critical for a change in the law in the first place.

## **1.2 The Principle of Sustainable Development**

Sustainable development is a principle of international environmental law that is in favour of a balance between economic development and environmental protection.

There has been increasing recognition of the need to protect the global environment and to lay down new principles and rules on certain issues.<sup>2</sup> Progressively, rights and obligations have been articulated so as to address the environmental impacts of developmental projects and new concepts and principles have emerged. One is the principle of Sustainable Development, which focuses on human interests in the environment, connecting the idea of a people's right to development with the need to preserve the environment.

The concept attracted international attention in 1987 when the World Commission on Environment and Development (WCED) defined and adopted it in *Our Common Future*: 'development that meets the need of the present without compromising the ability of future generations to meet their own need'.<sup>3</sup> Accordingly, the Commission's Expert Group on Environmental Law suggested a list of legal principles, which included the right to a healthy

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<sup>2</sup> See P Birnie, A Boyle and C Redgwell, *International Law & The Environment* (3<sup>rd</sup> ed, OUP 2009) 10 - 13; K Hulmes, 'Taking Care to Protect the Environment Against Damage: a Meaningless Obligation?' (2010) 92 (879) *IRRC* 695, 695

<sup>3</sup> See World Commission on Environment and Development, *Our Common Future* (OUP 1987) 43

environment as a fundamental human right:<sup>4</sup> ‘states shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations’.<sup>5</sup>

This concept is based on the precautionary principle - a principle of international environmental law that states that, in environmental management, allowances must be made for scientific *uncertainty* where there is the potential for *serious* or *irreversible* harm.<sup>6</sup> In its simpler form, the precautionary principle is a call to be anticipatory with respect to the causes of environmental degradation<sup>7</sup> and more proactive in preventing significant deleterious impacts on species and ecosystems by erring on the side of caution in the face of scientific uncertainty.<sup>8</sup>

Sustainable Development therefore relies on a commitment to equity with future generations. Distinguishing sustainability from traditional development schemes that often serve contemporary people to the detriment of future generations,<sup>9</sup> this ethical and philosophical commitment acts as a constraint on a natural inclination to take advantage of our temporary control over the earth’s resources, and to use them only for our own benefits without careful regard for what we leave to our children and their descendants.<sup>10</sup> The concept requires that we look at the earth and its resources not only as an investment opportunity, but as a trust passed to us by our ancestors for our benefit, but also to be passed onto our descendants for their use.<sup>11</sup> This notion conveys both rights and responsibilities. Most importantly, it implies that future generations have rights too.

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<sup>4</sup> See R Munro and J Lammers, *Environmental Protection and Sustainable Development -Legal Principles and Recommendations* (Graham & Trotman 1987) 25, art 1

<sup>5</sup> Art 2

<sup>6</sup> K Gustavson and R Kent, 'Applying the Precautionary Principle in Environmental Assessment: The Case of Reviews in British Columbia' (2003) 46 (3) JEPM 365, 365

<sup>7</sup> J Cameron and J Abouchar, 'The Precautionary Principle: a Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) B C Intl & Comp L Rev 14

<sup>8</sup> R Earll, 'Commonsense and The Precautionary Principle—an Environmentalist's Perspective' (1992) Marine Pollution Bulletin 24

<sup>9</sup> M Salvo, 'Constitutional Law and Sustainable Development in Central Europe: Are We There Yet?' (1996-1997) 5 S C Env L J 141,145

<sup>10</sup> E Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992-1993) 8 Am U J Intl L & Policy 19, 23-25

<sup>11</sup> Ibid

Sustainability issues arise wherever there is a risk of difficult or irreversible loss of the things or qualities of the environment that people value. And whenever there are such risks there is a degree of urgency to take action.<sup>12</sup>

Some of the issues that pose major environmental sustainability problems<sup>13</sup> include destruction of the living environments (habitats) of native species; discharge of polluting chemicals and other materials into the environment; emission of greenhouse gases into the atmosphere that can cause climate change; depletion of low cost oil and other fossil fuels.<sup>14</sup>

Sustainable Development is not a principle of zero growth, but one of adjustment of material progress (development) to the constraints of natural equilibrium (environment). The limit which the principle imposes is imperative in light of the profound impact of development on nature.<sup>15</sup>

### **1.3 The Right of Future Generations to a Clean Environment**

This section establishes that this generation has a duty to protect the right of future generations to a clean environment even though this right is a moral rather than a legal one.

Although the theory of consideration of future generations has only been in popular usage in international environmental law for a relatively short period,<sup>16</sup> its historical origins go back much further. It appears within Islamic doctrine<sup>17</sup> and within the Judeo-Christian

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<sup>12</sup> S Pilcanic, 'The Concept of New (Ecocentric) Legal Philosophy' <http://www.ecopsychology.org/journal/ezone/law.html> accessed on May 2020 accessed 14 November 2012

<sup>13</sup> Which will be seen in the discussion on the Niger Delta region in chapter two

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> See The United Nations Charter [www.un.org/en/documents/charter/](http://www.un.org/en/documents/charter/) accessed 13 November 2012; United Nations, *Historical Responsibility of States for the Preservation of Nature for Present and Future Generations* (UN Doc. A./RES/35/8, 1980) Principles 1 and 3; United Nations, 'Protection of the Global Climate for Present and Future generations of Mankind' (UNGA/T Res./43/53.A/44/862. 1989)

<sup>17</sup> See International Union for the Conservation of Nature, *Islamic Principles for the Conservation of The Natural Environment* (IUCN 1983) 13-14; A Khadduri, *The Islamic Conception of Justice* CUP 1984) 137-9; 219-20; 233-9

tradition.<sup>18</sup> Traditional indigenous perspectives also often have a strong recognition of the importance of future generations.<sup>19</sup>

The links between continuous generations have also influenced many of the most important philosophical and political theorists. For example, Cicero,<sup>20</sup> Kant,<sup>21</sup> Bentham,<sup>22</sup> Locke<sup>23</sup> and Marx<sup>24</sup> all recognized the idea of future generations as a legitimate concern.

A crucial issue in this thesis is whether current generations owe a duty to future generations to preserve the life support systems of the planet; to sustain the ecological processes and environmental conditions necessary for the survival of the human species; and to maintain a healthy and decent environment.<sup>25</sup> In other words, whether future generations have a protectable right to good environmental conditions.

Rights have been defined as entitlements (not) to perform certain actions or be in certain states or entitlements that others (do not) perform certain actions or be in certain states.<sup>26</sup> They are entitlements to do or refrain from doing something, or to obtain or refrain from obtaining an action, thing or recognition in civil society. Rights dominate most modern understandings of what actions are proper and which institutions are just. They structure the forms of our governments, the contents of our laws, and the shape of morality as we

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<sup>18</sup> See for example Gen 1: 1-31; 17: 7-8; H Derr, 'The Obligation to the Future' in E Partridge (ed), *The Rights Of Future Generations* (Prometheus 1981) 43

<sup>19</sup> I Burger, *The Gaia Atlas of First Peoples* (Gaia Books 1990) 11-13; 112-23; 172-7

<sup>20</sup> M Cicero, *De Finibus Bonorum et Malorum* (H Rackham tr, Macmillan 1971) 3 & 64

<sup>21</sup> I Kant, 'Idea For a Universal History With a Cosmopolitan Purpose' in F Nisbet, *Kant's Political Writings* (CUP 1970) 50

<sup>22</sup> J Narveson, 'Utilitarianism and Future Generations' (1967) 76 *Mind* 64; J Bentham, 'A Mixed Bentham-Rawls Criterion for Intergenerational Equity: Theory and Implications' (2009) 58 (2) *J Env Eco and Manage* 154

<sup>23</sup> P Laslett (ed), *Locke's Two Treatises of Government* (CUP 1988) 33- 37

<sup>24</sup> K Marx, *Capital* (vol III, Wishart 1972) 776

<sup>25</sup> See E Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Eco L Q* 511; R Epstein, 'Justice across Generations' (1988-1989) 67 *Tex L Rev* 1465

<sup>26</sup> E Zalta, *The Stanford Encyclopedia of Philosophy* (Summer edn, 2007) <[www.plato.stanford.edu/entries/rights/](http://www.plato.stanford.edu/entries/rights/)> accessed 25 November 2012



perceive it.<sup>27</sup> To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done.<sup>28</sup>

Rights could be either *legal* or *moral*. The utterance of a legal authority (legislature, official, court) that a right is being conferred is conclusive evidence that a legal right has been conferred. This however does not mean every utterance by a legal authority is authoritative. It is so only if it is not rejected by some higher authority.<sup>29</sup> Thus if a statute says that trees have rights, then trees have legal rights, whether we consider them to be morally defensible or even morally possible. Thus an important difference between legal and moral rights is that in determining whether a legal right exists, one determines first whether the law has imposed a legal duty on someone and then whether the duty can be interpreted as owed to *an existing* person.<sup>30</sup> On the other hand, a moral right implies a good (or interest) sufficiently important that it warrants protection by duties on others. Thus not all goods or interests generate rights; it is only when there is a particularly important moral reason for protecting the good or interest in question that we speak of it as having a moral right.<sup>31</sup>

Philosophers writing on the nature of legal rights have for ages been divided into two sharply opposed camps-‘will theory’ proponents and ‘interest theory’ proponents.<sup>32</sup> Proponents of the will theory of rights hold that individual freedom, autonomy, control or sovereignty is fundamental to the concept of a right. The theory asserts that the single function of a right is to give the right holder discretion over the duty of another.<sup>33</sup> A landowner has a right, for instance, because he has the power to waive or not to waive the

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<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> See J Feinberg and J Naverson, ‘The Nature and Value of rights’ (1970) 4(4) J of Value and Inquiry 243; J Raz, ‘Hart on Moral Rights and Legal Duties’ (1984) 4(1) OJLS 123; A Sen, Legal Rights and Moral Rights: Old Questions and New Problems (1996) 9(2) Ratio Juris 153

<sup>30</sup> Emphasis, mine

<sup>31</sup> M Hartney, ‘Some Confusions Concerning Collective Rights’ (1991) 4 Can J L & Juris 293, 304

<sup>32</sup> S Duffel, ‘The Nature of Rights’ (2008) National University of Singapore research Paper 7/2008,1 <[www.ssrn.com/abstract=1157282](http://www.ssrn.com/abstract=1157282)> accessed 20 March 2012

<sup>33</sup> L Wenar, ‘The Nature of Rights’ (2005) 33 (3) Phil & Pub Aff 238

duties that others have not to enter his land. A promisee has a right because s/he has the power to demand performance of the promisor's duty; or to waive performance as s/he likes.<sup>34</sup> As Hart describes the central thesis of the 'will theory', 'the individual who has the right is a small scale sovereign to whom the duty is owed'.<sup>35</sup> Thus, assuming that rights protect the choices and the free exercise of the right holder's will, there is a good reason to doubt that future persons have rights.

Proponents of the 'interest theory' argue that rights protect people's welfare, and this may include protecting interests that are not directly associated with people's freedom or control.<sup>36</sup> Since the interest theory turns on the right holder's interests instead of his/her choices, it can recognize rights as unwaivable claims such as the claims against enslavement and torture.<sup>37</sup> The interest theory also has no trouble viewing children and incompetent adults as right holders, since children and incompetent adults have interests that rights can protect.<sup>38</sup>

However, since proponents of the interests theory argue that having a legal right is a function of an identifiable right holder (like children and incompetent adults) having interests strong enough to justify holding others to a duty, future persons (being indeterminate) do not have legal rights against the performance of prenatal actions and choices that are determinative of their existence, and currently, existing people have no corresponding duty not to perform such actions. For example, wasteful energy practices, over population, irresponsible fiscal policies.<sup>39</sup>

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<sup>34</sup> Ibid

<sup>35</sup> H Hart, *Essays on Bentham* (OUP 1982) 183

<sup>36</sup> S Duffel, ( n 32) 1; see also J Raz, *The Morality of Freedom* (OUP 1986) 166

<sup>37</sup> L Wenar, ( n 33) 243

<sup>38</sup> Ibid

<sup>39</sup> See O Herstein, 'The Identity and (Legal) Rights of Future Generations' (2009) 77 GWLR 1173, 1202

Wenar,<sup>40</sup> in proposing a theory of rights which would address the inadequacies of the ‘will’ and ‘interest’ theories advocates the ‘several functions’ theory claiming that the ‘several functions’ theory captures what is plausible in the will and interest theories. He argues that the test of a theory of the functions of rights is how well it captures our ordinary understanding of what rights there are and what significance rights have for right holders.<sup>41</sup> His argument is against the backdrop that all rights are Hohfeldan incidents. The Hohfeldan framework shows that all the rights we are familiar with are built from different elements - privilege -rights and claim-rights share the concept of duty, and range over physical objects. Power- rights and immunity-rights share the concept of authority, and range over lower incidents. Privilege-rights and power-rights are actively exercised, and overlap in their functions. Claim-rights and immunity-rights are passively enjoyed, and their functions also merge. <sup>42</sup>All Hohfeldan incidents are rights so long as they mark exemption, or discretion, or authorization, or entitle their holders to protection, provision or performance. Therefore, rights are all those Hohfeldan incidents that perform these functions.<sup>43</sup>

Arguably, Wenar’s several functions theory does not also allow unidentifiable persons to possess legal rights because the justification of rights remains predicated on the strength or significance of interests of the determinate right holder.

Since the problem of non-identity rules out future people having any interest, no matter how minute, in many prenatal identity - determinative actions, what future generations can lay claims to are moral rights; that is, they will be entitled to protection based on the *moral justification* that the environment *ought* to be left in a condition that

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<sup>40</sup> L Wenar (n 33) 237-238

<sup>41</sup> Ibid 238

<sup>42</sup> See W Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 YLJ 16, 32; see also L LaRue, ‘Hohfeldan Rights and Fundamental Rights’ (1985) 35 (1) U Toronto L J 86

<sup>43</sup> W Hohfeld (n 42) 32

would be reasonably enjoyable by them.<sup>44</sup> Parfit argues that if any future people exist at all, then they cannot bemoan the fact that an earlier generation wronged them. For if an earlier generation acted differently, then via multipliers such as the Chaos effect, the specific persons of the generation that was complaining would not exist at all. Thus, given that (in the vast majority of cases) any existence is better than no existence, then they have no right to complain for if things had been different, they would not exist.<sup>45</sup> D'amato however contends that it would be unreasonable to limit our actions to those we are able to determine now as directly or indirectly benefitting ourselves or our descendants. Rather, we should cultivate our natural sense of obligation not to act wastefully or wantonly even when we cannot calculate how such acts would make any present or future persons worse off.<sup>46</sup> D'amato's argument aligns with Dworkin's main premises that violations of rights are grave assaults on equality of respect (hence are worth avoiding) and that, in recognizing moral rights, a government commits itself to paying regularly a certain cost in lost opportunities to promote collective goals. He argues that a loss to collective goals is not insignificant, but such losses do not strike at human dignity in the way that violations of moral rights do<sup>47</sup>.

Thus whether a right is legal or moral, in a world with no rights an intangible human sensitivity would be lost - sensitivity which highlights the right holder and his/her perspective as central components of moral theory. People may be well protected in such a world but depriving them of the status of right holders means that they are not protected for

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<sup>44</sup> See text to fn 31 above; see also J Feinberg, 'The Rights of Animals and Unborn Generations' in W Blackstone (ed), *Philosophy and the Environmental Crisis* (University of Georgia Press 1974) 65; J Sterba, 'The Welfare Rights of Distant People and Future Generations: Moral Side-Constraints on Social Policy' (1981); B Norton, 'Environmental Ethics and The Rights Of Future Generations' (1982) 4 *Env Ethics* 322) 7 *Soc Theory & Prac* 110; J Gaba, 'Environmental Ethics and our Moral Relationship to Future Generations: Future Rights and Present Virtue' (1999) 24 *Colum J Env L* 249, 264; E Weiss (n 25) 523.

<sup>45</sup> D Parfit, *Reasons and Persons* (OUP 1984) 355-365; 387-8

<sup>46</sup> A D'Amato, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' (1990) 84(1) *AJIL* 190, 198; see also B Weston, 'The Theoretical Foundations of Intergenerational Ecological Justice: An Overview' (2012) 34 *HRQ* 251 where the author argues that future generations have a right to a clean and healthy environment based on a respect based theory of sustainable justice which at its core honours the values that underwrite human rights law and policy.

<sup>47</sup> R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 193. Dworkin further elaborates on his constructive morality methodology in his book *Law's Empire* (Fontana Press 1986)

the right reasons – reasons which highlight their central role in justifying that protection. At the moment, rights are too entrenched in our moral and legal culture for us to comprehend how such a world would look.<sup>48</sup>

Building on the arguments of D'amato and Dworkin therefore, it can be emphasised that the basic argument for future generations maintains that it is highly probable that humanity will have future descendants, and that those descendants will have approximately the same basic needs and wants that the present generation has today. In this sense, future generations do have *interests* that can be affected by the policies of existing generations. This leads on to a moral concern and the necessity for practical action.<sup>49</sup> Humanity has unknown powers of a vast and potentially devastating nature which could have a ruinous effect on the environment for future generations. By the time future generations are living with the environmental problems that this generation has left them, this generation would have gone, having taken the benefits of such decisions, but leaving the costs behind.<sup>50</sup> Thus Avner De Shalit argues that our obligations to future generations should be seen as a matter of justice and not of charity; and that this generation has a duty to consider future generations when distributing access to natural resources, deciding on environmental policies and even budget planning.<sup>51</sup> The future is barely represented in most contemporary decision - making because of the ethic that underpins such decisions;<sup>52</sup> thus an ethic that is protective of the environmental interests of posterity needs to be introduced.

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<sup>48</sup> See A Harel, 'Theories of Rights' in M Golding and W Edmundson (eds), *Blackwell Guide To The Philosophy Of Law And Legal Theory* (Wiley Blackwell 2004) ch 13

<sup>49</sup> See J Feinberg, 'The Rights of Animals and Unborn Generations' in W Blackstone (ed), *Philosophy and the Environmental Crisis* (University of Georgia Press 1974) 65; B Norton, 'Environmental Ethics and The Rights Of Future Generations' (1982) 4 Env Ethics 322; J Gaba, 'Environmental Ethics and our Moral Relationship to Future Generations: Future Rights and Present Virtue' (1999) 24 Colum J Env L 249, 264

<sup>50</sup> B Gower, 'What Do We Owe Future Generations?' in D Cooper and J Palmer (eds), *The Environment in Question: Ethics and Global Issues* (Routledge 1992) 1

<sup>51</sup> His view aligns with the Communitarian theory of intergenerational justice. See A De Shalit *Why Posterity Matters: Environmental Policies and Future Generations* (Routledge 1999) 113-124

<sup>52</sup> LVilkka, *The Intrinsic Value of Nature* (Value Inquiry Books 1997) 100; See also C Hargrove (ed), *Religion and Environmental Crisis* (University of Georgia Press 1986) 54-55

## 1.4 Theoretical Underpinnings of Environmental Law

The ethic underlying a group of environmental laws determines the scope of operation of such laws. There are four major philosophical theories that influence environmental protection laws - Animal liberation/rights theory, biocentrism, ecocentrism, and anthropocentrism (strict and weak).

*Animal liberationists* argue that cruelty to animals is immoral not because it will lead to cruelty to humans, but because animals can suffer. They reject the idea that less rational human beings exist in order to serve more rational ones.<sup>53</sup> They contend that the pleasure and pain that animals experience are morally relevant, and that sentience is the necessary and sufficient condition for a creature to receive moral consideration<sup>54</sup>.

Not only philosophers working specifically within animal ethics but also philosophers in other fields of philosophy have made inputs in animal ethics. Martha Nussbaum, for instance, has argued that our sympathy with the suffering of non human animals must guide us as we try to define relationships between humans and animals. Thus, although she justifies certain uses of animals, her approach secures basic entitlements for animals based on their fundamental capacities.<sup>55</sup> Singer, a foremost animal liberationist, however argues that some non-human organisms - sentient animals should be taken into account for what they are in themselves even if this causes inconvenience for human beings. He labels failure to take sentient animals into equal moral consideration with humans as 'specieism', which is similar to racism and sexism and should be condemned from a moral point of view.<sup>56</sup>

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<sup>53</sup> P Singer, 'Ethics and the New Animal Liberation Movement' in P Singer (ed), *In Defense of Animals* (Basil Blackwell 1985) 1-10

<sup>54</sup> See P Singer, 'All Animals are Equal' in T Regan and P Singer (eds), *Animal Rights and Human Obligations* (2<sup>nd</sup> edn, Englewood Cliffs 1989) 148-162

<sup>55</sup> See M Nussbaum 'Beyond Compassion and Humanity: Justice for Non-Human Animals' in C Sunstein and M Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (OUP 2004) ch 6; A Schinkel, 'Martha Nussbaum on Animal Rights' (2008) 13 (1) *Ethics and the Environment* 41, 44-45 ; see also J Derrida *The Animal that Therefore I Am* (3<sup>rd</sup> ed, Forham University Press 2008) 41-52

<sup>56</sup> P Singer, *Animal Liberation* (Pimlico 1995) xvi

It is important to distinguish between ‘animal welfare’ and ‘animal rights’ theories. Singer’s theory is an example of the former. Animal rights theorists actively adopt the language of rights. The animal rights theorists believe that one right way to treat animals is to treat them as ends in themselves and never as means, because animals, like us, have rights that precede other interests. These theorists can be divided into the *strong* animal rights theorists and the *weak* animal rights theorists. Reagan, one of the former group argues that adult mammals should be seen as conscious, and as having beliefs and desires as well as a degree of self-awareness. He also claims that these animals have independent preferences and the ability to act on them. From this, he infers the claim that these animals can be harmed by unwanted things inflicted upon them or by being deprived of wanted things. Reagan distinguishes between ‘moral agents’ and ‘moral patients’. Moral agents, according to him, are able to behave in a moral way while ‘moral patients’ are not able to make moral decisions and are not accountable for what they do morally. However, Reagan argues that they are still morally considerable.

Although adult mammals are moral patients, they count from a moral point of view because they possess a life.<sup>57</sup> According to him, individuals are subject of a life if they have beliefs and desires, perception, memory and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare interests; a psychophysical unity over time and an individual welfare in the sense that their experiential life fares well or ill for them.<sup>58</sup>

The *weak* animal rights theorists however believe that animal rights are based on their interest.<sup>59</sup> Warren, a major proponent of this theory argues against Reagan’s Animal Rights view, rejecting what she calls the ‘the strong animal rights position’ and advocating

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<sup>57</sup> See T Regan and P Singer (eds) (n 54) 21

<sup>58</sup> Ibid 244

<sup>59</sup> See M Warren, *Moral Status: Obligations to Persons and Other Living Things* (OUP 1997) ch 10; J Robbins, ‘God and Nature: Saving Souls and Salmon’ *New York Times* (New York, 22 October 2000) 6

the ‘weak animal rights view’ asserting that what divides human animals from non-human animals is the capacity for rational thought, which provides for reasoned co-operation and non-violent conflict resolution. Also, our capacity for rational thought makes us more dangerous, which leads to the need to have clear controls over our behaviour. So, being able to change our behaviour based upon reasoned thought/argument is what separates us from other animals.<sup>60</sup>

*Animal liberationists and Biocentrists* differ to the extent that the latter argue that all life forms are ‘moral patients’- entities to which we should accord moral consideration. According to biocentrists, we have a duty towards all forms of life. One of the main representatives of the biocentric theory is Kenneth Goodpaster. He argues that being a living thing is both a necessary and a sufficient condition for moral considerability.<sup>61</sup> Unlike Peter Singer, he argues that the prerequisite for having interests is not sentience. He distinguishes between ‘welfare interests’ and ‘preference interests’. He argues that an organism which lacks the psychological ability to take *an interest in anything* (preference interests) still has things which *are in its interests*. According to Goodpaster, it is welfare interests that matter. Plant and non-sentient organisms have such welfare interests. They can be healthy or unhealthy, flourishing or not flourishing. It is in their interest to flourish, even if they cannot take an interest in flourishing.

Another major proponent of the biocentric theory is Paul Taylor. In *Respect for Nature*<sup>62</sup> he develops a justification for human duties towards other living organisms. He advocates a human attitude of respect for nature. Such an attitude involves the recognition that humans are part of an interconnected and interdependent ecosystem to which they are

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<sup>60</sup> For detailed discussions on Animal Rights, see M Bekoff, *Minding Animals: Awareness, Emotions & Heart* (OUP 2000); C Cohen and T Reagan, *The Animal Rights Debate* (Lanham 2001); C Diamond, ‘Eating Meat & Eating People’ in C Sustein and M Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2004)

<sup>61</sup> K Goodpaster, ‘On Being Morally Considerable’ (1978) 75 J Phil 308

<sup>62</sup> P Taylor, *Respect for Nature: A Theory of Environmental Ethics* (Princeton University Press 1986) 95-102



not intrinsically superior and that every living organism is a 'unique individual, pursuing its own good in its own way'.<sup>63</sup> This provides the justification for the 'intrinsic value' or inherent worth of all living beings. He argues that the pursuit of their good is as vital to any living organism as the pursuit of a human good is to a human being. On this basis, he defends a position of 'biocentric equality'- all organisms of whatever species ought to be treated equally and respectfully.

Albert Schweitzer, another biocentrist maintains that '...all living beings have the will to live, and all living beings with the will to live are sacred, interrelated and of equal value. It is, therefore, an ethical imperative for us to respect and help all life forms.'<sup>64</sup> Following this line of thought, Robin Attfield argues that an organism's ability to flourish and to exercise its basic capacities, gives it intrinsic value, for which we must extend moral consideration to it. Accordingly, we have an obligation to care for the well-being of all living organisms.<sup>65</sup>

*Ecocentric* theorists are however more holistic than the animal liberationists and biocentrists in their views. They focus on the integrity of the ecosystem and the value of species as a whole. They expand the definition of 'moral patient' to include nature as a whole. Aldo Leopold,<sup>66</sup> a foremost ecocentrist developed this theory in a chapter in his book, *A Sand County Almanac*, titled 'the Land Ethic'. The term 'land' as used by Leopold refers to the physical environment, or to what natural scientists and environmentalists call ecology: the study of ecosystems.<sup>67</sup> Leopold's definition of the land ethic counsels humans

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<sup>63</sup> Ibid 100

<sup>64</sup> A Schweitzer and J Naish, *Civilization and Ethics* (A&C Black 1923) noted in Y Tongjin, 'Towards an Egalitarian Global Environmental Ethics' <http://publishing.unesco.org/chapters/978-92-3-104039-9> accessed 6 November 2012

<sup>65</sup> See R Attfield, *The Ethics of Environmental Concern* (OUP 1983) 72; N Agar, *Life's Intrinsic value: Science, Ethics and Nature* (Columbia University Press 2001); B Gruzalski, 'Gandhi's Contributions to Environmental Thought and Action' (2002) 24 (3) *Env Ethics* 227; G Varner, 'Review of Nicolas Agar: Life's Intrinsic Value' (2003) 25(4) *Env Ethics* 413

<sup>66</sup> A Leopold, *A Sand County Almanac* (Sierra Club/Ballantine 1970) xviii-xix

<sup>67</sup> J Karp, 'Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development law?' (1988-1989) 19 *Env Law* 737, 740

to evolve to a point of looking beyond the myopia of our narrow human interests to include other living and non-living members of the earth's ecosystem in our decision - making processes.<sup>68</sup> He argues that humans must change their roles from conqueror of the land to member and citizen. While conceding that the land ethic cannot prevent the alteration, management and use of resources, he asserts that it does affirm their rights to a continued existence in a natural state.<sup>69</sup> He therefore argues that a movement into the era of a land ethic will come about only when humans stop making land use decisions based solely on economic considerations.<sup>70</sup> According to him, 'a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise'.<sup>71</sup> Arne Naess' Deep Ecology theory supports Leopold's view above. The theory promotes a balance of interrelationships between organisms within an ecosystem. It argues that the inherent value in nature must be recognized independently of human wants, needs or desires.<sup>72</sup>

Ecocentric theory no doubt serves as a better reminder of our responsibilities to the natural world and to animals. Following Leopold's reasoning, Rowe<sup>73</sup> argues that the ecocentric argument is grounded in the belief that, compared to the undoubted importance of the human part, the whole ecosphere is even more significant and consequential: more inclusive, more complex, more integrated, more creative, more beautiful, more mysterious, and older than time.

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<sup>68</sup> Ibid

<sup>69</sup> A Leopold (n 66) 240

<sup>70</sup> Ibid 262; see also S Zeki and H Kawabata, 'Neural Correlation of Beauty' (2004) *Journal of Neurophysiology* 1699; J Muir, *Steep Trails* (Cosimo 2006) 42 P Taylor, 'Notes on the Work in Progress of Prof. Claude Evans' (Hand Written Manuscript, September 2000) cited in J Evans, *With Respect for Nature: Living as Part of the Natural World* (SUNY 2005) 16; B Norton and D Noonan, 'Ecology and Valuation: Big Changes Needed' (2007) 63 *Ecological Economics* 664

<sup>71</sup> A Leopold (n 66) 262

<sup>72</sup> See A Naess, 'The Shallow and the Deep: Long Range Ecology Movement' (1973) 16 *Inquiry* 95-100; A Naess, 'Spinoza and the Deep Ecology Movement' in H Glasser (ed) *The Selected Works of Arne Naess* (Springer Verlag 2005) 2662-2687

<sup>73</sup> J Rowe, 'Ecocentrism: the Chord that Harmonizes Humans and Earth' (1994) 11(2) *The Trumpeter* 106

Ecocentrism goes beyond biocentricism with its fixation on organisms, for in the ecocentric view, people are inseparable from the inorganic/organic nature that encapsulates them. They are particles and waves, body and spirit, in the context of Earth's ambient energy. It tends to give moral consideration to non-living and non-human natural objects and ecological systems. Thus the preservation of biological values and biodiversity is therefore the main goal of this approach.

*Anthropocentric (human centred) theorists* assign intrinsic value to human beings alone (anthropocentrism in the *strong/ strict* sense) or they assign a significantly greater amount of intrinsic value to human beings than to any non-human things such that the protection or promotion of human interests or well-being at the expense of non-human things turns out to be nearly always justified (anthropocentrism in the *weak/enlightened* sense).<sup>74</sup> For example, Aristotle maintains that 'nature has made all things specifically for the sake of man and that the value of non-human things in nature is merely instrumental'.<sup>75</sup>

Generally, anthropocentric positions find it problematic to articulate what is wrong with the cruel treatment of non-human animals, except to the extent that such treatment may lead to bad consequences for human beings. Immanuel Kant, for example, suggests that cruelty towards a dog might encourage a person to develop a character which would be desensitized to cruelty towards humans.<sup>76</sup> From this standpoint, cruelty towards nonhuman animals would be instrumentally, rather than intrinsically wrong.<sup>77</sup>

When environmental ethics emerged as a new sub-discipline of philosophy in the early 1970s, it did so by posing a challenge to traditional anthropocentrism. In the first place, it questioned the assumed moral superiority of human beings to members of other

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<sup>74</sup> Peter Vardy distinguished between the two types of anthropocentrism. see P Vardy and P Grosch, *The Puzzle of Ethics* (2<sup>nd</sup> edn, Fount 1999) 231

<sup>75</sup> See E Baker (tr), *Politics* (OUP 1948) bk 1, ch 8

<sup>76</sup> See I Kant, 'Duties to Animals and Spirits' in L Infield (tr), *Lectures on Ethics* (Harper and Row York 1963) 3-10

<sup>77</sup> G Steiner, *The moral Status of Animals in the History of Western Philosophy* (University of Pittsburgh Press 2005) 2

species on earth. In the second place, it investigated the possibility of rational arguments for assigning intrinsic value to the natural environment and its non-human contents. It should be noted however, that some theorists working in the field of environmental ethics saw no need to develop new non-anthropocentric theories. Instead, they advocated what may be called *weak/ enlightened/ prudential* anthropocentrism.

Two foremost weak anthropocentrists are Bryan Norton and Eugene Hargrove. Bryan Norton introduced to the discussion what he termed weak anthropocentrism, a broadly humanistic project that distinguished between strong anthropocentrism and a weaker (less consumptive) variant of instrumentalism. In Norton's project, human contact with nature (for example, outdoor recreation, environmental education, ecotourism) could prompt individuals to question their own and others' ecologically irrational commitments and shape normative ideals affirming human harmony with the environment.<sup>78</sup> Although a *strict* anthropocentrist would regard the biological richness of a forest as little more than a storehouse of raw materials to be harvested and measured only in commercial terms, in Norton's view a weak anthropocentrist would value that landscape differently, recognizing its present and future beauty, cultural expressiveness, therapeutic and recreational value, and ability to inspire individuals and communities to care for and protect nature.<sup>79</sup> Hargrove's version differs from Norton's in a critical respect. Hargrove's version included recognition of the intrinsic value of natural objects.<sup>80</sup> Grounding his approach in the naturalistic traditions of nineteenth century landscape painting and field naturalism, Hargrove wrote that people may ascribe intrinsic value to the elements of nature they judge to be beautiful or scientifically interesting—just as one might ascribe intrinsic value to a priceless work of art

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<sup>78</sup> B Norton, 'Environmental Ethics and Weak Anthropocentrism' (1984) 6 *Env Ethics* 13

<sup>79</sup> B Norton, *Why Preserve Natural Variety?* (Princeton University Press 1987); B Norton and B Minteer, 'From Environmental Ethics to Environmental Public Philosophy: Ethicists and Economists, 1973–Future' in T Tietenberg and H Folmer (eds), *International Yearbook of Environmental and Resource Economics* (Edward Elgar 2002/2003); B Norton, *Toward Unity among Environmentalists* (OUP 1991)

<sup>80</sup> E Hargrove, 'Weak Anthropocentric Intrinsic Value' (1992) 75 *The Monist* 183; See also I Kant, 'Duties to Animals and Spirits' in L Infield (tr), *Lectures on Ethics* (Harper and Row 1963) 3-10

such as the Mona Lisa—even though that ascription is made from a distinctly human point of view and is intimately related to a complex suite of human values.<sup>81</sup>

They are however in agreement that all the moral duties we have towards the environment are derived from our direct duties to its human inhabitants. They maintain that the practical purpose of environmental ethics is to provide moral grounds for social policies aimed at protecting the earth's environment and remedying environmental degradation. They further argue that enlightened anthropocentrism is sufficient for that practical purpose, and perhaps even more effective in delivering pragmatic outcomes, in terms of policy making, than non-anthropocentric theories given the theoretical burden on the latter to provide sound arguments for its more radical view that the human environment has intrinsic value.<sup>82</sup>

An examination of the theories above reveals one objective but from different perspectives - respect for nature through environmental justice and intergenerational equality. Each one appears to be protecting one component of nature or the other. The animal rights theorists concentrate on animal protection; the biocentrists refer to all living organisms as 'moral patients'; since animals can be regarded as living organisms<sup>83</sup> it can be concluded that they are contemplated in a biocentric theory. The ecocentrists take it a step further by referring to all the components of nature – living (including man) and non-living as 'moral patients' suggesting the need for an equal moral consideration of the components. The contrast therefore is between ecocentrism and anthropocentrism for the fact that the former encompasses the arguments of animal liberationist and biocentrists by referring to all the components of nature – living (including man) and non - living as being equal members

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<sup>81</sup> Ibid 186

<sup>82</sup> A Light and A De-Shalit (eds), *Moral and Political Reasoning in Environmental Practice* (MIT Press 2003) 14-17

<sup>83</sup> Living organisms are split into animal and plant kingdom, which are further split into smaller groups. Since mammals are animals, and man is a mammal, then man is a living organism. Every living thing is therefore an organism. See R Wilson, 'The Biological Notion of Individual' (2007) Stanford Encyclopaedia of Philosophy <<http://www.Plato.stanford.edu/entries/biology-individual>> accessed 20 November 2012

of the ecological community; while the latter (whether strong, weak or enlightened) gives man a more exalted position. The ethical arguments this thesis will address will therefore be classified under *anthropocentric* and *ecocentric*. The next section will examine the proposals of scholars based on these two broad classifications with a view to arguing for an ethic that is more adaptable to the objective of sustainable development.

## 1.5 Analysis of Scholarly Opinions

Existing scholarly opinions on how the environment can be preserved have either an anthropocentric bias or an ecocentric bias.

Scholars with an anthropocentric bias have proposed that one major way to preserve the environment is by creating a *human* right to a clean environment that is enforced in such a way that the environment is protected for future generations by humans in this present generation. Edith Brown Weiss argues that enforcement of these intergenerational rights is appropriately done by a guardian or representative of future generations as a group, not of future individuals, who are of necessity, indeterminate. While the holder of the right may lack the capacity to bring grievances forward and hence rests on the representative's decision to do so, this inability does not affect the existence of the right or the obligation associated with it.<sup>84</sup>

Future generations have been shown to have no identifiable members, and thus no legal rights can be ascribed to an unidentifiable class of persons; however, they have moral rights that can and should be protected.<sup>85</sup> This is the point of accord with Weiss' proposal. The point of difference is in the way of enforcing the moral right. Weiss leaves it to the

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<sup>84</sup> E Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 Am J Intl L 198, 208; see also E Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational/United Nations University 1989) 25-26 ; C Trinade, 'The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change' [www.unu.edu/unupress/unupbooks/uu25ee/uu25ee0n.htm](http://www.unu.edu/unupress/unupbooks/uu25ee/uu25ee0n.htm) accessed 20 September 2012

<sup>85</sup> See paras 6; 12-14 of section 1.3 above; R Macklin, 'Can Future Generations Correctly Be Said to Have Rights?' in E Partridge (ed), *Responsibilities to Future Generations* (Prometheus Books 1981) 151-152

‘guardian’s’ *decision* to enforce this right as was done in the case of *Oposa v Factoran*<sup>86</sup> where an action was filed by several minors represented by their parents against the Department of Environment and Natural Resources in the Philippines, to cancel existing timber license agreements in the country and to stop issuance of new ones. The petitioners asserted that they represented others of their generation as well as generations yet unborn and they were granted standing by the court. The court ruled in favour of the minors, holding that the action was for self-preservation and perpetuation and so they had the standing to bring the action on behalf of future generations.

This thesis however argues that leaving it to the decision of a guardian is insufficient to secure the moral rights of future generations because the decisions reached by the courts in such situations are not based on substantive provisions thereby leaving the decisions to be subject to the whims and caprices of the judges.<sup>87</sup> Sueli Giorgetta, also arguing on a human rights-based platform, opines that the concept of Sustainable Development which is a solution to cope with development needs and the preservation of the environment for present and future generations can be achieved by the existence of a right to a healthy environment that is not only substantive but procedural in nature.<sup>88</sup> Human Rights have been defined as the right to property, freedom of religion, and so on; the rights which guarantee the concrete, real human being in their occupation, their beliefs, and so on

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<sup>86</sup> G.R. No. 101083 July 30, 1993; see also *Kahana Sunset Owners Association v Maui County Council* 948 P.2d 122 (Haw. 1997); *Montana Environmental Information Center v Department of Environmental Quality* 988 P.2d 1236 (Mont. 1999)

<sup>87</sup> See the discussion on the quasi dialectical nature of court interpretations in paras 6&7 of section 1.7 below.

<sup>88</sup> S Giorgetta, ‘The Right to a Healthy Environment, Human Rights and Sustainable Development’ (2002) 2(2) INEA 171; see also J May, ‘Constituting Fundamental Environmental Rights Worldwide’ (2005-2006) 23 PELR 113,137; D Shelton, ‘A Rights Based Approach to Conservation’ in T Greiber, M Janki, M Orellana, A Savaresi and D Shelton (eds), *Conservation With Justice: A Rights-Based Approach* (IUCN 2010) 5, 12 ; C Okpara, ‘Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle’ (2012) 5 (1) JPL 3,5

– but founded on the separation of man from man, not on the relations or community of people.<sup>89</sup>

Central to the concept of human rights is the protection of human dignity'.<sup>90</sup> The concept of a human right to a safe and healthy environment for protection of the environment or future generations is flawed considering that human rights are inherently individualistic.<sup>91</sup> Arguably, this individualism does not contemplate the foundation of environmental protection which suggests broader interests than human rights, namely, the preservation of biodiversity for man in the present and future generations. Where environmental protection is restricted to where an individual can show that he is endangered or has been harmed by an environmentally unfriendly act, then the environmental damage (whether imminent or anticipatory) which has been done to nature (land, waters, plants and animals and so on) that no one can lay claims to is not contemplated. Who/what will represent them? If they are not protected, it cannot be logically correct to say a human right will effectively preserve the environment.

On the other hand, scholars in favour of ecocentrism have proposed nature's rights with the objective of preserving the value of nature for itself and not its value to future generations. Christopher Stone, in 1972 proposed that legal rights should be given to 'forests, oceans, rivers and other so-called 'natural objects' in the environment – indeed, to the natural environment as a whole'.<sup>92</sup> Stone's book launched a debate that reached the US

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<sup>89</sup> C Beitz, *The Idea of Human Rights* (OUP 2009) 1

<sup>90</sup> See P Hayden (ed), *The Philosophy of Human Rights* (Paragon Press 2001) 4; B Orend, *Human Rights, Concept and Context* (Broadview Press 2002) 2-5; J Donnelly (ed), *Universal Human Rights in Theory and Practice* (2<sup>nd</sup> ed, Cornell University Press 2003) 22-33; J Griffin, *On Human Rights* (OUP 2008) 3; J Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 2009) 1-5; J Nickel, *Stanford Encyclopedia of Philosophy* (fall 2010 edn) <<http://plato.stanford.edu/entries/rights-human/>> accessed 18 November, 2012

<sup>91</sup> See T Berry, 'Legal Conditions for Earth's Survival' in M Tucker (ed), *Evening Thoughts: Reflections on Earth as a Sacred Community* (Barnes and Noble 2006) 107

<sup>92</sup> C Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 S Cal L Rev 450, 456; see also L Tribe, 'Ways Not to Think about Plastic Trees: New Foundations for Environmental Law' (1974) 83 YLJ 1315, 1343; C Stone, 'Should Trees Have Standing? Revisited: How Far Will Law And Morals Reach?' (1985) 59 S Cal L Rev 1



Supreme Court and inspired the dissenting view of Justice William Douglas in *Sierra Club v Morton*.<sup>93</sup> Justice Douglas argued that natural resources ought to have standing to sue for their own protection. Donald Worster argues that nature ought to have its rights because it has independent claims which press upon us.<sup>94</sup> Stone's essay and ideas appear to have also had an impact and found a new audience in the 'Earth jurisprudence' movement. This movement is best articulated by the writings of 'eco-theologian' Thomas Berry.<sup>95</sup> Berry identified the destructive anthropocentrism on which existing legal and political structures are based as a major impediment to the necessary transition to an ecological age in which humans would seek a new intimacy with the integral functioning of the natural world.<sup>96</sup>

In 2003, South African environmental lawyer Cormac Cullinan wrote *Wild Law: A Manifesto for Earth Justice* in which he expanded and articulated the basic concepts of Earth jurisprudence into what he called 'Wild law' – 'laws that regulate humans in a manner that creates the freedom for all members of the Earth Community to play a role in the continuing co-evolution of the planet.'<sup>97</sup> In sum, Cullinan advocates the creation of laws that seek to balance the rights and responsibilities of humans against those of other members of the community of beings that comprise the Earth. Emmeneger and Tschentscher further argue that humans are no longer seen as 'apart from nature' but as 'a part of nature' thus not only humans but every entity of nature, carries the potential to have rights on its own because humans are equal to all other living entities of nature and competition is allowed among them.<sup>98</sup>

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<sup>93</sup> 405 US 727 (1972)

<sup>94</sup> See D Worster, 'The Intrinsic Value of Nature' (1980) 4(1) Env L Rev 43

<sup>95</sup> See M Bell, 'Thomas Berry and an Earth Jurisprudence: An Exploratory Essay' (2003) 19 (1) Trumpeter [www.rainforestinfo.org.au/deep-eco/earth%20jurisprudence/Earth520justice.htm](http://www.rainforestinfo.org.au/deep-eco/earth%20jurisprudence/Earth520justice.htm) accessed 20 March 2012

<sup>96</sup> T Berry, *The Great Work: Our Way Into the Future* (Bell Tower 1999) 18-22; T Berry, 'Rights of the Earth: Recognising the Rights of all Living Things' (September/October 2002) 214 *Resurgence* <[www.resurgence.org/magazine/author2-thomas-berry.html](http://www.resurgence.org/magazine/author2-thomas-berry.html)> accessed 20 March 2012

<sup>97</sup> C Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books 2003) 32

<sup>98</sup> S Emmeneger and A Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (Summer 1994) 6 (3) GIELR 545, 571

Animal Rights theorists like Reagan are among this category of writers. They claim that animals should possess rights because they are sentient and not for their usefulness to humans.<sup>99</sup>

Again, this thesis agrees with the above proponents for nature's rights to the extent that preserving nature's rights will eventually result in preserving the environment for future generations. However, it argues that a strict preservation of nature's rights in such a way that the instrumental value of nature (to man) is ignored is indicative of an indifferent attitude to man's need for nature. The imperative of bridging these two extremes has formed the core of this research. Both extremes can be accommodated in one ethic as follows: If nature is preserved for its instrumental value to posterity, the result will be twofold: (1) other values of nature will be preserved; (2) the environment will be preserved for future generations. The proposed ethic will thus bridge the anthropocentric views of the first group of writers discussed, with the ecocentric views of the second group of writers and thus make the dividing line between the two unnecessary. This argument of a proposed ethic which is less anthropocentric in nature is similar to that which Joshua Bruckerhoff proposes.<sup>100</sup> He advocates a Constitutional protection of nature; while acknowledging that (1) the current understanding and enforcement of environmental rights is flawed because it is too anthropocentric, and that (2) a right to a healthy environment should actually guarantee a healthy environment, not just an environment that satisfies minimal health standards for humans, he argues that there are two principal avenues for incorporating biodiversity considerations into environmental rights jurisprudence. First, the constitutional provision should link the concept of environmental rights with a broader definition of environmental health. Second, and more importantly, courts should interpret and apply environmental

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<sup>99</sup> See T Regan, 'The Case for Animal Rights' in T Regan and P Singer (n 53); J Feinberg, 'The Rights of Animals and Future Generations' in W Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press 1974)

<sup>100</sup> See J Bruckerhoff, 'Giving Nature Constitutional Protection: A less Anthropocentric Interpretation of Environmental Rights' [2008] 86 Texas L Rev 616

rights more broadly. Because courts are unlikely to expand environmental rights on their own initiative, advocates of environmental rights should (1) highlight the scientific evidence that illustrates the interrelationship between biodiversity and human health and (2) emphasize the nexus between cultural values-specifically the rights of indigenous peoples-and overall environmental health.

There is no doubt that such broad interpretation as proposed by Bruckerhoff will go a long way in protecting biodiversity; but two questions may be raised from this argument: (1) does *nature* connote only ‘biodiversity’? and (2) would a constitutional right which is conferred on nature directly not do away with the enormous task of highlighting the relationship between biodiversity and man and the nexus between indigenous peoples and environmental health? To the first poser, this thesis argues that nature is both living and non-living; and the non-living components of nature are just as instrumental as the living components of nature.<sup>101</sup> To the second, it is argued that merely *implying* that nature possesses rights will not effectively protect nature, as it leaves nature in the realm of ‘objects’ and not ‘subjects’. Once nature is expressly granted rights by a Constitution, there will be no need for inferring nature’s rights from other constitutional provisions.

## **1.6 Justifying *Eco-Anthropocentrism***

This section will establish that the anthropocentric objective of sustainable development will be more effectively achieved using a less anthropocentric ethic. Thus it explores and proves that the option of using nature’s right to exist for posterity (*eco-anthropocentrism*) is one very effective way of preserving the environment for future generations.

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<sup>101</sup> ‘Nature’ is derived from the Latin word *natura* (translated from the Greek word *physis*) which originally related to the characteristics that plants, animals, and other products of the world derive of their own accord. From late 14<sup>th</sup> century, however, one of the things it connoted was ‘the Phenomena of the physical world collectively, including plants, animals, landscape and other features and products of the universe’. This thesis will adopt the later definition because it is broad enough to accommodate the former. See D Harper, ‘Nature’ Online Etymology Dictionary <http://www.etymonline.co./index.php?term=nature> accessed on 13 November 2012; N Nadaf, *The Greek Concept of Nature* (SUNY 2006) 1-3

Arguably, the ultimate benefactor of environmental protection is man. This is reflected in principle 1 of the Rio Declaration 1992 which provides that ‘human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’. Also, the preamble to the United Nations Convention on Bio diversity 1992 provides (among others) that member states should be ‘determined to conserve and sustainably use biological diversity for the benefit of present and future generations’.

Scientists have also acceded to the importance of biodiversity to the sustenance of human life on earth by acknowledging that the preservation of biodiversity is, by definition, vital for an ecologically sustainable society<sup>102</sup>. Thus, when the non-human components (like air & water) of the environment are protected, the living conditions of humans are enhanced.

Protection of Nature also has social and cultural benefits. Degradation of the environment in areas that are populated with indigenous peoples does not only result in human rights violations but also the loss of many cultures. For instance the indigenous groups in the Niger Delta region of Nigeria are a good example following the oil exploration operations in the area. For example, the Boupere lake in Nigeria’s Niger Delta region is of great spiritual significance to the Ijaws. They claim that the god of the Ijaws (Egbesu) originated from there. It is also regarded as a place of refuge and safety in times of war.; a place to seek favours and also to perform rituals prior to the fishing year.<sup>103</sup>

As a matter of fact, almost every justification for environmental protection printed or aired in major news media reflects an anthropocentric bias. For example, an April 2008 article from the BBC, entitled ‘Species Loss Bad for Our Health’, surveys ‘a wide range of

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<sup>102</sup> N Gunningham and M Young, ‘Toward Optimal Environmental Policy: The Case of Biodiversity Conservation’ (1997) 24 Eco L Q 243, 247

<sup>103</sup> O Adekola, ‘Oil Smears the Gods of the Niger Delta’ (*Earth Collective Magazine*, 20 March 2011) <<http://www.earthcollective.net/category/art/>>accessed 16 November 2012

threatened species whose biology could hold secrets to possible treatments for a growing variety of ailments.’<sup>104</sup> Barack Obama consistently spoke about global warming in terms of its impact on future human generations. In a 2007 speech at Portsmouth, New Hampshire, he stressed the urgency of the issue by saying that ‘the polar ice caps are now melting faster than science had ever predicted...this is not the future I want for my daughters.’<sup>105</sup>

The foregoing reveals that the objective of sustainable development is unquestionably anthropocentric. However, drawing from the discussion on anthropocentrism above,<sup>106</sup> it is only an anthropocentric ethic that is long sighted enough to contemplate the future that can be applied in achieving the objective of sustainable development; and since the major argument of weak anthropocentrists<sup>107</sup> is so forward looking as to prescribe that the practical purpose of environmental ethics is to provide moral grounds for social policies aimed at protecting the earth’s environment and remedying environmental degradation, this ethic is arguably more appropriate in achieving the protection of the environment for future generations.

Using this ethic as a foundation therefore, it can be argued that this ethic can be applied effectively to achieve sustainable development. Future generations have been argued to possess moral rights only.<sup>108</sup> Since moral rights cannot be enforced directly like legal rights, effective measures for their indirect enforcement are imperative. So far the moral rights of future generations have been enforced by procedural means<sup>109</sup> but as it will be argued shortly, this model is unlikely to effectively protect the moral rights of future generations because of the quasi-dialectical nature of legal interpretation.<sup>110</sup> It is therefore

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<sup>104</sup> ‘Species Loss Bad for Our health’ (*BBC News*, 23 April 2008) <<http://news.bbc.co.uk/2/hi/science/nature/7361539.stm>> accessed 12 March 2012

<sup>105</sup> ‘The Obama-Biden Environmental Plan’ <<http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf>> accessed 12 March 2012

<sup>106</sup> See paras 12-13 of section 1.4 above

<sup>107</sup> See para 14-16 of section 1.4 above

<sup>108</sup> See paras 6; 12-14 of section 1.3 above

<sup>109</sup> See para 3 of section 1.5 above

<sup>110</sup> Para 7 of section 1.7 below

argued that the rights of future generations can be effectively enforced through the legal rights of existing entities. Two options of existing entities abound: (a) man; (b) nature. Man's right to a clean environment may be used because in laying claims to a clean environment, the environment can be preserved for his unborn children. Also, nature's right to exist for future generations can preserve the environment for posterity. Arguably, nature's right will be a more effective model for the preservation of the environment for future generations because as it has been argued,<sup>111</sup> human rights are individualistic and can hardly suffice when it comes to environmental harm that affects a nebulous entity. Where harmful acts against nature are challenged by humans, nature's status still remains at the level of 'good' or 'resource'; consequently, any remedy for the damage challenged is not specifically (directly) for nature. Rather, nature benefits incidentally from the compensated *human* who has instituted the action or on whose behalf the action has been instituted. With this, nature's chance of being remediated or restored is negligible.

In light of the foregoing therefore, Nature's right to exist for future generations may be explored.

### **1.6.1 *Nature as a Right Holder***

Arguably, nature can be a holder of group rights which can be applied in a relational context.

Human rights may be conceptually distinct from group rights, but the two sorts of rights are united by the same underlying values and concerns. Jones<sup>112</sup> draws a distinction

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<sup>111</sup> Para 5 of section 1.5 above

<sup>112</sup> P Jones, 'Human Rights, Group Rights and Peoples' Rights' (1999) 21 (1) HRQ 81; 84-94; Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102 ; See also V Dyke, 'The Individual, The State, and Ethnic Communities in Political Theory' (1977) 29 World Politics 343; D Sanders, 'Collective Rights' (1991) 13 HRQ 368-386; M Freeman, 'Are There Collective Human Rights?' (1995) 43 Pol Stud 25; W Felice, 'The Case For Collective Human Rights: The Reality of Group Suffering' (1996) 10 Ethics & Intl Aff 47; R Thompson, 'Ethnic Minorities and the Case for Collective Rights' (1997) 99 (4) American Anthropologist 786; J Oestreich, 'Liberal Theory and Minority Group Rights' (1999) 21 (1) HRQ 109

between ‘collective’ conception of group rights and ‘corporate’ conception of group rights. He argues that the collective conception of group rights does not suppose that the interests that individuals have as members of a group can always be represented as interest that they might have as independent and unrelated individuals.

Morally, however, the case for a group right rests upon the interest of the individuals who form the group, regardless of the strength of their shared identity and the interdependence of their shared interests.<sup>113</sup> A collective right will qualify as a human right only if it is a right that can be ascribed universally to human beings and that rests upon their moral status as human beings.

On the corporate conception by contrast, a group must possess a morally significant identity as a group independently, and in advance, of whatever interests and rights it may possess. Just as an individual has an identity and a standing as a person independently and in advance of the rights that he possesses, so a group, if it is to be conceived as a corporate entity, must possess a morally significant identity and status independently and in advance of whatever rights it may hold. Its interests and rights follow upon its identity as a group; they are not what identify the group as a group.<sup>114</sup> One way in which a corporate conception of group rights threatens individuals is by making it possible for the moral standing of the group to displace that of individuals within the group. It follows therefore that if group rights are understood as corporate rights, they will be rights that are categorically different from human rights.<sup>115</sup>

Therefore, corporate rights cannot be human rights because they are rights held by corporate entities rather than human beings. They are rights grounded in whatever gives

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<sup>113</sup> P Jones (n 1112) 84

<sup>114</sup> Ibid 86

<sup>115</sup> See G Rainbolt, ‘What are Group Rights?’ in C Sistare, L May and L Francis (eds), *Groups and Group Rights* (University of Kansas Press 2001) 71–81; J Waldron, ‘Taking Group Rights Carefully’ in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 203–220

those corporate entities their special moral status rather than rights grounded in the status of humanity or personhood. Thus a ‘corporate group’ in this sense can comprise of humans or non-humans (including nature). The corporate conception accords groups a status that is ultimate rather than derivative,<sup>116</sup> nevertheless, individuals can also bear the costs of a group’s corporate right.

However, if group rights are understood as *collective* rights, thinking about group rights can amount to thinking about human rights because they might be represented by individuals, albeit by individuals jointly rather than severally. They might also be rights grounded in considerations that relate to human beings and human interests in general. Because the language of human rights has become the lingua franca of international standard setting, there has been an unfortunate tendency to present every significant international standard in that language.<sup>117</sup> We do not have to re-invent group rights as human rights for groups to have rights or for their rights to be morally significant. Group rights are every bit as important to human dignity and well-being as individual rights.<sup>118</sup>

From the foregoing, nature (though non – human) can be a holder of corporate group rights; and if nature possesses a corporate group right to exist for future generations, then logically, the moral rights of future generations to a clean and healthy environment can be effectively protected. However, this thesis argues that nature’s right to exist must be employed in a relational context.

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<sup>116</sup> A Vincent, ‘Can Groups be Persons?’ (1992) 42 (44) *Review of Metaphysics* 687; see also P Jones (n 109) 92

<sup>117</sup> ‘Group Rights, *Stanford Encyclopedia of philosophy* (Sept 22, 2008) <<http://plato.stanford.edu/entries/rights-group>>accessed 12 November 2012

<sup>118</sup> R Clinton, ‘The Rights of Indigenous Peoples as Collective Group Rights’ (1990) 32 *Ariz L Rev* 739, 747



### 1.6.2 *Nature's Right in a Relational Context*

Leaving nature's right to function in isolation from other existing rights will be counterproductive to achieving sustainable development.

Contemporary writers such as Jennifer Nedelsky<sup>119</sup> and Joseph William Singer<sup>120</sup> have progressed the relational view of rights. Nedelsky, for example,<sup>121</sup> argues that rights should not be viewed as clashing of individual interests or as absolute power within predefined spheres. Instead she situates rights within a broad web of relationships, limited by their impact on others. She notes, 'what rights in fact do and have always done is construct relationships—of power, of responsibility, of trust and obligation'.<sup>122</sup> From this perspective, rights create a setting in which individuals and communities live their lives and interact with others. This setting consists partly of rules requiring individuals to respect the legitimate interests of others. Other rules are designed to ensure that the comprehensive Earth community functions well.

Rights should thus be understood as socially constructed, involving not only relations between people, but also between people and things. While some might view relationships with nature as a limitation on human autonomy, Nedelsky points out that individuals achieve autonomy not in isolation, but by a combination of independence and dependence. She argues that this approach shifts the focus from protection against others to structuring relationships so that they foster autonomy; this makes some of the most basic presuppositions about autonomy to change: dependence will no longer be seen as the

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<sup>119</sup> See J Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1 Rev Const Stud 1; J Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts, and Possibilities' (1998) Yale J L & Fem 86; J Nedelsky, 'Reconceiving Rights and Constitutionalism' (2008) 7 (2) JHR 139;

<sup>120</sup> J Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000)

<sup>121</sup> Although Nedelsky's argument refers to human relationships, the term 'relationship' will be extended in this thesis to include nature, having established above that non-human entities can be right holders. See section 1.6.1 above

<sup>122</sup> See J Nedelsky, 'Reconceiving Rights as Relationship' (n 119) 13

antithesis of autonomy but a precondition in the relationships. Consequently, interdependence becomes the central fact of political life.<sup>123</sup>

Placing nature's rights in a relational context with other rights will have a profound implication for environmental preservation which this thesis advocates, because it puts property rights in a context and places limits on them. For example, if the Nigerian Government passes a law giving the water bodies in the Niger Delta Region a right to flow; such a right would definitely conflict with the rights of property owners to draw water to meet their own needs. Based on a purely individualistic ideology of rights, the dispute will be resolved based on legal hierarchy of the rights; but if the focus is on relationship, then both social and environmental factors are taken into consideration in resolving the dispute. From a conservationist standpoint, a good outcome would be that the property owners' right to draw water would become affected. This does not mean the right is non-existent; it simply puts it within the context of considering the needs of the river and its function in the preservation of ecological integrity. Thus property owners can draw water to the extent that these functions of the river are not jeopardized. Thus securing nature's right means nature ceases to be property.

Securing nature's right therefore implies that the framework of governance that defined nature as property must be changed to give nature a 'subject' status. It is this kind of ethical shift that this thesis proposes - a shift from environmental protection (*strict anthropocentrism*) to environmental management (*eco-anthropocentrism*) by giving nature a right to exist for posterity.

The argument for *eco-anthropocentrism* - using nature's right (ecocentrism) to protect the environment for future generations (anthropocentrism) can be illustrated as follows: A (this generation) has a moral duty to B (future generations) not to destroy C

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<sup>123</sup> Ibid 8

(nature, the environment). The Protection of C is for its contribution to B. Since B is presently not in existence, C should have a (legal) right to protect its instrumentality to B, that is, to enforce the (moral) right of B. Thus the moral right of posterity will be more effectively protected when nature's right to exist for it is guaranteed. In a situation where this right of nature is threatened, a better way may be to arrest such a threat by creating provision for components of nature to exercise their *legal* rights through a 'guardian'. Such rights clearly transcend the realm of *human rights* to the realm of *corporate group rights* where the rights are held by all the members of the group as a whole (in this case, nature).

A shift to this *eco-anthropocentric* ethic to underlie environmental protection laws can be effected through the amendment of a primary law. The next section will argue that law is a crucial agent for the achievement of change in society but cannot work without complementary social, political, cultural and economic changes.

### **1.7 Law as an Instrument for Social Change**

Law has always been considered as one of the important instruments of effecting social change.<sup>124</sup> Social change is held to occur only when social structure – patterns of social relations, established social norms and social roles – changes.<sup>125</sup> Thus, a change in the established pattern of social relations between racial or ethnic groups in a society would constitute social change.

Debates around the relationship between law and social change more often than not, tend to crystallise around inquiring as to which of the two (law and change) should

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<sup>124</sup> J Conley and L Mather, *Invitation to Law and Society: An Introduction to the Study of Real Law* (University of Chicago Press 2010) ch 1; S Roachanleu, *Law and Social Change* (Sage Publishers 2000) chs 1& 6; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing 2005) ch 5

<sup>125</sup> R Cotterrell, *The Sociology of Law* (OUP 2007) 47; Y Dror, 'Law and Social Change' (1959) 33 Tulane L Rev 788,797

influence the other?<sup>126</sup> There is a symbiotic relationship and interdependence between law and social change.<sup>127</sup> Society is in constant motion;<sup>128</sup> For example, China managed to moderate through law its population growth and as a result devoted more of its resources to economic development and modernization.<sup>129</sup> The conversion of Rome from Republic to Empire could also not have been accomplished except by means of explicit legal decree buttressed by the doctrine of imperial sovereignty.<sup>130</sup> The point of all this is that, as these societal changes occurred, it is agreed that they had influenced changes in the existing legal institutions of the time, and indeed those emergent legal institutions themselves had in turn laid the basis for new norms and values which were consistent with the nature of the new society at a particular period.<sup>131</sup>

The colonial era, and indeed its demise, provides yet another glaring example of the symbiotic nature of the relationship between law and social change. Colonial oppression and repression led to a clamour and agitation for political emancipation and independence.

<sup>126</sup> See for example U Baxi, *Towards a Sociology of Indian Law* (Satvahan 1986) ch 7; R Boudon, *Theories of Social Change: A Critical Appraisal* (J Whitehouse tr, University of California Press 1991 ) ch 1; B Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (CUP 2006) ch 1

<sup>127</sup> See C Epp, 'Law as an Instrument of Social Reform' in K Whittington, K Daniel and G Caldeira, *The Oxford Handbook of Law and Politics* (OUP 2008) 34; A Mohan, 'Social Transformation: Interplay Between Law and Social Change: With Special Reference to India' (2009) National Law School of India Research Paper 11/2009, 2 [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501262](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1501262) accessed 16 March 2012 ; Social Care Institute for Excellence, 'Exploring the Relationship Between Law and Social Issues' [www.scie.org.uk/assets/elearning/law/law02/resource/pdf/L02/relationship\\_between\\_law\\_and\\_social\\_issues.pdf](http://www.scie.org.uk/assets/elearning/law/law02/resource/pdf/L02/relationship_between_law_and_social_issues.pdf) accessed 16 March 2012

<sup>128</sup> P Kecskemeti, *Static and Dynamic Society* (Rand Corporation 1966); J Rex and G Singh, 'Pluralism and Multiculturalism in Colonial Society – Thematic Introduction' (2003) 5 (2) *IJMS* 106; J McDonald, 'No Society is Static – The Seasons of Civilization' [www.johnmcdonald.info/seasons-of-civ/](http://www.johnmcdonald.info/seasons-of-civ/) accessed 20 March 2012.

<sup>129</sup> See L Jiali, 'China's One-Child Policy: How and How Well Has It Worked?' (1995) 21(3) *Popul and Dev Rev* 563-585; Z Yi, 'Is Fertility in China in 1991-92 Far Below Replacement Level?' (1996) 50 (1) *Popul Stud* 27-34; A Hilali, 'China's Population Growth: Policy and Prospects' (1997) 33 (1) *China Report* 1-34

<sup>130</sup> W MacDonald, *The Architecture of the Roman Empire* (Yale University Press 1987) 3-19; H Flower (ed), *The Cambridge Companion to the Roman Republic* (Cambridge 2004); T Holland, *Rubicon : the Last Years of the Roman Republic* (Doubleday 2005) 298-337; H Flower, *Roman Republics* (Princeton University Press 2009) 61-97

<sup>131</sup> T Makhethhe, 'Law and Social Change: A Brief Outline' (A presentation made at the workshop of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA), Maseru, 11 October 2010 to 15 October 2010)

This became the new ethos and mores of the African society.<sup>132</sup> Finally, due to pressure, the colonial masters had to give in. This change led to what became known as ‘Africa’s independence constitutions’. These new legal instruments produced new ethos and mores in an independent African state.<sup>133</sup> Under the new post-colonialism dispensation, constitutional principles were either expressly provided for in the constitutions or were developed by the courts of law through constitutional interpretation. For example, ‘Democracy’, ‘Good governance’, ‘free and fair elections’, an ‘open and transparent government’, ‘public accountability’, ‘judicial independence’, ‘separation of powers’, ‘rule of law’, and so on.<sup>134</sup>

Conscious amendments of a central law (usually, a Constitution) by a central legislative body constitutes one of the most important avenues for changing law.<sup>135</sup> A constitution represents the highest or supreme law in a nation that establishes the formal rules which direct and constrain government powers, defining the relationships between government institutions, and protecting individual rights.<sup>136</sup> According to Mohanan, a country’s constitution is ‘the set of fundamental principles that together describe the organizational framework of the state and the nature, the scope of, and the limitations on the

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<sup>132</sup> Ibid

<sup>133</sup> Ibid; For detailed discussions of Colonialism and the African Societies, see J Go, ‘Modelling the State: Post-Colonial Constitutions in Asia and Africa’ (2002) 39(4) JSEAS 558; F Mlaponi, ‘Colonialism in Africa’ (2008) <authorpalace.com/politic/colonialism-in-africa> accessed 16 March 2012; K Appiagyei-Atua, ‘Civil Society, Human Rights and Development in Africa: A Critical Analysis’ <www.peacestudiesjournal.org.uk/dl/civil.pdf> accessed 16 March 2012; B Talton, ‘African Resistance to Colonial Rule’ www.exhibitions.nypl.org/africanage/essay-resistance.html accessed 16 March 2012

<sup>134</sup> T Makhetha (n 131)

<sup>135</sup> See J Birkhead, ‘Making Laws More Effective: Jeremy Bentham and Jean Jacques Rousseau on Good Citizenship’ (1995); M Munalula, ‘Law as an Instrument of Social Change: The Constitution and Sexual Discrimination in Zambia’ (1995) 1 (2) IJDL 131; R Posner *Law and Legal Theory in England and America* (Clarendon Press 1996); G Halmai, ‘Review: The Constitution as an Instrument of Change’ (2005) 3 (1) IJCL 157; D Strauss, *The Living Constitution* (OUP 2010) ch 6; US/AFA J Leg Stud 79; J Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (HUP 2011) ch 1

<sup>136</sup> H Hart, *The Pure Theory of Law* (M Knight tr, University of California Press 1967) 201; B Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Co 1982) 7; C Bruch, W Coker and C Van Arsdale, ‘Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa’ (2001) 26 Colum J Env L 131, 138; J McHugh, *Comparative Constitutional Traditions* (Peter Lang 2002) 4; J May, ‘Constituting Fundamental Environmental Rights Worldwide’ (2005-2006) 23(1) PELR 113, 118; W Wade and C Forsyth, *Administrative Law* (10<sup>th</sup> edn, OUP 2009) 15

<sup>136</sup> J Akande, *Introduction to the Nigerian Constitution* (Sweet & Maxwell 1982) 1

exercise of state authority'.<sup>137</sup> Limbach argues that there are three traits that primarily characterise the principle of supremacy of the constitution: the possibility of distinguishing between the constitution and other laws; the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.<sup>138</sup>

Considering the role of the central legislature against the other organs of government (the Judiciary and the Executive), one issue merits special attention: in a country with a rigid Constitution (like Nigeria)<sup>139</sup>, the possibility of changing the law is limited.<sup>140</sup> Therefore, in such a country, the other organs of Government bear a special responsibility and fulfil an important role. In such a situation (of a rigid constitution), the courts may attempt to effect social change through interpretation of the Constitution to meet the dynamism of society. Gerald Rosenberg<sup>141</sup> however argues otherwise saying that legal rulings fail to spark social progress not already underway, therefore reformers with limited resources and energy should direct their efforts to avenues such as electoral politics, grassroots organizing, and street activism. Nothing is wrong, according to Rosenberg, with pressing for favourable legal rulings, but one should not hold out unrealistic hopes for their efficacy.<sup>142</sup> *Roe v Wade*<sup>143</sup>, for example, did little to increase a woman's access to abortion services. *Brown v Board of Education*<sup>144</sup> produced a negligible increase in the proportion of

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<sup>137</sup> P Mohanan, *Constitutional Law* (3<sup>rd</sup> ed, Irwin Law 2006) 3; see also J Buchanan, 'Why Do Constitutions Matter?' in N Berggren, N Karlson and J Negrelius (eds), *Why Constitutions Matter* (Transaction Publishers 2000) 1-17; E Chemerinsky, *Constitutional Law: Policies and Principles* (3<sup>rd</sup> ed, Aspen 2006) 13

<sup>138</sup> J Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64(1) MLR 1, 3

<sup>139</sup> This will be discussed in detail in chapter two

<sup>140</sup> J Mallory, 'The Politics of Constitutional Change' (1983) 45(4) JLCP 53,54

<sup>141</sup> G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2<sup>nd</sup> ed, University of Chicago Press 2008)

<sup>142</sup> Ibid 8-13

<sup>143</sup> 410 U.S 113 (1973); see also ibid 201

<sup>144</sup> 347 U.S 483 (1954)

black schoolchildren attending integrated schools, and rulings upholding gay marriage, according to the new edition, have yielded similarly unimpressive results.<sup>145</sup>

Rosenberg's position has however been challenged. One of such challenges is that *The Hollow Hope* relies on an overly narrow, distorted, or otherwise inappropriate model of causation. They argue that Rosenberg generally treats the Court as a unilateral actor/agent whose influence is measured primarily by changes in the behaviour of other political actors. According to Schultz and Gottlieb, 'Rosenberg's model fundamentally misstates the Court's role in social change. It obscures how the Court exerts power and how it makes policy'.<sup>146</sup> In place of Rosenberg's 'nomological model,' Schultz and Gottlieb offer a model of necessary, or 'but for,' causality.<sup>147</sup> McCann has similarly opposed Rosenberg's 'instrumental, linear, and unidirectional' model of causation arguing that judicial influence is not primarily independent from, but largely linked to, that of other institutions.<sup>148</sup>

This thesis argues in line with Rosenberg's conclusion to the extent that Judicial interpretation of laws appears to operate in a quasi-dialectical manner. This is because, one court's decision may be weighted towards social concerns, but it may be preceded or succeeded by decisions of another court that has a stronger orientation towards traditional or stricter constitutional concerns. Thus an express legislation is indispensable to provide consistency and continuity of the desired change.

In Rosenberg's view, the constraints to Judiciary's impact on society are due to the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's limited enforcement powers.<sup>149</sup> According to him, these constraints may be overcome under

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<sup>145</sup> See G Rosenberg (n 138) 39-169 (on civil rights); 173-246 (on women's rights); 339-429 (on same-sex marriage)

<sup>146</sup> D Schultz and S Gottlieb, *Leveraging the Law: Using Courts to Achieve Social Change* (Peter Lang 1998) 179

<sup>147</sup> Ibid 182-184

<sup>148</sup> M McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago Press 1994) 459; see also D Purvis, *Evaluating Legal Activism: A Response to Rosenberg* (2009) 17 Buff J Gen L Soc Pol 1

<sup>149</sup> G Rosenberg (n141) 1046

some conditions: when there is ample legal precedent for change, there is support for legal change from substantial numbers in Congress and from the national executive, there is strong support or weak opposition from citizens, and when conditions otherwise support compliance with the judicial decisions at issue.<sup>150</sup> Arguably, however, these conditions must exist simultaneously, and in a particular order for a judiciary to be able to effect social change. The order may briefly be set out as follows: (1) strong support or weak opposition from citizens; (2) support for legal change (Constitutional Amendment) from substantial numbers in the legislature and executive; (3) ample legal precedent for change.

The order is thus set out because the private citizens or NGOs will first need to sensitize the public who will join forces with them to put pressure on their representatives in the legislature and executive to amend the law. The amended law will – also based on the activities of civil society - impact the consistency of the decisions of the courts.<sup>151</sup>

Overcoming these constraints is however only the first step towards the social change which the law desires to effect; because after the law has been amended, there is nearly always a certain difference ('tension') between actual social behaviour and the behaviour demanded by the law. It is this 'tension' that has made some theorists question the ability of the law to bring about social change. Marxists, for example argue that it may take some time for certain changes to be reflected in law, but it would be inconceivable for law to bring about changes in society.<sup>152</sup> A different argument against the possibility and desirability of using law to bring about social change was made by the historical school of jurisprudence and its founder, Savigny. He regarded law as an organic growth indigenous to every society. Therefore, he opposed legislation.<sup>153</sup>

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<sup>150</sup> Ibid

<sup>151</sup> This is similar to the sequence of events that preceded the granting of rights to slaves in the American Constitution discussed below.

<sup>152</sup> S Avineri, *The Social and Political Thoughts of Karl Marx* (CUP 1968) chs 1&2; A Callinicos, *The Revolutionary Ideas of Karl Marx* (first published in 1983, Bloomsbury 2010) ch 6

<sup>153</sup> A Hamilton, *Savigny: The Volksgeist & Law* (Counter Current 2011) 9-12



These arguments can be challenged based on the recognition that law plays a subtle role in shifting our perceptions and the way we view the world. Obvious examples include how the abolition of slavery, the universal recognition of human rights and the limited recognition of animal rights have expanded our field of moral concern.<sup>154</sup> The example on the abolition of slavery which Berry cites is a crucial one.<sup>155</sup> Despite wave after wave of petitions (beginning in 1787) to the US Congress seeking the end of slavery, the House of Representatives and the Senate chose to ignore them. Most of the free people of the United States also ignored such pleas and strove to stifle any discussion of slavery. They turned a collective blind eye, rather than confront the brutality which with their silence they condoned and their own role in its continuance. Even in the Northern states where slavery was not allowed, the economy was integrally linked with that of the Southern slave states. Out of all the different methods suggested for ending slavery – presidential proclamation, federal law, state law, gradualism, compensation and colonization – the final course settled upon was a constitutional amendment that abolished slavery in the entire United States. It took over a Century after the end of slavery for the goals of the Abolitionists to be realized – to have the rights of freed slaves and their descendants secured and upheld.<sup>156</sup>

The 1860 – 1861 secession crisis in America between the Republicans (supported by the North) and the Confederacy (supported by the South) prompted Americans to consider more seriously the amendment option. The civil war had good consequences like press attention and petitions. On April 8, 1864, the Thirteenth Amendment to the United States Constitution was passed the senate, 38-6, which was 8 votes more than the needed

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<sup>154</sup> See T Berry, *The Great Work: Our Way into the Future* (Bell Tower 1999); T Berry, 'Legal Conditions for Earth Survival' in N Tucker (ed), *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books 2006) 10-15; See St Thomas Berry University, Center for Earth Jurisprudence <<http://www.earthjuris.org>> Earth Jurisprudence Resource Center <[www.earthjurisprudence.org](http://www.earthjurisprudence.org)>; 'Navdanya & Earth Democracy' <<http://www.navdanya.org/>> all accessed 12 March 2012

<sup>155</sup> See H Klein and J Klein, *The Atlantic Slave Trade* (CUP 1999) 103; H Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade* (Simon and Schuster 1999) 1440

<sup>156</sup> See A Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York University Press 2001) ch 2; H Herald and S Gabbard (eds), *Lincoln and Freedom: Slavery, Emancipation and the Thirteenth Amendment* (Southern Illinois University Press 2007) ch 3

two-thirds majority. It officially abolished and continues to prohibit slavery and involuntary servitude, except as punishment for a crime. It was passed by the House on January 21, 1865, and adopted on December 6, 1865. This was followed by the Fourteenth Amendment which granted citizenship to all persons born or naturalized in the United States; and the Fifteenth Amendment which protected voting rights from being denied on the basis of ‘race, colour, or previous condition of servitude’.<sup>157</sup>

Changes began to be seen following years of persistent activities of movements (like the Civil Rights Movement, Niagara Movement, National Association for the Advancement of Coloured People (NAACP), the New Negro, Universal Negro Improvement Association), sponsorships by wealthy philanthropists and even public apologies. Though these changes came after almost a century after slave trade had been abolished,<sup>158</sup> they would not have taken place if there was no pressure for an express prohibition of slave trade in the Constitution.<sup>159</sup>

Law therefore is crucial (but limited) instrument of social change; thus it needs the actions of other interacting agents to help it achieve the desired change. However, it has been rightly argued that the potential shift in norms or societal behaviour anticipated by law is a function of the statement which the law itself makes. That is, a reflection of the commitment of the Government as evidenced in the express wordings of the law.<sup>160</sup>

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<sup>157</sup> See M Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (CUP 2001)

<sup>158</sup> See for example, *Brown v Board of Education* 347 U.S. 483 (1954); *Jones v Alfred H. Mayer Co.* 392 U.S. 409, 88 S. ct. 2186, 20 L.Ed. 2d 1189 [1968]; *Weidenfeller v Kidulis* 380 F. Supp. 445 [E.D. Wis. 1974]; *US v Kozminski* 487 U.S. 931, 108 S.Ct. 2751, 100 L.Ed. 2d 788 [1988]; *Steirer v Bethlehem Area School District* 789 F sup. 1337 [E.D. Pa. 1992]

<sup>159</sup> S Christopher, ‘When Politics Becomes Protest: Black Veterans and Political Activism in the Postwar South’ (2009) 71 J Pol 113; see also D Beito and L Beito, *Black Maverick: T.R.M Howard’s Fight for Civil Rights and Economic Power* (University of Illinois Press 2009) 72-79.

<sup>160</sup> This will be demonstrated in detail in chapter five; however, see generally, C Sunstein ‘On the Expressive Function of Law’ (1996) 5 E Eur Const Rev 66-72

## 1.8 Conclusion

This chapter has argued that the objective of sustainable development is to keep the environment in a state of ecological equilibrium for the benefit of future generations who have been proven to have rights (moral) to a clean environment. It further argued that although the objective of sustainable development is anthropocentric, the objective cannot be effectively achieved using *strict* anthropocentric laws. Instead it argues that laws employed towards the achievement of the objective of sustainable development should be less anthropocentric (preferably *eco-anthropocentric*) in order to effectively accommodate the interests of future persons. Thus where environmental protection laws are based on a *strict* anthropocentric ethic, a shift in ethic becomes imperative.

Although law is a good agent for effecting this shift, this chapter established that expected change in society cannot be achieved without complementary agents that will tackle cultural, social, economic and political impediments just like the case of the abolition of slave trade; it also showed that without the involvement of these same agents, there is little hope of passing a law that reflects this ethical shift. Thus the same factors that will facilitate social change through law will also be instrumental in the ethical change.

## CHAPTER TWO

### NIGERIA, THE NIGER DELTA PEOPLES AND ENVIRONMENTAL DEGRADATION

*Man's exploitation and development activities generally generate impacts on the environment. It is a basic fact that the quality of our environment has been on the decline over the years due to our quest for greater and industrial economic growth. It should be noted that there is a continuous interaction in every environment and the ultimate effect is the need for man to consider the inter-boundary relationship between environmental events and impacts. In other words, an environmental change affecting the existing relationship might pose serious threats to human population, aquatic organisms, plants, animals, air/water quality, and bottom sediments, among others.*<sup>1</sup>

#### 2.1 Introduction

As well-endowed as Nigeria's Niger Delta region is, its potential is constantly being threatened by the fearful spate of environmental degradation especially in the form of water, air and land pollution by oil exploration companies as well as indigenes, which will be shown in the course of this chapter. A variety of studies<sup>2</sup> has proven that the inhabitants of the Niger Delta area, who depend on the rivers and the outlying farmlands for their livelihood, have suddenly found themselves trapped in a ravaged environment that can no longer provide them with succour.

This chapter will focus on the case study of this thesis – the Niger Delta region of Nigeria. It will begin with the big picture of the Nigerian political environment by demonstrating that the political system in Nigeria is Federalist and thus characterised by a rigid constitution especially with respect to the amendment of sections on fundamental rights; the purpose of this is to show that if the general premise established in chapter one is

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<sup>1</sup> C Udia, 'The Environmental Pollution Consequences of the Niger Delta Wetland Occasioned by Gas Flaring' (2005) 1(1) J Land Use & Dev Stud 1, 9

<sup>2</sup> N Ashton Jones and O Douglas, *The Human Ecosystems of the Niger Delta* (Environmental Rights Action 1998) ch 2; World Bank, *Nigeria-Poverty: Environmental Linkages in the Natural resource Sector – Empirical Evidence from Nigerian case Studies with Policy Implications and Recommendations* (World Bank Report No. 25972, 30 June 2003) <[www.worldbank.org](http://www.worldbank.org)> accessed 02 January 2012; S Omotola, 'The Next Gulf? Oil Politics, Environmental Apocalypse and Rising Tension in the Niger Delta' (2006) 1(3) Accord 1, 4-5

found to be valid having been tested in chapters three and four, then any attempt to change the existing ethic in form of a justiciable constitutional right may be possible but difficult owing to the requisite high consensus from the legislators. It thereafter narrows down to a description of the Niger Delta region as a repository of one of the country's major sources of revenue, yet the indigenes of the region who also depend on the physical environment (which is being constantly degraded) for their sustenance live in penury and consequently can hardly access justice. Finally, the chapter shows the level of degradation in the region to be a nagging menace to the right to a clean environment of present and future generations..

## **2.2 The Nigerian Constitution and Political System**

Nigeria has a population of over 140 million in a country of 356,376 square kilometres. There are over 374 ethno-lingual groups, each with its distinguishing culture and tradition and the political culture of Nigerians is highly influenced by their ethnic, religious and regional backgrounds and identities are constructed along similar lines.<sup>3</sup>

Federalism became an inevitable choice for Nigerians immediately after the attainment of independence in 1960, as a result of Nigeria's diversity. This means that power is divided between the national government and a number of regional governments in such a way that each exists as a government separately and independently from the others, operating directly on persons and properties within its territorial area, conducting its own affairs and with an authority in some matters exclusive of all the other governments.<sup>4</sup> It was adopted as a mechanism for managing conflicts that resulted from interactions among diverse groups in the country.<sup>5</sup> Federalism remained a part of Nigeria's political system since independence in 1960 except for a brief period in 1966, when the military decreed a unitary system of Government. The federation was transformed from a highly decentralized

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<sup>3</sup> O Otite, *Ethnic Pluralism and Ethnicity in Nigeria* (Shaneson 1999) 10

<sup>4</sup> B Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell 1983) 1

<sup>5</sup> R Suberu, *Federalism and Ethnic Conflict in Nigeria* (USIP 2001) 21

polity with three large component units at independence to a highly centralized one with thirty six component units (states) and a Federal Capital Territory. There are also 774 local governments in the Federation.<sup>6</sup> Thus, by Section 2(1) of the Constitution, Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria. Subsection 2 of the same section also provides that Nigeria shall be a federation consisting of states and a Federal Capital Territory.

Nigeria was ruled for many years by the military. During that period the Federal Military Governments legislated by issuing Decrees while the State Military Governments legislated by issuing Edicts. The Federal Military Government had the power to legislate on any subject and once it did so, the Decree had the effect of covering the field. The Decree could not be challenged in court and it superseded any Edict promulgated by a State Military Government. In fact such an Edict was deemed to be null and void.<sup>7</sup>

It was under this arrangement that most of Nigeria's legislations on environment were promulgated. The most significant of which are the Land Use Decree 1978, the Federal Environment Protection Decree, 1988 and the Nigerian Urban and Regional Planning Decree 1992. With the return of civilian rule in 1999, a new Constitution was enacted (the 1999 Constitution)<sup>8</sup>. These legislations now earn their validity as 'existing laws' by the provisions of section 315 (1) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that 'Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution...' . The Constitution is therefore Nigeria's most fundamental law. It is, in its own words, 'supreme'. Section 1 (1) provides

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<sup>6</sup> E Okpanachi and A Garba, 'Federalism and Constitutional Change in Nigeria' (2010) 7 (1) Federal Governance 1, 3

<sup>7</sup> UNEP, 'Recent Development in Nigeria Strengthening Legal and Institutional Framework for Promoting Environmental Management' (Paper presented at the Global Judges Symposium On Sustainable Development and the Role of Law, Johannesburg, South Africa 18-20 August 2002) <[www.unep.org/law/Symposium/Documents/Country.../NIGERIA.doc](http://www.unep.org/law/Symposium/Documents/Country.../NIGERIA.doc)> accessed 03 January 2012

<sup>8</sup> Which is the current Constitution; hereinafter, 'the 1999 Constitution'

that the ‘Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria’.

The Constitution itself contains environmental protection provisions in sections 16(2), 17(2) (d), 17(3) and 20. Section 16(2) provides that the state shall direct its policy towards ensuring the promotion of a planned and balanced economic development. Section 17(2)(d) provides that ‘in furtherance of the social order exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented’. Section 17(3) provides that the state shall direct its policy towards providing adequate opportunities for securing the means of livelihood and employment; providing adequate medical and health facilities; protection of children and aged and promotion of family life. Section 20 further provides that ‘the state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria’. Section 20 is the only provision that deals directly with environmental matters. All the above sections are however contained in Chapter II of the Constitution - the Chapter on Fundamental Objectives and Directive Principles of State Policy. Matters under this chapter are not justiciable by virtue of section 6(6)(c) of the Constitution.<sup>9</sup> The classic case on the effect of section 6(6) (c) of the Constitution is *Bishop Okogie (Trustee of Roman Catholic Schools) & Ors v Attorney – General of Lagos State*.<sup>10</sup> In that case, Maman Nasir PCA (as he then was) held that while section 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to, observe and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that no court has jurisdiction to pronounce on any decision as to whether any organ of government

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<sup>9</sup> Matters under this chapter are tantamount to what are usually regarded as second generation rights or Economic, Social and Cultural Rights and third generation rights. See para 3 of section 5.2 below

<sup>10</sup> [1980] FNR 445

has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy.<sup>11</sup>

*Fundamental Objectives* refer to the identification of the ultimate objectives of the nation, while *Directive Principles of State Policy* indicate the path which leads to those objectives.<sup>12</sup> They are tantamount to moral rather than legal precepts. In the words of Ojo:<sup>13</sup> ‘.... they are mere pious hopes and aspirations, which could be likened to a cheque on a bank payable whenever the resources of the bank permit’. Therefore, all the matters under this chapter do not have the force of law. They are reckoned as mere guiding principles.

Against the recommendation of the competent sub-committee for a limited justiciability of these Objectives and Principles, the Nigerian Constitutional Drafting Committee rejected the possibility even of obtaining mere declaratory judgments from the courts. In support of their opposition, two main reasons were advanced. Firstly, cognizance by the courts would lead to constant confrontation between the executive and/or the legislature on the one hand and the judiciary on the other. Secondly, these Objectives and Directive Principles relate to policy goals or directions rather than to the existence or extent of legal rights vested in any individual or group normally subject to the jurisdiction of courts of law.<sup>14</sup>

Under the 1999 Constitution, the doctrine of separation of powers is established by the separate enumeration of the powers of the legislature,<sup>15</sup> executive<sup>16</sup> and judiciary<sup>17</sup>. This

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<sup>11</sup> p 455

<sup>12</sup> Report of the Constitution Drafting Committee (hereafter cited as Report) vol 1, v; See also E Wiles, ‘Aspiration Principles for Enforceable Rights? The Future for Socio-Economic Rights in National Law’ (2006-2007) 22 Am U Intl L Rev 35, 36

<sup>13</sup> W Ofonagoro, ‘The Great Debate: Nigerian Viewpoint on Draft Constitution’ organized by the *Daily Times* of Nigeria 1976/77, 42 noted in E Okon, ‘The Environmental Perspective in the 1999 Nigerian Constitution’ (2003) 5(4) Env L Rev 256, 264

<sup>14</sup> Report, Vol 1, p vii; See F Williams, ‘Fundamental Rights and the Prospects for Democracy in Nigeria’ (1967) 115 (7) U Pa L Rev 1073, 1085; A Ojo, ‘Fundamental Human Rights in Nigeria : The 1963 and 1979 Constitutional Provisions’ (1977-1980) NJCL118; B Nwabueze, *A Constitutional History of Nigeria* (Longman 1982)151

<sup>15</sup> S 4

<sup>16</sup> S 5

<sup>17</sup> S 6



enumeration of the various functions state that of the legislature primarily as making laws for the ‘peace, order and good governance of the federation or any part thereof...’<sup>18</sup> The Federal and State legislative powers are contained in the 1999 Constitution of Nigeria under the Exclusive Legislative List and the Concurrent Legislative List, respectively. While the Exclusive Legislative List applies exclusively to the Federal Government, the Concurrent Legislative List is shared concurrently by the Federal and State Governments.<sup>19</sup> Neither the Exclusive nor the Concurrent List contains a specific item on the protection of environment. However in *Attorney General of Ondo State v Attorney General of the Federation*<sup>20</sup> the supreme court reasoned that a state government has the power to legislate on the environment in view of the fact that the word ‘state’ in section 20 may include State Government by virtue of the combined effect of sections 4(2), (4) and (7) of the Constitution which provide for the legislative competence of the National and State Houses of Assembly.<sup>21</sup>

The doctrine of judicial review is ingrained in the concept of separation of powers with the objective of instituting a system of checks and balances. Judicial review is the principal tool at the disposal of the judiciary for *checking* the legislature.<sup>22</sup> Judicial review raises certain imperative questions relating to representative democracy and the power of judicial review of legislative actions to which perhaps the unease between the legislature and the judiciary may be traced.<sup>23</sup> Some of these questions border on whether, in fact, the court (whose members are not elected) is exercising political power disguised in rule interpretation when it departs from the words of a statute; and whether in having this power,

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<sup>18</sup> S 4(2)

<sup>19</sup> Schedule II of the 1999 Constitution

<sup>20</sup> (2002) 6 SC (pt 1) 1

<sup>21</sup> P 138

<sup>22</sup> W Ebewole and M Etudaiye, ‘Judicial Review and the Legislature Under the 1999 Constitution’ [http://www.etudaiyeandco.com/publications/judicial\\_review\\_and\\_the\\_legislature\\_under\\_the\\_1999\\_constitution.pdf](http://www.etudaiyeandco.com/publications/judicial_review_and_the_legislature_under_the_1999_constitution.pdf) accessed 02 January 2012. See also A Sheu, ‘Judicial Review and Judicial Supremacy: A Paradigm of Constitutionalism in Nigeria’ <<http://www.oppapers.com/essays/Judicial-Review-And-Judicial-Supremacy-A/364973>> accessed 02 January 2012

<sup>23</sup> W Ebewole and M Etudaiye (n 22)

it could at all be distinguished from the power of the legislature (whose members are elected) whose powers it seeks to regulate. Though the two arms keep struggling to balance each other, judicial reviews with respect to complying with the procedures of the Constitution or other statutes and the infringement of fundamental rights have recorded less friction.<sup>24</sup>

Nigeria, like many other federal countries has a rigid constitution.<sup>25</sup> Amending the Constitution requires securing two-thirds majority in the two houses of the National Assembly (House of Representatives and Senate). In addition, amendment requires approval by resolution of sub-national legislatures of not less than two-thirds of all the 36 states in the Federation.<sup>26</sup> This rigidity is sterner on issues that have to do with the restructuring of the federation and fundamental rights of citizens. This strictness however does not erase the possibility of an amendment to the chapter on fundamental rights especially with citizenship participation.<sup>27</sup> Amending the Constitution for these purposes or amending the section that stipulates the procedure of altering the Constitution requires the approval of four - fifths majority of all the members of the National Assembly and approval of not less than two thirds majorities in the sub-national legislatures of the federation.<sup>28</sup> Securing such majorities in the national and sub-national legislatures is quite Herculean given Nigeria's divisive politics of federalism. The sub-national representation in the upper houses is important with respect to a constitutional amendment. The effectiveness of this sub national representation

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<sup>24</sup> See *Governor of Kaduna State v The House of Assembly, Kaduna State & Anor* (1981) 2 NCLR 444; *Attorney General of Ondo State v Attorney General of the Federation* (2002) 10 NSCQR 1034; the Fundamental Rights also known as the First Generation Rights or the Civil and Political Rights are placed in Chapter IV of the Nigerian Constitution. See para 3 of section 5.2 below

<sup>25</sup> See B Akande, 'Towards True Federalism in Nigeria' (2003) 1(2) Nigeria Bar Journal 205; O Fatula, 'Constitutional Issues in Nigerian Federalism' (2003) 6 UMLJ 84; C Nwuche, 'A New Nigerian Constitution' <[http://www.nigerdeltacongress.com/articles/a\\_new\\_nigerian\\_constitution.htm](http://www.nigerdeltacongress.com/articles/a_new_nigerian_constitution.htm)> accessed on 16 May 2011

<sup>26</sup> S 8 of the Constitution

<sup>27</sup> See for example, the role of individuals in facilitating the entrenchment of equal rights to slaves in the American Constitution in para 10 of section 1.7 above; and the role of individuals discussed in section 4.3.1.1 below.

<sup>28</sup> S 9 of the 1999 Constitution

is influenced by the extent of the representation because a sub national unit is given equal representation regardless of its population. This can lead to significant over-representation of smaller states. Consequently, votes in the lower legislative houses may be a function of over representation and not necessarily reflect a consensus. Also, the strong centrally organised parties which dominate politics in Nigeria at both the national and sub national levels result in the sub-national representatives in the upper houses voting based on party bias and not sub national interests.<sup>29</sup>

One major advantage of having a rigid Constitution like the Nigerian one, however, is that only under rigid constitutions is it possible to establish institutional controls to ensure the conformity of legislation with the principles considered indispensable for the well-being of the community.<sup>30</sup> Nevertheless, a rigid constitution does not by itself guarantee the stability and continuity of a country's constitutional law. Although the amending process in the Nigerian Constitution is difficult, the possibility has been manifested in the three amendments made to the constitution in 2011.<sup>31</sup> The Senate has received 169 proposals from different interest groups, while the House of Representatives has 95 proposals before it as the national assembly gets set for another constitutional amendment exercise.<sup>32</sup> For example recent developments have been made with respect to electoral hegemony matters like the eligibility of candidates for different offices;<sup>33</sup> financial autonomy to the electoral commission;<sup>34</sup> political parties and the practice of internal democracy;<sup>35</sup> the jurisdiction and powers of electoral tribunals;<sup>36</sup> annulment and re-run of elections;<sup>37</sup> the manner of

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<sup>29</sup> See I Eliagwu, *Politics of Federalism in Nigeria* (Adonis and Abbey 2007) chs 1&2

<sup>30</sup> H Higgins, 'The Rigid Constitution' (1905) 20(2) PSQ 203, 204

<sup>31</sup> See 'Amendments to the 1999 Constitution of Nigeria'

[www.lawnigeria.com/constitution/Amendments.html](http://www.lawnigeria.com/constitution/Amendments.html) accessed on 16 December 2012

<sup>32</sup> 'NASS Set for 264 Amendments' *Punch* (Nigeria, September 29 2012) 1

<sup>33</sup> S 137

<sup>34</sup> S 81

<sup>35</sup> S 228

<sup>36</sup> S 223

<sup>37</sup> S 135(2)

succession when the President or the Governor of a state is outside the country.<sup>38</sup> Although the above matters may not be regarded as controversial ones, the current disposition of the National Assembly to Constitutional amendment, gives credibility to the assertion that a constitutional amendment may be difficult but not impossible. Among those at the fore front of the recent amendments were the Sovereign National Conference (which midwifed the exercise), in conjunction with prominent civil society organisations such as the Pro National Conference Organisation (PRONACO), Citizens' Forum for Constitutional Reform (CFCR), United Action for Democracy (UAD), Campaign for Democracy (CD).<sup>39</sup> Again, among those who have submitted proposals for amendments are coalitions of women groups, youth associations, political parties, media, and other civil society organisations.<sup>40</sup> Thus, it may not be easy to overcome old restraints with new forces, but with the resilience of civil society, it is achievable.

Having examined the federalist nature of the Nigerian Government, the next section will focus on the Niger delta of Nigeria with a view to establishing how much the Niger Delta indigenes depend on the Niger Delta environment for their sustenance, yet live in penury thus making access to justice a luxury.

### **2.3 The Socio-Economic Environment of the Niger Delta Peoples**

The Niger Delta Region is not a separate entity as far as the operation of Nigeria's federalism is concerned. It is only so called because of the common characteristic of the states in that region, namely, they are all oil producing states.

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<sup>38</sup> S 145; and S 190 in the case of a Governor.

<sup>39</sup> See O Obeche, 'Another Constitutional Review: Can Federal Government Solve the Puzzle?' *The Economy* (2009) [www.theeconomyng.com/news121.html](http://www.theeconomyng.com/news121.html) accessed on 16 December 2012

<sup>40</sup> C Ndijihe, Constitutional Amendment: What the People Want' *Vanguard* (Nigeria, 4 November 2012) 14

The Niger Delta is inhabited by a variety of small ethnic groups or host communities. The area, comprising nine states<sup>41</sup> of the thirty six states in Nigeria, covers a total landmass of about 29,100 square kilometres or about 3.2 per cent of the total land area of the country, excluding the continental shelf.<sup>42</sup> According to the United Nations Development Programme (UNDP), in a recent report, difficult topography encourages people to gather in small communities of the estimated 13,329 settlements in the region, 94 per cent of which have populations less than 5,000. These are rural communities, which offer very limited economic opportunities. Infrastructure and social services are generally deplorable and vastly inadequate for a regional population of nearly 30 million people.<sup>43</sup> Education levels are below the national average and are particularly low for women. While 76 percent of Nigerian children attend primary schools, this level drops to 30 per cent in some parts of the Niger Delta. The poverty level in the Niger Delta is exacerbated by the high cost of living. In the urban areas of Rivers State, the cost of living index is the highest in Nigeria.<sup>44</sup> The majority of the people of the Niger Delta do not have adequate access to clean water or health-care. Their poverty, in contrast with the wealth generated by oil, has become one of the world's starkest and most disturbing examples of the 'resource curse',<sup>45</sup> an economics paradox that the two central effects of dependence on economic rents (in Nigeria's case, oil) are economic inefficiency and, consequently the obstruction of socioeconomic development.<sup>46</sup>

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<sup>41</sup> These are: Abia, Akwa Ibom, Bayelsa, Cross Rivers, Delta, Edo, Imo, Ondo and Rivers States.

<sup>42</sup> O Djebah, 'Tackling The Niger Delta Conundrum' (August 2003) <[http://www.nigerdeltacongress.com/tarticles/tackling\\_the\\_niger\\_delta\\_conundr.htm](http://www.nigerdeltacongress.com/tarticles/tackling_the_niger_delta_conundr.htm)> accessed 28 November 2012

<sup>43</sup> UNDP, *Niger Delta Human Development Report* (UNDP 2006) 15

<sup>44</sup> World Bank, *Defining an Environmental Development Strategy for the Niger Delta* (World Bank Report, 2005) <[www.wds.worldbank.org/servlet/main](http://www.wds.worldbank.org/servlet/main)> accessed on May 20 accessed 16 November 2012

<sup>45</sup> Ibid 74; See also Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009) 27 available at <<http://www.amnestyusa.org/>>accessed 20 November 2012

<sup>46</sup> M Basedau and J Lay, 'Resource Curse or Rentier Peace? The Ambiguous Effects of Oil Wealth and Oil Dependence on Violent Conflict' (2009) 46 J Peace Research 757; see also R Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993) ch 1; M Ross, 'The Political Economy of the Resource Curse' (1999) 51 (2) World Politics 312; R Dode, 'The Political Economy of Resource Curse and the Niger Delta Crisis in Nigeria: Matters Arising' (2011) 2 (2.1) Afro Asian J Soc Sci 1

Environmental quality and sustainability are fundamental to the overall wellbeing of the Niger Delta indigenes and the development of the region. They find aspects of the ecosystem useful for their cultural, emotional and spiritual satisfaction.<sup>47</sup>

The economy of the region is traditionally dependent on fishing and farming. The network of creeks and rivers of the delta, and the coastal seas provide the basis for a peasant fishing industry. Although there is fishing for subsistence in all parts of the delta, the scale of operation in the outer delta (by the coast), where fishing is the main source of livelihood, is along commercial lines.<sup>48</sup> The estuaries and the coastline were renowned as the suppliers of the fish consumed in the urban centres before the inception of the modern fishery of the country. Whereas the mangrove swamps region of the outer delta depends on fishing, the inner delta area of rain forest is a farming region.<sup>49</sup> Except for the rubber and oil palm plantations, the agricultural landscape is one of the small staple food-crop farms. The oil palm and rubber economies of the area were important foreign exchange earners before the country became a major exporter of crude oil.<sup>50</sup>

It is on such a predominantly peasant economy that the oil industry came to be superimposed. Although the urban centres have grown rapidly because of the oil industry, it is in the rural areas, the actual production centres of petroleum, that the environmental crisis consequent on the exploitation of the resource is really evident.<sup>51</sup> A disturbance of the environment occurs not only during the search for oil but also in the process of production, storage and transportation. Prospecting activities necessitate the provision of various routes,

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<sup>47</sup> See text to fn 100 of Chapter One above on the usefulness of the Oporoma lake to the Ijaw people.

<sup>48</sup> C Ikporukpo, 'Petroleum exploitation and the Socio-Economic Environment in Nigeria' (1983) 21 Intl J Env Stud 193

<sup>49</sup> Ibid

<sup>50</sup> Ibid 194

<sup>51</sup> Ibid

pits, stream diversions and embarkation facilities, and the use of explosives in rivers and seas among others. These, in varying degrees deprive people of their livelihood.<sup>52</sup>

The ultimate effect of environmental impacts of oil production activities is therefore a reduction in the standard of living of the people in the area of primary activities. 'The overall economic effects are extensive and include the dislocation of traditional economic activities and associated livelihood pursuits as well as danger to human health'.<sup>53</sup> Measured in pecuniary terms, the economic impacts amount to reduced income and the loss of alternative uses of resources consumed by oil communities.<sup>54</sup>

The lack of funds remains a fundamental problem of hiring scientific experts, as well as access to courts by indigenes of the Niger Delta who intend to institute actions for environmental pollution. Section 251 of the 1999 Constitution of Nigeria provides that aggrieved persons can only seek redress against the oil and other big multinational companies engaged in the oil industry in the Federal High Courts. The courts are located only in state capitals, putting them out of the easy reach of most rural inhabitants. The litigation process is fraught with many technicalities, requiring the services of legal practitioners that most of the indigenes cannot afford.<sup>55</sup>

Ordinarily, an established legal aid scheme ought to confer benefits on a section of the community - those who only have modest means - to bring their suits and conduct their defence at the expense of the state. In Nigeria the Legal Aid scheme only covers selected criminal and civil cases as contained in schedule II to the Act and, the poverty level income of applicant, not exceeding =N=5,000.00 (Five Thousand Naira)<sup>56</sup> per annum. The legal aid

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<sup>52</sup> Ibid

<sup>53</sup> A Babatunde, 'The Impact of Oil Exploitation on the Socio-Economic Life of the Ilaje-Ugbo People of Ondo State, Nigeria' (2010) 12 (5) JSDA 61, 71

<sup>54</sup> Ibid

<sup>55</sup> UNDP ( n 43) 83

<sup>56</sup> Approximately £19

scheme in Nigeria is however fraught with problems,<sup>57</sup> namely, under funding of the Legal Aid scheme by the Federal Government; delays in treating case files by Directors of Public Prosecution; delays in investigating crime by the police; even though the 1994 Legal Aid Act was amended to address the foregoing drawbacks and to provide legal aid in civil claims dealing with fundamental rights violations under Chapter IV of the 1979 Constitution. Moreover, the Act confines legal aid to civil and political rights only and excludes matters under chapter II of the Constitution - which are usually of more concern to the poor. Unfortunately environmental matters are one of such matters.<sup>58</sup>

In some cases however, the indigenes of the Niger Delta Region are sponsored by private individuals or Non-Governmental Organizations.<sup>59</sup> In most of such cases however, the victims of pollution are poorly compensated for environmental pollution. Several other cases have dragged on for many years.<sup>60</sup> It has been argued that the absence of standards of liability for oil pollution and of rules for determining compensation to victims could have contributed to the way cases are delayed and/or decided in favour of the oil companies.<sup>61</sup>

The level of environmental damage as will be shown in the next section, has given rise to incessant conflicts between the Federal Government of Nigeria (FGN) and the Multinational Oil Companies (MOCs) on one hand, and the Oil Producing Communities (OPCs) on another. <sup>62</sup> At the core of the crisis are unresolved disputes centered on resource control and environmental degradation.

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<sup>57</sup> See 'An Overview of the State of Legal Aid Scheme in Nigeria Pre 1999' <[http://www.ilagnet.org/jscripts/tiny\\_mce/plugins/filemanager/files/Antwerpen\\_2007/Additional\\_Papers/An\\_Overview\\_of\\_the\\_State\\_of\\_Legal\\_Aid\\_Scheme\\_in\\_Nigeria\\_Pre\\_1999.pdf](http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Antwerpen_2007/Additional_Papers/An_Overview_of_the_State_of_Legal_Aid_Scheme_in_Nigeria_Pre_1999.pdf)> accessed 23 July 2012

'Pro Bono Profile: Nigeria' <<http://www.trust.org/trustlaw/country-profiles/pro-bono.dot?id=14ffe563-a002-4abd-a979-37cb4a30c090>> accessed 03 January 12; J Frynas, 'Problems of Access to Courts in Nigeria: Results of A Study of legal Practitioners' (2001) 10(3) SLS 397, 399

<sup>59</sup> Ken Saro-Wiwa's Organization, Environmental Rights Action, Amnesty International, among others.

<sup>60</sup> See O Adewale, 'Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria' (1989) 33 (1) JAL 91

<sup>61</sup> Ibid ; see sections 4.2.2 & 4.2.4 below

<sup>62</sup> For more details on the link between the degraded Niger Delta environment and the conflict in the region, see V Dike, 'Environmental Degradation, Social Disequilibrium and the Dilemma of Sustainable Development Within the Niger Delta of Nigeria' (2004) 34(5) JBS 686, 689-99; J Bisina, 'Environmental Degradation in the Niger Delta' *Pambazuka News* (Nigeria, 7 December 2006); V Ojaborotu and O



## 2.4 Environmental Degradation in the Niger Delta Region

The environment of the Niger Delta Region is the focus of this thesis for two main reasons: First, It makes up about 7.5 per cent of Nigeria's total land mass; it is the largest wetland and maintains the third-largest drainage basin in Africa. It is also home to about 31 million people. Secondly, more than 60 per cent of the people in the region depend on the natural environment for their livelihood;<sup>63</sup> the area is also the location of massive oil deposits, which have been extracted for decades by the government of Nigeria and by multinational oil companies. Oil has generated an estimated 600 billion dollars for Nigeria since the 1960s.<sup>64</sup>

Niger Delta's environment can be broken down into four ecological zones: coastal barrier islands, mangrove swamp forests, freshwater swamps, and lowland rainforests.<sup>65</sup> This incredibly well-endowed ecosystem contains one of the highest concentrations of biodiversity on the planet, in addition to supporting abundant flora and fauna, arable terrain that can sustain a wide variety of crops, lumber or agricultural trees, and more species of freshwater fish than any ecosystem in West Africa.<sup>66</sup> The Niger Delta is characterized by a great variety of plant species arranged in a complex vertical structure of forest canopies. Some economically important rainforest trees include mahoganies, African walnut (*Lovoa*), *Mansonia*, and a number of others.<sup>67</sup> Many other non - timber forest products extracted from these forests have significant value as food items and medicines as well as for other

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Olawale, 'Understanding the Niger Delta Conflict: Matters Arising' in Ojaborotu (ed), *Contending Issues in the Niger Delta Crises of Nigeria* (JAPSS 2009) 1, 7-9; S Omofonmwan and L Odia, 'Oil Exploitation and Conflict in the Niger Delta Region of Nigeria' (2009) 26 (1) *J Hum Ecol* 25, 28-29

<sup>63</sup> UNDP (n 43) 15; see also P Eregha and I Irughe, 'Oil Induced Environmental Degradation in Nigeria's Niger Delta Region: The Multiplier Effects' (2009) 11(4) *JSDA* 160, 163

<sup>64</sup> *Ibid*

<sup>65</sup> P Eregha & I Irughe (n 63) 164

<sup>66</sup> *Ibid*

<sup>67</sup> USAID, *Nigeria Biodiversity and Tropical Forestry Assessment* (Report on Maximizing Agricultural Revenue in Key Enterprises for targeted Sites (Markets) USAID 2008) 6-10

domestic uses by local residents. It also contains a number of rare or endangered rainforest animal species, including finfish, primates, forest antelopes, rodents, and birds.<sup>68</sup>

Since 1956, oil companies such as Shell (Anglo/Dutch), AGIP (Italian), Elf (French) and Chevron (American) have been carrying out oil exploration activities in the region. Revenue from the sale of crude oil in the last four decades has brought a phenomenal change in the country's economy.<sup>69</sup> Nigeria established the Nigerian National Petroleum Company (NNPC) in 1971 to be a state owned and controlled company which is a major player in both the upstream and downstream sectors. Thus through collaboration (joint venture) with these companies, the Nigerian government performs petroleum exploration and production.<sup>70</sup>

Ironically however, the oil industry which has brought development to many parts of Nigeria, has become a source of misery to the people of oil-producing communities whose existence is now threatened by the scourge of oil pollution. As much oil is spilled in the Niger Delta annually as was spilled during the Exxon Valdez disaster.<sup>71</sup> The oil spills in the region occur both on land and offshore.<sup>72</sup> Oil spills on land destroy crops and damage the quality and productivity of soil that communities use for farming. Oil in water damages fisheries and contaminates water that people use for drinking and other domestic purposes.<sup>73</sup> There are a number of reasons why oil spills happen so frequently in the Niger Delta, namely, corrosion of oil pipes, poor maintenance of infrastructure, spills or leaks during

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<sup>68</sup> Ibid

<sup>69</sup> P Okonmah, 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta' (1997) 41 (1) JAL 43

<sup>70</sup> See UNDP (n 43) 20 -25

<sup>71</sup> A Nossiter, 'Half a World from the Gulf: A Spill Scourge 5 Years Old' *New York Times* (New York, 17 June 2010) A1.

<sup>72</sup> Ibid

<sup>73</sup> For a detailed discussion on the effect of oil spills on land, See D Mackay and R Matsuju, 'Evaporation Rates of Liquid Hydrocarbon Spills on Land and water' (1973) 51 (4) CJChE 434, 439; A Amadi, S Abbey and A Nma, 'Chronic Effects of Oil Spill on Soil Properties and Microflora of a Rain Forest Ecosystem in Nigeria' (1994) 86 (1-4) Water, Air & Soil Pollution 1; G Anoliefo and D Vwioko, 'Effect of Spent Lubricating Oil on the Growth of *Capsicum annum L.* and *Lycopersicon Esculentum Miller*' (1995) 88(3) Env Pollu 361-364; L Osuji, S Adesiyan and G Obute, 'Post-Impact Assessment of Oil Pollution in Agbada West Plain of Niger Delta, Nigeria: Field Reconnaissance and Total Extractable Hydrocarbon content' (2004) 1(10) Chemistry & Biodiversity 1569

processing at refineries, human error and as a consequence of deliberate vandalism or theft of oil.<sup>74</sup> In the 1990s corrosion was acknowledged as a major problem with oil infrastructure in the Niger Delta. Infrastructure was old, and many pipes were above ground.<sup>75</sup> Sabotage of oil infrastructure and thefts of oil are serious problems in the Niger Delta. Sabotage ranges from vandalism by indigenes (groups or individuals) as pure criminality or as a protest for the pollution of their environment by the oil exploration activities of oil companies to theft of oil and deliberate attacks by criminal groups. These acts of criminality have constantly led to inter – ethnic clashes as well as clashes between the indigenes of the Niger Delta Region and the Federal Government of Nigeria when the latter tries to suppress such acts.<sup>76</sup> Thefts of oil for sale at local markets or for personal use have also damaged installations.<sup>77</sup>

The increasing degradation of the Niger Delta environment can be broken down into five major activities – waste disposal, gas flaring, seismic surveys and the construction of roads and pipelines, dredging and inadequate clean up. These will be discussed below.

#### **2.4.1 Waste Disposal**

The activities involved in petroleum exploration and production produce wastes of varying chemical compositions, which are generated at each phase of the operation. The disposal of these wastes in the Niger Delta has polluted land and water, damaging fisheries and agriculture, in breach of the Federal Government of Nigeria's fundamental objective to secure means of livelihood of its citizenry.<sup>78</sup>

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<sup>74</sup> Platform London, 'Oil Pollution in the Niger Delta' <[www.platformlondon.org/carbonweb/index.asp](http://www.platformlondon.org/carbonweb/index.asp)> accessed 12 November 2012

<sup>75</sup> Ibid

<sup>76</sup> ibid; 'Oil Spills and Environmental Pollution in Nigeria' *Oil Spill News* (Nigeria, 13 September 2010) [www.oilspillnews.net/oil-spill-cleanup/oil-spills-and-environmental-pollution-in-Nigeria](http://www.oilspillnews.net/oil-spill-cleanup/oil-spills-and-environmental-pollution-in-Nigeria) accessed 28 November 2012

<sup>77</sup> Ibid; Mangrove Action Project, 'Why Oil and mangroves Do not mix' <[www.mangroveactionproject.org/issues/petroleum/oil-mangroves-do-not-mix](http://www.mangroveactionproject.org/issues/petroleum/oil-mangroves-do-not-mix)> accessed 6 November 2012

<sup>78</sup> S 17 (3) (a) of the 1999 Constitution

Wastewater is one of the major sources of waste material.<sup>79</sup> When oil is pumped out of the ground, a mixture of oil, gas and water emerges. Following treatment – and in some cases without any treatment – much of this wastewater (known as ‘produced water’ or ‘formation water’) is discharged into rivers and the sea. Experts have queried the quality of the treatment in some cases.<sup>80</sup> Only some of the oil can be removed from the water before it is discharged, and along with oil, produced water may also contain heavy metals and other potentially dangerous substances. Hundreds of tonnes of oil together with other potentially toxic substances are released into the Niger Delta in wastewater.<sup>81</sup>

#### **2.4.2 Gas Flaring**

When oil is pumped out of the ground, the gas produced is separated and, in Nigeria, most of it is burnt as waste in massive flares. This practice has been going on for more than five decades. The burning of this ‘associated gas’ has long been acknowledged as extremely wasteful and environmentally damaging.<sup>82</sup> Nigeria has become the world’s biggest gas flarer, both proportionally and absolutely, with around 2 billion Standard Cubic Feet (scf), perhaps 2.5 billion scf, a day being flared.<sup>83</sup> Communities and Non-Governmental Organizations (NGOs) have raised concerns about the impact of gas flaring on human health.

The flares have contributed more greenhouse gases than all of sub-Saharan Africa combined. This has contributed to climate change, the impacts of which are already being

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<sup>79</sup> M Ayotamuno, A Akor and T Igbo, ‘Effluent Quality and Wastes from Petroleum Drilling Operations in the Niger Delta, Nigeria’ (2002) 13 (2) *Env Manage & Health* 207, 208-213

<sup>80</sup> Ibid 210; see also O Bello, J Sonibare, S Macaulay, A Okelana and A Durojaiye, ‘Incineration of Hazardous Wastes From the petroleum Industry in Nigeria’ (2004) 22(6) *IJEP* 710; L Osuji and A Uwakwe, ‘Petroleum Industry Effluents and Other Oxygen-Demanding Wastes in Niger Delta, Nigeria’ (2006) 39 (7) *Chemistry & Biodiversity* 705, 708-710;

<sup>81</sup> See M Ayotamuno et al (n 79) 208-209; L Osuji and A Uwakwe (n 80) 706;

<sup>82</sup> M Ayotamuno et al (n 79) 210

<sup>83</sup> Platform London, ‘Gas Flaring in the Niger Delta’ <<http://www.platformlondon.org/carbonweb/showitem.asp>> accessed 28 November 2012; see also B Ikari, ‘The Contribution of Gas Flaring in Nigeria to Global Warming’ (2008) 46 *Synthesis/Regeneration* <<http://www.greens.org/s-r/46/46-06.html>> accessed 20 November 2012

felt in the region with food insecurity, increasing risk of disease and the rising costs of extreme weather damage.<sup>84</sup> The flares also contain widely-recognized toxins, such as benzene, which pollute the air. Local people complain of respiratory problems such as asthma and bronchitis. The flares contribute to acid rain and villagers complain of the rain corroding their buildings. The particles from the flares fill the air, covering everything with a fine layer of soot. Local people also complain about the roaring noise and the intense heat from the flares.<sup>85</sup> Nigeria has prohibited gas flaring since 1984, unless a ministerial consent has been issued. Under section 3 of the Associated Gas Re-Injection Act 1979, consent can only be issued if the Minister is satisfied that utilization or re-injection is not appropriate or feasible in a particular oil field. Where the oil Minister's consent is issued, the Minister may require the recipient oil Company to pay a sum of 10 Naira (about One US cent) per million cubic feet of gas flare. So far, there is no record of consent given by the minister yet on a daily basis in the Niger Delta region gas is being flared. Although the government has announced various deadlines for the cessation of flaring, each deadline has passed and flaring continues.<sup>86</sup>

### **2.4.3 Seismic Surveys and the Construction of Roads and Pipelines**

Activities associated with oil extraction, including laying pipes, building infrastructure and making the area accessible by road and water, have done considerable damage to the Niger Delta environment.<sup>87</sup> Companies that have the requisite oil exploration and production

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<sup>84</sup> R Idris, 'Impacts of oil Spillage and Gas Flaring on the Population and Distribution of Birds in Niger Delta Region of Nigeria' (African Bird Club 2007) <[www.africanbirdclub.org/club/documents/ABC\\_Nigerian\\_interimreport0907.doc](http://www.africanbirdclub.org/club/documents/ABC_Nigerian_interimreport0907.doc)> accessed on 20 September 2012; see also S Yakubu, 'Gas Flaring in the Niger Delta and its Health Hazards' *Daily Trust* (Nigeria, 8 March 2008) <[www.allafrica.com/stories/200803100319.html](http://www.allafrica.com/stories/200803100319.html)> accessed 22 November 2012

<sup>85</sup> R Idris (n 84) 3

<sup>86</sup> All Africa, 'Nigeria: Enforcing the Gas Flaring Deadline (Analysis)' <[www.allafrica.com/stories/201008091226.html](http://www.allafrica.com/stories/201008091226.html)> accessed 22 November 2012

<sup>87</sup> Amnesty International, *Seismic Surveys and the Construction of Roads and Pipelines, Petroleum, Pollution and Poverty in the Niger Delta* (Amnesty International 2009) 18

licences and leases are entitled to build infrastructure and conduct surveys across large areas of the delta, including land used for farming and fisheries.<sup>88</sup>

The construction of access roads has resulted in deforestation in the Niger Delta cutting through the region's mangrove forests. In some cases, access roads have been constructed in such a way as to block the natural flow of water.<sup>89</sup> When this happens, one side of the road may become flooded or waterlogged, while plant life on the opposite side is starved of water.<sup>90</sup> On the flooded side forests die of asphyxiation, while on the other side, vegetation dies of desiccation. Experts believe that the entire hydrology of the Delta ecosystem has been significantly altered by oil development.<sup>91</sup> The construction of access channels through waterways and swamps is both damaging in itself, and in some cases has caused salt water to flow into freshwater systems, destroying freshwater ecosystems. The incursion of salt water into freshwater is highly damaging to fisheries, and once saltwater enters freshwater, it is no longer usable for drinking or other domestic purposes.<sup>92</sup>

#### **2.4.4 Dredging**

Oil companies also dredge rivers to facilitate navigation and obtain sand for construction. Dredging causes serious environmental damage, with direct repercussions for human rights, since it harms fisheries and can significantly degrade water quality.<sup>93</sup> During dredging, sediment, soil, creek banks and vegetation along the way are removed and deposited as

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<sup>88</sup> Ibid

<sup>89</sup> See Ecumenical Council for Corporate Responsibility, *Shell in the Niger Delta: A Framework for Change: Five Case Studies from Civil Society* (ECCR 2010); Federal Ministry of Environment, *Niger Delta Natural Resource Damage Assessment and Restoration Project* (FME 2006)

<sup>90</sup> Amnesty International (n 87) 2

<sup>91</sup> Ibid

<sup>92</sup> Ibid; B Manny, *Ecological Effects of Rubble-Mound Breakwater Construction and channel Dredging at West Harbor, Ohio (Western Lake Erie)*(US Army Corps of Engineers, Environmental Laboratory 1985) 6-10; P Nwilo and A Onuoha, 'Environmental Impacts on Human Activities on the Coastal Areas of Nigeria in L Awosika, A Ibe and P Shroader (eds), *Coastlines of West Africa* (American Society of Civil Engineers 1993) 220-234; 223-226

<sup>93</sup> Amnesty International (n 87) 18

dredge spoils.<sup>94</sup> Sediment introduced into the water system as a result of dredging and other related activities can destroy fish habitats.<sup>95</sup>

Toxic substances attached to sediment particles can enter aquatic food chains, cause fish toxicity problems and make the water unfit for drinking.<sup>96</sup> The waste material from dredging has often been dumped on the river banks, which disrupts the environment. Moreover, the waste is often acidic and if it leaches into the water, is a further source of contamination.<sup>97</sup>

#### **2.4.5 Inadequate Clean-Up**

Clean-up of oil pollution in the Niger Delta is frequently both slow and inadequate, leaving people to cope with the on-going impacts of the pollution on their livelihoods and health. Failure to swiftly contain, clean up and remediate oil spills can increase the danger of fires breaking out and causing damage to life and property.<sup>98</sup>

One of the worst incidents on record is the Jesse explosion of 1998, when more than 1,000 people reportedly lost their lives. On October 18, 1998 a pipeline explosion occurred in the community of Jesse, southeast of Lagos, Nigeria. The cause of the blast has been debated. The Nigerian government stated the explosion took place after scavengers intentionally ruptured the pipeline with their tools and ignited the blaze; however, others have stated the pipeline ruptured due to a lack of maintenance and neglect with a cigarette

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<sup>94</sup> A Fagbami, E Udo and G Odu, 'Vegetation Damage in an Oilfield in the Niger Delta of Nigeria' (1988) 4 J Trop Eco 65, 65-67

<sup>95</sup> See E Ohimain, T Imoobe and M Benka-Coker, 'Impacts of Dredging on Zooplankton Communities of Warri River, Niger Delta' (2002) 1 AJEPH 37, 40-42

<sup>96</sup> P Nwilo and A Onuoha (n 92) 223; D Moffat and O Linden, 'Perception and Reality: Assessing Sustainable Development in the Niger River Delta' (1995) 24 Ambio 527, 530

<sup>97</sup> P Nwilo and A Onuoha (n 92) 224

<sup>98</sup> See B Jibrin and N Ugwoke, 'Niger Delta: Human Rights Tragedy' *The Market* (Nigeria, 6 July 2009) 10; Irin News, 'Nigeria: Poor Oil Spill Clean-Up Methods Affect Niger Delta Communities' <<http://www.irinnews.org/Report.aspx?ReportId=76635>>accessed 28 November 2012

igniting the fire. The bottom line is that a ruptured pipeline was ignited. With a total of 1,082 deaths attributed to the blast.<sup>99</sup>

## 2.5 Conclusion

This chapter has examined the Nigerian constitutional and political System and showed that being a federalist country with a rigid constitution, an amendment that will reflect the kind of ethical shift advocated in chapter one will be difficult especially if it borders on fundamental rights. It also showed that the indigenes, though living in the country's 'gold mine', live in poverty and as a result are not able to easily challenge acts of environmental degradation in court.

The chapter further demonstrated that the degradation of the Niger Delta environment and the resultant conflicts have their roots in the discovery of oil, exploitation, exploration and the production activities by the oil multinationals in the late 1950s. The Niger Delta, a lush of mangrove swamps, rainforests and swamp land is the site of rich oil and natural gas reserves in Nigeria. Despite being the richest geopolitical region in terms of natural resource endowment, the Niger Delta's potential for sustainable development however remains unfulfilled, and is now increasingly threatened by environmental devastation and worsening economic conditions.<sup>100</sup> Particularly threatened is the mangrove forest of Nigeria, the largest in Africa and 60 per cent of which exists in the Niger Delta. Also facing extinction are the fresh water swamp forests of the Delta, which at 11,700 km square are the most extensive in West and Central Africa and the local people depend on

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<sup>99</sup> See 'A Chronology of Pipeline Fires in Nigeria' *The Nation* (Nigeria, 16 May 2008) <<http://www.thenationonline.com/dynamicpage.asp?id=51129>> accessed 24 November 2012

<sup>100</sup> See para 7 of section 1.2, where the issues which pose major sustainable development problems were identified.



this for sustenance.<sup>101</sup> In spite of the enormous wealth accrued from their land, the people continue to live in poor conditions in the absence of electricity, pipe borne water, hospitals, housing and schools.<sup>102</sup>

In 1989, the Nigerian government publically committed to ‘sustainable development based on proper management of the environment in order to meet the needs of the present and future generations through a system of environmental laws’.<sup>103</sup> The next chapter will show that while the legislative steps taken by the Nigerian Government are enormous, most of the laws are defective.

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<sup>101</sup> See A Onduku, ‘Environmental Conflicts: The case of the Niger Delta’ (a presentation at the One world Fortnight Programme Organized by the Department of Peace Studies, University of Bradford, United Kingdom, 22 November 2001).

<sup>102</sup> Ibid

<sup>103</sup> Federal Environmental Protection Agency, *National Policy on the Environment* (FEPA 1989)1

## CHAPTER THREE

### RELEVANT ENVIRONMENTAL LEGAL REGIMES AND THEIR EFFECTIVENESS IN ACHIEVING SUSTAINABLE DEVELOPMENT IN THE NIGER DELTA REGION

*In the many laws that deal with the natural environment, society implements its ideas on how humans ought to interact with the land. By probing these laws and unravelling their strands, we can gain a new sense of how we have, as a people, interpreted the value of nonhuman nature and sought to acknowledge that value in our communal lives.<sup>1</sup>*

#### 3.1 Introduction

This chapter will prove the relevant existing regimes that apply to environmental protection in Nigeria to be defective and in need of reforms. Reforms which will be examined in chapter four and enhanced by the *eco-anthropocentric* ethic that will be developed in chapters five and six.

Generally, the sources of Nigerian law are the 1999 Constitution, other Nigerian Legislation (statutes, ordinances, Acts, Laws, Decrees, Edicts and subsidiary legislations), English Law (consisting of received English Law which was introduced into Nigerian law by the Nigerian Legislature; and consists of Common Law, Doctrines of Equity, Statutes of General Application in force in England on January 1, 1900 and statutes of subsidiary legislations on specified matters; and English Law made before October 1, 1960) customary law and Judicial precedents.<sup>2</sup> The sources of Nigerian environmental law particularly, are international law (Treaties, Conventions and Protocols) which Nigeria is a party to, and has enacted into her law, the 1999 Federal Constitution, Statutes, Customary Law and English Common law<sup>3</sup>

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<sup>1</sup> E Freyfogle, *The Ethical Strands of Environmental Law*, (1994) U Ill L Rev 819, 819-820

<sup>2</sup> See A Obilade, *Nigerian Legal System* (Sweet and Maxwell 1979) ch 1; T Dada, *General Principles of Law* (2<sup>nd</sup> Ed, T.O Dada & Co 1998) ch 5

<sup>3</sup> L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ambik Press 2010) 16

Nigeria was initially not committed to environmental protection between the 1960s and 1970s because even though a few environmental - protection statutes existed, these laws were not the result of any unified public-policy initiative, thus they were not made for the direct protection of the environment.<sup>4</sup> Nigeria was initially not committed to environmental protection between the 1960s and 1970s because even though a few environmental protection statutes existed, these laws were not the result of any unified public-policy initiative, thus they were not made for the direct protection of the environment.<sup>5</sup> However, the Nigerian Government was rudely awakened in 1988 after the 'Koko incident'. In June 1988, about 4,000 tons of toxic waste were dumped in Koko, in the Southern part of Nigeria following an agreement between an Italian trader and a Nigerian. The dump resulted in numerous deaths, loss of businesses, as well as flora and fauna.<sup>6</sup> Consequently, the government organized an international workshop that eventually led to the publication of the National Policy on the Environment in 1989 which committed Nigeria to sustainable development.<sup>7</sup>

Nigeria also passed the Federal Environmental Protection Agency Act (FEPA Act) in 1988, establishing the country's first agency responsible for the protection and management of the environment. The FEPA Act was repealed in 2007 by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act).<sup>8</sup> The NESREA Act and the other environmental statutes form the backbone

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<sup>4</sup> Y Osibanjo, 'Industrial Pollution Monitoring in Nigeria' in E Aina and N Adedipe (eds), *Environmental Consciousness for Nigerian National Development* (FEPA 1992) 95, 97

<sup>5</sup> However, they have been included as part of the legal framework on environmental protection in Nigeria; precisely, in the Laws of the Federation of Nigeria. See Y Osibanjo, 'Industrial Pollution Monitoring in Nigeria' in E Aina and N Adedipe (eds), *Environmental Consciousness for Nigerian National Development* (FEPA 1992) 95, 97

<sup>6</sup> See R Johnston, 'Koko Radiological Accident, 1987' <<http://www.johnstonsarchive.net/nuclear/radvents/1987NIGI.html>>accessed 11 March 2013

<sup>7</sup> K Ebeku, *Oil and The Niger Delta People in International Law: Resource Rights, Environmental And Equity Issues* (Ridger Koppe 2006) 189. This policy was revised in 1999 to account for developments in environmental protection.

<sup>8</sup> National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) (2007) 94:92 O.G., A635 (Nigeria) [hereinafter NESREA Act]

of Nigeria's environmental law, which works in conjunction with constitutional provisions. This chapter will show that most of the existing legal regimes which manifest the commitment of the Nigerian Government to achieve sustainable development are defective. For example, in addition to the problem of access to justice discussed in chapter two, the legal regimes are flawed in several ways - key constitutional environmental provisions are non-justiciable; the oil and gas sector which is the major source of environmental degradation in the Niger Delta Region is excluded from the control of the Flag ship Environmental Enforcement Agency; some criminal sanctions are so weak as to lack deterrent effect, while common law remedies have deficiencies mainly in terms of proof and compensation. This chapter will also demonstrate that environmental litigations can, and have been instituted in the home countries of the offenders but the litigants have either been unsuccessful from inability to prove environmental damage or have been successful but awarded inadequate compensation. It discusses these under the United States Alien Tort Claims Act 1789 and a class action in the United Kingdom.

### **3.2 The 1999 Constitution and Environmental Protection**

In chapter two, it was shown that environmental matters in Chapter II of the 1999 Constitution where environmental matters are placed (in section 20) are unenforceable in courts. As a result, protection for the environment has been sought in other constitutional provisions.<sup>9</sup> For instance, the Federal High Court in *Gbemre v SPDC*<sup>10</sup> interpreted the fundamental right to life under section 33 of the 1999 Constitution to contemplate the right to a clean and healthy environment.<sup>11</sup> The applicant in that case, suing in a representative

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<sup>9</sup> See para 5 of section 2.2 above

<sup>10</sup> *Gbemre v Shell Petroleum Dev Corp & the Nigerian National Petroleum Corporation* [2005] 6 AHRLR 152 (Nigeria).

<sup>11</sup> This inference is similar to that made by the Indian Supreme Court in *Subhash Kumar v State of Bihar*, A.I.R. 1991 S.C. 420, 424 (India) (ruling that the right to life included the right to the 'enjoyment of pollution free water and air')

capacity, alleged that the oil production activities of the respondents (Shell Petroleum Development Company of Nigeria and the Nigerian National Petroleum Corporation)-specifically gas flaring-violated his constitutional rights to life and the dignity of the human person to the extent that his health and immediate natural environment were jeopardized.<sup>12</sup> Granting the appellants' reliefs, the court held that gas flaring is a threat to human life and consequently, ordered the respondents to take immediate steps to stop further flaring of gas in the applicant's community.

With the interpretation of the right to life in *Gbemre*, courts ought to be able to provide compensation to victims of environmental destruction, ordering cessation of the environmentally harmful activity or even requiring legislation to prohibit further activity of that sort.<sup>13</sup> However, *Gbemre* is yet to get to the Supreme Court. Until it eventually does and the decision of the High Court is upheld by the Supreme Court, it can hardly be used as a weapon in cases of environmental damage in Nigeria even though it has some precedential value.

The possibility of *Gbemre* making its way to the Supreme Court (thereby fuelling social change) is quite slim because, apart from the obvious lack of political will to achieve sustainable development in Nigeria, Shell failed to comply with the court's orders to take steps to stop gas flaring.<sup>14</sup> Furthermore, the trial judge in charge of the case was transferred and the file was reported missing.<sup>15</sup>

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<sup>12</sup> Ss 33(1) & 34(1) of the 1999 Constitution guarantee every Nigerian fundamental rights to life and human dignity respectively.

<sup>13</sup> E Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria* (2007) 51 (2) JAL 249, 251

<sup>14</sup> Climate Justice, 'Shell Fails to Obey Court Order to Stop Nigeria Flaring Again' <<http://www.climatejustice.org/cases/country/nigeria/media/2007May2/>> accessed 16 November 2012 see also R Black, 'Contempt Case for Shell Over Gas, (*BBC News*, 24 December 2005) <<http://news.bbc.co.uk/2/hi/science/nature/4556662.stm>> accessed 16 November 2012

<sup>15</sup> 'Climate Justice' (n 14)

### 3.3 The National Environmental Standards and Regulations Enforcement Agency (NESREA) and Other Environmental Agencies in Nigeria.

The Nigerian Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007<sup>16</sup> provides for the functions and powers of the Agency and council in Part II, sections 7 and 8. In these sections it excludes the oil and gas sector from the scope of the powers of the agency.<sup>17</sup> The exceptions in part II bar the Agency from enforcing hazardous waste regulations in the oil and gas sector. The Agency cannot monitor, license, research, survey, study, or audit the sector. It may not propose evolution of the environmental regulations for, promote compliance in, or conduct investigations of the oil and gas sector. Thus, while the Agency is technically allowed to ‘enforce compliance with laws, guidelines, policies and standards on environmental matters,’ it may not observe the oil and gas sector in any way to determine if it is in compliance thus limiting its role in dealing with the major cause of environmental degradation in the Niger Delta.<sup>18</sup>

The NESREA Act provides additional exceptions to the oil and gas sector in sections 24, 29, and 30. Under section 24, although the Agency may *review* effluent limitations on existing point sources,<sup>19</sup> it is barred from *making* regulations on effluent limitations on new and existing point sources in the oil and gas sector. Section 29 provides that the agency shall liaise with other agencies for the removal of pollutants excluding oil and gas related ones. Finally, section 30 prohibits Agency officers from entering and searching all oil and gas facilities even with a warrant issued by a court.

The foregoing provisions make the Nigerian Government’s commitment to sustainable development in the oil and gas sector questionable. It is curious that NESREA,

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<sup>16</sup> Hereinafter, NESREA Act.

<sup>17</sup> See ss 7 (g)-(i) and 8 (g), (k), (l)

<sup>18</sup> See s 7 generally

<sup>19</sup> Under s 37 of NESREA Act, a point source is defined as ‘any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduct, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged.’

the flag ship agency for environmental protection in Nigeria is excluded from ensuring compliance in an industry that is the major cause of environmental degradation in the country. Arguably, the Department of Petroleum Resources (DPR) appears to be responsible for overseeing the affairs in the oil and gas sector. It has described its role as ‘supervising all petroleum industry operations being carried out under licenses and leases in the country in order to ensure compliance with the applicable laws and regulations in line with good oil producing practices.’<sup>20</sup>

It is also responsible for ‘enforcing safety and environmental regulations and ensuring that those operations conform to national and international industry practices and standards.’<sup>21</sup> In that case, it is difficult to reconcile placing environmental protection in the hands of a department responsible for the development of Nigeria’s energy sector; because of the tendency of a partnership of sorts between the department and other Multinational Oil Companies. It therefore breaches the idea of having an independent regulatory body.

Also, the National Oil Spill Detection and Response Agency (NOSDRA) was set up by the Federal Government in 2006 to ‘create, nurture and sustain a zero tolerance oil spill incident in the Nigeria environment and to restore and preserve our environment by ensuring best practices in exploration, production and use of oil in the quest to achieve sustainable development in Nigeria.’<sup>22</sup> The agency was established by the NOSDRA Act of 2006 which vested in it the power to implement the National Oil Spill Contingency Plan (NOSCP) in line with the International Convention on Oil Pollution Preparedness Response and Co-operation (COPRC), 1990. The agency however has no proactive capacity for oil-spill detection and has to rely on reports from oil companies or civil society concerning the

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<sup>20</sup> Nigerian Department of Petroleum Resources, *Organization Roles* (2 August 2010) <[http://www.dprnigeria.com/dpr\\_roles.html](http://www.dprnigeria.com/dpr_roles.html)> accessed 16 February 2012

<sup>21</sup> Ibid

<sup>22</sup> ‘NOSDRA’ [www.nosdra.org/about\\_nosdra.html](http://www.nosdra.org/about_nosdra.html) accessed 23 April 2012

incidence of a spill.<sup>23</sup> It also has very little reactive capacity – even to send staff to a spill location once an incident is reported. Consequently, in planning their inspection visits, the regulatory authority is wholly reliant on the oil company. Such an arrangement is inherently inappropriate because it is the same oil companies that are responsible for the spill, thus they are likely to produce biased reports.<sup>24</sup>

It is absurd that the supervision of the Department of Petroleum Resources (DPR) with limited oversight of oil spills by National Oil Spill Detection and Response Agency, is the responsibility of an arm of the Federal Ministry of Environment.<sup>25</sup> The absurdity comes from the fact that the Federal Government which controls the DPR and NOSDRA is in a joint venture with the Multi National Oil Companies<sup>26</sup> thus making its ability to effectively supervise (others and itself) doubtful.

### **3.4 Nigerian Environmental Protection Statutes**

This section will examine civil and criminal liability statutes that are relevant to environmental degradation in the Niger Delta Region. The civil liability statutes consist of the Land Use Act of 1978<sup>27</sup>, the Oil Pipelines Act of 1958<sup>28</sup> and the Petroleum Act of 1969<sup>29</sup>. While the criminal liability statutes comprise the Criminal Code Act 1916<sup>30</sup>, Criminal Justice Act 1997<sup>31</sup>, Oil in Navigable Waters Act 1968<sup>32</sup>, Associated Gas Re Injection Act 1979<sup>33</sup>, Harmful Waste (Special Criminal Provisions) Act 1992<sup>34</sup>,

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<sup>23</sup> S 6(2) of NOSDRA Act 2006

<sup>24</sup> UNEP, *Environmental Assessment of Ogoni Land* (UNEP 2011) 140; see also s 4 of COPRC, 1990

<sup>25</sup> M Okorodudu-Fubara, 'Country Reports: Nigeria Legal Developments 2009-2011 (2012) (1) IUCN Academy of Env L e-Journal 170, 176

<sup>26</sup> See para 3 of section 2.4 above

<sup>27</sup> Cap L5 Laws of the Federation of Nigeria, hereinafter, LFN 2004

<sup>28</sup> Cap O7 LFN 2004

<sup>29</sup> Cap P10 LFN 2004

<sup>30</sup> Cap C38 LFN 2004

<sup>31</sup> Cap C39 LFN 2004

<sup>32</sup> Cap O6 LFN 2004

<sup>33</sup> Cap A20 LFN 2004

<sup>34</sup> Cap H1 LFN 2004



Environmental Impact Assessment Act 1992<sup>35</sup>, Sea Fisheries Act, 1992<sup>36</sup> and Endangered Species Act 1985<sup>37</sup>.

### 3.4.1 *Civil Liability Laws*

Very crucial is the effect of the **Land Use Act 1978** on compensation provisions in The **Oil Pipelines Act 1958** and the **Petroleum Act 1969**. Section 1 of the Petroleum Act 1969 vests the entire ownership and control of all petroleum in the Nigerian territory in the Federal Government. Prior to 1978, oil companies that had obtained mining rights from the Federal Government approached land owning communities where oil was to be found for a right of access to that land for its operations. Accordingly, this was a way by which those communities had some sense of participation in oil operations by way of receiving compensation for granting access and for any damage to land and any surface rights thereon.<sup>38</sup>

Also, the Petroleum Act requires the holders of oil exploration licenses, oil prospecting licenses or oil mining leases to pay ‘fair and adequate compensation for the disturbance of surface or other rights’ to the owner or occupier of any land or property,<sup>39</sup> though there is no provision for compensation for expropriation of the land itself. However, the Oil Pipelines Act of 1958 provides for compensation to be paid in respect of acquisition of the land itself.<sup>40</sup>

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<sup>35</sup> Cap E12 LFN 2004

<sup>36</sup> Cap S4 LFN 2004

<sup>37</sup> Cap E9 LFN 2004

<sup>38</sup> See L Agbosu, ‘The Land Use Act and the State of Nigerian Land Law’ (1988) 32 (1) JAL 1, 8; K Ebeku, ‘Oil and the Niger Delta People: The Injustice of the Land Use Act’ (2001) 9 (14) CEPMLP Internet Journal <[http://www.dundee.ac.uk/cepmlp/journal/html/vol9/article\\_9-14.html](http://www.dundee.ac.uk/cepmlp/journal/html/vol9/article_9-14.html)> accessed 13 March 2012; R Ako, ‘Nigeria’s Land Use Act: An Antithesis to Environmental Justice’ (2009) 52 (2) JAL 289, 296-298

<sup>39</sup> S 36 of the Act. Regulation 17 (c ) (ii ) of The Petroleum (Drilling and Production) Regulations (1988), made under the Act, also provides that before entering or occupying any private land, oil companies are required to obtain written permission from the government and pay ‘fair and adequate’ compensation to the lawful occupiers, presumably in respect of the rights mentioned in the primary legislation.

<sup>40</sup> Ss 6(3); 19-23 provide for payment of compensation for land acquired for purposes of laying pipes and for resulting damage

Since 1978, however, the Land Use Act now governs real property in Nigeria, providing that all lands in the territory of each state in the Federation vest in its Governor to be held in trust and administered for the common benefit of all Nigerians.<sup>41</sup> This section has a tendency to be abused by holding authorities as they may revoke the statutory rights of an occupier at will especially with the provision of section 28 of the Act that a land can be retrieved for ‘overriding public interest’ – a term which is overly vague. Land in urban areas is under the Governor’s management and control while land in non-urban areas is controlled by the local government authority.<sup>42</sup> State and local government authorities grant statutory rights of occupancy<sup>43</sup> and customary rights of occupancy respectively<sup>44</sup>.

In rural areas, however, residents perceive the land as their own, though, legally speaking, they only have rights of occupancy, transfer of which requires the assent of the appropriate authority.<sup>45</sup> Crucially, the Land Use Act has had unquestionable constitutional status since 1999 when the Constitution expressly provided that none of its provisions shall invalidate the Land Use Act.<sup>46</sup>

When a land is acquired based on ‘overriding public interest’, the holder or occupier is only entitled to ‘fair and adequate compensation’ for ‘unexhausted improvements’ based on the market value at the time of the acquisition.<sup>47</sup> Thus any compensation paid years after the acquisition was made would be grossly inadequate following the crippling effects of inflation.

Disputes over quantum of compensation payable for a land compulsorily acquired under the Act or other incidental issues are now to be settled administratively by a statutory

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<sup>41</sup> S 1

<sup>42</sup> See generally, ss 5, 6 and part V of the Land Use Act 1978

<sup>43</sup> S 5(1)(a)

<sup>44</sup> S 6 (1) (a)

<sup>45</sup> S 21

<sup>46</sup> S 27 of the Land Use Act, 1978 and S 44(3) of the 1999 Constitution

<sup>47</sup> See section 77 of the Minerals Act 1916; Now Minerals Act 2007. Moreover, disputes over compensation are now settled administratively by bodies a body set up by the state governor. The independence of such a body is therefore in doubt. See s 2 of the Land Use Act

body – Land Use Allocation Committee whose members are appointed by state governors.<sup>48</sup> There is no statutory provision to ensure the independence and impartiality of these bodies. The implication of setting up this committee is that every law on compensation for land acquisition prior to the promulgation of the Land Use Act will be null and void and the issue of compensation will now be based on administrative discretion and the decision of the courts<sup>49</sup>

### **3.4.2 Criminal Liability Laws**

Although Nigeria's **Criminal Code Act** was enacted in 1916, it has three provisions that could be used to prosecute the pollution of the Niger Delta environment. Section 234(e) provides for up to two years of imprisonment for any person who deliberately diverts or obstructs a navigable river. Section 245 provides for up to six months of imprisonment for any person who corrupts the water of any spring, stream, well, tank, reservoir, or place making it unfit for its normal use. Finally, section 247 protects the atmosphere by providing for up to six months of imprisonment for any person who violates the atmosphere so as to make it noxious for human health.

These criminal provisions apparently provide sanctions for the type of water and air pollution caused by dredging, oil spills, petroleum waste, and gas flaring. However, the short sentences - a maximum of six months for water or air pollution are an insufficient deterrent and penalty for contaminating the fragile ecosystem of the Niger Delta. The limitation of the provisions of the Criminal Code has been aptly captured by Uchegbu who observes that the Criminal Code merely prescribes the penalties for anti-social or criminal

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<sup>48</sup> See s 2 of the Land Use Act

<sup>49</sup> R Onyegbu, 'Legal Framework for the protection of Oil Producing Communities in Nigeria' 1998 2(2) Living 3

behaviour by individuals and is not really concerned or intended ‘to restore environmental integrity, but rather to protect the environment from current human activity’.<sup>50</sup>

The **Oil in Navigable Waters Act of 1968** was enacted to give effect in Nigeria to provisions of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 to 1962. The Act covers generally, the discharge of oil into the waters of Nigeria. The major problems with this act are its laughable penalty sections and the defences available to offenders. The penalties range from ~~₦~~20 to ~~₦~~200. For example under section 8, the harbour authority is required to provide facilities in harbours for the disposal of oil residues. This is the only offence, specifically directed at a governmental agency. Failure to provide such facilities is an offence under section 8 (8). The section provides that the agency shall be guilty of an offence and liable on summary conviction to a fine not exceeding *twenty naira* (~~₦~~ 20)<sup>51</sup> for each day during which the default continues, from the day after the end of the period specified in the directions, or any extended period allowed by the Minister, as the case may be, until the last day before that on which the facilities are provided in accordance with the directions.

Again, the number of defences created under the Oil in Navigable Waters Act necessarily puts in question the possible efficacy of criminal liability created there under. For instance, it is provided in section 4(1) of the Act that it shall be a defence to an offence under section 1 thereof for the offender to prove that oil was discharged for the purpose of saving life or to prevent damage or destruction of vessel or cargo. Saving a life on the vessel may be more important than not immediately endangering the lives of people however, the defence seems to indicate that preventing damage to the vessel or cargo is also of greater importance than endangering the lives of invariably hundreds of people that may be affected

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<sup>50</sup> A Uchegbu, ‘The Legal Regulations of Environmental Protection and Enforcement in Nigeria’ (1987-1988) JPPL, cited in G Ojo and J Gaskiya *Environmental Laws of Nigeria: A Critical Review*, (Environmental Rights Action/Friends of the Earth 2003) 561

<sup>51</sup> Emphasis, mine. ~~₦~~ 20 is equivalent to 8 pence

by the resultant pollution of the sea. This provision tends to underestimate the equally certain danger to the larger populace. Even more alarming is the defence offered for discharge of pollutants for the purpose of ‘preventing damage or destruction to any vessel or cargo.’<sup>52</sup>

This provision does not show that the consequences of such a defence was taken into cognizance, namely, that the lives, habitat and property of a whole community can be thrown into jeopardy once the defence is invoked successfully.<sup>53</sup> This is not to say that it would be right for seamen to perish in order to protect the environment.

The Nigerian Legislature passed the **Associated Gas Reinjection Act in 1979** that required oil companies to submit a detailed plan for utilizing associated gas with an ultimate goal of ending gas flaring by 1984. Section 2 of the Act made it mandatory for every company producing oil and gas in Nigeria to submit preliminary programmes and detailed plans for implementation of gas reinjection to the Minister<sup>54</sup> not later than October 1, 1980.

Section 3 states the main purpose of the Act. Section 3(1) provides that companies engaged in oil and gas production are prohibited from gas flaring after January 1, 1984 without the permission in writing of the Minister. Section 3(2) gives the Minister discretion to issue certificate to authorize gas flaring if he is satisfied after January 1, 1984 that ‘utilisation or reinjection of the produced gas is not appropriate or feasible’. So far, there has been no disclosure as to whether any certificates have been issued yet the menace of gas flaring rages on. Thus, it is either the certificates have been issued by the minister on an unlawful basis or the oil companies have continued to flare gas without the issuance of any certificate.<sup>55</sup> Unfortunately, the Gas Flaring (Prohibition and Punishment) Bill passed by the

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<sup>52</sup> S 7 (1) (a)

<sup>53</sup> It must be noted however that the 1954 Convention did not provide that the defenses be included.

<sup>54</sup> ‘Minister’ is defined in s 7 of the Act to mean the minister charged with the responsibility for matters relating to petroleum.

<sup>55</sup> Friends of the Earth, *Gas Flaring in Nigeria: A Human Rights, Environmental And Economic Monstrosity* (A report by the Climate Justice Programme and Environmental Rights Action/Friends of the

Nigerian Senate in 2009 which had the objective of curbing gas flaring by December 31 2010 (Later, December 12, 2012) has still not been passed into law. It is therefore no wonder that the situation has remained unchanged.<sup>56</sup>

**The Harmful Waste (Special Criminal Provisions) Act 1992**<sup>57</sup> implemented the Basel Convention of 1989 which marked the first attempt at the international level to foster a global control of transboundary movement of hazardous waste through binding treaty provision. The Act expresses a bold natural policy to prohibit all activities normally involved in the transboundary movement of hazardous waste within the territory of Nigeria. Such activities include purchase, sale, importation, transit, transportation or carrying, deposit, dumping, storage and possession of hazardous waste without lawful authority.

A ‘hazardous waste’ is clearly defined in section 1 of the Act as ‘any injurious, poisonous, toxic or noxious substances and in particular includes nuclear waste emitting any other consignment of the same or of different substance, as to subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health’. Section 15 provides that any person who violates the specific provisions therein shall be guilty of a crime subject to a penalty of life imprisonment. Forfeiture to the Federal Government of any carrier, aircraft, vehicle, container, and so on is also prescribed.

Environmental pollutants will no doubt qualify as ‘hazardous waste’ under section 1 of the Act, but the provisions of the Act can only be said to be breached where there has been ‘transit’ or ‘transportation’ of the said hazardous waste (the environmental pollutants). Any action dealing with pollution during oil exploration activities (spillage, for instance) cannot be punished by the Act. This reduces the effectiveness of the Act to the extent that

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Earth Nigeria, June 2005) <<http://www.climatelaw.org/cases/case-documents/nigeria/report/section9;>>  
Climate Law, ‘Climate Justice, Legal Action to Stop Nigerian Gas Flaring’  
<http://climatelaw.org/media/2005Jun20/> both accessed 07 March 2013

<sup>56</sup> See O Nzeshe, ‘Gas Flare Deadline Now December 2012’ *This Day* (Nigeria, 14 January 2010)  
<<http://allafrica.com/stories/201001140228.html>> accessed 13 March, 2013.

<sup>57</sup> Cap H1 LFN 2004

one of the major causes of environmental degradation in the Niger Delta region is oil spillage as discussed in chapter two.<sup>58</sup>

The Nigerian Legislature also enacted the **Environmental Impact Assessment (EIA) Act 1992** as a demonstration of her commitment to the Rio Declaration 1992.<sup>59</sup> According to Anago, the EIA Act is unique in some respects: first, it is the first of its kind in Nigeria; secondly, where proposed projects will likely cause environmental damage, EIAs become mandatory;<sup>60</sup> Thirdly, EIAs are anticipatory and mitigative in nature.<sup>61</sup>

Environmental Impact Assessment offers a golden opportunity for the achievement of sustainable development in Nigeria. However, more than two decades after the EIA was enacted, the country's environment is still characterized by ecological problems, unplanned growth and increasing problems of domestic and industrial waste disposal and pollution<sup>62</sup>. The reasons are as follows: (i) the DPR is required to review a proposed project. In such a case, as discussed above, bias can hardly be avoided; (b) EIAs are aimed at new projects; thus, old ones like most of the oil exploration projects (a constant menace to the Nigerian environment) which are more than five decades old are excluded;<sup>63</sup> (c) Environmental Management Plans (EMPS) are hardly implemented;<sup>64</sup> (d) Most EIA Reports are actually presented to Non-Governmental Organisation and affected host communities because after the project has commenced in order to avoid resistance from individuals and civil society

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<sup>58</sup> See section 2.4.5 above

<sup>59</sup> Principle 17 of the Declaration provides that Environmental Impact Assessment shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

<sup>60</sup> S 2

<sup>61</sup> See I Anago, 'Environmental Impact Assessment as a Tool for Sustainable Development: the Nigerian Experience' (Paper presented at FIG XX II International Congress, Washington DC, USA, 19-26 April 2002) 4 [www.fig.net/pub/fig\\_2002/Ts10\\_3\\_anago.pdf](http://www.fig.net/pub/fig_2002/Ts10_3_anago.pdf) accessed 15 August 2012

<sup>62</sup> O Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2010) 4 *J Env Sci Technol* 250; See also J Ayanda, 'Incorporating Environmental Impact Assessment in the Nigerian Planning Process: Need and Procedure' (2010) 10 (1) *Third World Plan Rev* 51, 53

<sup>63</sup> K Ebeku (n 38) 214

<sup>64</sup> See O Ameyan, 'Environmental Impact Assessment: Insight into the Environmental Impact Regulatory Process and Implementation for Qualifying Projects' (Paper presented at a one day seminar, 'Preparing Business in Nigeria for Environmental Challenges and Opportunities' organized by the Manufacturing Association of Nigeria, MAN House, Lagos 4 November 2008) <<http://mangreencourses.com/papers/paper6b.pdf>> accessed 07 February 2013

organisations;<sup>65</sup> (e) as relatively reasonable as the penalties of the Act are, there is no known record of any individual or firm who has been fined for violating the provisions of the Act. If there is continued indifference to the implementation of such a profound and promising Act, then the safety of the environment in Nigeria would at best remain illusory.

The **Criminal Justice (Miscellaneous Provisions) Act 1997**<sup>66</sup> was enacted to provide penalties for damages to telecommunication works, electricity transmission lines and oil pipelines and to enable armed patrols to arrest any person committing an offence under this Act. This Act is most commendable for its specific provisions especially the provision with respect to the destruction of oil pipelines. Section 3 of the Act punishes damage to pipelines or the obstruction of flow of oil along that pipeline with a fine of two thousand naira (~~₦~~2,000) and (~~₦~~500) respectively.<sup>67</sup> In the same way, Section 5 also provides for the sanction of any one who aids, counsels, abets or procures any person to commit an offence under the Act. The provisions of the Act will no doubt be appropriate for the punishment of the acts of vandalisation of the oil pipelines by the militants in the Niger Delta region of Nigeria. However, considering the enormous impact such acts of vandalisation cause, the fines provided for in sections 3 and 5 do not appear to be deterrent enough. 2,000 naira and 500 naira are amounts that the average Nigerian can afford to pay, including the very poor indigenes.

Nigeria also has two major legislations regulating biodiversity conservation in the Niger Delta Region – Endangered Species Act 1985 and Sea Fisheries Act 1992.

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<sup>65</sup> A Usman, 'General Principles of Environmental Protection Laws' (Workshop presentation on Environmental Impact Assessment organized by the Nigeria Institute of Quantity Surveyors, 13-14 November 2001); G Agha, D Irechukwu and M Zagi, 'Environmental Impact Assessment and the Nigerian Oil Industry: A Review of Experiences and Learnings' (International Conference on Health, Safety and Environment in Oil and Gas Exploration and Production, Kuala Lumpur, Malaysia 20-22 March 2002); N Bello, 'NDDC Votes N1 Billion to Dredge Canal, Others in Ondo State' *Guardian* (Nigeria, 7 February 2002) 7

<sup>66</sup> Cap C37 Laws of the Federation of Nigeria 2004

<sup>67</sup> That is, the equivalent of £8 and £2 respectively



The **Endangered Species (Control of International Trade and Traffic) Act** can only be helpful to the extent of its coverage, as some of the species listed therein for protection are present in the Niger Delta region of Nigeria. However, the problem with the legislation is its ridiculous sanctions for breaches of the provisions of the Act in section 5. Under that section, the minimum fine for an offence under the Act is five hundred naira (₦500) or six months imprisonment for subsequent offences in that category, while the maximum fine is one thousand naira (₦1,000)<sup>68</sup> or one year imprisonment for subsequent offences in that category. They are neither sufficient to deter individuals nor companies.

**The Sea Fisheries Act 1992** regulates fishing to protect certain fish stock, and prevents harmful fishing and over fishing. Anyone in Nigerian territorial waters taking or destroying (or attempting to take or destroy) any fish by the use of any explosive, noxious or poisonous matter can be fined fifty thousand naira (₦50,000)<sup>69</sup> or imprisoned for two years. Killing fish by polluting water with oil is unambiguously covered by this section. The penalty may well be sufficient to deter private individuals, but not companies - the primary polluters, even though for individual polluters the law is still not being properly enforced.

### 3.5 Customary Laws

In addition to the above statutes, the indigenous peoples in Nigeria have customary laws which regulate the protection of forests in many ways, and which were enforced pre colonialism and the emergence of statutory laws. For example, there are local laws which provide for communal declaration of certain forests and groves as sacred,<sup>70</sup> distinguishing forests as burial grounds for good and evil people, recognising boundary forests between

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<sup>68</sup> Approximately £4

<sup>69</sup> Approximately £192

<sup>70</sup> For example, there is a Yoruba customary law on the sanctity of *Igbo Oro* (forest of shrines)

neighbouring communities, family heritage forests, forests of common use, and the essential habitat forests; and also specific conservation laws on fishing, hunting, water and animals.<sup>71</sup>

However, these customary laws will not be applicable where they are incompatible with statute law, and where they are ‘repugnant to natural justice, equity and good conscience’.<sup>72</sup> This is evidenced in the incompatibility of customary laws on biodiversity conservation with the statutory (and constitutional) vesting of ownership of Oil in the Federal Government of Nigeria which includes rights to regulate issues affecting or which may affect oil exploration.<sup>73</sup> This is however inconsistent with one of the strategies for achieving national environmental policy on forestry, wildlife and protected natural areas under the revised Nigerian National Policy on the environment of 1999 which is ‘combining desirable features of traditional approach with modern scientific methods of conservation.’<sup>74</sup> This means that a customary law cannot be enforced unless the provisions of such a law are brought in conformity with the present National Policy on the Environment.

### **3.6 Common Law (Tort) Remedies**

One of the sources of Nigerian law is the Common Law of England. Thus common law remedies are usually resorted to in environmental litigations in the Niger Delta. In order to obtain assistance from the court, the plaintiff must claim that the defendant has done something which is in breach of the common law.

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<sup>71</sup> See O Adewale, ‘Customary Environmental Law’ in M Ajomo and O Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (NIALS 1994) 157 ; A Olatubosun, ‘The Need for a Legal Regime for Sustainable Forest Management in Nigeria’ 2010 (1) IUCN Academy of Env L e-Journal 1,8

<sup>72</sup> As provided by s 20(1) of the Eastern Nigeria High Court Law, 1985 which is applicable to the Niger Delta states of Rivers, Bayelsa and Delta

<sup>73</sup> The combined effect of s1 of the Petroleum Act 1969; s 2 of Territorial Waters (Amendment) Act 1998; s 2 of Exclusive Economic zone Act 1973; s 14 of the Land Use Act 1978 and s 44(3) of the 1999 Constitution of Nigeria vests ownership and right of exploitation of minerals and natural resources in the territorial waters and exclusive economic zone of Nigeria in the Federal Government of Nigeria.

<sup>74</sup> Paragraph 4.9.i

A breach of the common law gives the plaintiff a 'cause of action'. The common law causes of action are: Nuisance, Trespass to Land, Negligence, the Rule in *Rylands v Fletcher*.<sup>75</sup> They will be discussed below.

The common law tort of **nuisance** could be said to be the most potent of all the torts as they relate to pollution in general. An actionable nuisance is incapable of *exact* definition, and it may over-lap with some other heading of liability in tort such as negligence, trespass or the rule in *Rylands v Fletcher*.<sup>76</sup>

However, it has been described as an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of -

- (a) a right belonging to him as a member of the public, when it is public nuisance, or
- (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance.<sup>77</sup>

Nuisance can either be private or public. The distinguishing feature between a private and public nuisance is that in private nuisance the burden on the plaintiff is to show that the activities of the defendant interfered with his property rights. The material question, which has to be affirmatively answered in favour of the plaintiff: 'was the defendant's activity reasonable according to ordinary usages of want and living in a particular Society?'<sup>78</sup> The advantage of the tort of nuisance in environmental litigations lies in the fact that unlike negligence, it dispenses with the requirement of proof by the plaintiff of a duty of care, and its breach by the defendant. However, like the tort of Negligence, the plaintiff has the burden of establishing certain requirements in order to succeed against the defendant.

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<sup>75</sup> [1868] UKHL 1

<sup>76</sup> J Fekumo, 'Civil Liability For Damages Caused By Oil Pollution' in J Omotola (ed), *Environmental Laws in Nigeria Including Compensation* (University of Lagos Press 1990) 256

<sup>77</sup> *Per* Eso JSC, in *Ipadeola and Another v Oshowole and Another* (1987) 5 SC 376, 389.

<sup>78</sup> T Osipitan, 'Problems Of Proof' in J Omotola (ed) (n 76) 120

A private nuisance gives a right of action only to the person injured.<sup>79</sup> What is paramount in the mind of the court is not so much the threat or hazard posed by a particular activity to the environment, but whether in that particular instance, it should be regarded as a nuisance.<sup>80</sup> It is therefore limited to the injurious effects on individuals, other legal persons or corporate entities which is what *strict* anthropocentrism portends.<sup>81</sup> In *Airobuyi v Nigerian Pipeline Limited*<sup>82</sup>, the defendant company conducted sand blasting and pipe coating operation in a shed about 300 feet from the plaintiff's house. As a result of the operation, dust and smoke escaped in sufficient quantities from the pipe yard and caused damage to the plaintiff's house, as well as endangered his health. The plaintiff complained to the defendant. The latter justified their operations on the ground that it provided employment and promised to cease the disturbing activities in three months; the plaintiff sued in nuisance. The court found the defendant liable in private nuisance.<sup>83</sup>

The main drawback of nuisance however, has always been that the reasonableness of the defendant's conduct is the central question in such cases. This generally gets determined by the Courts by weighing its utility against the gravity of the harm to the plaintiff. In cases where major polluters are large industrial firms, it is often difficult to prove unreasonableness in the conduct of their business, having regard to their high economic and social status.<sup>84</sup> However, the English Court of Appeal in *Barr & Others v Biffa Waste Management Services Limited*<sup>85</sup> has emphasised that in deciding whether a use of land is 'reasonable', cognizance must be taken *only* of what an ordinary person would

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<sup>79</sup> D Dobbs, *The Law of Torts* (Hornbook 2000) 14

<sup>80</sup> O Fagbohun, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Odade Publishers 2010) 257

<sup>81</sup> See discussion on *strict* anthropocentrism in para 9 of section 1.4 above

<sup>82</sup> (1976) 6 ECSLR 53

<sup>83</sup> See also *Oladehin v Continental Textile Mills Limited* (1977) 6 S C 9; *Ejowhomu v Edok-Eter Mandilas Limited* (1986) 9 SC 41, 106-107

<sup>84</sup> R Rychlak, 'Common-Law Remedies for Environmental Wrong: The Role of Private Nuisance' (1989) 59 Miss L J 657, 685; see also J Palma, 'The Inapplicability of Traditional Tort Analysis to Environmental Risks: the Example of Toxic Waste Pollution Victim Compensation' (1983) 35 Stan L Rev 575, 576-578

<sup>85</sup> [2012] EWCA Civ 312 <http://www.bailii.org/ew/cases/EWCA/Civ/2012/312.html> accessed 15 April 2013

reasonably be expected to put up with. According to the court, this has always been the longstanding common law test irrespective of whether the defendant is using the land via an environmental permit or not.<sup>86</sup>

This standard is however relative to the extent that an activity which occurs in a particular location and surrounding may be reasonable, while the same or similar activity in another location and in other surroundings may be a nuisance.<sup>87</sup>

An individual can bring a public-nuisance action, but only if the nuisance causes a special damage that is different in kind and degree from the damage suffered by the public in general. In Nigeria, prior to the 1979 Constitution, actions based on public nuisance could only be instituted by or with the consent of the Attorney General of the Federation or a state as the case may be. Actions filed otherwise were struck out as incompetent.<sup>88</sup>

However, by section 6 (6) (b) of the 1979 Constitution, an individual may bring an action in public nuisance where he can prove damage caused to him over and above that of others affected. The Supreme Court in *Adediran v Interland Transport Limited*<sup>89</sup> interpreting section 6(6) (b) of the 1979 Constitution held that the section vested the courts with powers of determination of any questions as to the civil rights and obligations of any person or between government or an authority and any person in Nigeria. Accordingly, where the determination of a person's right or obligation is in issue, any law which imposes conditions inconsistent with the free and unrestrained exercise of that right is void to the extent of such inconsistency.<sup>90</sup> Taiwo Osipitan argues that the requirement of proof of special damage by an individual in an action based on public nuisance finds explanation in the need to avoid 'multiplicity of actions.' If every person, aggrieved by acts of public

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<sup>86</sup> Per Carnwarth LJ; See para 50

<sup>87</sup> See for example, *Town of Preble v Song Mountain Inc* 62 Misc. 2d 353, 308 N.Y.S 2d. 1001; *UTB (Nig) Ltd v Ozoemena* (2001) 7 NWLR (pt 713) 718

<sup>88</sup> See *Amos and others v Shell BP Petroleum Development Company of Nigeria Ltd* (1975) 9-11 SC

<sup>89</sup> (1987) 3 NWLR (pt 20) 18

<sup>90</sup> p 43

nuisance, is allowed to sue, it will lead to absurd results, as well as congestion of courts.<sup>91</sup> It is however difficult for the plaintiff in an environmental litigation to prove that his exposure to the concentration of the hazardous substance was much higher than that of all the other plaintiffs. In such a case, the plaintiff has to be prepared to give precise exposure information such as the concentration of the exposure and the duration of the exposure. To refer to such a task on the part of the plaintiff as an enormous one, would be understating the fact.<sup>92</sup>

For nuisance generally, what is worse is that the significant connection between the interference and the polluter's acts is often difficult to establish because of the long period of time and alternated nexus in which some pollution manifests the harm.<sup>93</sup> Although the Attorney General can take a relator action, there is no record of any such action. Furthermore, it is doubtful if, the Attorney General, an officer of the Nigerian Government would willingly make efforts to prosecute oil companies being Nigeria's major investors.

The tort of **Trespass to Land** connotes an unjustifiable intrusion by one person upon land in the possession of another. Thus trespass to land occurs where a person directly enters upon another's land without permission, remains upon the land, or places or projects any object upon the land.<sup>94</sup> So far, the tort of trespass to land appears not to have been directly pleaded in any oil pollution litigation. It can however be argued that where a plaintiff alleged that a particular pollutant 'spread all over the respondents' farms and into their ponds and lakes,' destroyed crops and killed fish in ponds, a clear case of trespass to land, especially with respect to the farm lands, has been made out.<sup>95</sup>

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<sup>91</sup> T Osipitan (n 78) 122

<sup>92</sup> See J Cleary, 'Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just do not Work' (2002) 31 U Balt L Rev 273, 277

<sup>93</sup> S Ferry, *Environmental Law, Examples and Explanations* (Aspen Law and Business 1997) 16

<sup>94</sup> W Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2010) 383; *Per Uwais* (Ag CJ) in *Alhaja Salamotu v Adamu Yola* (1976) 1 NMLR 115, 117

<sup>95</sup> See *Umudje & anor v Shell –BP Petroleum Development Company Nigeria Limited* (1975) 9-11 SC 155

However, where the plaintiff cannot prove damage, he will be entitled to nominal damages since trespass is actionable by itself.<sup>96</sup> Recovery for trespass is available only for actual physical invasion of property, and a plaintiff must prove specific acts of trespass for each defendant. Where the head of claim for environmental damages is based on trespass, then the general principle where such trespass affects farmland and economic trees is to restore property to its original position. In *S.D Law v Stirling Arbdali (Nigeria) Limited*<sup>97</sup> the Supreme Court stated that ‘the measure of damages (at first sight) for all torts affecting land, is the diminution in value to the plaintiff or in case of a plaintiff in possession, the cost of reasonable re-instatement’<sup>98</sup>

Private nuisance and trespass are quite similar; however the difference between them is that trespass is actionable per se whereas nuisance is actionable on proof of damage. If the injury is direct it is trespass and if it is consequential it is nuisance.<sup>99</sup> Also the defense of lawful authority can be raised in a case of private nuisance. This applies even when the activity is carried out not directly in line with the statute, but still within the powers given to it. In *Allen v Gulf Oil Refining Ltd*<sup>100</sup> the defendant was authorised to build an oil refinery by an Act of Parliament. The Act gave no express authority to operate it, and after it came into operation the claimant argued that it caused a nuisance through the smell and noise. The House of Lords held that it had statutory authority to operate the refinery.

Despite having distinct advantage over nuisance, actions under trespass in environmental cases have been rarely invoked. Trespass, despite its wide scope, is unpopular among environmental litigants for two major reasons; first, it is clear from the foregoing cases that though the tort of trespass is actionable on its own, courts may require

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<sup>96</sup> J Fekumo (n 76) 256

<sup>97</sup> (1977) 11-12 SC 53

<sup>98</sup> Ibid 61-62; The holding of the court here is in line with the requirement of s 36 of the Land Use Act 1978 which provides that ‘fair and adequate compensation’ to the occupiers of a land for disturbance of their surface rights. See section 3.4.1 above

<sup>99</sup> See T Merrill, ‘Trespass, Nuisance and the Costs of Determining Property Rights’ (1985) 14 JLS 13, 13-14

<sup>100</sup> [1981] A C 1001

minimum proof of injury or harm before affording a remedy for trespass.<sup>101</sup> Second, the requirement of the law that the interference must be direct and not just consequential is another deterrent to potential plaintiffs as most cases bordering on environmental harm are usually based on the consequence of the defendant's actions.<sup>102</sup>

At common law, **negligence** connotes the complex concept of duty and damages suffered by the person to whom the duty is owing<sup>103</sup> To succeed in an action for negligence, the plaintiff must establish the trinity requirements of **duty, breach and damage**. In other words, the plaintiff must establish that;

- (a) The defendant owed him a Duty of care;<sup>104</sup>
- (b) The defendant breached the duty;<sup>105</sup>
- (c) There was damage to the plaintiff as a result of the breach<sup>106</sup>

Unlike traditional tort cases, toxic tort cases (oil-related litigations) often involve indirect links between cause and effect. For example, in a traditional negligence case, careless driver A collides with driver B, who was stopped at a traffic light. Such a case is straight forward because eyewitnesses often see that A failed to stop and caused an immediate damage to B's trunk and bumper. Toxic torts often lack these helpful elements

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<sup>101</sup> *Eliochin (Nigeria) Ltd & Ors v Mbadiwe* (1986) 1 SC 99

<sup>102</sup> See *Esso Petroleum Co Ltd v Southport Corporation* (1956) AC 218; G Smith, 'Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion' (1995-1996) 36 Santa Clara L Rev 39, 42

<sup>103</sup> Per Lord Wright in *Lockgelly Iron and Coal Company v Mulan* (1934) AC 25

<sup>104</sup> A duty of care was originally established by applying Lord Atkin's 'Neighbour' Test from *Donoghue v Stevenson* (1932) AC 562 the modern three stage test was laid down by the House of Lords in *Caparo Industries v Dickman* [1990] 2 AC 605. The court will consider whether the consequences of the defendant's act were reasonably foreseeable; whether there is a relationship of proximity between the parties; and whether in all the circumstances, it will be fair, just and reasonable that the law should impose a duty.

<sup>105</sup> The court will consider the following four factors in deciding if there has been a breach of duty: the degree of risk involved, the seriousness of harm, the practicability of taking precautions, and the social importance of the risky activity. The claimant must also produce evidence which infers a lack of reasonable care. See *Roe v Minister of Health* [1954] 2 All ER 131

<sup>106</sup> The claimant or plaintiff must prove that the harm would not have occurred but for the negligence of the plaintiff see *Barnett v Chelsea & Kensington Hospital* [1968] 1 All ER 1068. Where there are a number of possible causes of the injury, the claimant must prove that the defendant's breach of duty caused the harm or was a material contribution. See *Wilshie v Essex AHA* [1988] AC 1074 the claimant must also prove that the consequences were reasonably anticipated, that is, there was no remoteness of damage. See the *Wagon Mound no. 1* (1961) UKPC 1 see also *Edok Eter Mandilas Limited v Ale and others* (1985) 3 NWLR (pt 110) 43



because the defendant's chemical intrusion goes unnoticed and latent injuries manifest themselves years after the act. Thus in oil-related litigations, there must be proof of causation of the 'injury' complained of.

More often than not, the burden is on the plaintiff.<sup>107</sup> Usually the burden lies on him who desires the court to make any pronouncement in his favour as to any legal rights on the existence of facts to which he asserts.<sup>108</sup> In *Shell Petroleum Development Company of Nigeria Ltd v Chief G.B.A. Tiebo VII & Others*<sup>109</sup> the plaintiffs claimed the sum of ~~₦~~64,146,000.00<sup>110</sup> as special and general damages arising from the defendant's negligence for crude oil spill on the lands, creeks, lakes and shrines of the plaintiff from the defendant's oil mining activities. The plaintiffs claimed specific sums as special damages for losses arising from pollution of fish- ponds, damages to communal fishing nets and raffia palms. They also claimed specific sums as general damages. The trial court awarded damages of four hundred thousand naira (~~₦~~400,000.00) and six hundred thousand naira(~~₦~~600,000.00)<sup>111</sup> as special damages for loss of raffia palms and loss of drinking water respectively; N5 million as general damages and ~~₦~~1 million as costs to the plaintiffs. The defendants appeal to the Court of Appeal was dismissed. On appeal to the Supreme Court, the later that anyone making a claim in special damages must prove strictly that he did suffer such special damages claimed. Thus where plaintiff is unable to prove special damages, his case crumbles and a trial court cannot compensate him by way of general damages. Ladan<sup>112</sup> claims this is good law because where there is no strict proof of special damages there exists the tendency for a judge to make estimations. In this case, the plaintiff could not strictly

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<sup>107</sup> See s 135, 136 and 137 of the Evidence Act (Cap E 12 LFN 2004); See *Ojo v Philips* (1993) 5 NWLR (Pt 296) 751; *Jalico Ltd v Owoniboye* [1995] 4 SCNJ 256; *Onyenge & Ors v Ebere & Ors* [2004] 11 MJSC 184; *Nsirim v Nsirim* [2002] 3 MJSC 26; *Ewo v Ani* [2004] 4 MJSC 119; *NNPC v Lutin Inv Ltd* [2006] 2 MJSC 1

<sup>108</sup> See *Adams v LSDPC* [2002] 5 NWLR (Pt 656) 291; *Bon Ltd v Babatunde* (2002) 3NWLR (Pt 706) 20

<sup>109</sup> [2005] 9 MJSC 158

<sup>110</sup> Which is equivalent to approximately £246,715

<sup>111</sup> Approximately £1,539 and £2,308 respectively

<sup>112</sup> M Ladan, *Biodiversity, Environmental Litigation, Human Rights and Access to Environmental Justice-A Case Study of Nigeria* (Faith Printers and Publishers 2007) 87

prove the loss to the raffia palms, the cost of purchasing alternative drinking water and water used for domestic purposes yet the court below awarded four hundred thousand naira(~~N~~400,000) and six hundred thousand naira( ~~N~~600,000) damages respectively for these.

It is good law, but the plaintiffs in environmental tort litigations can hardly discharge this burden by virtue of the basic features of environmental torts which are: (1) the long latency of many environmental harms; (2) the frequent difficulty of identifying the party or parties responsible for causing these harms; (3) the corresponding difficulty of identifying the particular individuals who have suffered injury caused by harmful environmental exposure.<sup>113</sup>

A plaintiff's difficulty with proof in environmental litigations is not likely to be enormous where the case is clear. In such cases, the maxim of *Res ipsa loquitur* is applied. *Res ipsa Loquitur* literally means 'the thing speaks for itself.' The doctrine is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself, which is such as necessarily to involve negligence.<sup>114</sup> It is no more than a rule of evidence which merely shifts the onus on the defendant. In such circumstances, a plaintiff merely proves the resultant accident and injury and then asks the court to infer there from negligence on the part of the defendant. Reliance on *res ipsa* is thus a confession by the plaintiff that he has no direct and affirmative evidence of the negligence complained of against the defendant but that the surrounding circumstances amply establish such negligence.<sup>115</sup>

For the doctrine to apply, the following two conditions must be fulfilled:

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<sup>113</sup> See K Abraham, 'The Relation Between Civil Liability and Environmental Regulation'(2002) 41 Washburn L J 379, 380

<sup>114</sup> J Fekumo (n 76) 271

<sup>115</sup> See R Morris, 'Res Ipsa Loquitur'-Liability Without Fault (1957) 163 (12) JAMA 1055, 1059; G Kimball, 'Application of Res Ipsa Loquitur in Suits against Multiple Defendants' (1969-1970) 34 Alb L Rev 106, 110; M Grady, 'Res Ipsa Loquitur and Compliance Error' (1993-1994) 142 U Pa L Rev 887; F Erhonsele, 'The Onus Of Proof In Cases Of Environmental Degradation In Oil Related Litigations: A Case For Change In Attitude Of Nigerian Courts' in L Atsegbua (ed), *Selected Essays on Petroleum and Environmental Laws* (New Era Publications 2000) 161,163

- (a) the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control;
- (b) the occurrence is such that it would not have happened without negligence; that is, in the ordinary course of events the injury should not have happened unless there was want of care.

The first step is whether the accident is the kind that would usually be caused by negligence, and the second is whether or not the defendant had exclusive control over the instrumentality that caused the accident. If found, *res ipsa* creates an inference of negligence, although in most cases, it does not necessarily result in a direct verdict.<sup>116</sup> *Res ipsa loquitur* was fully applied in the case of *Man v Shell BP*.<sup>117</sup> In that case, the plaintiffs claimed compensation for damages from an oil spill. They were unable to lead evidence of specific negligent act of the defendant but however established the fact of their losses as a result of oil spill from the defendant company. The court entered judgement for the plaintiff relying probably on the doctrine of *Res Ipsa loquitur* to shift the burden of proof from the plaintiff to the defendant. The court held that negligence on the part of the defendants has been pleaded, but there is no evidence of it; and that no evidence is actually needed because the defendants must naturally be held responsible for an escape of oil which they should have kept under control.

The maxim however has its limitations. Firstly, the maxim is applicable only when the cause of damage is known. In *Umudge v Shell BP Nigeria Ltd*.<sup>118</sup>, the cause of action was crude oil-waste previously collected in a pit burrowed by, and in control of, the plaintiffs. The doctrine of *Res ipsa loquitur* could therefore not apply. Secondly, the maxim merely raises a presumption where the defendant is able to adduce evidence that the

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<sup>116</sup> F Erhonsele (n 115) 164

<sup>117</sup> (1970-1972) 1 RSLR 71

<sup>118</sup> (1975) 9-11 SC 115

accident occurred without negligence. The burden of proving negligence then shifts back to the plaintiff. The limitation of the maxim is further accentuated by the fact that the defendant is usually in a good financial position to procure the services of experts to give uncontradicted evidence in rebuttal of the presumption of negligence encapsulated in the maxim.<sup>119</sup>

However, in toxic tort cases which are not so direct, the plaintiff can hardly prove causation between the defendant's act and the damage suffered by him. The plaintiff must not only show that the substance caused the injury in question, but also that the plaintiff's specific injury was caused by the substance. Without some evidence that the substance in question caused the specific injury to the specific plaintiff, courts are likely to grant the defendant summary judgment.<sup>120</sup>

Another danger inherent in the requirements of proof of causation in environmental tort litigations is further underlined by its adverse effects in cases of Multiple Pollution. The source of a substance that is an environmental pollutant or contaminant is not always readily identifiable, especially if the substance was released into the environment in the distant past. Moreover, sometimes, there are multiple sources. Even when the potential source of a substance can be identified, it may be difficult or impossible to determine the proportion of each source's responsibility for the total harm that has occurred.<sup>121</sup> It is clear that, going by the trend of judicial decisions, when faced with Multiple Pollution cases, the courts will likely put the onus of proving which of the multiple polluters was responsible for the resultant damages, on the plaintiff.<sup>122</sup>

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<sup>119</sup> R Morris (n 115) 1056

<sup>120</sup> See J Sanders and J Machal-Fulks, 'The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law' (2001) 64 (4) Law and Contemp Prob 110.

<sup>121</sup> K Abraham (n 113) 381; see also G Robinson, 'Multiple Causation in Tort Law: Reflections on the DES Cases' (1982) 68 Va L Rev 713

<sup>122</sup> This is in line with s 137- 138 of the Evidence Act, Cap E12 Laws of the Federation of Nigeria 2004.

In addition to negligence, strict liability may be imposed for injury or damage caused by ‘abnormally dangerous’ activities.<sup>123</sup> Although the requirement of this cause of action vary somewhat across jurisdictions, in general, the activity must pose significant foreseeable risk that cannot be eliminated even when reasonable care is exercised in the conduct of the activity. Usually, the activity must not be a matter of common usage. The seminal English case on this issue is *Rylands v Fletcher*<sup>124</sup> The strict liability rule in *Rylands v Fletcher* (which is also applicable in Nigeria) is an alternative tort remedy available to an aggrieved plaintiff. It has an edge over the other remedies to the extent that it dispenses with the need to prove negligence. The rule states as follows:

The person who for his own purpose brings on his land and 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 the damages which is the natural consequence of its escape...<sup>125</sup>

The advantage of the rule is that it dispenses with the need to prove either negligence or special damages suffered by the plaintiff. The limitation of the rule lies in the fact that it places the burden of proving some facts on the plaintiff and the plaintiff may not easily be able to discharge the burden. Again, even where a plaintiff crosses the hurdle of proof, he remains at the mercy of the Law where the defendant is availed by one or more of the defenses under the rule in *Rylands v Fletcher*, namely, Act of God, Consent of the plaintiff, Default of the plaintiff, Act of a stranger, statutory authority. In *Ikpede v Shell Bp Development Company of Nigeria*<sup>126</sup> for example, there was a leakage of crude oil from the defendant’s pipelines which caused damage to the plaintiff’s fish swamp. The court held that even though all the requirements of the rule had been met, the defendants were not

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<sup>123</sup> K Abraham (n 113) 385

<sup>124</sup> (1868)[1] LR 3 HL 330

<sup>125</sup> Per Blackburn J, 279-280

<sup>126</sup> (1973) All NLR 61

liable since the laying of the pipeline was done in pursuance of a license issued under the Oil Pipelines Act of 1958.<sup>127</sup>

The number of defences under the rule waters down the apparent efficacy which the rule was meant to achieve. Also, the rule proves too weak to cope with the modern day realities of complex petroleum operations.<sup>128</sup>

### **3.7 The African Charter on Human and People's Rights 1981**

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an International Human Rights instrument that is intended to promote and protect human rights and basic freedoms in the African Continent.<sup>129</sup> The economic, social and cultural rights in the Charter include the right to property<sup>130</sup>, the right to work,<sup>131</sup> the right to health,<sup>132</sup> the right to education,<sup>133</sup> and the freedom to take part in cultural life.<sup>134</sup>

The collective rights listed in articles 20-24 also have important social, economic and cultural connotations, for example article 21(1) which guarantees the right of all peoples to freely dispose of their wealth and natural resources and article 24 which guarantees the right of peoples to a satisfactory environment favourable to their development. The African Commission on Human and People's Rights had the opportunity to apply these rights in Communication 155/96- *the Social and Economic Rights Action Center and Another v Nigeria*<sup>135</sup> In that case, the state-owned Nigerian National Petroleum Company (NNPC) and the Shell Petroleum Development Corporation (SPDC) had been exploiting oil reserves

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<sup>127</sup> Under S 3 (b) of the Act, the minister can grant licenses to construct, maintain and operate oil pipelines  
<sup>128</sup> L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ambik Press 2010) 46

<sup>129</sup> 'African Charter on Human and Peoples Rights' <[www.who.int/hhr/Human\\_and\\_Peoples\\_Rights.pdf](http://www.who.int/hhr/Human_and_Peoples_Rights.pdf)> accessed 23 November 2012

<sup>130</sup> Art 14

<sup>131</sup> Art 15

<sup>132</sup> Art 16

<sup>133</sup> Art 17 (1)

<sup>134</sup> Art 17 (2)

<sup>135</sup> Also known as the *Ogoni Case* or *Wiwa v Royal Dutch Petroleum Co* discussed in section 3.7 below

in Ogoni land, Nigeria. Toxic wastes were deposited into the local environment and waterways without facilities put in place to prevent spillages. Consequently, the villagers suffered short and long term health problems.

The issue before the African Commission was whether the military government of Nigeria was guilty of, among other things, direct and indirect violations of the right to health and the right to a clean environment by contaminating water, soil and air, of the Ogoni people. The Commission emphasised the interrelatedness of the rights to health and environment on the authority of article 12 of the International Convention of Economic Social and Cultural Rights (ICESCR).<sup>136</sup> The Commission further held that articles 16 and 24 of the African Charter which protect the rights to health and environment respectively, impose a duty on the state parties to take steps to respect, promote and fulfil them. Thus, while recognising the right of the Nigerian Government to derive its income from oil extraction, it criticized it for violating the provisions of the Charter by not undertaking environmental impact studies.

The decision of the African Commission in the Ogoni case represents a remarkable step towards a manifestation of the hope for redress of human rights violations (especially environmental rights) in Africa. In theory however, the decisions of the Commission are not binding on states, they are simply recommendations that the state may adopt at its discretion. In other words, the state is not required to follow the decision of the Commission. In practice, also, most of the states that have been examined by the Commission under the article 55 complaints procedure have not complied with its decisions.<sup>137</sup> However, the Commission has stated more than once that, in its view, its decisions are authoritative interpretations of the African Charter and therefore binding on states parties.

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<sup>136</sup> 29 July, 1993

<sup>137</sup> On the issue of state compliance generally, see 'Non-compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach' DOC/OS/50b (XXIV).

In contrast, judgments of the African Human Rights Court and the new African Court of Justice and Human Rights (ACJHR) will be binding upon the parties and states will have to comply with judgments within the time periods fixed by the court.<sup>138</sup> Moreover, states parties to the protocol on the court and the ACJHR statute will be obliged to guarantee the execution of the court's judgments.<sup>139</sup> The ACHJR statute also confers enforcement powers on the African Union's (AU) Assembly of heads of state and Government.<sup>140</sup>

The African machinery for human rights protection is weaker than its European and Inter-American counterparts<sup>141</sup>. This is so despite the fact that the scope of personal and subject-matter jurisdiction of the African human rights system is broader than any other regional human rights institution – it covers 53 countries, is available to complainants other than the actual victims of human rights violations,<sup>142</sup> and encompasses a broad range of human rights (including economic and social rights and instruments other than the African Charter).

It appears that the limited success of the African Human Rights Commission is closely tied to broader problems surrounding the process of democratization, good governance and economic development in the African Continent.

<sup>138</sup> The first and only case decided by the court was done on 15 December 2009 - *Michelot Yogogombaye v the Republic of Senegal* application No. 001/2008 <[www.african-court.org](http://www.african-court.org)> Cases> Latest Judgments> accessed 17 July 2012

<sup>139</sup> Court Protocol, art 30; ACJHR Statute, art 46 (2) & (3). Nigeria is already a signatory but has not ratified it.

<sup>140</sup> Art 46(4) of the statute

<sup>141</sup> O Okere, 'The Protection of Human rights in Africa and the African Charter on Human and People's Rights: A Comparative analysis with the European and American Systems' (1984) 6(2) HRQ 141, 159

<sup>142</sup> R Murray, 'Decisions by the African Commission on Individual Communications Under the African Charter on Human and People's Rights' (1997) 46 ICLQ 412,413; W Benedek, 'The African Charter and Commission on Human and People's Rights: How to make it More Effective' (1993) 11 Neth Q Hum Rts 25, 31; E Kodjo, 'The African Charter on Human and People's Rights' (1990) 11 Hum Rts L J 271,280; See however, C Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and People's Rights: A Preliminary Assessment' (1998) 8 Transnatl L & Contemp Probs 359, 371 where the author argues that such criticisms are unsupported by international law and even the character itself.



Without real enforcement powers, the commission has to rely on its informal ability to prod and persuade African Governments to adopt better practices; and its ability to do so is heavily dependent on the goodwill and capabilities of the relevant state – both often lacking in practice.<sup>143</sup> The type of violation brought before the commission – including state sanctioned violence, ethnic and gender discrimination and political repression<sup>144</sup> further complicate the challenges presented before the commission. This is however without prejudice to the fact that the commission’s record has certainly improved over the years (notably, its work has become more efficient, well organized and publicized).<sup>145</sup>

Although the move by the African Union to create stronger institutions – most notably the creation of the African Human Rights Court and the future ACJHR – should be seen as a move in the right direction, it is probably too soon to assess its actual implications for the protection of human rights in Africa. However, the unclear relationship between the court and the commission suggests that the court is still very much a half- baked idea. Finally, the limits placed on the court’s ability to hear cases brought by individuals and NGOs put in question the actual commitment of the drafter to creating a robust court that could hold African governments accountable for their human rights records.<sup>146</sup>

This limitation is clear from the provisions of article 5(3) of the Protocol to the African Charter - The African Court on Human and Peoples’ Rights will exercise optional jurisdiction with regard to cases submitted by ‘non-governmental organizations with observer status before the Commission and individuals’. In that regard, only those states that have allowed NGOs and individuals to institute cases against them will be able to do so. This presents a huge problem since only two states, Mali and Burkina-Faso, have made the

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<sup>143</sup> Ibid, 408

<sup>144</sup> See *Institute of Human Rights and Development in Africa v Angola* Comm No 292/204, AHPH Commission 23-24<sup>th</sup> Activity Report (2006-2008), Annex II, 86

<sup>145</sup> For example see *SERAC v Nigeria* (2001) AHRLR 60; *Amnesty International v Zambia* Comm No 212/98, ACHPR 12<sup>th</sup> Activity Report (1998-1999) Annex v, 76

<sup>146</sup> M Evans and R Murray, *The African Charter on Human and People’s Rights: The System in Practice 1986-2006* (2<sup>nd</sup> edn, CUP 2004) 413

declaration allowing individuals and NGOs such direct access to the African Court. Individuals and NGOs from the rest of the states that do not give such permission will rely on the African Commission to take cases to the African Court. This means that, apart from individuals from Mali and Burkina Faso, no one else from the rest of the African countries can take cases directly to the African Court on Human and Peoples' Rights.<sup>147</sup>

In light of the above therefore, Nigerians ought to be able to sue/or demand for the protection of their Economic, Social and Cultural rights through the African Charter on Human and People's Rights; this is because by virtue of section 12(1) of the 1999 Constitution,<sup>148</sup> the African Charter has been incorporated into Nigerian Law as African Charter (Ratification and Enforcement) Act <sup>149</sup> . In *General Sani Abacha v Gani Fawehinmi*<sup>150</sup> the Nigerian Supreme Court upheld a decision of the Court of Appeal on the superiority of the African Charter to domestic legislation. The Court, however, rejected an argument that the Charter was superior to the national constitution of the country. It follows therefore, that any conflict between any section of the Constitution and any article of the African Charter will be resolved in favour of the Constitution. Section 1 (3) of the 1999 Constitution provides that any national law that contains provisions that are contrary to the Constitution, shall, to the extent of that inconsistency be void. In this regard therefore, as laudable as the provisions of the African Charter are, it is doubtful if the Charter can be used to elevate environmental rights from non-justiciable rights to justiciable rights.

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<sup>147</sup> G Wachira, 'African Court on Human & Peoples' Rights: Ten Years on and Still no Justice' <<http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf>> accessed 07 January 2012

<sup>148</sup> This section 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'.

<sup>149</sup> Cap A9 Laws of the Federation of Nigeria 2004

<sup>150</sup> (2000) 6 NWLR (pt 660) 228

### 3.8 Environmental Litigations Brought Under Foreign Laws

Apart from seeking redress on the platform of the existing framework discussed above, victims of environmental degradation in the Niger Delta region have also resorted to the laws of countries whose citizens are responsible for environmental damage in Nigeria. This section will discuss cases brought under American and British laws.

The **Alien Tort Claims Act** created under the Judiciary Act of 1789<sup>151</sup> gives the district courts original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The ATCA is a recent avenue for plaintiffs to pursue corporations (and individuals) for torts committed outside the United States. It was enacted as part of the codification of the previous Common Law doctrine that the nation had to observe international law, known then as the Law of Nations. Although no ATCA case asserting environmental harms has yet been fully heard on the merits, several plaintiffs have attempted to make a claim for violations of international environmental law. As international environmental law crosses into the realm of customary international law and meets the additional requirement of becoming universal, definable and obligatory, it will be a viable cause of action under the ATCA. One of such cases is the Nigerian case of *Wiwa v Royal Dutch Petroleum Company*<sup>152</sup>. In that case, the multinational companies carrying out oil exploration activities in the Niger Delta Region of Nigeria were sued in the United States of America under the Alien Tort Claims Act of 1789 by Ken Saro Wiwa's son<sup>153</sup>. The claims of the plaintiffs included (1) summary execution with respect to the hangings of Ken Saro-Wiwa and John Kpuinen; (2) crimes against humanity (3) torture (4) cruel, inhuman, or degrading treatment (5) arbitrary arrest and

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<sup>151</sup> 28 U.S.C § 1350

<sup>152</sup> No. 96 Civ. 8386 (KMW) (HBP) at 17-32 S.D.N.Y March 16, 2009) Available at <<http://ccrjustice.org/files/3.16.09%205th%20Amended%20complaint.pdf>> accessed 03 March 2012

<sup>153</sup> The deceased were executed by the Federal Military Government of Nigeria in 1995.

detention and (6) violation of the rights to life, liberty and security of person and peaceful assembly and association.

The Southern District Court of New York in this case, held that torture and summary execution required proof of state action. The Court found that the relevant test in this case is the 'joint action' test, under which private actors are considered state actors if they are wilful participants in joint action with the State or its agents. The plaintiffs in this case offered two theories under the joint action test which the plaintiffs proved to the satisfaction of the Court.

The effect of the court's approval of the proof of 'joint action' was to permit the plaintiffs to further establish Shell Nigeria's connection to the United States. Before this could be done however, Shell agreed to pay \$15.5 million to the families of the victims out of court but however denied any wrongdoing or liability, claiming that the payment was a humanitarian gesture.<sup>154</sup>

So far, no case under ATCA has yet yielded corporate liability because courts have not accepted environmental principles as part of the 'law of nations', and therefore actionable under the ATCA.

Following the *Wiwa* case, another case arose against Royal Dutch Shell Petroleum Company in February 2012 (*Esther Kiobel, et al v Royal Shell Petroleum Company*)<sup>155</sup>. Esther Kiobel is the widow of one of the nine protest leaders discussed in the *Wiwa* case above. The case was brought before the US Supreme Court to decide whether it can be adjudicated upon in the US judicial system. The British, Dutch and German governments, as well as the U.S. Chamber of Commerce and other multinational corporations supported Shell, saying what happened in Nigeria has no connection to the United States. The

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<sup>154</sup> See *Wiwa v Royal Shell Dutch Co* No 04 civ.2665,4 (S.D.N.Y June 7, 2009 <<http://wiwavshell Petroleum Development Co.>> accessed 16 March 2012

<sup>155</sup> 132 S Ct 248 (2011)

administration of President Barack Obama and international human rights organizations however supported the argument of corporate liability.<sup>156</sup>

On June 13 2012, Human Rights First filed its second amicus brief in the US Supreme Court.<sup>157</sup> In addition to this, Human Rights First urged the United States Government, which is not a party to the suit, to also file an amicus brief in support of extraterritorial application of the ATS for human rights violations. Again, the Government filed a brief in support of corporate liability under the ATS, but opposed the use of the ATS for human rights violations occurring abroad.<sup>158</sup>

Shell has however formally accepted responsibility in British courts for two significant spills in Bodo, in Ogoni region of the Delta.<sup>159</sup> Shell's acceptance of full liability for the spills followed a class action suit brought on behalf of communities by London law firm Leigh Day & Co which represented Ivory Coast Community that suffered health damage as a result of the dumping of toxic waste by a ship (Trafigura) leased to the multinational oil company in 2006. In 2008, Shell also accepted responsibility for a double rupture of the Bodo - Bonny trans-Niger pipeline that pumps 120,000 barrels of oil a day through the community. The crude oil that gushed unchecked from the two Bodo spills, which occurred within months of each other, in 2008 has clearly devastated the 20 sq km network of creeks and inlets on which Bodo and as many as 30 other smaller settlements depend for food, water and fuel.<sup>160</sup>

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<sup>156</sup> 'US Supreme Court will Hear Shell Nigeria Abuse Case' <<http://www.voanews.com/english/news/africa/Nigerian-Activists-Press-US-Supreme-Court-Case-Against-Shell-140793313.html>> Accessed 15 March, 2012

<sup>157</sup> See *Kiobel v Royal Dutch Petroleum Company* <http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co/> accessed 23 July 2012

<sup>158</sup> Ibid

<sup>159</sup> J Vidal, 'Shell Accepts Liability for Two Oil Spills in Nigeria' See <[guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria](http://guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria)> accessed 20 November 2012

<sup>160</sup> Ibid; see also *Africa Focus Bulletin*, 12 August 2011 [http://www.africafocus.org/docs11/nig\\_1108\\_b.php](http://www.africafocus.org/docs11/nig_1108_b.php) accessed 3 February 2012

Apart from the fact that such victories are rare, the compensation in such cases are usually inadequate to take care of over five decades of degradation, making remediation of that ecosystem elusive.<sup>161</sup>

### **3.9 Conclusion**

This chapter has examined the existing legal and institutional frameworks that are relevant to the achievement of sustainable development in the Niger Delta Region of Nigeria and shown most of them to be defective. Although the Nigerian Government did not begin a deliberate legislative effort toward achieving sustainable development until after the ‘Koko incident’ in 1988, all other relevant legal regimes that existed prior to that time which have been retained also count as the Government’s steps (howbeit, indirect) to achieving sustainable development in the region.

The 1999 Constitution is the primary environmental protection legislation in the Niger Delta region. The local statutes impose either criminal or civil liability; apart from the local statutes there are also some relevant customary laws which encourage environmental protection; the institutions (agencies) have supervisory and enforcement roles. These relevant regimes also include common law tort remedies, the Alien Tort Claims Act of 1789 and even the local laws of foreign countries.

The examinations of these regimes revealed two types of defects – those that are specific to the character of the legal regime in question and those that apply generally to the enforcement of environmental laws in Nigeria. Under the first group are fundamental problems dealing with the justiciability of environmental rights, the exclusion of NESREA from activities in the oil and gas sector, the inadequacy of some fines to deter offenders, a haphazard compensation scheme, ownership of resources, proof of causation, and slim

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<sup>161</sup> UNEP, ‘ERA seeks \$100 billion for Niger Delta’ (4 August 2011) accessed 3 February 2012

chances of success under foreign laws. The second group entails general enforcement problems like the absence of good governance, the need for judicial reform, the fragmentation of laws and insufficient use of non-legalistic enforcement mechanisms.

The next chapter will establish that reforms to the defective legal regimes examined in chapter three will improve their efficacy but argues that this efficacy will be enhanced if the laws are founded on a less anthropocentric ethic rather than a *strict* one.

## CHAPTER FOUR

### A CRITIQUE OF PROPOSED REFORMS FOR THE RELEVANT ENVIRONMENTAL LEGAL REGIMES IN NIGERIA: JUSTIFYING AN ETHICAL CHANGE

*... It is important to recognize that ideas have consequences. They shape the concepts and vocabularies that we use to approach problems of our time. For this reason, if no other, it is important for us to examine our cultural heritage. We may be embarrassed by it or find it ugly or despicable. But through this examination we may also find important threads that can help illuminate our present problems. At the very least, from this examination we can learn to understand ourselves better.<sup>1</sup>*

*Not about human dignity but the need for humankind to subordinate itself to two communities... future generations and ecosystems.<sup>2</sup>*

#### 4.1 Introduction

This chapter sets out to assess possible reforms - general and specific - to the defective regimes discussed in chapter three with a view to determining whether or not such reforms will constitute a sufficient strategy towards the effective management of the environment in the Niger Delta Region of Nigeria.

It will however argue that if the suggested reforms are adopted, the Niger Delta environment will be better *protected* and not necessarily *preserved* which is what the objective of sustainable development portends. It will argue this on the premise that Nigeria's religious and economic values have influenced the ethic that underlies its environmental protection laws; and that because these values tilt the ethic more towards development, the resultant laws (as they currently are) are bound to be *strictly* anthropocentric – more concerned about present man. In light of that, it will argue that when the ethic underlying the current legal framework on environmental protection in the Niger Delta region is changed from a *strictly* anthropocentric one to a less anthropocentric one, the commitment of the Nigerian Government to sustainable development will be more effective.

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<sup>1</sup> L Gruen and D Jamieson (eds), *Reflecting on Nature: Readings in Environmental Philosophy* (OUP 1994)1

<sup>2</sup> A Tarlock, 'The Future of Environmental "Rule of Law" Litigation' (2002) 19 PELR 575



## 4.2 Particular Reforms

These reforms are with particular reference to specific laws that have been analysed and they touch on the nature of the law (s) in question. Reforms under this subhead will address justiciability for environmental matters, fines, compensation, ownership of resources, proof of causation and foreign environmental litigations.

### 4.2.1 *Adopting a Justiciable Constitutional Environmental Right in Nigeria*

Although the justiciability of environmental matters under the 1999 Constitution is discussed exhaustively in chapter five, it is important to mention here that if environmental matters can be moved from chapter II (Fundamental Objectives and Directive Principles of State Policy) of the Constitution to Chapter IV (Fundamental Rights), and section 6(6) (c) of the Constitution is excluded from applying to environmental matters, then individuals can freely challenge violations to their environmental rights under the Constitution. An enforceable environmental right has been identified to be an effective way of responding to national environmental challenges.<sup>3</sup>

### 4.2.2 *Revising Inadequate Punishment/ Deterrence*

Classic deterrence theory holds that, to achieve maximum deterrence, an enforcement program must demonstrate three principles.<sup>4</sup> First, detection and penalty must be *certain* if the illegal conduct is undertaken. Second, the *severity* of penalties must exceed the benefit

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<sup>3</sup> See E Okon, 'The Environmental Perspective in the 1999 Nigerian Constitution' [2003] 5(4) Env L Rev 256, 264; C Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle' (2012) 5 (1) JPL 3, 5. The right referred to by the authors is however a human right to a clean environment which was argued in para 5 of section 1.5 not to be preservationist in nature which is what this thesis argue for.

<sup>4</sup> C Beccaria, 'On Crimes and Punishment' (D Young Tr, first published 1764, Hackett Publishing 1986) 7-8; K Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country' (2004) 16 JEL 361, 374

resulting from the illegal conduct. Third, penalties must be swiftly applied, a factor termed *celerity*. The classical theory assumes that a would-be violator must perceive these risks associated with the illegal conduct and react in a rational manner. The severity of the offence is reflected in some instances by the severity of the sanction. The nature of the offender may also influence the severity of the sanction.<sup>5</sup> Also, the speed at which a penalty arrives after a violation occurs creates an important link between the violation and the perception of risk. If the penalty takes a long time to arrive, the violator and others tend to disassociate the violation from the penalty.<sup>6</sup>

The penalties created under some of the laws examined in chapter three were shown to be a mockery of the offences themselves, making it possible for the offenders to even pay in advance for future offences under this Act. The legislature appears to have imposed rather lenient fines for such far-reaching breaches. Breaches that do not only endanger the environment which can be used for other sources of revenue (like agriculture), but also endanger the lives of the Nigerian citizenry.<sup>7</sup> For example, under the Oil in Navigable Waters Act, a person who fails to keep a record of spills or escape of oil caused by a desire to save life, vessel or cargo or resulting from damage to ship or leakage shall be penalised with a fine not exceeding two thousand naira (₦ 2,000). Where such a person deliberately falsified an entry, he is liable to a fine of one thousand naira (₦1,000) or imprisonment for six months or both.<sup>8</sup> Failure to report intentional discharges, accidental

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<sup>5</sup> S Rosseau, 'Empirical Analysis of Sanctions for Offences' (2009) 3 IRERE 161, 162

<sup>6</sup> See C Beccaria (n 4) 14-15; see also A Imevbore and M Okorodudu-Fubara, 'Review of Laws and Statements on the Environment in Nigeria' in E Aina and N Adedipe, *The Making of the Nigerian Environmental Policy* (Ibadan Press 1991) 35; A Salu, 'Can Laws Protect The Environment in Nigeria?' (1998) 2 (2) MPJFIL 153, 159

<sup>7</sup> See A Uchegbu, 'The Legal Regulations of Environmental Protection and Enforcement in Nigeria' (1988) 8 JPPL 57; A Imevbore and M Okorodudu-Fubara, 'Review of Laws and Statements on the Environment in Nigeria' in E Aina and N Adedipe, *The Making of the Nigerian Environmental Policy* (Ibadan Press 1991) 35; A Salu, 'Can Laws Protect The Environment in Nigeria?' (1998) 2 (2) MPJFIL 153, 159 G Ojo and J Gaskiya, *Environmental Laws of Nigeria: A Critical Review* (Environmental Rights Action/Friends of the Earth 2003)

<sup>8</sup> S 7 (1) and (2)

discharges from vessel or land results in a fine upon conviction of one thousand naira (₦1,000).

#### **4.2.3 *Involvement of NESREA in Oil and Gas Activities***

The NESREA Act amply demonstrates awareness on the part of government of the dangers of environmental pollution in general. However, there is no specific reference to ‘oil polluters’ in the Act. There ought to be such a provision imposing an additional liability for ‘spillers’, making them responsible for the cost of removal of such pollutants or reimburse the government for costs incurred where the pollutants were removed by the government or any of its agencies. They should also be made to pay the costs of restoration or replacement of natural resources damaged or destroyed as a result of the discharge.

Also, the exclusionary clauses under sections 7, 8, 24, 29 and 30 of the Act which permit the agency to carry out its activities on the environment and other related activities other than in the Oil and Gas sectors<sup>9</sup> should be expunged owing to the fact that the major oil spillages in Nigeria’s Niger Delta region are from the oil and gas sectors.<sup>10</sup>

Again, it is suggested that only minimum penalties should be provided for, and not a range;<sup>11</sup> that is, the penalties should be left open to be able to be applied in cases where the wealth of the offender will be taken into consideration. Also, the Act should provide for administrative penalties like suspension or forfeiture of license, community service, share issue, environmental audit and so on.

#### **4.2.4 *Formulation of Compensation Guidelines***

Compensation might include payments for medical care and health monitoring, and any kind of loss that the victims of environmental degradation face, including a rehabilitation

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<sup>9</sup> Specifically in ss 8(k), (l), (m), (n) and (s)

<sup>10</sup> section 2.4.5 above

<sup>11</sup> The maximum penalty under the Act is ₦2,000,000; that is approximately £7,692

program to bring their community back to its original state, insofar as possible. However, civil liability laws examined in chapter three were seen not to have a standard for calculating fair and adequate compensation.<sup>12</sup>

Moreover, compensation for medical care, loss of earnings, loss of future opportunities, and so on is not enough to compensate for the health damages from pollution. The serious clinical symptoms of pollution related diseases take a long period of time to develop.<sup>13</sup> Furthermore, pollution-related diseases are always difficult to diagnose. Therefore, what a fair compensation system should look like is a big question for all stakeholders - the victims, lawyers, the government, and the society in general. It is not yet clear what kind of system would be fair and how it would work but basically the compensation system should at least cover all real damages. To find a suitable system, there needs to be further interdisciplinary research done with cooperation from lawyers, doctors, economists, and experts from other fields.<sup>14</sup>

The civil statutes in Nigeria should be able to provide guidelines for determining the compensation to be granted to victims of environmental degradation instead of leaving the entire responsibility to the courts. Ironically, however, the guide provided by the court in *Shell Petroleum Development Company v Farah*<sup>15</sup> will be a good starting point for the legislature as far as damage to property is concerned. In that case, the Court of Appeal, basing its judgment on English and Nigerian case law, stated that compensation should restore the person suffering the loss as far as money can do that to the position he was before the loss or would have been but for the loss. The court further held that the amount payable in compensation is the current market value of the property damaged, including

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<sup>12</sup> L Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Routledge 2012) ch 8

<sup>13</sup> See C Cranor, *Toxic Torts: Science, Law and the Possibility of Justice* (CUP 2006) 13-15

<sup>14</sup> See G Garrard and K Willis, *Economic Valuation of the Environment: Methods and Case Studies* (Edward Elgar 1999) 10-12

<sup>15</sup> [1995] 3 NWLR (Pt 382), 148,192. This case arose from a blow out at Shell's Bomu II oil well in Tai/Gokana local government areas in Ogoni in 1970, though the case was not commenced until 1989.

interests and loss of earnings and use.<sup>16</sup> There is however a lot of work to be done by the legislature as far as compensation for health damage is concerned.

#### **4.2.5 Decentralization of Ownership of Natural Resources**

There is no gainsaying that every government has the right to acquire land for public purposes; however, those affected should have the right to voice opposition to the acquisition, to challenge it before an impartial court, and to obtain adequate compensation.<sup>17</sup>

The all-inclusive sharing formula for oil and gas revenue in Brazil is recommended for the resolution of the resource control agitation in Nigeria.

The provisions of Brazilian law on sharing of revenue from oil and gas operations are encompassing, ensuring that all interested parties are taken on board.<sup>18</sup> For example, article 52 of the Brazilian Petroleum Law<sup>19</sup> specifically provides that the concessionaire must set aside 0.5 -1 per cent of the value of total production from all land based fields as special royalties to be paid to the landowners in Brazilian currency on a monthly basis.<sup>20</sup> The concessionaire is required to show proof of this payment to Brazil's National Agency of Petroleum, Natural Gas and Biofuels (ANP) on a monthly basis, and where the owner of the land is not known, or the ownership is in dispute, such payments are required to be made into court.<sup>21</sup> The concessionaire and the landowner are to enter into a separate agreement detailing the manner of determining the value of production, the conditions for the payment, and the penalties to the concessionaire for failure to pay as agreed, or to the landowner for

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<sup>16</sup> See also *Shell v Isaiah* (1997) 6 NWLR (Pt 508) 236

<sup>17</sup> See K Viitanen, 'Just Compensation for Expropriation?' (Paper presented at XXII International Congress Washington DC, USA, 19-26 April 2002)

<sup>18</sup> 'Brazil's Oil and Gas Exploration and Production Regimes: An Overview' <<http://www.mayerbrown.com/publications/Brazils-Oil-and-Gas-Exploration-and-Production-Regimes-An-Overview-03-23-2012/>> accessed 16 August 2012. The phrase 'all interested parties' includes landowners.

<sup>19</sup> Brazilian Petroleum Law, as amended by Law No. 7990 of 28

<sup>20</sup> See art 3 para 1 of the ANP Ordinance No. 43 of 1998.

<sup>21</sup> Ibid

failure to inform the concessionaire of any change in the ownership of the land after the agreement is entered into.<sup>22</sup>

The various interest groups in the oil revenue, ranging from the individual and family landowners, to the communities, through the local government areas to the states and the Federal Government need to be adequately taken care of in allocating the revenue from oil and gas, and by extension, other mineral resources.<sup>23</sup>

A comprehensive formula which encompasses all these interest groups and is adequately monitored to ensure strict compliance will help to reduce agitation and improve the relationship between communities and oil and gas companies. In advocating this approach, a number of bottlenecks and challenges exist in the terrain in Nigeria which need to be highlighted and addressed. First, the provision of the Land Use Act which vests title to all lands in a state in the governor of the state and reduces the individuals on the land to the status of occupiers, will provide an obstacle, as it would lead to arguments that the occupier, not being the owner, cannot claim any long term benefits from operations on the land.

This law will therefore need to be repealed or amended to restore the freehold interest of landowners in their property, which subsisted in most parts of Nigeria before the introduction of the law in 1978. Secondly, the complex land tenure system in most of the Niger Delta area where land is owned by individuals, families and communities will make it difficult to ascertain ownership of land for payment of royalties, and could exacerbate land disputes and intra and inter communal rivalry, at least in the short term. An effective mechanism for managing this situation will therefore need to be developed, with strict rules

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<sup>22</sup> Art 3, para 2 of the ANP Ordinance No. 43 of 1998

<sup>23</sup> I Sagay, 'Nigerian Constitutions, Operation of Federalism and the South - South Zone' (A Keynote Address at the All Niger Peoples' Conference 2006 held at Grand Hyatt, DFW Dallas, Texas, USA 24-27 August 2006, 3); see also D Dafinone, 'Resource Control: The Economic and Political Dimensions' (2001) available at <http://www.waado.org/NigerDelta/Essays/ResourceControl/Dafinone.htm> accessed 20 July 2012

for payment of royalties from disputed lands into escrow accounts, in order to ensure that such disputes do not create another source of disruption of oil and gas production activities. Finally, there is an urgent need to diversify the revenue base of Nigeria from its current mono cultural state, to ensure that undue attention is not paid to oil and gas revenue, which increases the arguments around how the revenue is to be distributed.<sup>24</sup> Unlike Nigeria where oil and gas accounts for most of government revenue, the percentage of oil and gas in Brazil's GDP is not more than 4 per cent, and so the distribution of revenue from this source does not generate the sort of controversy it does in Nigeria.

If the Land Use Act is amended in such a way as to vest the right of ownership of land through which oil pipelines pass in the communities along with the other stakeholders (Federal, State and Local Government and oil Companies or other Licensees), it becomes one sure way of ending cases of oil pipelines vandalism as the community's joint ownership interest will be safeguarded while the environment stands better protected for the present and future generations.<sup>25</sup>

It is encouraging that the Federal Government of Nigeria has considered it imperative to call for a fairly comprehensive review of the Act by sending 14 amendment clauses<sup>26</sup> to the National Assembly for this purpose. The proposed bill seeks to vest ownership of land in the hands of those with customary right of ownership and also enable farmers to use land as collateral for loans for commercial farming to boost food production in the country. The bill also seeks to restrict the requirement of the Governor's consent to

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<sup>24</sup> I Akintoya and S Onayemi, 'Diversifying the Productive Base of Nigeria: an Econometric Approach to the Assessment of Non-Oil Export Promotion Strategies' (2009) 24 IRJFE 209

<sup>25</sup> See M Banire, *Land Management in Nigeria: Towards a New Legal Framework* (Ecowatch Publication 2006); A Adefulu and N Esionye, 'Nigeria: An Overview of Nigeria's Land Use Amendment Bill' <[http://www.mondaq.com/article.asp?article\\_id=81844&signup=true](http://www.mondaq.com/article.asp?article_id=81844&signup=true)> accessed 16 August 2012; K Akogu and T Soniyi, 'Constitution Review: Immunity, Land Use Act May Go' *This Day* (Nigeria, 7 May 2012)<<http://www.thisdaylive.com/articles/constitution-review-immunity-land-use-act-may-go/115308/>> accessed 16 August 2012

<sup>26</sup> Titled: Land Use (Amendment) Bill 2009

assignment only,<sup>27</sup> which will render such consent unnecessary for mortgages, subleases and other land transfer forms in order to make transaction in land less cumbersome and facilitate economic development. It is however hoped that the National Assembly will expedite action on the passage of the bill after thorough examination and that the amendment would attract the required number of endorsements in the State Houses of Assembly.

#### **4.2.6 *Amending the Laws on Proof of Causation***

Even where the plaintiff successfully establishes that the defendant owes him a duty of care under the tort of negligence, and further proves the defendant's breach of duty, this will not guarantee the award of damages, in his favour, against the defendant. There is the additional burden of proving that the damage suffered by him was wholly and exclusively caused by the negligent conduct of the defendants.<sup>28</sup>

To circumvent the problem of proof inherent in toxic tort litigations it is recommended in line with Professor Berger's proposal that liability in negligence should be imposed for failure to provide substantial information relating to risk and proof that the failure caused plaintiff's injury would not be required.<sup>29</sup> Thus defendants would be relieved of liability for injuries caused by exposure to their products, provided that they had met the required standard of care for developing and disseminating information relevant to risk. The idea would be to create a new tort that conditions culpability on the failure to develop and disseminate significant data needed for risk assessment. Zipurski and Goldberg followed this line of reasoning when they asserted that negligence law should be viewed as a reasonably coherent body of rules and principles articulating a particular kind of legal

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<sup>27</sup> Ss 21 and 22 of the Act provide for the requirement of a Governor's consent for the alienation of customary and statutory rights of occupancy, the procurement of which is usually characterized by long and frustrating delay.

<sup>28</sup> See the problem of proof discussed in paras 15-17 of section 3.6 above

<sup>29</sup> M Berger, 'Eliminating General Causation: Notes Towards a New Theory of justice and Toxic Torts' (1997) 97 Colum L Rev 2117



wrong, namely, the wrong of breaching an obligation to take care toward another person, thereby injuring her.<sup>30</sup>

The above proposals are most laudable in the sense that in order to minimize risk in the face of uncertain knowledge, the law ought to concentrate on developing the required standard of care regarding a company's duty to keep itself reasonably informed about the dangers of its activities. If a company fails to exercise the appropriate level of due care, it should be held liable to those put at risk by its action. This strict liability system would ease the plaintiff's burden of proof by providing the plaintiff with rebuttable presumptions after the plaintiff showed basic causation facts. Once granted, the rebuttable presumption would shift the burden of causation proof to the defendant. The defendants in oil-related litigations should be culpable if they have acted without taking into account the interests of those who will be affected by their conduct.

In the event of the plaintiff suffering damage in an environment, where there is the likelihood of multiple polluters, strict adherence to the principle of causation (requiring proof by the plaintiff of which of the multiple polluters caused the damage suffered) may result in injustice to the plaintiff.

Having been confronted with similar problems, certain jurisdictions have devised various rules aimed at tackling the problems of proof in environmental litigations-whether by multiple polluters or otherwise. The Chinese, American and English jurisdictions are good examples, among others.

On December 6, 2001, the Supreme People's Court of China adopted the several provisions on the Evidence of Civil Litigation.<sup>31</sup> With respect to the burden of proof for compensation, article 4 provides that if the litigation of environmental damage is based on

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<sup>30</sup> B Zipurski and J Goldberg, 'The Restatement (third) and the Place of Duty in Negligence Law' (April 1 2001) Va L Rev [serial online]www.highbeam.com24, accessed 16 November 2012

<sup>31</sup> See generally M Zhang and P Zwier, 'Burden of Proof: Development in Modern Chinese Evidence Rules' (2003) 10 Tulsa J Comp & Intl L 419-471

environmental pollution, then the injurer shall bear the burden of proof of the statutory exemptions and the fact that there is no causation between his act and the damages. According to this provision, after the injured party brings an action against a polluter, the polluter shall bear liability if he can prove causation between the damage and his polluting act. The injured party, however, must only prove an injury and resulting damages caused by the polluter's action, or inaction.<sup>32</sup>

The American Restatement (third) of Torts 1997<sup>33</sup>, provides unequivocally that where the conduct of two or more actors is tortious and it is proved that the harm has been caused to the plaintiff by any of them, but there is uncertainty as to which one of them has caused it, the burden is upon each of such actor to prove that he has not caused the harm.

The British Parliament has also lightened the burden of plaintiffs by including in the Compensation Act 2006 a section about apportioning damages for mesothelioma which results from exposure to asbestos at work. Section 3 of the Compensation Act 2006 provides that a defendant is liable in respect of the whole of the damage caused to the victim by mesothelioma, jointly and severally with other employers. Thus any solvent employer is responsible in full for the entirety of the victim's claim and has to rely on its right to claim a contribution from other negligent parties.<sup>34</sup>

The thread that runs through these three jurisdictions – the removal of the burden from the plaintiffs is a system that is worth adopting by the Nigerian legislature especially with respect to oil pollution related matters.

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<sup>32</sup> W Canfa, 'Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms' (2006-2007) 8 VJEL<<http://www.vjel.org/journal/VJEL10058.html>> accessed 16 November 2012

<sup>33</sup> Art 433 (b) (3)

<sup>34</sup> The latest case in this line is *Karen Sienkiewicz v Greif (UK) Ltd* [2009] EWCA Civ 1159

#### **4.2.7 *Expanding Claims in Environmental Litigations under Foreign Laws***

In chapter three, it was shown that all attempts to use the Alien Tort Claims Act for environmental torts have failed. Although this is generally the case, plaintiffs can improve their chances of success by linking the environmental damage caused with a subsequent damage to human life or health.

It is foreseeable that environmental harms would be able to be successfully justiciable under the ATCA when states develop international instruments that expressly recognise the duty of states to protect the Right to a Healthy Environment, as well as specific measures to accomplish its effective protection.<sup>35</sup> Also, until environmental matters are recognized under the ‘laws of nations’, it is suggested that plaintiffs should use remedies available for human rights claims as proxies for their environmental claims.<sup>36</sup> Thus, at present, a claim which alleges a violation of customary international environmental law, is unlikely to succeed at trial. However, plaintiffs may succeed if they can establish a violation of the plaintiff’s international human rights based on the environmental damage.

While it is difficult for plaintiffs to meet the threshold to succeed in an ATCA action, the cost to petroleum and mining corporations in resources and adverse publicity is significant. It is not difficult to imagine the impact on a mining or petroleum corporation from a claim that alleges that the corporation instigated large scale egregious environmental abuses and was involved in serious violations of International human rights, including torture and genocide. Even where the case has been dismissed, considerable damage to the reputation of the defendant(s) would have been done.<sup>37</sup>

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<sup>35</sup> R Romero, ‘Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment’ (2005) <[https://www.dundee.ac.uk/~cemlp/journal/html/vol16/vol16\\_7.pdf](https://www.dundee.ac.uk/~cemlp/journal/html/vol16/vol16_7.pdf)> accessed 12 November 2012; see also S Stewart, ‘A Limited Future: The Alien Tort Claims Act Impacting Environmental Rights: Reconciling Past Possibilities With Future Limitations’ (2006-2007) 31 Am Indian L Rev 743, 759

<sup>36</sup> N Bridgeman, ‘Human Rights Litigation Under ATCA as a Proxy for Environmental Claims’ (2003) 6 Yale Hum Rts & Dev L J 1, 42

<sup>37</sup> P Little, ‘What are the Consequences of the Alien Tort Claims Act (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region’ (2003) 22 AREJ 211, 230

### 4.3 General Reforms

These reforms comprise proposals for the enhancement of the environmental law enforcement in Nigeria generally. They include the need for good governance, consolidation of laws, judicial reforms, institutional reforms and use of hybrid enforcement mechanisms.

#### 4.3.1 *The Imperative Good Governance*

‘Governance’ is the process of decision making and the process by which decisions are implemented.<sup>38</sup> Abdellatif<sup>39</sup> argues that governance is not just about ‘organs’, it is about the quality of governance which expresses itself through certain elements and dimensions. He asserts that good governance is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. Thus, good governance symbolizes the ‘paradigm shift of the role of governments’.<sup>40</sup>

It should be noted that good governance is an ideal which may be difficult to achieve in its totality. However, to ensure sustainable human development, actions must be taken to work towards this ideal with the aim of making it a reality.

The concept of good governance has been clarified by the work of the United Nations Commission on Human Rights. The Commission has linked good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights.<sup>41</sup>

Good governance is therefore a prerequisite to strengthening enforcement of environmental law because it has at its core, citizen participation and transparency (which

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<sup>38</sup> See A Hasnat, *Governance: South Asian Perspective* (OUP 2001) 1

<sup>39</sup> A Abdellatif, ‘Good Governance and its Relationship to Democracy and Economic Development’ (paper delivered at Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul, May 20-31 2003) 3

<sup>40</sup> H Marc and K Byong-Joon, *Building Good Governance: Reforms in Seoul* (National Center for Public Productivity 2002) Preface

<sup>41</sup> In its resolution 2000/64

helps curb corruption). Good governance can therefore be grouped into two components which will be discussed below – public awareness/ participation and management of corruption.

#### **4.3.1.1 Improving Public Awareness /Participation**

Public awareness of environmental matters is essential to prevention of damage to the environment and to the prosecution of environmental law violations.

Popovic argues that environmental education is the cornerstone of effective participation in environmental decision making, because it furnishes the public with knowledge and information about the environment's importance and its vulnerability to degradation; and also that education can equip the public to analyse and understand proposals, options, alternatives and explanations put before it with respect to a given environmental effect.<sup>42</sup> It can also discourage 'traditional' practices detrimental to the environment for example fishing with explosives, destroying fish habitat, and so on.

It is only a person who is aware that can effectively participate in environmental decision making. If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper.<sup>43</sup> Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make Nigeria's environmental protection goals a reality.

The two past International Conferences on Environmental Enforcement in Budapest, Hungary in 1992 and Oaxaca, Mexico in 1994 established the principle that

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<sup>42</sup> N Popovic, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10(2) PELR 683 at 692; M Takahashi, 'Education, Public Awareness and Training' <[www.eolss.net/Sample-Chapters/C16/E1-57-35-00.pdf](http://www.eolss.net/Sample-Chapters/C16/E1-57-35-00.pdf)> accessed 26 March 2012

<sup>43</sup> S Casey-Lefkowitz, J Futrell, J Austin and S Bass 'The Evolving Role of Citizens in Environmental Enforcement' Paper delivered at the Fourth International Conference on Environmental Compliance and Enforcement, available at <<http://www.inece.org/4thvol1/futrell.pdf>> accessed 6 November 2012

citizen participation is an important supplement to government enforcement efforts.<sup>44</sup> Citizen enforcement plays a valuable role in promoting environmental compliance, spurring agency enforcement efforts and providing an important deterrent to non compliance when government agencies fail to act because of lack of resources or political will.

According to Casey-Lefkowitz et al, citizens know the country's land and natural attributes more intimately than a government ever will; their number makes them more pervasive than the largest government agency; and seeing citizens as part of the enforcement team helps shield an agency from isolation and builds broad-based popular support for what can be controversial enforcement actions.<sup>45</sup>

Thus, in order to achieve a balanced environmental law enforcement system, Nigerian legislations, for example, the EIA Act should first promote environmental awareness and encourage public and environmental NGO participation.<sup>46</sup> Public participation, particularly for non-governmental organization plays a crucial role in the implementation of and compliance with environmental laws.<sup>47</sup> Governments often prefer not to publicly disclose information concerning compliance with environmental laws. Such information, however, is often essential for successful monitoring. As a result, NGOs often put pressure on governments, directly or indirectly, to release compliance information and provide the public with information on environmental problems. Additionally, NGOs mobilize public opinion, set political agenda, and communicate with other NGOs worldwide.<sup>48</sup>

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<sup>44</sup> See 'INECE-Publication List' [www.inece.org/publicationlist.html](http://www.inece.org/publicationlist.html) accessed 28 August 2012; For an overview of access to justice under Aarhus Convention, see *Handbook on Access to Justice under the Aarhus Convention* (REC 2003)

<sup>45</sup> S Casey-Lefkowitz and others (n 43) 2

<sup>46</sup> F Olokesusi, 'Environmental Impact Assessment in Nigeria: Current Situation and Directions for the Future' (1992) 35 (3) JEM 163

<sup>47</sup> M Weiss and L Roberts, 'Toxic Torts, Public Interest law and Environmental Justice: Evidence From Louisiana' (April 2004) 26 (2) Law & Policy 259, 284

<sup>48</sup> M Ladan, 'Enhancing Access to Justice on Environmental Matters: - Public Participation in Decision-making and Access to information' (A paper presented at a Judicial training workshop on Environmental Law in Nigeria Organized by the National Judicial Institute, Abuja, 6-10 Feb 2006). See also R

Another crucial aspect of public participation especially and its impact on the enforcement of effective environmental laws in Nigeria is the involvement of indigenous peoples in environmental decision making. Understanding of indigenous knowledge, values and practices may provide an opportunity for using them to complement the current strategies seeking to address the conservation problems such as resource overexploitation, conflicts and limited budget for law enforcement.<sup>49</sup>

The Convention on Biological Diversity recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and Article 8(j) of the Convention aims to respect, preserve, and promote such traditional knowledge, thereby recognizing the interdependence of indigenous and local communities and biodiversity.<sup>50</sup> Environmental conservation planning should therefore take into account both the rights and traditional knowledge of indigenous and local communities. The main strategy for achieving this is through the effective participation of indigenous peoples and local stakeholders in decision-making and governance processes, on the basis of free, prior and informed consent to any projects, plans or changes that affect their communities, traditional lifestyles, and environment. This should also include education and awareness-raising, indigenous to indigenous transfer of knowledge, and capacity building.<sup>51</sup>

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Rangarajan, 'Lessons From a Model of Public Participation in Environmental Enforcement in India – Local Area Environmental Committees' (A Research Report from Centre for Development Finance, June 2010)

<sup>49</sup> See discussion on the relationship between indigenous people and nature in para 6 of section 4.4.1 below; see also C Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (World Bank 2008) 10-16

<sup>50</sup> See also Principle 8 (b) of the Earth Charter 2000

<sup>51</sup> See K Redford and M Painter, 'Natural Alliances between Conservationists and Indigenous Peoples' (World Conservation Society Working Paper no 25, New York, 2006) 12-14

#### **4.3.1.2      Managing Corruption**

This section will demonstrate that, corruption, a major impediment to the enforcement of environmental laws in Nigeria can effectively be tackled when legal and social reforms are employed.

Indeed, there are many unresolved problems in Nigeria, but the issue of the upsurge of corruption is troubling. And the damages it has done to the polity are astronomical.<sup>52</sup>

The Nigerian system, the product of more than fifty years of mismanagement, ethnic strife, military misrule, and political instability, provided a conducive setting for corruption to flourish. Control mechanisms were ineffective, and prospects of detection and prosecution were weak.<sup>53</sup> The government's control and near domination of the economic sphere provided limitless opportunities for Nigerians who operate without any sense of accountability to seek rents with impunity. Corruption flourished in Nigeria mainly because no government credibly and honestly committed itself to fighting it. Neither civilian nor military regimes could stop corruption because each administration, in differing ways and to varying degrees, exemplified the pervading culture of public service: an amoral obsession with using public office for private gain.<sup>54</sup>

After several decades of military rule, Nigeria's democratic institutions had become weak and ineffective. A major challenge that faced the Obasanjo Administration was how best to ensure genuine restoration of democracy and good governance in Nigeria and eradication of corruption.<sup>55</sup> Weak and battered institutions, poor culture of accountability and transparency, abuse of human rights and the neglect of the majority of the population created an environment in which reforms had been difficult. Faced with the

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<sup>52</sup> See A Odinakalu, 'Corruption and Governance in Africa: How do we Break the Cycle in Nigeria' in CLEEN Foundation, *Corruption and Governance Challenges in Nigeria: Conference Proceedings* (CLEEN Foundation 2010) 14-42

<sup>53</sup> Ibid 18

<sup>54</sup> Ibid

<sup>55</sup> V Dike, 'The Philosophy of Transforming Nigeria into a Corruption-Free Society: Are the Probes the Solution?' <<http://www.Nigeriaworld.com/feature/article/corruption.html>> accessed 16 November 2012



tragic consequences of underdevelopment, which was propelled and sustained by dictatorial regimes and inept civilian governments, the country was challenged to induce qualitative transformation of the Nigerian economy and society.<sup>56</sup>

Corruption has the potential to be a significant hindrance to the effective enforcement of environmental laws in Nigeria. Corruption has caused the police, government officials and judges to overlook environmental law violations. In the field of environmental management, corruption can lead to (deliberate) design and implementation of environmentally damaging practices to enrich individuals. Environmental corruption also means trafficking in wildlife, hazardous waste, and natural resources, often through bribery during permitting or inspection.<sup>57</sup> Besides being rooted in the lack of transparency and accountability, corruption is commonly nurtured by weak institutions, low salaries, a high level of bureaucracy, and low professionalism. It touches all levels of management. In view of this, an effective remedy will be to enact civil service laws that will be backed up by criminal sanctions.<sup>58</sup>

Former Nigerian president, Olusegun Obasanjo took steps towards tackling corruption head on through the enactment of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act 2000 and the Economic and Financial Crimes Commission (EFCC) Act 2004. However, since the establishment of these anti-corruption agencies, their expected impacts are yet to be seen.<sup>59</sup>

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<sup>56</sup> For more discussions on this, see S Akindele, 'A Critical Analysis of Corruption and its Problems in Nigeria' (2005) 7(1) *Anthropologist* 7; O Olu-Olu, 'Corruption and the Problem of Development in Nigeria' (2006) 1(3) *The Social Sciences* 183-186

<sup>57</sup> See W Ehwareme and J Cocodia, 'Corruption and Environmental Degradation in Nigeria and its Niger Delta' (2011) 13 (5) *JSDA* 34, 36-40

<sup>58</sup> G Rose, *Gaps in the Implementation of Environmental Law at the National, Regional and Global Level* (first preparatory meeting of the World Congress on Justice, Governance and the Law of Environmental Sustainability, Malaysia, 12-13 October, 2011) 8 <http://www.unep.org/...FormattedGapsEL.pdf> accessed 14 November 2012

<sup>59</sup> For further discussion on the failures of the Corruption initiatives, see P Inokoba and W Ibegu, 'Economic and Financial Crimes Commission (EFCC) and Political Corruption: Implications for the Consolidation of Democracy in Nigeria' (2001) 13(4) *Anthropologist* 283; D Enweremadu and E Okafor (eds), *Anti-Corruption Reforms in Nigeria Since 1999: Issues, Challenges And The Way Forward* (vol 3,

It is arguable that for Nigeria's efforts truly to be effective in the long-term, more attention should focus on helping people to understand that engaging in corrupt practices violates a deeper sense of right versus wrong. No amount of legislation or proposed legislation will render effective results in combating corruption if most of the government officials refuse to remediate their behavior.<sup>60</sup> As such, initiatives need to be aimed at addressing cultural ideas that perpetuate corrupt practices. This, Ocheje<sup>61</sup> has referred to as 'restructuring the social environment of Nigeria'. Kivutha et al graphically illustrate the point on behavioural (cultural) revamping as follows:

The structure of the dwelling conditions the life of the occupants, but the occupants can change the structure if they wish. If the structure begins to leak and all the occupants resign themselves to it, blaming it on the structure, the structure will continue to leak. In this case the explanation still lies with the occupants who do not wish to repair the structure. Something non-human cannot be held responsible for something human. The structuralist explanation for corruption shifts the focus of responsibility from the human actor to factors external to the actor. These external factors are significant in understanding the extent and manifestation of the phenomenon, but they are not the terminal point of the explanation. The terminal point is the nature of man.<sup>62</sup>

Professor Oyewo<sup>63</sup> has also argued that the roots of corruption are deeply embedded in the Nigerian society; thus uprooting it will require the application of all the available mechanisms of the constitution, good governance and international support. Combating and preventing corruption, has become indispensable for Nigeria's development, otherwise the Constitution and the government will become meaningless to the existence of

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IFRA 2009); V Dike, 'Corruption in Nigeria: A New Paradigm for Effective Control' <<http://www.africaeconomicanalysis.org/articles/gen/corruptiondikehtm.html>> accessed 16 November 2012

<sup>60</sup> V Dike (n 55)

<sup>61</sup> See P Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 (2) JAL 173

<sup>62</sup> K Kibwana, S Wanjala, and O Owiti (eds), *Anatomy of Corruption in Kenya: Legal, Political, and Socio-Economic Perspectives* (Claripress 1996) 42; see also N Goodling, 'Nigeria's Crisis of Corruption- Can The UN Global Programme Hope to Resolve This Dilemma?' (1 May 2003) Vanderbilt J Transnatl L [<http://www.highbeam.com>] accessed 10 November 2012

<sup>63</sup> O Oyewo, 'Constitution, Good Governance and Corruption: Challenges and Prospects for Nigeria' <[http://www.enelsyn.gr/papers/w16/paper by prof oyelowo oyewo.pdf](http://www.enelsyn.gr/papers/w16/paper%20by%20prof%20oyelowo%20oyewo.pdf)> accessed 8 November 2012

the Nigerian citizenry. He further argues that corruption has become a cancerous growth that has gone from being benign to malignant in the Nigerian society, 'it is therefore necessary to rethink the boundary of our constitutional and governmental practices to evolve means to effectively contain, curtail and control corruption, so that it will not terminate the development and existence of the Nigerian nation state'.<sup>64</sup>

#### **4.3.2 Consolidation of Laws**

The environmental protection laws in the Nigeria should be consolidated to avoid the complications that characterize haphazard laws.

In chapter three the local statutes on environmental protection were shown to comprise laws that were both incidental to environmental protection in Nigeria and those that were made after 1988. Thus provisions in one of the incidental laws may punish the same offense that a more deliberate law will punish, but with different fines. For example the Harmful Waste Act 1992, Oil in Navigable Waters Act 1968 and the Criminal Code Act 1958 all punish the emission of poisonous substances into the atmosphere with different sanctions – life imprisonment, ₦ 400 and six months imprisonment respectively. Also, civil law and criminal law should work together in addressing damage to the environment. For example, a violator can be made to pay the requisite fine for an environmental crime under the Criminal Liability section, and at the same time be made to restore the damaged environment under the Civil Liability Section. It is therefore deemed necessary to take the legislative reform a step further by proposing a National Environmental Policy Act made up of consolidated laws on civil and criminal liability for environmental damage.

A satisfactory solution requires not merely a simple criminal prohibition model, but an elaborate scheme of regulation, administered by a state agency empowered to grant,

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<sup>64</sup> Ibid

withhold and suspend licenses, following rules designed to promote fairness and efficiency. Imposing civil liability can check a lot of harms for which criminal sanction cannot provide a solution.<sup>65</sup> The role of criminal law would then be a derivative one-to provide backup sanctions to enforce authoritative and/or administrative orders. Thus the sharp demarcation between criminal and tort law must be transcended if environmental misdeeds by major corporations are to be adequately punished and deterred.<sup>66</sup> Civil law has the advantage of flexibility and its sanctions can be more effectively tailored to the particular situation.<sup>67</sup>

This consolidation will make the common law torts of Nuisance, Negligence, Trespass to Land and Strict Liability redundant because the elements of these torts can be codified in more specific terms.

#### **4.3.3 Judicial Reforms**

Nigerian judges usually have little or no capacity to effectively adjudicate and manage the environmental cases before them. Some of the judges are hardly updated on developments in law, rules and jurisprudence on environmental matters; also, some of the judges have low sensitivity levels in the resolution of environmental disputes.<sup>68</sup>

In such cases where the courts are not environmentally minded in their analyses of the cases brought before them, the enforcement of environmental law in Nigeria would still leave much to be desired in terms of ensuring fair hearing of prosecuted cases, promoting

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<sup>65</sup> J Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models –and What Can be done About It' (1991) 101 YLJ 1875, 1877

<sup>66</sup> K Mann, 'Punitive Civil Sanctions: The Middle Ground Between Civil and Criminal Law' (1992) 101 (8) YLJ 1795, 1816-1830

<sup>67</sup> J Coffee (n 65) 1876

<sup>68</sup> See M Ajomo and O Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (NIALS 1994) 11-66; N Tobì, 'Judicial Enforcement of Environmental Laws in Nigeria' in M Ladan (ed), *Law, Human Rights and the Administration of Justice in Nigeria* (ABU Press 2001) 262; K Ebeku, 'Judicial Attitudes to Redress for Oil Related Damages in Nigeria', (2003) RECIEL 12(2) 199, 208; M Ladan, 'Biodiversity Conservation in Nigeria: - Issues, Problems and Challenges in Implementation' (Paper presented at a 5 day Second African Regional Seminar on Environmental Law, Natural Resources and Poverty Reduction organized by UNEP, Nairobi, Kenya in Collaboration with the Ugandan National Environmental Protection Agency, Entebbe, Uganda, 25-28 September 2006) [4]accessed on 20 February 2012

enforcement, deterring environmental violations and ensuring compliance. Thus, Nigerian judges need to be equipped with enhanced knowledge of the complex environmental legislative and regulatory framework, relevant legal concepts such as strict liability, standing and class action, and environmental principles such as sustainable development, the precautionary principle, and intergenerational equity.<sup>69</sup> Nigerian Judges are urged ‘to equip themselves with commanding armour of the emerging substantive body of environmental law, especially considering the depth and breadth of contemporary environmental issues’<sup>70</sup>. They should be creative like the court in *Gbemre* and shed their fears even when they find themselves in some ‘unfenced spaces of our environmental law’<sup>71</sup>.

The power and authority given to the Judiciary to grant redress for the contravention by the State of the fundamental rights enshrined in the Constitutions is a most potent weapon in the armoury of the law to protect the citizen against violation of his fundamental rights. In order for the Judiciary to perform this important duty in protecting the individual against unconstitutional action by the State it must have the following characteristics:-<sup>72</sup> independence and impartiality; incorruptibility; boldness in applying the

<sup>69</sup> S Gutto, ‘Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa’ (1998) (4) Buffalo Hum Rts L Rev 79, 82; K Ebeku, ‘Judicial Contributions to Sustainable Development in Developing Countries: An Overview’ (2003) 15 (3) ELM 168

<sup>70</sup> Borrowing the words of Justice Puno: See R Puno, ‘Phillipine Environmental Law Practice and the Role of the Courts’ 2004 6 (20) The Phijsa Jud J 6, 7

<sup>71</sup> Ibid; see also D Tacha, ‘Independence of the Judiciary for the Third Century’ (1994-1995) 46 Mercer L Rev 645 Markowitz and J Gerardu, ‘The Importance of the Judiciary in Environmental Compliance and Enforcement’ (2011) 29 PELR 538, 538-539

<sup>72</sup> See W Anderson, ‘Enforcement and Compliance of Environmental Law in National courts: The Role of the Judiciary’ (A paper presented to and published in Caribbean Judicial Awareness Symposium on Environmental Law and Sustainable Development, Castries, St. Lucia, 8-10 April 2001); L Kurukulasuriya, ‘The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law’ (Paper prepared for global Environmental Governance: The Post-Johannesburg Agenda, Yale Center for Environmental Law and Policy, New Haven, Connecticut, 23-25 October 2003); T Greiber (ed), *Judges and the Rule of Law- Creating the Links: Environment, Human Rights and Poverty* (papers and Speeches from an IUCN World Conservation Congress held in Bangkok, Thailand, 17-25 November 2004) No. 60; L Lavrysen, ‘The Role of National Judges in Environmental Law’ <[www.inece.org/newsletter/12/lavrysen.pdf](http://www.inece.org/newsletter/12/lavrysen.pdf)> accessed 25 November 2012; J Stein, ‘Why Judges are Essential to the Rule of Law and Environmental Protection’ in T Greiber (ed), *Judges and the Rule of Law- Creating the Links: Environmental Law, Human Rights and Poverty* (papers and speeches from an

law; competence to apply abstract legal issues to practical situations; ability to secure public confidence; ability to expeditiously defend the rights of citizens against the Government; and liberally interpret the Constitution in order to give effect to the spirit of the Constitution.

#### **4.3.4 Appointment of Independent Litigators**

The creation of independent litigators within the already existing flagship agency (NESREA) will have a positive impact on the enforcement of environmental laws and access to environmental justice in Nigeria.

In light of the problem of access to justice identified in chapter two,<sup>73</sup> its manifestation in the problem of proof discussed in chapter three,<sup>74</sup> and the problem of the ineffective supervisory role of the Department of Petroleum Resources (DPR) also in the same chapter<sup>75</sup>, it is recommended that independent litigators be attached to the office of the Director General of NESREA and they, in addition to the Director General should be appointed and removed based on constitutional provisions. This will to a large extent secure the independence of the Agency.

The role of the independent litigators will be to assist indigent litigators to institute actions and then to ensure that the environmental agencies perform their duties. The role of these litigators is similar to the role of the Brazilian *Ministerio Publico*<sup>76</sup>. However, it differs from the Brazilian model to the extent that the proposed litigators are officers within the already existing agency as against the *Ministerio Publico* which is a separate ministry.

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IUCN Environmental Law Programme Side Event at the 3<sup>rd</sup> IUCN world Conservation Congress (WCC) held in Bangkok, Thailand, 17-25 November 2004) 53-64

<sup>73</sup> See paras 7-9 of section 2.3 above

<sup>74</sup> See section 3.6 above generally

<sup>75</sup> See paras 3&4 of section 3.3 above

<sup>76</sup> The Brazilian Constitution of 1988, Art 129, provides that one of the *Ministerio Publico*'s institutional functions is to 'ensure that the government and other entities of public relevance respect constitutional rights; The Administrative Improbability Act of 1992 prohibits acts or omissions relating to corruption and other illegal behavior. The Environmental Crimes Law of 1998 includes a category of "crimes against administration" for which agency officials may be prosecuted. L Mcallister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press 2008).

The independent litigators which this thesis proposes are preferred because it would discourage multiple overseeing agencies but enhance their effectiveness at the same time. Thus the independent litigators will be *in* the agency but not *of* the agency. Just like the *Ministerio Publico*, the independent litigators will monitor, find facts and generate evidence regarding the legality of agency decisions and actions, in particular environmental cases. Using their civil and criminal enforcement processes, thus lending significant judicial force to environmental protection laws.

The independent litigators may, like the *Ministerio Publico* face problems of lack of accountability and lack of co-operation with other enforcers, but it can however be argued that no mechanism is devoid of shortfalls;<sup>77</sup> the *Ministerio Publico* is not an exception. The positive impact of the body appears to overwhelm its downside. However, one sure way of ensuring the optimum efficacy of the independent litigators is by avoiding an overtly legalistic enforcement model and thus complementing it with other flexible enforcement models like naming and shaming, environmental taxes, environmental incentives and disincentives, environmental auditing, community service and so on<sup>78</sup> which will be addressed in the next section.

#### **4.3.5 Introducing Hybrid Enforcement Mechanisms**

The primary goal of enforcement cannot be over emphasised - it is to correct violations, and create an atmosphere in which the regulated community is stimulated to comply with established rules.<sup>79</sup>

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<sup>77</sup> L Mcallister (n 76) 142-146

<sup>78</sup> See I Ayres and J Braithwaite, *Responsive Regulation: Transcending The Deregulation Debate* (OUP 1992) 3-18; C Coglianese and J Nash, *Leveraging The Private Sector: Management-Based Strategies For Improving Environmental Performance* (RFF 2006) 3-10.

<sup>79</sup> C Wasserman, 'International Conference on Environmental Enforcement' (Paper presented at the Third International Conference on Environmental Enforcement, Oaxaca, Mexico, 25-28 April 1994) 16; see also A Uchegbu, 'The Legal Regulations of Environmental Protection and Enforcement in Nigeria' (1988) 8 JPPL 57

By integrating a variety of regulatory tools for enforcement – each consciously chosen for its effectiveness in a particular application – an agency can create a system that both pushes and pulls regulated entities toward environmentally protective behaviour. Such a holistic approach can work to decrease direct compliance costs (through information sharing, assistance and incentives), increase direct costs to noncompliance (through penalties and sanctions) and increase the probability that non-complying companies will experience further direct or indirect costs (through customer and community pressure) or additional governmental interventions (through inspections or monitoring). However, determining how and when to use one tool (for example, inspections) over another tool (for example, technical assistance) has intellectual challenges.<sup>80</sup>

Furthermore, reforms of instruments of direct regulation can only be successful if they are closely interconnected. The permitting reform needs to be linked to the revision of environmental quality standards to less stringent, enforceable levels, striking a balance between what is desirable from an environmental point of view and what is feasible from a technical and economic standpoint.<sup>81</sup>

As sound as the above reforms may be, the fact that they are still based on a *strictly* anthropocentric ethic (that is, an ethic that is reactionary and mostly to help present man to enjoy a relatively safe environment) could impede the effective achievement of Sustainable Development in the Niger Delta region. This ethic, as will be shown in the next section, is

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<sup>80</sup> For details on integrated enforcement, see; B Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11 *Law & policy* 153; I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) ch 1; B Hutter, *Compliance: Regulation and Enforcement* (Clarendon Press 1997) 20-48; R Baldwin, C Scott and C Hood (eds), *A Reader on Regulations* (OUP 1998) 3-16; A Farmer, *Handbook of Environmental Protection and Enforcement: Principles and Practice* (Routledge 2007) chs 1 & 6; M Faure, M Goodwin and F Weber, 'Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries' (2010) *Virginia J Intl L* 95;

<sup>81</sup> A Farmer (n 81) 46; A Heyes, 'Making Things Stick: Enforcement and Compliance' (1998) 14 *Oxf Rev Econ Policy* 50; R Baldwin and M Cave, *Understanding Regulations* (OUP 1999) 42-48; A Jordan, 'Policy Innovation or "Muddling Through" "New" Environmental Policy Instruments in the United Kingdom?' (2003) 12 (1) *Env Politics* 192; L Pratt and C Mauri, 'Environmental Enforcement and Compliance and its Role in Enhancing Competitiveness in Developing Countries' <[http://www.inece.org/conference/7/vol2/63\\_Pratt.pdf](http://www.inece.org/conference/7/vol2/63_Pratt.pdf)> accessed 16 August 2012



one of the major causes of global environmental crises generally, and Nigeria in particular. This is so because the ethic is hinged on exploitation stemming from greed and domination thus it is not forward looking.<sup>82</sup> It will therefore be anomalous to proffer a ‘solution’ to the nagging environmental crisis using one of its major ‘causes’. The next section will argue that the current legal framework on environmental protection in Nigeria has been influenced by two strictly anthropocentric values - judeo-christian religious values and exploitative economic values.

#### **4.4 Analysis of the Efficacy of the Proposed Reforms: Towards an Effective Ethic for Sustainable Development in Nigeria**

It must be emphasised that the above general reforms will play a vital role in the change to the proposed ethic. For example, the effective participation of individuals, management of corruption, appointment of independent litigators and the revamping of the judiciary are factors that will predispose the environmental protection system in Nigeria to a change. Ironically, these reforms will be more effective in achieving sustainable development when the change to a less anthropocentric ethic has occurred.

Thus with a view to establishing the need for a change in ethic to Nigerian environmental protection laws, this section will demonstrate how religious and economic assumptions have influenced the environmental protection laws in Nigeria and contributed largely to their *strict* anthropocentric nature resulting in laws that are not preservationist in nature.

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<sup>82</sup> See the discussion on *strict* anthropocentrism in paras 12-3 of section 1.4 above.

#### 4.4.1 *Religious Assumptions*

Generally, environmental crisis is a long-term threat to Earth's well-being. Human technology has done so well in exploiting the Earth's 'resources' that we are rapidly using up in the form of both renewable and non-renewable resources. Also, the toxic by-products of our production processes and consumer lifestyles are being produced much more rapidly than Earth can absorb.<sup>83</sup>

The impact is so pervasive that there is hardly an ecosystem on the planet that is free from the consequences of human activity. Human activity has changed the 'chemistry of the planet'<sup>84</sup>: for example, climate change, ozone depletion, desertification of soil, growth of deserts, and the proliferation of toxins (many of which lead to illness and birth defects).<sup>85</sup> If climate change continues and Carbon Dioxide keeps being released into the atmosphere the process of global warming will be compounded.<sup>86</sup> Poverty and destitution also contribute to ecological destruction as, for example, forests are cut down in efforts to secure a livelihood.<sup>87</sup>

A historian of the medieval period, Lyn White traced the development of modern science back to the appearance of exploitative attitudes towards nature first introduced with advances in European agriculture. These attitudes, he argued, were heavily influenced by Judeo-Christian theology, which represents time as linear and non - repetitive, and which presents a creation story that legitimizes and encourages the dominance of humans over the natural world.<sup>88</sup> According to this view, Western science and technology, which since the

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<sup>83</sup> T Berry, *The Dream of the Earth* (Sierra Club 1988) 106

<sup>84</sup> Ibid

<sup>85</sup> See Association of Reproductive Health Professionals, 'Environmental Impacts and Reproductive Health' <<http://www.arhp.org/publications-and-resources/clinical-proceedings/RHE/Environmental-Exposures>> accessed 16 August 2012

<sup>86</sup> See G Dauncey and P Mazza, *Stormy Weather: 101 Solutions to Global Climate Change* (New Society Press 2001) ch 1

<sup>87</sup> S Latouche, *In the Wake of the Affluent Society: An Exploration of Post-Development* (M O'Connor & R Arnoux trs, first published 1991, Zed Books) 42; see generally, section 2.4 above

<sup>88</sup> The source of this viewpoint was that Christians believed that the earth and everything on it were given by God to man to rule over and subdue because in the bible, Genesis 1:28 states: 'And God blessed

19th century have enabled humans to dramatically alter natural systems for the worse, are inextricably tied to these Christian conceptions of the separation of humans from nature.<sup>89</sup>

This ideology which is characterised by the melding of Jewish values into protestant teachings thereby adding onto the heritage of English theory and common law, was largely affected by Greek philosophy which saw the world ordered hierarchically with nature being very low on the hierarchy.<sup>90</sup> For instance the definition of the human being has been attempted many times in the past without reference or correlation to the natural environment. One classic instance is found in ancient Greek philosophy, chiefly in its Platonic guise, while there have also been numerous theological approaches through the centuries that, in the final analysis, always bore the direct or indirect influence of Platonism. This Platonic conception of identifying the human being within the soul influenced Christian tradition deeply, and its implications were of momentous import to ecological problems.

Human identity was seen to reside in the soul, which was thought to be self-existent and self-subsisting, rather than an organic part of the natural world, thereby making it spiritual (not material) and independent of the body's relation to the natural world.<sup>91</sup> This conception led to the following implications:

- a) The assumption that time and space, fundamental constituents of the natural world surrounding us, make up, along with the perishable body, the prison of the soul. To

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<sup>89</sup> them, and God said to them, be fruitful and multiply, and fill the earth and subdue it; and have *dominion* over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth' See L White, 'The Historical Roots of Our Ecological Crisis' (1967) 155 *Science* 1203-1207; R Routley, 'Is There a Need for a New Environmental Ethic?' (Proceedings of Twelfth World Congress of Philosophy, 1973) 205-210; J Callicott, 'Traditional American Indian and Western European Attitudes toward Nature: An Overview' (New York Press 1989)

<sup>90</sup> T Robinson and L Westra (eds), *Thinking About the Environment: Our Debt to the Classical and Medieval Past* (Lexington Books 2002)

<sup>91</sup> 'Greek Philosophy: The Definition of Morality' in *Stanford Encyclopedia of Philosophy* [www.plato.stanford.edu/entries/morality-definition](http://www.plato.stanford.edu/entries/morality-definition) accessed 19 November 2012; see also S Foster, 'Aristotle and the Environment' (2002) 24 (4) *Env Ethics* 409; G Carone, 'Plato and the Environment' (1998) 20 *Env Ethics* 115.

find himself man must break free from his natural environment, and live within an eternity that is not linked to the natural world.

- b) Since the human being may be conceived without its relation to the natural world, therefore, it does not matter whether or not the natural world surrounding him will be annihilated.<sup>92</sup>

Xenophon formulated the classic position in his dialogue, *Memorabilia*, in which Socrates says:

Tell me, Euthydemus, has it ever occurred to us to reflect on the care of the gods have been taking to furnish man with what he needs? Now, seeing that we need food, think how they make the earth to yield it, and provide to that end appropriate seasons which furnish in abundance the diverse things that minister not only to our wants but to our enjoyment... and is not evident that they [the lower animals] too receive life and food for the sake of man?<sup>93</sup>

A similar attempt to identify and define the human being without reference to the natural environment, a modified form of Platonic idealism centered on the soul, was undertaken, mainly in the West from the Middle Ages into modern times, by the definition of man as a **rational and intelligent being**. Descartes, for example claimed that human beings developed their intellectual capabilities unilaterally, and independently of the body. The development of mathematics as an instrument producing pure 'intelligence' led headlong to the emergence of 'intelligent beings' that have no need for the human body in order to produce rational thought.<sup>94</sup> The implication of this for ecology is that intelligence

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<sup>92</sup> A similar view was also shared by theologians like Augustine and Boethius who claimed that apart from the souls of human beings and the incorporeal angels, everything else is destined to disappear. See 'St Augustine' in *Stanford Encyclopaedia* [www.plato.stanford.edu/entries/augustine/](http://www.plato.stanford.edu/entries/augustine/) accessed 19 November 2012; A Boethius, *Liber de persona et Diabys naturis* (ch 3) cited in 'The Definition of Person: Boethius Revisited' <[www.aristotelophile.com/Book/Articles/Boethius.1.pdf](http://www.aristotelophile.com/Book/Articles/Boethius.1.pdf)> accessed 19 November 2012; T Aquinas, *Summa Theologiae* (CUP 2006) ch 2

<sup>93</sup> Xenophon, *The Memorabilia* (H Dakyns tr, bk IV Gutenberg ebooks 1998) ch III, 3,5,10; J Hughes, 'Athens: Mind and Practice' in J Hughes (ed), *An Environmental History of the World: Humankind's Changing Role in the Community of Life* (Routledge 2001)

<sup>94</sup> G Kemerling, 'Descartes: God and Human Nature' <[www.philosophypages.com/hy/4d.htm](http://www.philosophypages.com/hy/4d.htm)> accessed 20 November 2012; J Cottingham, *The Philosophical Writings of Descartes* (J Cottingham, R Stoothoff and D Murdoch trs, vol II CUP 2004) 13-16

was wrested away from the human body so radically as to abrogate it and render it useless. The body is gradually cancelled as an instrument of intelligence. He believes that by the power of knowledge, man is both master and possessor of nature. In the same vein, Francis Bacon did not see anything wrong with man binding nature and making it his slave.<sup>95</sup>

This Judeo-Christian tradition is considered, along with classical Greco – Roman civilization to be a fundamental basis for western legal codes and morality.<sup>96</sup> What Western culture has lost for reasons just indicated above, the indigenous people have preserved, namely close relationship with nature. There is no sense with them of superiority, let alone domination of the human being over nature, as we find it in our Western culture.<sup>97</sup>

Perhaps the best intellectual discussion of the concept of an Indigenous reciprocal relationship with the natural world is provided by Vine Deloria, Jr. In a simple equation - Power + Place = Personality, Deloria provides an Indigenous metaphysical view of the world in which power is defined as the ‘living energy that inhabits and/or composes the universe,’ while place refers to the ‘relationship of things to each other.’<sup>98</sup> For the indigenous people of the Niger Delta region, power interfaces with place to necessitate a personal relationship between all living things. In other words, the universe is not only alive, but personal and must be approached in a personal manner. Deloria goes on to stress that ‘The spiritual aspect about the world taught the people that relationships must not be left incomplete’.<sup>99</sup> He then goes on to say: ‘There are many stories about how the world came

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<sup>95</sup> See ‘Francis Bacon’ <plato.stanford.edu/entries/francis.bacon/> accessed 20 November 2012; S Gaukroger, *Francis Bacon and the Transformation of Early Modern Philosophy* (CUP 2004) 3-17

<sup>96</sup> L Troster, ‘Created in the Image of God: Humanity and Divinity in an Age of Environmentalism.’ In D Yaffe (ed), *Judaism and Environmental Ethics: A Reader* (Lexington Books 2001); B Spinoza, *Theologico-Political Treatise* (M Yaffe (tr), Focus Publications 2004)

<sup>97</sup> See the example of the relationship of the Ijaw people with the forest discussed in the text to fn 103 in Chapter One above

<sup>98</sup> V Deloria and D Wildcat, *Power and Place: Indian Education in America* (Fulcrum Publishing 2001) 22; see also D Rothschild (ed), *Protecting What is Ours: Indigenous Peoples and Biodiversity* (SAIIC 1997) ch 1; A Watson, L Alessa and B Glaspell, ‘The Relationship Between Traditional Ecological Knowledge, Evolving Cultures and Wilderness Protection in the Circumpolar North’ (2003) 8 (1) *Conserv Ecol* 2

<sup>99</sup> Ibid

to be, and the common themes running through them are the completion of relationships and the determination of how the world should function'.<sup>100</sup>

This culture helps them develop a holistic approach to nature and a sense of deep respect for it.<sup>101</sup> However, this culture of the indigenous people has been rendered virtually impotent and so has had little or no impact on the nature of environmental protection laws in Nigeria;<sup>102</sup> rather, the laws have been influenced greatly by the (Judeo-Christian) laws of England (which colonized her) as seen in chapter three<sup>103</sup> - for example, the common law tort remedies of Negligence, Nuisance, Trespass to Land and the rule in *Rylands v Fletcher* - are one of the major sources of Nigerian environmental protection laws.<sup>104</sup> Also, some of the environmental protection statutes are old English statutes enacted before Nigeria's independence in 1960 (for example, the Criminal Code Act 1916; Oil Pipelines Act 1956); some others which were localised after 1960 are virtually verbatim copies of their English counterparts (for example, The Endangered Species Act 1985, Petroleum Act 1969, Criminal Justice Act 1997, Oil in Navigable Waters Act 1968, Sea Fisheries Act 1992). The Land Use Act 1978, Associated Gas Re-Injection Act 1979 and the Harmful Waste Act 1992 may not have been directly affected by the Judeo-Christian English laws, but their common characteristic is anthropocentric.<sup>105</sup>

In light of the foregoing therefore, the Judeo-Christian laws fit the description of laws based on a *strict* anthropocentric ethic, which have been proven in chapter one to be incapable of effectively achieving sustainable development.<sup>106</sup> This is because it sees nature as property to be dominated and used for man's enjoyment – an exploitative ideology that does not have an element of preservation. Thus, it has been proven above that the *strict*

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<sup>100</sup> Ibid 23

<sup>101</sup> This relationship is a good example of ecocentrism described in paras 9&10 of section 1.4 above

<sup>102</sup> See section 3.5 above

<sup>103</sup> Para 2 of section 3.1 above

<sup>104</sup> See section 3.6 above

<sup>105</sup> See paras 3-5 of section 3.4.1; paras 11-13 of section 3.4.2 and paras 17-19 of section 3.5 respectively; see also the critique of the EIA Act 1992 below

<sup>106</sup> See discussion on *strict* anthropocentrism in paras 12-13 of section 1.4 above

anthropocentric Judeo-Christian laws have largely influenced Nigerian environmental protection laws, it can be deduced that most of these laws are also based on a *strict* anthropocentric ethic thereby making the laws rather curative rather than preventive.

Consequently, compensation under a civil action is also not likely to suffice, because, in order for the victims to succeed, the impoverished victims are faced with the enormous challenge of hiring the services of a lawyer. Also, there is the issue of quantum of compensation, like in the Bodo case, which even if applied towards cleaning-up will most likely not effectively cover the damage for which it was awarded neither will it restore the degraded environment.

Further, the rules of common law, no matter how well reformed, cannot effectively preserve nature; because under common law, environmental degradation cannot be challenged unless at the instance of a human being who seeks to challenge the invasion of his rights.<sup>107</sup> Thus where such an individual envisages slim chances of winning, he will most likely decline from instituting the action. Also the court usually measures the economic hardship of abating the environmental menace against the economic hardships of continued pollution on other human beings.<sup>108</sup> What does not weigh in the balance is the damage that nature itself has suffered; consequently, it cannot be the beneficiary of a favourable judgement. 'This omission has a further effect that, at most, the law confronts a polluter with what it takes to make the plaintiffs whole; this may be far less than the damages to the stream, but not so much as to force the polluter to desist'.<sup>109</sup> This will be so even if litigation under the rules of common law become devoid of the hindrances of proof

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<sup>107</sup> See C Stone, 'Should Trees Have Standing?-Toward Legal Rights for Natural Objects' (1972) 450 Col L Rev 307, 310

<sup>108</sup> Ibid

<sup>109</sup> Ibid

and causation. In such fashion, nature has been regarded as ‘objects for man to conquer and master and use’.<sup>110</sup>

As for the particular reforms, heavier fines may have greater deterrent effect especially when the usual offenders are the multinational oil companies with vast resources of funds at their disposal, the victims of environmental pollution (nature inclusive) will not benefit from imposition of terms of imprisonment on the culprit. What they invariably desire is to have the damage occasioned by oil pollution ameliorated and the *status quo* returned to as far as possible.

Under the ACHPR and foreign laws, the cases examined reveal that the common objective of all the claims is how to compensate *present man* for damage to his environment. Thus even when the hindrances examined in chapter three are removed as proposed in this chapter, the object will still be short sighted - the well-being of *present man*.

Again, where the ATCA begins to be applied to environmental litigations, it will still be restrictive because of its anthropocentric nature. It will concentrate on dealing with damage which has already been done to the environment (curative) as against the more effective situation of a preventive measure. Even in its curative characteristic, compensation to present man will still be the focus rather than restoration of the degraded environment.

The same goes for the Nigerian Constitution. A removal of environmental matters from the covering of section 6(6) (c) and a creation of a right to a healthy environment under Chapter IV of the Constitution; or even an upholding of the High Court’s decision in *Gbemre* by the Nigerian Supreme Court will mean that protection of nature will only be incidental to the protection of man in the present generation.

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<sup>110</sup> Ibid



In the same way, well enforced laws following the adoption of the general reforms will not yield much in terms of achieving sustainable development in the Niger Delta region if they are still underlined by a *strictly* anthropocentric ethic. This will be the case even with respect to the enforcement of the Environmental Impact Assessment Act 1992 which has precautionary objectives.

It is arguable that although the EIA act is precautionary in objective this is however far from reality in practice. While the screening process is useful, the fact that a development is seen in the screening process not to require an EIA does not mean that there will be no adverse impacts on the environment. EIAs do not take into account the cumulative effects of several minor developments.<sup>111</sup> Thus without taking these into consideration, it is difficult to truly promote sustainable development because the precautionary principle requires that uncertainty in impact predictions are assessed and taken into account when evaluating significance.<sup>112</sup> Again, even if (following the recommendation on public enlightenment and public participation above) the law is reformed in such a way that environmental impact statements become clear, able to be reviewed and understood by members of the general public, the development bias which the decision makers (government agencies) in the Nigerian oil industry already have, will often push them towards a decision that promotes economic development rather than ecologically sustainable development. Thus, although the EIA Act is designed to promote sustainable development, it is an Act that still tilts more towards development rather than a balance between economic development and environmental protection which this thesis proposes.

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<sup>111</sup> C Wood, *Environmental Impact Assessment: A Comparative Review* (2<sup>nd</sup> ed, Pearson 2003) 42

<sup>112</sup> See discussion on precautionary principle in para 4 of section 1.2 above

#### 4.4.2 *Economic Values*

The industrial and agricultural practices that exploit people and the environment in Nigeria are supported by the values and beliefs which are central to modern society. These values and beliefs fuel the demand for increasing material and consumer resources and drive the cycle of exploitation and destruction.<sup>113</sup> Charlene Spretnak draws attention to a number of these values and beliefs as follows:<sup>114</sup> (i) that well-being in other areas of life is a function of economic well being;<sup>115</sup> (ii) that abundance will bring an improvement in human condition;<sup>116</sup> (iii) that industrialism is the best way to perfect human society and achieve abundance;<sup>117</sup> (iv) that humans should consume the earth's resources as much as possible in order to satisfy their desires.<sup>118</sup>

The above values highlighted by Spretnak have one common thread running through them – a tilt of the balance of sustainable development in favour of economic development through the justification that human well-being is tied to economic growth. This is reflective of another ideology governing Nigerian environmental protection laws. Consider, for example, the expropriatory nature of the Land Use Act 1978 where title to all the land in Nigeria vests in the state which can retrieve any part held at any time, for the purpose of development.<sup>119</sup>

The Courts have also endorsed this ideology of the prioritisation of economic growth in *Alar Irou v Shell BP*<sup>120</sup> where the court expressed its reluctance to give judgment against the defendant because of its contribution to the Nigerian economy. Also, Nigeria's

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<sup>113</sup> See N Salafky and E Wollenberg, 'Linking Livelihoods and Conservation: a Conceptual Framework and Scale for Assessing the Integration of Human Needs and Biodiversity' (2000) 28(8) World Development 1421, 1423

<sup>114</sup> C Spretnak, *Resurgence of the Real* (Routledge 1997) 219-220; see also P Ferrano and A Kiss, 'Direct Payments to Conserve Biodiversity' (2002) 298 Science 1718; R Dirzo and P Raven, 'Global State of Biodiversity and Loss' (2003) 28 Annual Rev of Env & Resources 137

<sup>115</sup> See for example, WHO, *Ecosystems and Human Wellbeing: Health Synthesis* (WHO 2005) 12-26

<sup>116</sup> See S Anand, 'Human Development and Economic Sustainability' (2000) 28 (12) World Dev 2029

<sup>117</sup> See E Altvater, 'Ecological and Economic Modalities of Time and Space' (1989) Capitalism Nature Socialism 59

<sup>118</sup> See T Berry (n 83) 116; A Azqueta, 'Ethics, Economics and Environmental Management' (2006) 56(4) Ecol Econ 524

<sup>119</sup> See ss 1 & 28 of the LUA and section 3.4.1 (above) generally

<sup>120</sup> Unreported No. W/89/71, Warri High Court

flagship law (NESREA Act) which was enacted in 2007 is precluded from the supervision of the oil and gas sector (its major source of revenue<sup>121</sup>) by the Agency.<sup>122</sup> The absence of an Oil Pollution Act to regulated oil exploration in Nigeria's Niger Delta region is another example.

Thus, apart from the strictly anthropocentric religious assumptions that have influenced Nigerian statutes on environmental protection discussed above, Nigeria is also a country that prioritises economic growth above environmental protection which, in itself is *strictly* anthropocentric. Thus, because law emerges from predominant values (ideas) of each society,<sup>123</sup> the environmental protection laws in Nigeria can therefore be concluded to be reflective of the strictly anthropocentric religious and economic values which have influenced it.

Chapter three showed that the existing laws in Nigeria do not feature management or preservation of the environment for future generations. This means that even if the defects in the existing laws are corrected within the same utilitarian ethic, preservation will still elude the Nigerian environment to a large extent. Thus a change in ethic is required. Such a change will however be complemented by the reforms suggested in this chapter as the proposed change will be an enhancement of the proposed reforms and not necessarily an alternative for them.

Consequently, a fundamental proposition is therefore that to enhance the effectiveness of the environmental protection laws if they are reformed, there should be a change in the ethic underlying these laws to one with a preservationist outlook which sustainable development requires. The change should be to an ethic that bestrides the need for development and environmental protection, taking into cognizance the right of future generations to a clean environment.

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<sup>121</sup> See paras 1-3 of section 2.4 above

<sup>122</sup> See s 8 of NESREA Act 2007 and s 3.3 above generally

<sup>123</sup> D Shelton and A Kiss, *Judicial Handbook on Environmental Law* (UNEP 2005) 4

Definitely, a human legal system should only be concerned with human values, human needs and human priorities. It is therefore right that the laws should remain anthropocentric. Humanity occupies a special place in nature through consciousness or reason or culture, and therefore we have the right, if not the duty, to manage the natural world. In that management process, we can have proper regard to the protection of species and features of the natural landscape, at least in so far as they are of value or concern to people. All the creatures and things in the environment, with all their diversity and differences, sentient or not, animate or not, are of immense value in one way or the other to man in the present as well as in the future, the irony is that damage to nature will ultimately amount to damage to man now and in the future. Thus human beings are *still* the central concern of the new ethic.<sup>124</sup> It is against this backdrop that the *eco-anthropocentric* ethic argued for in chapter one will be explored in the next chapter as this ethic has been shown to have the capacity to preserve the environment for future generations through guaranteeing Nature's right to exist.<sup>125</sup>

The difference between the proposed ethic and the *strict* anthropocentric ethic is that 'human being' in the proposed ethic includes future humans, because sustainable development is all about improving the environment to enhance the quality of human life (now and in the distant future) while living within the carrying capacity of supporting ecosystems.<sup>126</sup>

It therefore does not suffice to say that we cannot go on treating nature as an 'object' or 'resource', created for our use alone and to go on living in the world with the same concepts or ideas as before. The notion of human dominion over nature must be replaced with something new. Because as Quinn opined:

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<sup>124</sup> See generally section 1.6 above.

<sup>125</sup> See section 1.6.1

<sup>126</sup> IUCN/UNEP/WWF, *Caring for the Earth* (IUCN, Switzerland 1991) 10

As long as... people... are convinced that the world belongs to them and their divinely-appointed destiny is to conquer and rule it, then they are of course going to go on acting the way they have been acting for the past ... years. They are going to go on treating the world as if it was a piece of human property...<sup>127</sup>

#### 4.5 Conclusion

One feature seen to be common to *all* the regimes on environmental protection in Nigeria is *strict* anthropocentrism (human-centredness). They are clearly for the purpose of ensuring man's health and comfort in the present generation. The criterion for this protection is man and not the natural equilibrium of *all* biotic communities. Thus, suggested reforms aimed at remedying existing environmental degradation and preventing future degradation will be less effective than if the ethic were changed as proposed.

The essential reasons for the current destruction of nature and/or reasons for the inefficiency of the current environmental protection regimes have been found in the dominant anthropocentric cultural paradigm of the western cultures which are progress oriented. The morality therefore controlling man's interaction with nature has remained utilitarian<sup>128</sup>. The religious and economic values and assumptions of modernity have pervaded our social norms and spawned the current ecological demise. They contribute to everything and everyone being treated as a commodity. Thus, this bias which informs the exploitation of the Earth also leads to the exploitation of people and can be seen to inform racism, sexism, the abuse of women and children, and war.<sup>129</sup>

A resolution of this crisis can therefore be found in enhancing the current legal framework if reformed as proposed with a new set of foundational values and beliefs -

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<sup>127</sup> D Quinn, *Ishmael: an Adventure of the Mind and Spirit* (2<sup>nd</sup> ed, Turner Books 1993) 249

<sup>128</sup> S Plicanic, 'The concept of New (Ecocentric) Legal Philosophy' <<http://www.ecopsychology.org/journal/ezone/law.html>>accessed 20 September 2010; D Nir, 'Critical Examination of the Jewish Environmental Law of Bal Tashchit -Do Not Destroy' (2005-2006) 18 Geo Intl Env L Rev 335; J Deckers, 'Christianity and Ecological Ethics: The Significance of Process Thought and a Pan experientialist Critique of Strong Anthropocentrism' (2004) 9 (3) Ecotheology 359

<sup>129</sup> M Bookchin, *Which Way for the Ecology Movement: Essays by M Bookchin* (AK Press 2001) 3-19; see also B Tokar, 'On Bookchin's Social Movements' (2008) 19 (1) Capitalism, Nature and Socialism 51-66

human well-being can only come about through the health and well-being of the earth in its wholeness. This need for an ethical change is what prompts the core of the next chapter which will prove that the *eco-anthropocentric* ethic which was proposed in chapter one can be adopted in Nigeria.

## CHAPTER FIVE

### ESTABLISHING THE PRACTICABILITY OF A JUSTICIABLE RIGHT FOR NATURE IN THE NIGERIAN CONSTITUTION

*If legal rights are conferred on feral beasts, outcroppings of stone, primeval forests and sweet country air, and if these legal rights are taken seriously, men will accord these rights the respect usually accorded to primary rights. When these legal rights are disregarded, the force of legal remedies may deter future breaches of duty, and so, perhaps, teach more people to take nature's legal rights seriously.<sup>1</sup>*

#### 5.1 Introduction

In chapter one, it was deduced that laws based on a *strict* anthropocentric ethic would not effectively achieve the objective of sustainable development. This conclusion was tested against the situation of environmental degradation in Nigeria's Niger Delta region (described in chapter two) in chapters three and four. Chapter three projected the defects in the relevant regimes used in environmental protection in the region; and chapter four went on to propose reforms to tackle these defects and ended by arguing for the need for a change in the ethic underlying the current laws from a *strictly* anthropocentric one to a less anthropocentric (management) one in order to enhance the reforms made earlier in the chapter.

Consequently, this chapter will demonstrate that the *eco - anthropocentric* model proposed in chapter one can be adopted in Nigeria with a view to achieving sustainable development in the Niger Delta region. It will argue that the justiciability of environmental rights as an extension of economic and social rights (currently grouped with fundamental principles and directive principles) is both practicable and imperative for the protection of a clean and healthy environment in Nigeria despite the high requirement of a four fifth majority to make amendments with respect to fundamental rights. Further, drawing from

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<sup>1</sup> C Morris, 'The Rights and duties of beasts and Trees: A Law Teacher's Essay for Landscape Architects' (1964-1965) 17 J Legal Educ 185,191

comparative constitutionalism, it contends that nature's right in Nigeria can be a sound constitutional right where specific procedural and substantive elements are employed.

## **5.2 Arguing for the Justiciability of Environmental Rights in Nigeria**

This section will argue that, based on the experiences of the South African and Indian courts as well as on the arguments of some scholars, environmental rights (as an extension of economic, social and cultural rights) are justiciable in Nigeria. This may be difficult following the difficulty of amending the constitution with respect to the four fifths requirement and the problem of over representation discussed in chapter two.<sup>2</sup>

After World War II, states formed the United Nations, pledging to strive for 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.<sup>3</sup> In 1948, these ambitions were further clarified through adoption of the Universal Declaration of Human Rights (UDHR). The UDHR stipulated that 'it is essential...that human rights should be protected by the rule of law'.<sup>4</sup> In addition, the UDHR included rights corresponding to what later became known as the three generations of human rights.<sup>5</sup> First generation rights are articulated in Articles 2-21 of the UDHR. First generation rights are comprised of civil and political rights, such as the freedom of speech and the right to vote, which mandate government's non-interference. These rights owe an intellectual debt to the French and American revolutions, which sought to secure human rights through freedom from governmental interference. Second generation rights appear in Articles 22-27. Second generation rights consist of economic and social rights, such as the right to a living wage and fair working conditions, which require active Government involvement.

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<sup>2</sup> See Paras 10-12 of section 2.2 above.

<sup>3</sup> Charter of the United Nations ch 1, s 3 <[www.un.org/en/documents/charter/](http://www.un.org/en/documents/charter/)> accessed 26 March 2012

<sup>4</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), pmbl. UN Doc. A/810.

<sup>5</sup> S Marks, 'Emerging human rights: A new generation for the 1980s?' (1981) 33 Rutgers L Rev 435, 440 ; B Weston, 'Human rights' (1984) 6 HRQ 257



This generation of rights came about as a result of ‘social upheavals... arising from abuses of the rights of the first generation’ and found philosophical substantiation in ‘socialist and Marxist writings’.<sup>6</sup> The distinction between first and second generation rights is similar to the distinction between negative and positive duties in that first generation rights reflect a freedom from government influence whereas second generation rights seek the enjoyment of certain freedoms that require government intervention.<sup>7</sup>

Third generation rights differ from first and second generation rights in that they may be both invoked against the State and demanded of it.<sup>8</sup> They include the right to environment, development, peace, the common heritage, communication, and humanitarian assistance.<sup>9</sup>

In chapter two, it was mentioned that in the 1999 Constitution of Nigeria, first generation rights are provided for in chapter IV as Fundamental Human Rights<sup>10</sup>; second and third generation rights (though not called rights) are included in chapter II as Fundamental Objectives and Directive Principles of State Policy.<sup>11</sup> However, the grouping of Environmental ‘rights’ with Economic, Social and Cultural ‘Rights’ in (the non-justiciable) Chapter II of the 1999 Constitution of Nigeria could mean that the Nigerian legislature regards the former as an extension of the latter. Arguably, the reason for this is because, environmental claims, whether they focus on matters like health or on species diversity, seem (like ESCRs) to import certain substantive values that are rooted in the

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<sup>6</sup> S Marks (n 5) 438

<sup>7</sup> J Nickel, ‘The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification’ (1993) 18 YJIL 281

<sup>8</sup> S Marks (n 5) 441; see also W Gormley, ‘The Legal Obligation Of The International Community To Guarantee A Pure And Decent Environment: The Expansion Of Human Rights Norms’ (1990) 3 GIELR 85, 115

<sup>9</sup> See J McClymonds, ‘The Human Right To A Healthy Environment: An International Legal Perspective’ (1992) 37 NYU Sch L R 583, 591-592

<sup>10</sup> See fn 24 of ch 2 above

<sup>11</sup> See fn 9 of ch 2 above; s 20 provides for the protection of the environment by the state.

precepts of a modern welfare state; for example, the allocation of resources and positive action required by the state.<sup>12</sup>

The effort to guarantee each individual a basic right to decent housing, health care, nutrition, safe working conditions, education and cultural opportunity seems most closely fitted to the effort of articulating basic environmental rights; because environmental protection is undoubtedly recognized as a precondition to the enjoyment of these rights. Such preconditions to the enjoyment of fundamental rights may be elevated to the status of rights themselves, as happened to the right to equality and non-discrimination.<sup>13</sup> Terms like ‘decent environment’, ‘environment adequate for their health and well-being’ or ‘environment of quality’ suggest that a significant driving idea behind efforts to establish environmental rights is a version of welfare-state ideology.<sup>14</sup>

For many years, the prevailing opinion was that Economic, Social and Cultural Rights (ESCRs) ought not to be justiciable.<sup>15</sup> The main arguments against the justiciability of these rights were the subversion of democracy (allowing unelected judges to substitute their opinion for elected legislators), the judicial system’s lack of capacity for resolving and monitoring complex, polycentric disputes, and the vagueness of social, economic, and environmental rights.<sup>16</sup>

The concern is that these rights may represent open-ended claims on societal resources and that judicial decisions allocating those resources would be made without

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<sup>12</sup> J Sax, ‘The Search for Environmental Rights’ (1990-1991) 95(6) J Land Use & Env L 93, 95

<sup>13</sup> D Shelton, ‘A Rights Based Approach to Conservation’ in T Greiber (ed), *Conservation With Justice: A Rights-Based Approach* (IUCN) 5-24, 12

<sup>14</sup> J Sax (n 12) 95 ; see also S Anaya, ‘Human Rights, Environment & Community’ (A Workshop held at University of Buffalo Law School, 17 - 18 April 1998); S Anaya, ‘Environmentalism, Human Rights and Indigenous People: A Tale of Converging and Diverging Interests’ (Fall 1999/Spring 2000) 7 Buff Env L J 1; A Boyle, ‘Human Rights and the Environment: A Reassessment’ (2007) 18 Fordham Env L Rev 471, 490

<sup>15</sup> D Davis, ‘The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 SAHRJ 475; C Sunstein, ‘Against Positive Rights’ (1993) 2(1) EECR 35.

<sup>16</sup> See J Waldron, *Law and Disagreement* (OUP 1999) 213 - 221; H Steiner, P Alston and R Goodman, *International Human Rights in Context: Politics and Morals* (OUP 2008) 280 - 293

consideration of other societal priorities therefore encroaching on the legislature's competence to determine how a government's budget is allocated.<sup>17</sup>

Sunstein once claimed that courts are incapable of properly enforcing social, economic, and environmental rights because they cannot create government programs and lack the resources to oversee government implementation of orders. He argued that it would be a 'large mistake, possibly a disaster' to include positive rights, including the right to a healthy environment, in the new constitutions of Eastern European nations.<sup>18</sup> Writing about the new South African constitution, Davis warned that social and economic rights would act as a Trojan horse for politics to enter the courtroom, placing an undue amount of power in the hands of unelected judges.<sup>19</sup>

Today, however, there appears to be a shift in the jurisprudence of the enforceability of economic, social and cultural rights. The Indian Supreme court is one good example with respect to the changing trend. The court has established a link between Civil and Political Rights and Economic, Social and Cultural Rights, and has, in some cases, interpreted the former to include the latter in order to make the latter enforceable. For example, the right to life has been applied in a diversified manner in India to incorporate the right to a healthy environment.<sup>20</sup> It includes for example the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood.<sup>21</sup> In *Subhash Kumar v. State of Bihar*<sup>22</sup> the Supreme Court of India interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment. The court held that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-

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<sup>17</sup> C Fried, *Right and Wrong* (Harvard University Press 1973) 109-110

<sup>18</sup> See C Sunstein, 'Against Positive Rights' (1993) 2 EECR 35, 38

<sup>19</sup> D Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 14 SAJHR 475, 489

<sup>20</sup> Art 48A and Art 51A (g) of the Constitution (Forty Second Amendment) Act 1976 impose responsibility on every citizen to protect, safeguard and improve the environment. See P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experience* (Routledge 2012) ch 4

<sup>21</sup> *Charan Lal Sahu v Union of India* AIR 1990 SC 1480; *MC Mehta v Union of India* (1998) 9 SCC 589; *Kirloskar Bros Ltd v ESI Corporation* (1996) 2 SCC 682

<sup>22</sup> AIR 1991 SC 420/1991 (1) SCC 598

free water and air for full enjoyment of life'.<sup>23</sup> In chapter three, it was shown how the Nigerian court attempted to achieve this in *Gbemre v SPDC*<sup>24</sup> where the court interpreted the right to life under section 33 of the 1999 Constitution to include the right to a clean environment. This jurisprudence (though short lived), showed the determination of the Nigerian court to prove that the boundaries built around matters under chapter II of the Constitution could be removed by interpreting those matters as part of the enforceable rights under Chapter IV.

Thus the disadvantage of having this kind of dynamism demonstrated by the Indian and Nigerian courts is that it is haphazard. It can change easily. For example, plans to get the case of *Gbemre* to the Supreme Court were foiled;<sup>25</sup> and since then, no case like it has been decided by any other high court. In India, the Supreme Court which began the socio-economic rights jurisprudence in the country has begun to turn away from its once notable jurisprudence in favour of socio-economic rights and its objective to protect the poor.<sup>26</sup>

A less haphazard example abounds in South Africa. The 1996 Constitution of South Africa includes key Economic, Social and Cultural Rights including the right of access to adequate housing (section 26(1)), to health care, food and water, and to social security (section 27 (1)). Also protected is a range of children's rights to basic nutrition, shelter, basic health care services and social services (section 28(1) (c)). Under section 24 of the Constitution, everyone has the right to an environment that is not harmful to health or well-being; it adds that the government must *act reasonably* to protect the environment by preventing pollution, promoting conservation and securing sustainable development, while building the economy and society.

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<sup>23</sup> P 598

<sup>24</sup> See section 3.2 above

<sup>25</sup> Ibid

<sup>26</sup> See B Rajagopal, 'Pro-Human Rights but Anti Poor? A Critical Evaluation of the Indian Supreme Court From a Social Movement Perspective' (2007) 8 Hum Rts Rev 157.

The role of the state is identified in Section 7(2) of the Constitution, where it is stated that the state is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights, including socio-economic rights. The duty to *respect* socio-economic rights means that the South African state is required to refrain from interfering with the enjoyment of the rights.<sup>27</sup> It imposes a negative duty on the state - a duty *not* to act in any way that would deprive people of the rights or access to the rights. In relation to some of the socio-economic rights in the South African 1996 Constitution (housing, health care, food, water, and social security)<sup>28</sup> it is only necessary for the state to provide 'access to' these rights.

The Constitutional Court of South Africa applies the principles of proportionality and reasonableness which requires that there be a reasonable relationship between a particular objective and the means to achieve that objective.<sup>29</sup> The court applies it in cases that call for a careful balance between the economic and social rights of individuals and the public interest recognizing societal priorities and limited government resources on the other hand.<sup>30</sup>

The decision of the South African Constitutional Court in *Grootboom*, a case about the right to housing, played a pivotal role in demonstrating that the legal enforcement of social and economic rights is not so different from the protection that is provided by the more traditional political and civil guarantees.<sup>31</sup>

The *Grootboom* case involved a group of homeless people asserting their constitutional right to housing. South Africa's Constitutional Court did not require the government to address the needs of the specific individuals who brought the lawsuit but ruled that the government's existing efforts to address homelessness were inadequate. The

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<sup>27</sup> Maastricht Guidelines on Violations on Economic, Social and Cultural Rights, 1997, para 6 <[www1.umn.edu/humanrts/instree/Maastrichtguidelines.doc](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.doc)>accessed 30 November 2012

<sup>28</sup> The exclusion of the right to a clean environment from these groups of rights implies that the right is among those rights which the state has a positive duty to protect.

<sup>29</sup> R Clayton and H Tomlinson, *The Law of Human Rights* (OUP 2000) 278

<sup>30</sup> D Beatty, *The Ultimate Rule of Law* (OUP 2004) 66-70; M Tushnet, 'State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations' (2002) 3 Chi J Intl L 435-453

<sup>31</sup> *South Africa & Ors v Grootboom & Ors* (2000) (11) BCLR 1169 (Constitutional Court)

Court ordered the government to develop and implement a comprehensive and effective strategy to fulfil the right of access to housing.

The court was stronger in vindicating socio-economic rights in *Treatment Action Campaign v Minister of Health*.<sup>32</sup> In that case, the Government of South Africa argued that courts are constrained by the doctrine of separation of powers from issuing anything but a declaratory order in socio-economic rights cases. In response, the Constitutional court powerfully reaffirmed the justiciability of socio-economic rights<sup>33</sup>, and rejected the government's argument. It reiterated that the separation of powers underlying the 1996 Constitution is not absolute. It stated that while the branches of government must respect the respective domains of the other branches, this does not mean that courts cannot and should not make orders that have an impact on policy<sup>34</sup>. It affirmed that the inclusion of social and economic rights in the Bill of Rights is a clear articulation that democracy is as much about the right to vote, and of free expression and of association as it is about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.<sup>35</sup>

The new South African Jurisprudence is therefore in favour of the fact that not only should economic rights be enforceable like civil and political rights, but also that the classical conceptions of the separation of powers are best understood in the context of the problems prevailing in the 17<sup>th</sup> century Europe, contemporary local understandings of the doctrine must therefore be responsive to current social and constitutional context, and accordingly to the goals of the new constitutional order<sup>36</sup>. Ackerman asserts that 'the

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<sup>32</sup> 2002 (5) SA 721 ('TAC 2')

<sup>33</sup> It stated: 'The question in the present case...is not whether socio-economic rights are justiciable. Clearly they are' see para 25

<sup>34</sup> Ibid para 98

<sup>35</sup> S Verma, 'Justiciability of the Economic, Social and Cultural Rights Relevance Case Law' (Working paper on the ICHRP review meeting on Rights and Responsibilities of Human Rights and Organisation, Geneva, 15 March 2005) 42

<sup>36</sup> M Pieterse, 'Coming to Terms With Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383, 405

separation of powers is a good idea, but there is no reason to suppose that the classical writers have exhausted its goodness<sup>37</sup>.

The South African example clearly refutes the arguments that socio-economic rights are not justiciable; however, in spite of its pronouncement in the *Treatment Action Campaign* above, the Court has remained timid in its approach to vindicating socio-economic rights; and this has to some extent resulted in a denial of socio-economic rights in South Africa. This timidity is manifest in the Court's marked deference to the elected branches of government,<sup>38</sup> and its failure to live up to the transformative role assigned to it under the Constitution. Karl Klare has argued that the new South African Constitution, required the courts to 'address the problems concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretative practices are a medium for articulating social visions',<sup>39</sup> Instead of embracing its role in the transformative enterprise the Constitutional Court has sought to 'limit the appearance of its own agency in the interpretive project' and retreated into limited, formalist and overly-deferential models of judicial reasoning.<sup>40</sup>

Despite the shortcomings in their approaches, the Indian and South African examples represent innovative and successful judicial interpretation and application of social and economic rights. These approaches align with Mantouvalou's argument that social and economic rights have common foundations with civil and political rights because they are rights that exist primarily to satisfy the needs of constitutional essentials but have been neglected because of cold war ideologies; thus she argues that 'the two groups of rights

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<sup>37</sup> B Ackerman, 'The New Separation of Powers' (2000) 113 Harv L Rev 634, 727; P Curland, 'The Rise and Fall of the Doctrine of Separation of Powers' (1986) 85 Michigan L Rev 592, 611

<sup>38</sup> See P O'Connell (n 20) ch 3; M Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 N Y Univ L Rev 1565, 1590

<sup>39</sup> K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146, 188.

<sup>40</sup> P De Vos, 'South Africa's Constitutional Court: Starry-Eyed in the Face of History?' (2002) 26 Vermont L Rev 837, 845.

are based on common values and have no sharp conceptual differences.’<sup>41</sup> In light of these judicial developments, Sunstein has reversed his initial position against the justiciability of social and economic rights and now argues that constitutionalizing ESCRs will help create the preconditions for a well-functioning democratic order because in ethnically divided societies, for example, one of the ways a constitution proves its primary purpose of restraining violence will be to promote ESCRs.<sup>42</sup>

Ramcharan concludes that the courts have a role to play in providing judicial protection of ESCRs and that there is no doubt that the era of justiciability of economic, social, and cultural rights has arrived.<sup>43</sup>

Adopting the views Mantouvalou<sup>44</sup> and Sax<sup>45</sup> that ESCRs (inclusive of environmental rights) are of like foundations with CPRs, it can therefore be argued that environmental rights may be extrapolated from both first generation (negative) and second generation (positive) rights. First generation rights such as those guaranteeing the right to participate in democratic institutions could be utilized to expand public involvement in environmental governance. For example, the procedural rights to information, to participation and to access to justice are of fundamental importance to the protection and enforcement of all human rights.<sup>46</sup> This is reflected in developing international reliance on existing civil and political rights to give access to environmental information, judicial

<sup>41</sup> V Mantouvalou, ‘The Case for Social Rights’ Georgetown Public Law Research Paper No. 10, 10-18 <<http://scholarship.law.georgetown.edu/facpub/331/>> accessed 20 July 2012, 31; See also House of Lords/House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights* (Twenty-First Report of Session 2003-04, HL Paper 183, HC 1188, Published 2 November 2004) 11; J Siegel, ‘A Theory of Justiciability’ (2007) 86 Texas L Rev 73, 75-78

<sup>42</sup> C Sunstein, *Designing Democracy: What Institutions Do* (OUP 2001) 221-238; see also D Davis, P Macklem and G Mundlak, ‘Social Rights, Social Citizenship, and Transformative Constitutionalism: a Comparative Assessment’ in J Conaghan, M Fischl and K Klare (eds), *Labour Law in an Era of Globalization* (OUP 2002); D Davis, ‘Socio-Economic Rights in South Africa: The Record after 10 Years’ (2004) 2 N Z J Pub and Intl L 47; D Davis, ‘Socioeconomic Rights: Do they Deliver the Goods?’ (2008) 6 (3&4) Intl J of Const L 687

<sup>43</sup> B Ramcharan, *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials* (Martinus Nijhoff Publishers 2005) 3; see also G Katrougalous and P O’Connell, ‘Fundamental Social Rights’ (2011) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1945320](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945320)> 14 accessed 24 July 2012

<sup>44</sup> V Mantouvalou (n 41)

<sup>45</sup> J Sax (n 12)

<sup>46</sup> See ss 38, 39 & 46 of the 1999 Constitution of Nigeria



remedies and political processes. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention and widely ratified in Europe, focuses entirely on procedural rights in an environmental context.<sup>47</sup> It does so in recognition of the fact that public participation will enhance the quality as well as the implementation of decisions about the environment.

Second generation rights requiring government intervention are also a natural source of inspiration for providing a certain level of environmental quality to the citizens of a state. For example, our decisions about how and when to use and protect the environment have implications for the full range of economic, social and cultural rights including the right to work, the right to economic development, the right to privacy and family life, the right to adequate food and even the right to life. This deduction was also most clearly expressed in a decision of the International Court of Justice, in which Judge Weeramantry stated that

The protection of the environment is ... a vital part of contemporary human rights doctrine.... It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>48</sup>

From the foregoing, it can be concluded that environmental rights can be justiciable in Nigeria in spite of the rigours involved in the Nigerian constitutional amendment process discussed in chapter two<sup>49</sup> that is, of course following an amendment of the Constitution to expunge the application of section 6 (6) (c) to environmental matters.<sup>50</sup>

Thus, although the four fifths majority which is required for the amendment of the fundamental rights section may not be easy to achieve, the possibility of such an amendment

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<sup>47</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 38 ILM (1999) 517; In force 29 October 2001

<sup>48</sup> Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) 1997 ICJ 92, ACEL Submission on Greening.

<sup>49</sup> See para 11-12 of section 2.2 above

<sup>50</sup> See paras 5&6 of section 2.2 above

is not in doubt based the current disposition of the Nigerian National Assembly to constitutional Amendment which has reflected in three recent amendments (in 2011) to the Nigerian Constitution (although those ones required a two thirds majority).<sup>51</sup> Even if this proposed amendment to the Nigerian Constitution takes longer than the recent amendments, its eventual possibility is not in doubt considering the monumental example of the entrenchment of rights of slaves in the American constitution.<sup>52</sup> In other words, with persistence on the part of non-state actors like private individuals and NGOs, it may take decades or about a century (like the recognition of the rights of slaves in the United States), but it will eventually materialise.

Apart from the argument against the justiciability of environmental rights, there other criticisms of the rights. Opponents of entrenching the right to a healthy environment in national constitutions argue that the right is vague because it creates too much uncertainty about what level of environmental quality will be protected;<sup>53</sup> it is absolute and thus will trump other societal interests;<sup>54</sup> it is fundamentally undemocratic to transfer decision-making power from elected legislators to unelected judges;<sup>55</sup> it will neutralize the effects of other rights;<sup>56</sup> it is a form of cultural imperialism;<sup>57</sup> it represents an emerging value and an

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<sup>51</sup> See paras 10-12 of section 2.2 above

<sup>52</sup> See paras 11-12 of section 1.7 above

<sup>53</sup> K Wolfe, 'Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment' (2003) 9 *Appeal: Rev of Current Law and Law Reform* 45; P Pevato, 'A Right to Environment in International Law: Current Status and Future Outlook' (1999) 8 (3) *RECIEL* 309

<sup>54</sup> G Handl, 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View' in C Trinidad (ed), *Human Rights, Sustainable Development, and the Environment* (Seminario de Brasilia 1992) 117, 121-22; see also R Lazarus, *The Making of Environmental Law* (University of Chicago Press 2004) 28

<sup>55</sup> B Barry, *Justice as Impartiality* (OUP 1996) 17; J Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *OJLS* 18

<sup>56</sup> C Miller, *Environmental Rights: Critical Perspectives* (Routledge 1998) xi; A CanacoTrindade, 'Environmental Protection and the Absence of Restrictions on Human Rights' in K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (Martinus Nijhoff 1993) 561

<sup>57</sup> C Brown, 'Universal Human Rights: A Critique' in T Dunne and N Wheeler (eds), *Human Rights in Global Politics* (CUP 1999); H Steiner, Palston and R Goodman, *International Human Rights in Context* (OUP 2008) 517; R Mushkat, 'Contextualizing Environmental Human Rights: A Relativist Perspective' (2009) 26(1) *PELR* 119;

aspiration rather than a concrete reality, at least in the short-term;<sup>58</sup> it is anthropocentric in nature and thus ignores the intrinsic value of the environment.<sup>59</sup>

The above criticisms, apart from the one on anthropocentrism are not peculiar to constitutional environmental rights. They have been made against human rights in general. Thus it will be outside the scope of this thesis to respond to each criticism in detail. However, a brief rebuttal to these misgivings against constitutional environmental rights is imperative but first it must be acknowledged that constitutional rights are not a magic bullet for today's environmental problems.<sup>60</sup> However, rights have contributed to ameliorating some of the wrongs they are intended to address.<sup>61</sup> Particularly, rights-based approach to environmental protection is the only effective alternative to today's market-based approach, which is failing to adequately protect the environment.<sup>62</sup> Cullet specifically argues that economic globalization needs to be counter-balanced by the globalization of the right to a healthy environment.<sup>63</sup>

Constitutional rights are usually phrased in brief, general terms whose meaning evolves over time.<sup>64</sup> Thus, rights are almost always balanced against competing rights, so that absolutism is a non-issue.<sup>65</sup> Again, where constitutional rights are properly

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<sup>58</sup> N Gibson, 'The Right to a Clean Environment' (1990) 54 SLR 5; F Carter and D Turnock (eds), *Environmental Problems of East Central Europe* (2nd ed, Routledge 2002) 57

<sup>59</sup> C Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 71; A McGlone, 'The Human Rights Approach' in E Sevig and H Bugge (eds), *International Environmental Law* (Juridisk & Forlag 1994) 86; M Pallemerts, 'International Environmental Law From Stockholm to Rio: Back to the Future?' in P Sands (ed), *Greening International Law* (Earthscan 1994) 1

<sup>60</sup> C Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 205

<sup>61</sup> Ibid

<sup>62</sup> B Hill, S Wolfson and N Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2004) 16 Geo Intl Env L Rev 359; see the discussion on the inadequacy of common law in texts para 12 of section 4.4 above

<sup>63</sup> P Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 Netherlands Q H R 25

<sup>64</sup> A Kiss and D Shelton (eds), *International Environmental Law* (Transnational Publishers 2004) 710; M Anderson, 'Individual Rights to Environmental Protection in India' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 199, 224.

<sup>65</sup> D Beatty, *The Ultimate Rule of Law* (OUP 2004) 137; A Cancado Trindade, 'Environmental Protection and the Absence of Restrictions on Human Rights' in P Mahoney (ed), *Human Rights in the Twenty-first Century: A Global Challenge* (Martinus Nijhoff 1993) 561.

implemented, the issue of ‘false hope’ will not arise. Constitutional environmental rights cannot be rightly said to be caught up in an argument of cultural imperialism because environmental degradation is a global issue which every country (developed or not) seeks to tackle in similar ways. For example, almost every country of the world ratified the Rio Declaration of 1992.<sup>66</sup>

As for the involvement of the judiciary, the courts have a legitimate supervisory role in constitutional democracies, and elements of that role involve: defending the rule of law, ensuring that government laws, policies, and actions are within their constitutionally defined jurisdictions and adjudicating claims that constitutional rights have been violated. Courts have extensive experience and expertise in defining and refining the parameters of human rights in particular legal, cultural, and social contexts.<sup>67</sup> The judicial role may thus constrain the legislature but does not disable it.<sup>68</sup> On the anthropocentric criticism, it must be reiterated that the concept of nature’s rights is not a new one.<sup>69</sup> It has not only been proven theoretically that nature can possess rights<sup>70</sup>, but a practical example like the Ecuadorian Constitution which will be examined later in this chapter will prove that nature’s right can be protected in a constitution.

In spite of all the above criticisms of constitutional environmental rights, there is an increasing trend to them. Since the 1972 United Nations Conference on the Human Environment in Stockholm, where the link between human rights and the environment was established, the world has witnessed a dramatic increase in the absolute number and

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<sup>66</sup> S Subedi, ‘Are the Principles of Human Rights “Western” Ideas an Analysis of the Claim of the “Asian” Concept of Human Rights from the Perspective of Hinduism’ (1999) 30 Cal W Intl L J 45, 70; See also J Donnelly ‘The Relative Universality of Human Rights’ (2007) 29 HRQ 281

<sup>67</sup> H Rodriguez-Rivera, ‘Is the Human Right to Environment Recognized Under International Law? It Depends on the Source’ (2001) 12 Col J Intl Env L & Policy 1

<sup>68</sup> Ibid; P Hogg and A Bushell, ‘The Charter Dialogue Between Courts and Legislatures’ (1997) 35 Osgoode Hall L J 75; J Nedelsky, ‘Reconceiving Rights and Constitutionalism’ (2008) 7JHR 139

<sup>69</sup> A Leopold, *A Sand County Almanac and Sketches Here and There* (OUP 1949) 203; C Morris, ‘The Rights and Duties of Beasts and Trees: A Law Teacher’s Essay for Landscape Architects’ (1964) 17 JLE 189; C Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45 S Cal L Rev 450; See also *Sierra Club v Morton* 405 U.S. 727 (1972)

<sup>70</sup> See section 1.6.1 above

percentage of domestic constitutions that contain provisions for environmental protection. Today, about 70 per cent of the world's national constitutions (140 out of 192) include explicit references to environmental rights and/or environmental responsibilities.<sup>71</sup> Those with substantive environmental rights are most often articulated as 'every person has the right to a healthy environment' or 'every person has the right to a healthy, ecologically balanced environment'. Other similarly worded formulations were placed in this category as long as both the concepts of a right and environmental protection were included. For example, in the Constitution of Argentina, Article 41 (1) provides that '[A]ll inhabitants enjoy the right to a healthy, balanced environment, which is fit for human development so that productive activities satisfy current needs without compromising those of future generations.'<sup>72</sup> The 1988 Brazilian Constitution contains an extremely comprehensive environmental provision with a level of detail that in most nations would be found in environmental legislation. Article 225 of the Constitution provides that:

All have the right to an environment that is ecologically in equilibrium and that is available for shared use by the people, essential to a healthy quality of life, which imposes on both the Government and society as a whole the duty of protecting it and preserving it for both the present and future generations.

Having established that environmental rights are a possibility, the next section will demonstrate why it is critical (whether as rights of man or rights of nature) for them to be protected in a constitution.

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<sup>71</sup> D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press 2011) 83-85

<sup>72</sup> R Wolfrum and R Grote (eds), 'Constitution of Argentina' in *Constitutions of the Countries of the World* (Oceana Law 2009) Binder I.

### 5.3 The Imperative of Constitutionalizing Environmental Rights in Nigeria

Relying on the argument of Mohanan which was discussed in Chapter one that a constitution establishes fundamental principles that describe the organizational framework of the state and the nature, the scope of, and the limitations on the exercise of state authority, a constitution cannot be regarded as a mere or common legal document.<sup>73</sup> It is, essentially, a document relating to and regulating the affairs of a nation state and stating the functions and powers of the different apparatus of the government, as well as regulating the relationship between the citizens and the state. It makes provisions for the rights of the citizens within the compass of the state. This is true of the Nigerian Constitution which was shown in chapter two to be the supreme (highest) law of Nigeria.<sup>74</sup>

At the heart of constitutional law is the idea of ‘protecting minorities from majoritarian actions’, or protecting the weak from the strong.<sup>75</sup> Both nationally and internationally, there is a growing body of evidence that a disproportionate burden of harm from environmental degradation\toxic pollution, over-fishing, habitat destruction, and so on is borne by people who are poor, belong to ethnic minorities, or are otherwise disadvantaged.<sup>76</sup> Thus in theory, constitutional recognition of the right to a healthy environment could increase the probability of effective protection, provide vulnerable individuals, affected communities, and civil society with a potentially powerful tool for holding governments accountable and offer remedies to people whose rights are being violated.<sup>77</sup> This premise, as was discussed in chapter two<sup>78</sup> finds expression in the Niger Delta region. The indigent indigenes are the direct recipients of the impact of the wanton

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<sup>73</sup> See P Mohanan, *Constitutional Law* (3<sup>rd</sup> ed, Irwin Law 2006) 3; see also para 3 of section 1.7 above

<sup>74</sup> See discussion on the Constitution in para 9 of section 2.2 above

<sup>75</sup> G Bryner, ‘Constitutionalism and the Politics of Rights’ in G Bryner and N Reynolds (eds), *Constitutionalism and Rights* (State University Press 1987) 7

<sup>76</sup> R Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books 2005); J Byrne, C Martinez and H Glover (eds), *Environmental Justice: Discourses in the International Political Economy* (Transaction Publishers 2002) ch 2; R Hofrichter (ed), *Toxic Struggles: The Theory and Practice of Environmental Justice* (University of Utah Press 2002)

<sup>77</sup> R Bullard (n 76 ) 22

<sup>78</sup> See generally section 2.4 above

degradation in the area. Thus if a constitutional environmental right will increase the possibility of effective protection for man (and nature) in the region, then such a right is a necessity in the Nigerian constitution.

Furthermore, by entrenching a justiciable constitutional environmental right, citizens will be encouraged to institute public interest litigations for environmentally degrading activities as an infringement against their guaranteed right to a clean environment. A class action allows any citizen to sue for damages and/or injunctive relief on behalf of others who are similarly aggrieved.<sup>79</sup> This innovation would go beyond the broadening of the standard rule, to allow the courts to assess and compensate an injury to the entire community affected by environmental damage, not just the individual litigant; and could even go further to order the remediation of the degraded environment as much as practicable.<sup>80</sup> Thus if the Nigerian Constitution adopts environmental rights, the liberal standing rules which apply to all the Fundamental Rights in chapter IV of the Constitution will apply to it, making it easier for a person to sue on behalf of himself and others which will dispense with the kind of proof required in public nuisance – proof of damage over and above those whom the claimant is representing.<sup>81</sup>

The creation of a constitutionally guaranteed environmental right incorporates an integrated approach to environmental problems. It discards the belief that places conservation in the domain of non-human species whilst lack of environmental quality is considered to be a problem that concerns humans.<sup>82</sup> Moreover, a constitutional environmental right acknowledges the profound effect that environmental degradation may have on humans. It acknowledges that environmental problems have the ability to threaten

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<sup>79</sup> See D Olawuyi, 'Adopting the Language of Rights for Environmental Protection: Legal and Theoretical Justifications' <[www.com/link/oxford-student-LEG.html](http://www.com/link/oxford-student-LEG.html)> 24-25 accessed 01 November 2012

<sup>80</sup> Ibid

<sup>81</sup> See section 5.6.1.2 below

<sup>82</sup> T Hayward, *Constitutional Environmental Rights* (OUP 2005) 5

potentially everyone in an indiscriminate way and that they can be so severe as to present a threat to the security of states.<sup>83</sup>

The threat to security which a constitutional environmental right indirectly tackles is crucial to the Niger Delta region. It was noted in chapter two that the degradation in the Niger Delta region is a major cause of conflict in the region.<sup>84</sup> Thus if the entrenchment of a constitutional environmental right in Nigeria will help enhance national security, then its adoption should be encouraged.

Also, continued environmental degradation may threaten not only the health, livelihoods and lives of humans, but our continued existence. Constitutional entrenchment of environmental rights therefore serves as a basic condition for human existence.<sup>85</sup>

Constitutional rights have corresponding duties attached to them. These duties must be granted or protected by the state, individuals or other non-state entities, to protect the public. Duties can be positive or negative.<sup>86</sup> A positive duty is one that requires action, while a negative duty is one that prevents action. The primary duties associated with an environmental right would require the state to, ‘implement and enforce laws that secure to the individual the enjoyment of what is intended as the substance of the right’<sup>87</sup> the negative duty which an environmental right embodies is what is required in Nigeria to prevent the Federal Government (which has also been identified to be a major contributor to environmental degradation in the Niger Delta region)<sup>88</sup> from engaging (directly or indirectly) in acts that will threaten the health and livelihood of persons in the region.

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<sup>83</sup> Ibid

<sup>84</sup> See para 4 of section 2.4 above

<sup>85</sup> L Feris, ‘Constitutional Environmental Rights: An Under Utilised Resource’ (2008) 1SAJHR 132, 149-150

<sup>86</sup> R Cholewinski, ‘State Duty towards Ethnic Minorities: Positive or Negative’ (1987-1988) 10 HRQ 344

<sup>87</sup> T Hayward, ‘Constitutional Environmental Rights: A Case for Political Analysis’ (2000) 48 Pol Stud 560, 562; R Cruft, ‘Human Rights and Positive Duties’ (2006) 19(1) Ethics & Intl Aff 29; R Cholewinski, ‘Negative Duties, Positive Duties, and the “New Harms”’ (2010) 120 (3) Ehtics 557

<sup>88</sup> See para 3 of section 2.4 above



Constitutional environmental rights in the form of procedural rights dictate how the government or legal entities should operate. These rights ensure fair and consistent application of due process and justice to all cases that come before a court.<sup>89</sup> These rights would help illustrate proper procedure for lawful enforcement of an environmental right where they have elements of informed consent and political participation of those affected by an environmental decision.<sup>90</sup> Proper procedure is very important especially with respect to the Nigerian Environmental Impact Assessment Act 1992. The effectiveness of this Act rests in the ability of the public to know and participate in decision making.<sup>91</sup> Thus where Nigerian citizens possess a procedural right to a clean environment, they can challenge lack of disclosure and failures of defaulters to follow due process in court.

Also, very important is the fact that an entrenched constitutional environmental right will help guarantee that short-term political pressure and economic considerations of external actors will not trump long-term environmental concerns.<sup>92</sup> While this is almost impossible to guarantee in the definition and implementation of an environmental right, great lengths will be achieved towards this end by simply establishing the right.<sup>93</sup> That is, it could be a better way of protecting environmental claims from government tradeoffs, cost benefit analysis and political lobbying that have for many years placed economic interest over and above environmental concerns. Rights-based recognition of environmental matters could therefore place them at par with other urgent concerns and protect environmental values as legal norms against the usual inertia and reluctance of governments to amend

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<sup>89</sup> See C Simeone, 'The Necessity of Possibilities of Constitutional environmental Rights' <repository.upenn.edu/mes-capstones/7> 5 accessed 16 February 2012; D Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1991-1992) 28 SJIL 11

<sup>90</sup> Ibid

<sup>91</sup> See paras 21-23 of section 3.4.2 above

<sup>92</sup> See discussion on entrenchments of fundamental rights in paras 11-12 of section 2.2 above

<sup>93</sup> E Brandl and H Bungert, 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad' (1992) 16 HELR 1,87

human rights instruments.<sup>94</sup> Thus a constitutional environmental right in Nigeria is one sure way to address the lack of the Nigerian Government's inclination to prioritize economic development above environmental degradation which is manifest in the exclusion of NESREA from addressing oil and gas matters;<sup>95</sup> as well as in judicial decisions like *Alar Irou v Shell BP*<sup>96</sup> where the court felt restrained from sanctioning shell because of its major investments in Nigerian oil industry.

Because environmental law spans many areas of law, constitutionalizing environmental rights provides a broad framework for directing environmental policy. In addition, it can bolster other environmental protection measures.<sup>97</sup> This is achieved by the language of environmental rights and will contribute to the development of more effective environmental rules.

Adopting a constitutional environmental right would make such a right more indestructible than mere statement of policy, procedural norms, or even regulatory statutes.<sup>98</sup> It will give environmental protection a high rank among legal norms, thereby 'trumping statutes,' administrative rules, and/or court decisions on the matter<sup>99</sup>. This quality of constitutional environmental rights calls for the inclusion of section 20 of the 1999 Constitution on environmental matters under the chapter on fundamental objectives and directive principles of state policy under the Fundamental Rights chapter; and will also prevent the struggles engaged in judicial activism as in the case of *Gbemre v SPDC* Where

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<sup>94</sup> N De Sadeleer, 'Environmental Principles, Modern and Post-modern Law' in R Macrory (ed), *Principles of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers* (Europa Law Publishing 2002) 223-36

<sup>95</sup> See section 3.3 generally

<sup>96</sup> Unreported No. W/89/71, Warri High Court

<sup>97</sup> J Bruckerhoff, 'Giving Nature Constitutional Protection: a Less Anthropocentric Interpretation of Environmental Rights' [2008] 86 Texas L Rev 616

<sup>98</sup> J May, 'Constituting Fundamental Environmental Rights Worldwide' (2005-2006) 23 PELJ 113, 118

<sup>99</sup> E Brandl and I Bungert (n 93) 4 C Bruch, W Coker and C Van Arsdale, 'Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa' (2001) 26 Colum J Env L 131

the further hearing of the case (in which the judge monumentally equated gas flaring with a threat to life) was frustrated by the transferring of the judge and the theft of the file.<sup>100</sup>

If contained in a Constitution, environmental rights could have positive educational effects where the wider public will identify and recognise a Constitution as a central instrument.<sup>101</sup> This will serve as a tool of empowerment for civil society groups in general. In other words, environmental rights can serve as a platform on which to base campaigns for change.<sup>102</sup> It is on this attribute of constitutional environmental rights that a major component of this the argument of this thesis is based – that law can bring about social change in the long run. Thus if there is no law to rely on to effect a change, the desired change will most likely be elusive.

In sum, from the widest possible perspective, environmental rights may be thought of as a common denominator for a wide range of rights, obligations and responsibilities in relation to the environment. More narrowly defined, environmental rights place traditional environmental debates on conservation, pollution control and the epidemiological effects of polluting activities in the confines of a language of rights.<sup>103</sup>

Although the constitutional environmental rights referred to above mostly refer to a human right to a clean and healthy environment, this thesis will extend it to nature having established nature to be a person (an entity) that possesses corporate group rights.<sup>104</sup> Thus, in whatever way the constitution is said to protect the right holder, the entity of nature is also protected. The next section will prove (using the practical example of Ecuador) that nature's right can be protected in a Constitution.

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<sup>100</sup> See section 3.2 above

<sup>101</sup> O Pedersen, 'A Bill of Rights, Environmental Rights and the UK Constitution' (2011) PL 577, 578.

<sup>102</sup> E Brandl and H Bungert (n 93); J May (n 98) 118.

<sup>103</sup> O Pedersen (n 101) 587

<sup>104</sup> See fn 9 of introduction

## 5.4 A Practical Example of Nature's Constitutional Right

The question of constitutional recognition and protection for the natural world has moved to the forefront in several European countries and at least one Latin American country. Out of all these countries, only Ecuador provides constitutional rights for the entire entity of nature; The European Union (EU) has discussed – but not yet acted upon – including rights for nature in their constitution.<sup>105</sup> Spain is about to grant rights to animals and the rest of them merely protect either animals or both plants and animals; not necessarily giving them any legal standing.

The Swiss Constitution has protected animals for over 100 years pursuant to the power given to the Government Article 80 of the Swiss Federal Constitution of 1999. In 2002, Article 120 of the Constitution (which covers Gene Technology in the Non Human Field) was amended to recognize ‘the dignity of the creature in the security of man, animal, and the environment.’<sup>106</sup> In 2002, the phrase ‘and animals’ was added to Article 20a of the German Basic Law to read, ‘The state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations.’<sup>107</sup> In 2004, Austria passed similar legislation writing into its Federal Constitution animal welfare protection.<sup>108</sup> Also in August 2010, Kenya adopted a new Constitution in which its article 69 declares that the ‘state shall be responsible for maintaining tree cover at least 10 per cent of the nation’s land...’.The most notable innovations on the rights of nature have taken place in South America.

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<sup>105</sup> ‘Protection of Nature and Biodiversity’ <Europa.eu/legislation\_summaries/environment /nature\_and\_biodiversity/index\_en.htm> accessed 26 March 2012

<sup>106</sup> Para 2; see A Willemsen (ed), ‘The Dignity of Living Beings with Regard to Plants: Moral Consideration of Plants for their Own Sake’ (Paper presented to the Federal Ethics Committee on non-human Biotechnology, Berne, Switzerland April 2008)

<sup>107</sup> See K Natrass, ‘Und Die Tiere: Constitutional Protection for Germany’s Animals’ (2004) 10 Animal Law 283; see also C Haupt ‘The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law’s Animal Protection Clause’ (2010) 16 Animal Law 213

<sup>108</sup> ‘Tough Animal Rights Laws Enacted in Austria- Regulations Protect a Range of Creatures From Hens to Dogs’ <www.msn.com/id/5077350/ns/health-pet\_health/t/tough-animal-rights-laws-enacted-austria/#T3BO1fITajc> accessed 26 March 2013

In September 2008, the Constitutional Assembly of Ecuador became the first Latin American political body to recognize – by a vote of 92-12 - constitutional rights to the natural world. This has made the Ecuadorian Constitution the first in the world to expressly protect nature's rights. Here are the words from the relevant sections of the Ecuadorean Constitution, adopted by Ecuadoreans in the fall of 2008:

Chapter 7 Articles 71-72 provide as follows

Article 71-Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people community or nationality, will be able to demand the recognitions of rights for nature before public bodies. The application and interpretation of these rights will follow the related principles established in the Constitution.

Article 72-Nature has the right to an integral restoration. This integral restoration is independent of the obligation on the natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems. In the cases of severe or permanent environmental impact, including the ones caused by the exploitation of non-renewable natural resources, the state will establish the most effective mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.

In March 2011 there was a successful case against the Government of Ecuador on behalf of nature. Richard Frederick Wheeler and Eleanor Geer Huddle, demanded the observance of the rights of nature, based on Article 71 of the Ecuadorian Constitution. They obtained a Constitutional injunction from the Provincial Court of Justice of Loja in favour of nature, specifically the Vilcabamba River, against the Provincial Government of Loja.<sup>109</sup>

The Provincial Court of Loja ruled in favour of nature, particularly the Vilcabamba River, in the Granted Constitutional Injunction<sup>110</sup> which established (among other things) that the argument of the Provincial Government that the population needs roads does not

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<sup>109</sup> N Greene, 'The first successful case of the Rights of Nature implementation in Ecuador' <[www.therightsof nature.org](http://www.therightsof nature.org)> accessed 2 November 2012

<sup>110</sup> Ibid

apply because there is no collision of constitutional rights of the population, nor is there any sacrifice of them, because the case does not question the widening of the Vilcabamba-Quinara road, but the respect for the constitutional rights of nature; and that the suitability and efficacy of the Constitutional injunction as the only way to remedy in an immediate manner the environmental damage focusing on the undeniable, elemental, and essential importance of nature, and taking into account the evident process of degradation.<sup>111</sup> The Court further ordered (among other things) that the Provincial Government of Loja must present within thirty days a remediation and rehabilitation plan of the areas in the Vilcabamba River and the populations affected by the lateral dumping and accumulation of rubbish material from the project, the implementation of corrective actions such as: construction of security bunds to prevent oil spills in the soils around the fuel storage tanks and machinery; cleaning of the soils contaminated by fuel spills; implementation of an adequate road sign system; and, creation of a location to store the rubbish from the construction.<sup>112</sup>

Following Ecuador's legal template, on April 22 2011, Bolivia passed 'The Law of Mother Earth' (*Ley de Derechos de la Madre Tierra*). The Bolivian constitution formalized the belief system of the indigenous people of the Andes, who pay homage to Pachamama, the female spirit of nature.<sup>113</sup> 'No commercialism,' states one article in the document: 'Neither living systems nor processes that sustain them may be commercialized, nor serve anyone's private property.'<sup>114</sup> This section has shown that it is possible for nature's right to be protected in a constitution. It is the right attributed to nature that gives the provisions an ecocentric flavour which this thesis seeks to use as the method of achieving the anthropocentric objective of sustainable development in Nigeria's Niger Delta region (hence

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<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> See the Preamble of the Bolivian Constitution of 2009

<sup>114</sup> Art 2(6) of the Law of Mother Earth  
2010<[http://f.cl.ly/items/212y0r1R0W2k2F1M021G/Mother\\_Earth\\_Law.pdf](http://f.cl.ly/items/212y0r1R0W2k2F1M021G/Mother_Earth_Law.pdf)> accessed 22 August 2012

it is coined the *eco-anthropocentric* right). In light of this, the next section will argue that based on comparative constitutionalism, nature's right can also be protected by the Nigerian Constitution.

## 5.5 Justifying Nigeria's Constitutional Borrowing

This section will argue that the Ecuadorian Constitutional Protection of Nature's right can be adopted as a model in Nigeria because the 'history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.'<sup>115</sup>

The development of the English common law, the Roman-Canonic law and the advent of constitutionalism in the second half of the twentieth century are examples of phenomena in which the circulation of legal norms and ideas changed not only legal systems but also the course of history.<sup>116</sup> The study of legal transplants in comparative law aims to understand how the complex dynamic of cross-jurisdictional legal transfers brings legal systems into contact and eventually causes them to change.

For most of the twentieth century, comparative legal studies focused almost exclusively on transplanting rules of private law - Watson, who is portrayed as the father of modern transplantation theory argues that transplantations are a pervasive characteristic of legal development.<sup>117</sup> He disagrees with Montesquieu, in the need for cultural compatability when importing or exporting a law, arguing that in many cases it is the existence of a law

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<sup>115</sup> R Pound, *The Formative Era of American Law* (Littlebrown 1938) 94

<sup>116</sup> V Perju, 'Constitutional Transplants, Borrowing and Migrations' Boston College Law School Faculty Papers, Paper 360 2012) <<http://lawdigitalcommons.bc.edu/isfp/360>>accessed 3 March 2012

<sup>117</sup> A Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974) 90-91

that is often more important than the fact that it was designed for the cultural conditions of the society in which it is to operate.<sup>118</sup>

Legrand,<sup>119</sup> Kahn Freund<sup>120</sup> and the Seidmans<sup>121</sup> object rather radically to the utility of legal transplants altogether. Similarly, some comparatists argue that only convergent or similar systems can benefit from each others' experience. Like must be compared with like.<sup>122</sup> 'Like' is defined as countries in the same evolutionary stage.<sup>123</sup>

A larger group of contemporary comparativists support the view that only differences enhance our understanding of law in a given society.<sup>124</sup> Taking the middle ground on this debate, Schlesinger points out that to compare means to observe and to explain similarities as well as differences, emphasis can be placed both on differences and on similarities. He argues that Periods of contractive comparison with emphasis on differences alternate with periods of integrative comparison with emphasis on similarities. Schlesinger concludes that the future belongs to integrative comparative law and puts forward the EU's *Ius commune* as an example of integration of similar and different legal systems.<sup>125</sup>

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<sup>118</sup> Ibid 96; see also A Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 80; A Watson, 'Legal transplants and European Private Law' in *Ius Commune Lectures on European Private Law*, no. 2 (Unigraphic 2000)

<sup>119</sup> See P Legrand, 'The Impossibility of Legal Transplants' [1997] MJECCL 111

<sup>120</sup> O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 7

<sup>121</sup> A Seidman and R Seidman, *State and Law in the Developing Process: Problem Solving and Institutional Change in the Developing World* (Macmillan Publishers 1994) 44-46

<sup>122</sup> H Gutteridge, *Comparative Law* (CUP 1949) 73; see also W Buckland and A McNair, *Roman Law and Common Law* (CUP 1936)

<sup>123</sup> C Schmidthoff, 'The Science of Comparative Law' [1939] CLJ 94, 96

<sup>124</sup> For example, see M Dean, 'Legal Transplants and Jury Trial in Japan' (2011) 31 (4) JLS 570; see also J Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996) 16

<sup>125</sup> See R Schlesinger, 'Research on the General Principles of Law Recognised by Civilised Nations' (1957) 51 AJIL 734; R Schlesinger, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study' in K Nadelmann, A Von Mehren and J Hazard (eds), *XXth Century Comparative and Conflicts Law, Legal Essays in Honour of Hessel E Yntema* (AW Sythoff 1961) 42.



Jhering, Zweigert and Kötz<sup>126</sup> qualify Watson's view by addressing the question of comparability through the relative prism of functionality. According to them, the reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home. It is the theory of functionality that seems to serve drafting teams in the current period of integrative legal globalization, although currently the use of social analysis in legislation is minimal.<sup>127</sup> Thus to them what matters when selecting a legal system for comparative examination in the process of legal transplantation is not the similarity of its characteristics with that of the receiving legal order, but the functionality of the proposal.<sup>128</sup> If the policy, concept or legislation of a foreign legal system can serve the receiving system well, then the origin of the transplant is irrelevant to its success.<sup>129</sup>

As long as the transplant can serve the social need to be addressed, the transplant can work well in the new legal ground. In fact, it is this transfer of the transplant to national contexts that promotes indigenization of positive transplants as a block to indiscrete globalization and modern legal colonialism.<sup>130</sup>

In line with Zweigert and Kotz, it can be argued that the current trend of legal globalization at the regional and international levels creates fertile ground for transplants from legal systems not only within the region of the country of reception but also further afield. Comparability can and should no longer be synonymous with convenience or familiarity, much less so if this refers to familiarity at random based on experience of the

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<sup>126</sup> See K Zweigert and K Sier, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 AJCL 21; K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung Neubearbeitete Auflage* (JCB Mohr 1996)

<sup>127</sup> Ibid

<sup>128</sup> H Xanthaki, 'Legal Transplants in Legislation: Defusing the Traps' (2008) ICLQ 659, 662

<sup>129</sup> See S Zhuang, 'Legal Transplantation in the People's Republic of China: A Response to Alan Watson' [2006] EJLR 215, 223.

<sup>130</sup> See R Petrella, 'Globalization and Internationalization: The Dynamics of the Emerging World Order' in R Boyer and D Drache (eds), *States against Markets: the Limits of Globalization* (Routledge 1996) 132; C Rosenkrantz, 'Against Borrowing and Other Non-authoritative Uses of Foreign Law' (2003) 1 ICON 269; D Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: the South African Experience' (2003) 1 ICON 181

particular members of each drafting team. Policy choices, concepts, terms and legislative solutions can be borrowed from other legal systems, both neighbouring and further. The criterion of comparability should then be that of whether the law can function in the new legal system.

The issue of comparative constitutional borrowing has however been less controversial - the field of comparative constitutional law is already developing on its own rich ways of conceptualizing the interplay between (constitutional) law and (constitutional) culture. Constitutional norms, and public law generally, **were** perceived as too enmeshed with politics to allow for the same rigorous and systematic treatment that could be applied to the study of contract or property law. Yet, instances of constitutional borrowing are now everywhere.<sup>131</sup> Not only has the idea of a (written) constitution spread to virtually every corner of the world but also constitutions are gaining recognition as enforceable legal documents, rather than mere declarations.<sup>132</sup> The institution of judicial review, the principle of the separation of powers, and the enactment of a bill of rights have become fixtures on the world constitutional map.<sup>133</sup> Goodwin has aptly argued that ‘Reading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation’s constitution making, it is striking how much self-conscious borrowing goes on.’<sup>134</sup> Sujit Choudhry has also noted, ‘the migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.’<sup>135</sup>

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<sup>131</sup> V Perju (n 116) 2

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> R Goodwin, ‘Designing Constitutions: The Political Constitution of a Mixed Commonwealth’ in R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Better World Books 1996) 223

<sup>135</sup> S Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2007) 16

As countries around the world continue to move towards liberal democratic constitutionalism, the need for constitutional comparativism and sometimes, borrowing will be inevitable.<sup>136</sup> In the early years of the United Nations system for example, many new constitutions incorporated mutually similar provisions by drawing upon international instruments such as the UDHR, International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic Social and Cultural Rights (ICESCR) as well as the then long-established constitutional systems such as those of the United States of America.<sup>137</sup> The inclusion of substantive rights in national constitutions became an alternative method for the assumption of treaty obligations, while allowing countries the right to selectively choose amongst the evolving international human rights norms.<sup>138</sup> In recent years, the decisions of constitutional courts in common law jurisdictions such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law.<sup>139</sup>

Socio-political conditions prevailing in different jurisdictions will pose legal problems particular to them, but there is no reason why legislatures in these countries should not benefit from each other's experiences in tackling them. With the ever expanding scope of international human rights norms and transnational institutions dealing with disparate issues such as trade liberalization, climate change, war crimes, law of the sea and cross-border investment disputes among others, there is bound to be a concomitant trend towards

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<sup>136</sup> L Epstein and J Knight, 'Constitutional Borrowing and Non borrowing' (2003) 1 Intl J Const L 196; M Horwitz, 'Constitutional Transplants' (2009) 10 Theoretical Inquiries 353; G Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 Intl J Const L 563

<sup>137</sup> See generally 'Symposium on Constitutional Borrowing' (2003) 1(2) Intl J Const L 177; Symposium Issue on 'Contextuality & Universality: Constitutional Borrowings on the Global Stage' (1998) 1(2) U Penn J Const L 173

<sup>138</sup> C L'Hereux-Dube, 'Human Rights: A Worldwide dialogue' in B Kirpal, H Ashok, G Subramanian and R Dhavan (eds), *Supreme but not Infallible: Essays in Honour of Supreme Court of India* (OUP 2000) 214-231

<sup>139</sup> See M Tushnet, 'The Possibilities of Comparative Constitutional law' (1999) 108 YLJ 1225; S Chaudhary, 'Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 79 Ind L J 819; M Nussbaum, 'Introduction to Comparative Constitutionalism' (2002) 3 CJIL 429

convergence in the domestic constitutional provisions of different countries.<sup>140</sup> In this era of globalization of legal standards, there is no reason to suppress the constitutional dialogue between different legal systems.

Although constitutional borrowing seems less problematic than borrowing of other legal instruments, Choudry's argument that constitutional ideas migrate can be complemented with the conclusion of Zweigert and Kotz on legal globalization and Xantakhi's proposal for functionalism to support the adoption of nature's rights into the Nigerian constitution like Ecuador has done. However, it is argued in the next section that the potency of the *eco-anthropocentric* right is a function of how well the statement of the definition, scope and guarantees afforded by the right are set out.

## **5.6 Pragmatic Pathways to the Establishment of a Potent Right for Nature in Nigeria**

In the introduction of this thesis, it was stated that the proposed *eco-anthropocentric* right will apply to both man and nature but that nature's right will be emphasised because of the premise on which the argument of this thesis is based – that the rights of nature can be used to effectively achieve sustainable development.<sup>141</sup> However, because man can also lay claims to the right for himself, the pathways discussed in this section will apply to both entities.

An environmental right that will be feasible must comprise duties, procedural and substantive rights.<sup>142</sup> In addition, it is suggested that such a right should offer injunctive relief against infringing parties, and in order to avoid the inherent difficulties in enforcing

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<sup>140</sup> M Tushnet (n 139) 1227; see also L Henkin and A Rosenthal (eds), *Constitutionalism and Rights* (Columbia University Press 1990); D Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 NWULR 1277

<sup>141</sup> See fn 9 of introduction

<sup>142</sup> T Hayward, *Constitutional Environmental Rights* (OUP 2005) 82-88; 143-149

environmental rights, the definition, scope, and guarantees afforded by the right must be stated clearly.<sup>143</sup>

The more precisely a right is formulated, the less ambiguity will result, followed by accurate judicial interpretation. Overall, the intention is to provide a language and protection which are both anticipatory and preventive. Anticipation and prevention are at the heart of the precautionary principle, which is designed to prevent harm, not measure and manage it.<sup>144</sup>

### **5.6.1 *The Proposed Substantive Right***

Substantive rights and laws establish principles, create and define rights and set limitations under which society is governed. For a constitutional environmental right, the following substantive issues will invariably arise:

1. The Duties imposed on the state by the Constitution
2. The rules on 'standing'
3. The role of injunctive reliefs and
4. damages

#### **5.6.1.1 Imposing Positive and Negative Duties on the State**

This section argues that when negative duties are combined with positive duties in a right, the right becomes more effective in preventing defaulters (including the government) from carrying out environmentally harmful activities. Thus it further argues that if the Government and its agencies in addition to individuals and non-state entities (like Multinational Oil Companies) are the targets of the *eco-anthropocentric* right, then the right must be made to apply horizontally.

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<sup>143</sup> Ibid 112-114

<sup>144</sup> See discussion on Precautionary Principle in para 4 of section 2.2 above

Constitutional rights usually have corresponding duties attached to them. These duties ought to be granted or protected by the state, individuals or other non-state entities to protect the citizenry of a particular country. Duties are either positive or negative, thereby conferring positive or negative rights. Most of the time, constitutional environmental rights are written as positive rights, making such rights to be construed at best as statements of public policy rather than actual enforceable rights. Only a few are entrenched as negative rights. Succinctly put by Brandl & Bungert,<sup>145</sup> ‘Courts may hesitate to apply environmental provisions which they perceive as hortatory’. Even though courts can interpret positive rights to be negative rights<sup>146</sup>, it is advisable to draft express provisions that provide for negative duties. This would provide the necessary language for courts to find the right to be self-executing and therefore enforceable.<sup>147</sup>

A negative environmental right, Wilson argues, does not require the government to bestow upon individuals minimum necessities, but rather assures individuals that the government will refrain from acting in ways that can harm the environment, much like the government must refrain from interfering with an individual’s right to free speech.<sup>148</sup> A negative right should state clearly that the government shall pass no law abridging the right; neither shall the right be denied by the government, individuals and other non-state entities. Thus even if the right is couched in such a way as to require the state to ‘implement and enforce laws that secure to the individual the enjoyment of what is intended as the substance of the right’<sup>149</sup>, it is doubtful if the courts would grant a fundamental right despite legislative intent; however, if a negative right alone is provided for, the courts may not interpret them to include acts that the Government (for instance) should perform. For example, the later

<sup>145</sup> E Brandl and H Bungert (n 93) 52

<sup>146</sup> Looking at it from the perspective that the government does not necessarily provide a healthy environment to its citizenry; instead it must refrain from acting in ways that harm the environment.

<sup>147</sup> See J Fernandez, ‘State Constitutions, Environmental Rights Provisions, and Doctrine of Self – Execution: A Political Question’ (1993) 17 HELR 333, 342

<sup>148</sup> B Wilson, Comment ‘State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?’ (2004) 53 Emory L J 627

<sup>149</sup> T Hayward, ‘Constitutional Environmental Rights: A case for political Analysis’ [2002] 48 PS569

part of article 72 of the 2008 Ecuadorian Constitution provides that ‘in cases of severe or permanent environmental impact... the state will establish the most effective mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.’ It is unlikely that this type of positive duty can be interpreted from a negative one. Thus positive duties and negative duties should exist complementarily and not to the exclusion of each other.

Thus, against the backdrop that the soundness of the proposed *eco-anthropocentric* right will be enhanced if it imposes negative and positive duties on the government and individuals, it is argued that this can be effectively achieved if the right is applied both horizontally (against non-state actors alone) and vertically (against the Government).

In the simplest cases, defendants are state actors who are obligated to comply with constitutional mandates. In most situations, it does not matter whether the government was acting as sovereign/regulator or as licensor,<sup>150</sup> since in any event, it is obligated to conform to constitutional norms. In federal systems (like Nigeria), the local (state or provincial) government may be liable instead of or in addition to the federal authorities. Under the theory of horizontal application that operates in some constitutional systems, private parties are also held accountable for violation of constitutional norms.<sup>151</sup> Zeven argues that horizontal application of constitutional obligations is useful in environmental litigation because a court is more likely to find liability against a private party than against the government, both because separation of powers principles and values tend to protect government actors, and because in most cases the private party’s action (for example, the cutting down of the forests or the mining) is more likely to be the direct cause of the

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<sup>150</sup> See *Oposa v Factoran* G.R. No. 101083 July 30, 1993, 15,195–96; for detailed discussion on the horizontal application of rights, see A Magaisa ‘Why the Bill of Rights Should Apply Horizontally’ <[www.dailynews.co.zw/opinion/940-whythe-bill-of-rights-should-apply-horizontally.pdf](http://www.dailynews.co.zw/opinion/940-whythe-bill-of-rights-should-apply-horizontally.pdf)>accessed 25 May 2011; J Froneman, ‘The Horizontal Application of Human Rights Norms’ <[www.Horizontal\\_Application\\_of\\_Human\\_Rights\\_Norms.pdf](http://www.Horizontal_Application_of_Human_Rights_Norms.pdf)> accessed 15 March 2012

<sup>151</sup> *Social and Economic Rights Action Center of Nigeria & Anor v Nigeria* (2001) AHRLR 60

environmental degradation than is the government's decision to authorize the private party's action.<sup>152</sup> Arguably, it will be less difficult to apply vertical constitutional obligations if the constitutional right clearly prohibits inaction or restrains certain actions by the government as this right seeks to propose. This makes the horizontal and vertical applications necessary, as an individual's action or a non-state actor's action is just as much an infringement as a government's inaction and vice versa.

#### **5.6.1.2 Standing Rules**

This section demonstrates that if the impediments to liberalized standing under the 1999 Constitution of Nigeria are not removed, then the proposed *eco-anthropocentric* right will lose its potency.

In Nigeria, the requirement of the common law doctrine of *locus standi*<sup>153</sup> first developed in the case of *Abraham Adesanya v President of the Federal Republic of Nigeria & Another*<sup>154</sup> is entrenched in sections 6 (6) (b), 46 (1) and 272 (1) of the 1999 Constitution as amended. The implication of the provisions is that it is only a party that is directly affected that can approach the High Court for legal redress. Section 46(1) particularly confers locus standi on a person who is directly affected by a violation of any of the fundamental rights stipulated in Chapter IV of the Constitution. There has been an expansion of what constitutes sufficient interest to ground *locus standi* under section 46(1) by virtue of the Fundamental Rights (Enforcement Procedure) Rules of Nigeria 2009. Pursuant to his powers as conferred by section 46 (3), the Chief Justice of Nigeria made the

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<sup>152</sup> See J Zeven, 'The Untapped Potential of Horizontal Private Enforcement Within European Environmental Law' (2010) 22 GIELR 241

<sup>153</sup> The right to bring an action or to be heard in court.

<sup>154</sup> [1981] ANLR 1 where the Supreme Court of Nigeria laid down what is now viewed as a narrow interpretation to the principle of *locus standi* in Nigeria when it held that to entitle a person to invoke the judicial power to determine the constitutionality of legislative or executive action, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself, and which interest or injury is over and above that of the general public. This decision was emphasized in *Thomas v Olufosoye* (1986) ANLR 261



new rules with respect to the practice and procedure for the enforcement of fundamental rights. The rules have given a new meaning to the person aggrieved that may apply for the enforcement of fundamental rights which is wider in scope than the provision of section 46(1) and (2). Thus paragraph 3(e) of the preamble to the rules provides that the courts (Federal and State High Courts) 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*. It defines an applicant seeking to enforce fundamental rights to mean (i) anyone acting in his own interest; (ii) anyone acting on behalf of another person; (iii) anyone acting as a member of, or in the interest of, a group or class of persons; (iv) anyone acting in the public interest and (v) an association acting in the interest of its members or other individual or groups.

The purpose of this paragraph is obviously to do away with the narrow interpretation of *locus standi* given in *Adesanya's case* so that enforcement of fundamental rights may be more realizable. Unfortunately, however, to the extent that the 2009 rules are inconsistent with the express wordings of section 46 (1) and (2) on the scope of the persons that can enforce the provisions of Chapter IV of the Constitution, its provisions will be void.<sup>155</sup> This means that the principle in *Adesanya's case* is still the law as far as *locus standi* in Nigeria is concerned. However, in *Gani Fawehinmi v Akilu and Another*<sup>156</sup>, the Supreme Court rejected the narrow interpretation and held that in cases of criminal prosecution, everybody is his brother's keeper and as such, once a person is potentially affected by a particular act, he should be deemed to have sufficient interest. Although this was a decision with respect to criminal proceedings, it has been used to expand the scope of

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<sup>155</sup> S 1(3) of the 1999 Constitution of Nigeria provides that any law inconsistent with the provisions of the Constitution shall to the extent of that inconsistency be void.

<sup>156</sup> [1987] 4 NWLR (pt 67) 797

‘sufficient interest’ requirement under Order 53 Rule 3(1) of the High Court Civil Procedure Rules of Lagos State (borrowed from England).<sup>157</sup>

England, from which Nigeria has obtained most of its legislative models, has also made remarkable adjustments as far as the *locus standi* principle is concerned which Nigeria may also emulate.<sup>158</sup> Order 53 of the Rules of the Supreme Court of England, which contained the rules of procedure for judicial review, has been abolished and replaced by the new Part 54 of the Civil Procedure Rules.<sup>159</sup> The new Rules bring judicial review fully within the framework of the CPR and also implement certain recommendations of the Bowman Committee’s Report on the Crown Office List. The result is a procedure which is in most respects the same as its predecessor. There are, however, also some significant changes, most notably with respect to the permission stage and third party intervention.<sup>160</sup> In recent years, the courts have shown themselves increasingly willing to allow third party intervention by groups purporting to represent either some aspect of the public interest or some particular interest not adequately represented at the hearing.<sup>161</sup>

Very recently, a series of decisions have started to expand the right of legal standing again, at least in environmental cases. The environmental group Greenpeace was granted standing in a case known as the *Thorp* case<sup>162</sup> to challenge a proposed license for a nuclear power plant. The High Court said that Greenpeace was a responsible and respected body with a genuine concern for the environment (a kind of ideological standing) and that granting them standing to pursue the litigation would save the court's time. They would

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<sup>157</sup> L Atsegbua, *Administrative Law: an Introductory Text* (Fifers Lane 2012) 161

<sup>158</sup> See para 2 of section 3.1 above

<sup>159</sup> The new rules are contained in the schedule to SI 2000/2092, laid before Parliament on 2nd August 2000 and came into force on 2nd October 2000

<sup>160</sup> T Cornford, ‘The New Legal Rules of Procedure for Judicial Review’ (2005) 5 Web JCLI <webjcli.ncl.ac.uk/2000/issue5/cornford5.htm> accessed 27 November 2012

<sup>161</sup> P Shiner, ‘The Importance of Third Party Interventions in Public Law and Human Rights Cases’ (A Presentation made at FLAC Amicus Curiae Interventions Seminar, Ireland, 30 April, 2007); H Brooke, ‘Interventions in the Court of Appeal’ (2001) PL 401; M Fordham, ‘Public Interest Interventions in the UK Supreme Court: Ten Virtues’ (Paper presented at The University of Toronto, Faculty of Law, 6 November 2009)

<sup>162</sup> *R v Inspectorate of Pollution, ex parte Greenpeace, Ltd (No 2)* [1994] 2 All ER 329 (High Court)

efficiently and effectively represent the interests of 2,500 of its supporters living in the area of the proposed nuclear plant. This may be seen as a kind of representational standing, or perhaps third party standing, in lieu of others who truly would have had ordinary standing.<sup>163</sup> The Court rejected the argument that Greenpeace is a busybody, but instead regarded their genuine interest in the issues raised as sufficient for them to be granted *locus standi*.<sup>164</sup>

The issue of ‘standing’ in environmental litigations is a critical one. Ordinarily, a person is deemed to have the right to institute an action/application if he can show individual harm. That is, the individual must allege injury, (which supersedes that of everyone else in that situation), causation and redress- ability. Given that environmental damage usually affects groups, it is recommended that section 46 (1) and (2) be expunged and replaced with a provision that allows public interest litigation<sup>165</sup> (PIL) in fundamental rights cases pursuant to the incorporation of the proposed right in the Constitution. Under PIL, an individual challenging the breach of an environmental right no longer needs to establish that he has been personally affected. It is enough to show that the provision that guarantees the environmental right has been infringed. That is, it is sufficient to show that a part or the entire provision of the law granting such a right has been violated. This is because such litigations are regarded as litigations in the interest and for the protection of that ‘nebulous entity’<sup>166</sup>- the public in general. It is for the common heritage of mankind. In India, ‘public interest litigation’ (PIL) is not defined in any statute or in any Act. It has been

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<sup>163</sup> Judge Otton said, however, that standing would be granted on a case by case basis, not that all interest groups would automatically be granted standing. This comes under the rubric of “leave to appeal,” something provided in the Supreme Court Act 1981 s 31(3).

<sup>164</sup> See further E Darroch, ‘Recent Developments in UK Environmental Law’ (1996) *Rivista Giuridica Dell Ambiate* 293, 300

<sup>165</sup> Blacks Law Dictionary (7<sup>th</sup> Edition) Defines ‘Public Interest Litigation’ as ‘a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.’

<sup>166</sup> See V Vadivel, ‘Public Interest Litigation (PIL) A Boon or Bane’ noted in C Schall, ‘Public Interest Litigation Concerning Environmental Matters Before Human Rights Courts: A Promising Future Concept?’ (2008) 20 JEL 417, 418

interpreted by judges to consider the intent of the public at large. Although, the main and only focus of such litigation is only 'Public Interest' there are various areas where a public interest litigation can be filed. For example, violation of basic human rights of the poor; content or conduct of government policy; compel municipal authorities to perform a public duty; violation of religious rights or other basic fundamental rights. In the *Judges Transfer Case*<sup>167</sup> the Court held that Public Interest Litigation can be filed by any member of public having sufficient interest for public injury arising from violation of legal rights so as to get judicial redress. This is absolutely necessary for maintaining Rule of law and accelerating the balance between law and justice. Also in the case of *MC Mehta v Union of India*<sup>168</sup> a Public Interest Litigation was brought against Ganga water pollution so as to prevent any further pollution of Ganga water. The Indian Supreme court held that petitioner although not a riparian owner is entitled to move the court for the enforcement of statutory provisions, as he is the person interested in protecting the lives of the people who make use of Ganga water.

The main counter argument to an expansive view of standing is that the Courts will be flooded with litigations. This counter argument is not without merit, but ways have been developed to circumvent such abuse. The Indian courts, from where the concept originated, have devised criteria for curbing indiscriminate litigations which can also serve as a guide for the Nigerian legislature. The cases in the name of public interest litigations should be entertained by the Court only when (a) there is a gross invasion of fundamental rights, (b) the invaded fundamental right must be of the persons who are unable to move to the Court due to poverty, illiteracy, social or economical backwardness, or due to any such other cause, (c) the act invading the fundamental rights must shock the judicial conscience of the

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<sup>167</sup> *AIR 1982, SC 149*

<sup>168</sup> (1988) 1 SCC 491; For further discussions on PIL, see P Hassan and A Azfar, 'Securing Environmental Rights Through Public Interest Litigation in South Asia' (2003-2004) 22 Va Env'tl L J 215; C Achall, 'Public Interest Litigation Concerning Environmental Matters Before Human Rights Courts: A Promising Future Concept?' (2008) 20 (3) JEL 417

Court, and (d) the matter must be strictly of public interest though the direct victim of the act of invasion may be some determinate class of individuals. In addition to the above, if someone initiates indiscriminate and vexatious petitions and wastes valuable time of the Court, he may be severely fined and in serious cases his act of initiation of such petition may be treated as contempt of Court.<sup>169</sup>

The above argument for standing is very crucial with respect to man's aspect of the right. Nature is not necessarily limited by a narrow standing provision because nature's stand for itself could connote making claims for a whole forest, a large water body, vast highlands, a collection of animals and so on; however certain guidelines as to the practicability of this will be necessary.<sup>170</sup>

### **5.6.1.3      Mechanisms for Injunctive Relief and Damages**

This section will contend that injunctions and damages are effective reliefs for the infringement of the proposed *eco-anthropocentric* right.

An injunction may be permanent or it may be temporary.<sup>171</sup> A temporary injunction or interlocutory injunction, is a provisional remedy granted to restrain activity on a temporary basis until the court can make a final decision after trial.<sup>172</sup> It is usually necessary to prove the high likelihood of success upon the merits of one's case and a likelihood of irreparable harm in the absence of a preliminary injunction before such an injunction may

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<sup>169</sup> These criteria are a product of the judgements of the Supreme court in the following cases: *M C Mehta v Union of India* AIR 1988 SC 1115; *Subhash Kumar v State of Bihar* AIR 1991 SC 420; *D K Basu v State of West Bengal* AIR 1997 SC 610; *N D Jayal v Union of India* AIR 2004 SC 867; *M C Mehta (Taj Corridor Scam) v. Union of India and Others* AIR 207 SCW 1025; *Vishwanath Chaturvedi v Union of India* AIR 2007 SC (Supp) 163; See also A Anand, 'Public Interest Litigation as Aid to Protection of Human Rights' (M Bhandari Memorial Lecture delivered at Jodhpur on 25 August 2001) 1

<sup>170</sup> This will be discussed in chapter six

<sup>171</sup> UNEP, 'Remedies in Environmental Cases' 2 <[www.gov.mu/scourt/unep/09\\_REMEDIES](http://www.gov.mu/scourt/unep/09_REMEDIES)> accessed 13 April 2012

<sup>172</sup> Ibid

be granted; otherwise the party may have to wait for trial to obtain a permanent injunction.<sup>173</sup>

The injunction could be used to stop a polluter from operating, preventing a development from being built, or temporarily cease other actions that may be harmful to the environment and public health. The proceeding following the injunction will determine whether the cease of the operation stands or is dismissed. Thus allowing for injunctive relief would prevent some potentially negative environmental issues from coming to fruition. Injunctions can also be used to compel a person to perform a particular act.<sup>174</sup> For example, a mandatory injunction can be required to a public officer to perform his duty. Thus injunctions can either be used to impose negative actions or positive actions.<sup>175</sup> Not all injunctions would permanently stop harmful operations. However, they may afford citizens with 'liberal' standing, the chance to temporarily cease operations until the full extent of environmental and public health impacts can be assessed.<sup>176</sup>

Provisions on damages would legally require citizens to receive a sum of money if their rights have been breached and harm has been done<sup>177</sup>. In such cases, damages are either compensatory or punitive. Compensatory damages would attempt to compensate a citizen for any harm they have suffered; while punitive damages are meant to punish a person or entity for their wrong doing. It is important to include both compensatory and punitive damages, in the protection of a constitutional environmental right because the award of one or both of them will depend on the circumstances of the case<sup>178</sup>.

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<sup>173</sup> Ibid; see also D Riesel, 'Preliminary Injunctions, an Stays Pending Appeal in Environmental Litigation' 1-7 [www.sprlaw.com/pdf/spr\\_preliminary\\_injunctions\\_072805.pdf](http://www.sprlaw.com/pdf/spr_preliminary_injunctions_072805.pdf) accessed 12 April 2012

<sup>174</sup> See J Love, 'Damages: A Remedy for the violations of Constitutional Right' (1979) 67(6) Cal L Rev 1242

<sup>175</sup> See L Atsegbua (n 157) 192 - 198

<sup>176</sup> Ibid 197

<sup>177</sup> UNEP (n 171) 2

<sup>178</sup> Ibid 6; see also C Perlman (ed), *Environmental Litigation: Law and Strategy* (American Bar Association, 2009) ch 3; INECE, 'Penalties and Other Remedies for Environmental Violations: An Overview' 299-300 [www.inece.org/conference/7/vol1/48\\_INECE%20SECRETARIAT%20STAFF.pdf](http://www.inece.org/conference/7/vol1/48_INECE%20SECRETARIAT%20STAFF.pdf) accessed 13 April 2012

The proposed *eco-anthropocentric* right should therefore include mechanisms for injunctive reliefs because at the core of injunctive relief is a recognition that monetary damages may partially solve man's problem if it is his right that has been infringed; when the claimant is nature. However, there will have to be further guidance in form of rules to determine how this will be achieved.<sup>179</sup>

### **5.6.2 The Procedural Right**

This section will prove that a procedural component in the proposed *eco-anthropocentric* right will enhance the participation of man and nature in environmental decisions that pertain to their livelihood.

Procedural rights ensure fair and consistent application of due process and justice to all matters that come before a court. Dinah Shelton believes that procedural rights of an effective environmental right should require informed consent and political participation of those that would be affected by an effective environmental decision. Shelton outlines three procedural rights that a constitutional environmental right should guarantee as follows:<sup>180</sup>

1. A right to prior knowledge to an action that would impact the environment with corresponding state duty to inform;
2. A right to participate in decision making;
3. A right to recourse before competent administrative and judicial bodies.

The procedural rights enable citizens to participate meaningfully in decisions that affect their livelihood thus promoting accountability and transparency in decision making. An informed public may find it easier to demand the enjoyment of their environmental right.

In 1998, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters (Aarhus Convention),

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<sup>179</sup> This will be discussed further in chapter six.

<sup>180</sup> D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', (1991-1992) 28 Stanford J of Intl L 103,117

which was drafted under the auspices of the United Nations Economic Commission for Europe (ECE), entered into force.<sup>181</sup> The Convention is based on the principle that each person has the right to live in an environment adequate to his or her health and well-being, and each person is individually and collectively obliged to protect and improve the environmental conditions for the benefit of the present and future generations, and everyone has the right to receive information and participate in environmental decision-making to exercise this right and obligation<sup>182</sup>. The then United Nations Secretary-General, Kofi Annan characterized it as ‘by far the most impressive elaboration of principle 10 of the Rio Declaration.’<sup>183</sup> It has been concluded that this convention therefore grants a person two main possibilities to guarantee the right to a clean environment:

1. Exercising control over environmental management by participating in decision-making and through these decisions, subjecting to court control;
2. Enforcement of individual rights in Private Law (for example, property)<sup>184</sup>

Nature’s right of access to justice is not in question and its inability to possess a right to know is not also in doubt, because its right to participate is arguably manifest in a relational context which was discussed in chapter one<sup>185</sup> in other words, it is considered as a *subject* (just like other stakeholders) that could be affected by an environmentally harmful

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<sup>181</sup> See European Commission, ‘The Aarhus Convention’ <[www.ec.europa.eu/environment/aarhus/](http://www.ec.europa.eu/environment/aarhus/)> accessed 12 April 2012

<sup>182</sup> Ibid. According to the United Nations Non-Governmental Liaison Service (NGLS) Public Participation in decision making related to: (a) specific activities such as permit procedures that may have an effect on the environment; (b) early public participation in plans, programmes and policies relating to the environment; and (c) executive regulations and rules that have a general application on environmental question – NGLS Round Up 90 (May 2002), 4 <<http://www.unsystem.org/ngis/documents/text/roundup/90hrsd.htm>> accessed 16 November 2012

<sup>183</sup> Reported in NGLS Round Up (n 184) 4. Principle 10 of the Rio Declaration provides that environmental issues are best handled with the participation of all citizens, at the relevant level.

<sup>184</sup> See H Veinla, ‘Right to the Environment in the context of EC Approximation and Codification of Estonian Environmental Law’ (1999) IV *Juridica Intl* 108, 110

<sup>185</sup> See section 1.6.2



activity. This, however, is easier not as practicable as it seems hence specific guidelines will be required.<sup>186</sup>

## 5.7 Conclusion

The current regulatory system for environmental protection in Nigeria falls short of protecting the rights of future generations. Regulation advances environmental protection in many ways, such as by setting emissions standards and requiring environmental impact statements prior to development. It fails, however, adequately to take into account future generations and the long term damage that environmental degradation can cause. For example, individual polluters may each be in compliance with regulatory standards, but collectively they may be causing harm to a population or ecosystem over the long term. This makes it imperative for the obligations of present generations to be linked to rights. If this is not so, the present generation has a strong incentive to bias the definition of these obligations in favour of itself at the expense of future generations. Drawing a connection between present action and future health and survival, Edith Brown Weiss writes:

Future generations really do have the right to be assured that we will not pollute ground water, load lake bottoms with toxic wastes, extinguish habitats and species or change the world's climate dramatically – all long-term effects that are difficult or impossible to reverse – unless there are extremely compelling reasons to do so, reasons that go beyond profitability<sup>187</sup>.

At this point, one can recount Roscoe Pound's thesis on law as an agent of social change that the express inclusion of legal rights is an effective strategy to counteract social problems *in the long run*. At the level of constitutional protection, such rights have an

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<sup>186</sup> This will be discussed in chapter six.

<sup>187</sup> E Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 AJIL 191, 206

inherent symbolic value which goes beyond empirical consideration about their actual enforcement.<sup>188</sup>

It must however be re-emphasised that entrenching the proposed *eco-anthropocentric* right in the Nigerian Constitution will not be easy considering the four-fifths requirement for amendment with respect to fundamental rights.<sup>189</sup> However difficult it may seem, the possibility of an amendment still exists considering the recent amendments made to the Constitution though with respect to electoral matters and requiring two-thirds majority.<sup>190</sup> Also, the granting of rights to slaves in the United States Constitution can be used as another point of reference.<sup>191</sup> After all, ‘when even a Constitution becomes a barrier to the natural progress of the society it must yield or break’.<sup>192</sup> Thus, it may take a while for this proposed right to be entrenched in the Constitution; but (using Rosenberg’s argument as a premise), with the involvement of the sensitization by private individuals, improved political will, management of corruption and judicial reforms there will be positive predisposition to the proposed amendment by the legislature which will lead to an amendment of the law that will be applied consistently by the courts. Thus, ironically, the reforms which the *eco-anthropocentric* right will eventually complement to bring about social change (sustainable development) in Nigeria will facilitate its entrenchment.<sup>193</sup>

Certainly, granting nature a constitutional right does mean that development will be hindered. Seeking to conserve all biodiversity is often not a realistic objective especially as far as development is concerned. In most landscape mosaics inhabited by poor people,

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<sup>188</sup> See M Tushnet, ‘Social Welfare Right and the Form of Judicial Review?’ (2004) 82 Texas L Rev 1895; see generally section 1.7 above

<sup>189</sup> See para 10-12 of section 2.2

<sup>190</sup> Ibid

<sup>191</sup> See paras 11-12 of section 1.7 above

<sup>192</sup> W Maltbie, ‘Our Attitude to the Constitution’ (1930) 23 Law Libr J 104,110

<sup>193</sup> See G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2<sup>nd</sup> ed, University of Chicago Press 2008) 1046; see also the discussion on the symbiotic relationship between law and social change in para 2 of section 1.7 above; para 13 of section 1.7 for an example of change effected by the same factors that brought about the constitutionalisation of slave rights; and also the General Reforms discussed in section 4.3 above

development will inevitably cause some losses of biodiversity. Not all biodiversity can be maintained. Setting realistic, measurable and locally relevant biodiversity objectives will provide a sound basis for the negotiation of trade - offs. It is important to recognize that local people may have their own priorities for biodiversity that differ from those of outside conservation groups. Building on these may provide a sound basis for securing local buy – in.<sup>194</sup> It is also important to recognize that sustainable use of biodiversity may be a more attractive option for local people than total protection. If people can benefit from using a species they are more likely to conserve it. This goes to question the reality of either pure anthropocentrism or ecocentrism. Aldo Leopold realized this paradox and wrote: ‘conservation is a state of harmony between men and land’.<sup>195</sup> Ideally, both sides must look towards a compromise. Grumbine argues that if ecosystem management is to take hold and flourish, the relationship between the new goal of preserving ecological integrity and the old standard of providing goods and services for humans must be reconciled.’<sup>196</sup> Jason Veil also made the same argument by asserting that a balanced approach to ecosystem management is a call to face reality, gather input from opposing viewpoints, and let these lessons drive future policy objectives. This depends on utilitarians recognizing the folly of relentless consumption and environmentalists accepting the reality of society’s continued growth.<sup>197</sup> What is advocated therefore is ‘sustainable development in an environmentally and socially-responsible manner through discussion, redesign, and active negotiation with potentially-affected communities’.<sup>198</sup>

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<sup>194</sup> See D Sheil, R Puri, M Wan, I Basuki, V Heist, M Liswanti, N Rukmiyati, I Rachmatika and I Samsoedin, ‘Recognizing Local People’s Priorities for Tropical Forest Biodiversity’ (2006) 35 (1) *Ambio* 17

<sup>195</sup> A Leopold, ‘A Sand County Almanac’ (Sierra Club/Ballantine 1970) 295

<sup>196</sup> E Grumbine, ‘What is Ecosystem Management?’ (1994) 8 (1) *Conserv Biology* 31

<sup>197</sup> J Veil, ‘Anthropocentrism and Ecocentrism: A Balanced Approach’ (April 2001) [www.courses.psu.edu/for/for410\\_mem14/Essays/Spr\\_01/Jason\\_Veil.PDF](http://www.courses.psu.edu/for/for410_mem14/Essays/Spr_01/Jason_Veil.PDF) accessed 16 October 2010

<sup>198</sup> C Caron, ‘Defining the Public Interest, Negotiating Rights: The Influence of Environmental Impact on Assessment Legislation in Sri Lanka’ (Paper submitted for the 9<sup>th</sup> International Conference on Sri Lanka Studies, Matara, Sri Lanka, 28-30 November 2003)

In sum, this chapter has applied a management ethic (*eco- anthropocentrism*) to the situation of environmental degradation in the Niger Delta region of Nigeria by proposing a justiciable, constitutional right for nature. The next chapter will, after drafting the right, establish that having a profoundly worded law without effective enforcement of the same, is as bad as having no law at all. Consequently, it will argue for the establishment of an environmental court that will address the technicalities that will come with enforcing nature's right.

## CHAPTER SIX

### THE *ECO-ANTHROPOCENTRIC* RIGHT AND ITS CONCOMITANT REFORM

*The best of environmental standards in the world will be innocuous if they are not complied with or effectively enforced. Compliance and enforcement therefore ensure good environmental governance, and respect for the rule of law.*<sup>1</sup>

#### 6.1 Introduction

This chapter will demonstrate that the effective implementation of the proposed *eco-anthropocentric* right in the Nigeria will be a function of a specific concomitant reform – the establishment of an environmental court. This reform is isolated from those discussed in chapter four and termed ‘concomitant’ because it is consequential to the proposed right. Thus a discussion of this reform in conjunction with the reforms in chapter four would have been premature.

An attempt will be made to draft the *eco-anthropocentric* right flowing from the pragmatic pathways set out in chapter five. A special environmental court will be consequently recommended to create and enforce guidelines that border on nature’s right. Such guidelines are required with respect to issues on standing, admission of evidence, award of damages, and conflict between the *eco-anthropocentric* right and human rights. The need for an organised environmental justice system will also warrant the incorporation of other environmental litigation matters into this new system. Although the precise rules of such a court is a matter for further research, this chapter will demonstrate the basis for the establishment of the court as well as outline the structure and mode of operation of the proposed court.

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<sup>1</sup> N Sama, ‘Criminal Law and Environment, Prosecutors, Inspectors and NGOs in Cameroon’ [www.inece.org/conference/7/vol1/sama.pdf](http://www.inece.org/conference/7/vol1/sama.pdf) accessed 25 September 2012

## **6.2 The *Eco-Anthropocentric* Right**

### **(1) Right to an ecologically balanced environment**

1. (a) Man and Nature shall have a right to a healthful and ecologically balanced environment which shall comprise the maintenance of ecological equilibrium and the enhancement of the natural foundations of life;
2. (For the purpose of this section, ‘maintenance of ecological equilibrium’ shall mean
  - (i) the non-interference with the structure and functioning capacities of ecosystems and their interconnectedness; and
  - (ii) the adoption of adequate measures to eliminate or mitigate harmful environmental consequences; and employment of restoration mechanisms in cases of severe or permanent environmental impact.
- (c) The term ‘natural foundations of life’ shall comprise air, water, soil, plants, animals and microorganisms in their natural living space.
3. This right is self-executing<sup>2</sup> although it shall be maintained and strengthened under the guidance of the legislature and the right shall not be denied by the state, individuals, or non-state entities.
  - a. Entities who believe that the environmental right as provided by this section has been violated may seek redress in a court of competent jurisdiction against alleged violators, both public and private, and if violation is found on the merit of the case, the court shall grant one or all of the following reliefs where necessary subject to statutes enacted in pursuance of this provision:
    - (i) injunction against the violator;
    - (ii) order remediation of the affected area;
    - (iii) compensatory and/or punitive damages
  - (b) The word ‘entities’ in paragraph a refers to Man and Nature.

### **(2) Procedural Environmental Right**

- (1) Every person shall have a right to:
  - (a) Access information concerning environmental matters that is held by the public authorities, including information on hazardous materials and activities in their communities;
  - (b) Participate in decision making that is related to environmental matters.

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<sup>2</sup> It is self-executing because the proposed right provides the means by which the right can be effected.

- (2) The State shall provide information that will enhance public awareness and participation with respect to matters under subsections (1) and (2) above.
- (3) Individuals and groups who believe that their procedural rights as provided for under this section have been infringed may seek redress in a court of competent jurisdiction against alleged violators, both public and private and if violation is found on the merit of the case, then the court may grant any or all of the following reliefs where necessary subject to statutes created in pursuance of this section:
  - (i) an injunction against the violator;
  - (ii) compensatory and/or punitive damages.

Section 20 of the 1999 Constitution which provides that ‘The State shall protect and improve the environment and safeguard the water, air, land, forest and wild life of Nigeria’ should be replaced with a less vague and more preservationist provision as follows:

- (1) (a) The state shall provide for the protection and conservation of fauna, flora and the ecosystem in general in order to promote sustainable development
- (b) ‘Sustainable Development’ shall connote development that is carried out with a corresponding consciousness to preserve ecological balance for present and future generations.
- (2) (a) The state shall undertake the just distribution of agricultural lands, taking into account ecological, developmental, and other equity considerations;
- (b) ‘State’ under this section shall include Federal and State Governments of the Federation.

This proposed provision in subsection (1)<sup>3</sup> contemplates biodiversity conservation with a view to achieving sustainable development. Since sustainable development has been defined as ‘development that meets the needs of present generations without compromising the ability of future generations to meet their own needs’<sup>4</sup>, it follows therefore that the proposed section 20(1) of the Nigerian Constitution will possess an intergenerational

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<sup>3</sup> The provisions of this sub section are similar to the combined provisions of s 4, art XII and s 7, art XIII of the 1987 Constitution of Philippines.

<sup>4</sup> As defined by the Brundtland report, known as *Our Common Future* - a report from the United Nations World Commission on Environment and Development (WCED) which was published in 1987.

content. Subsection 2(a)<sup>5</sup> (proposed) takes into cognizance the profound impact of developmental activities on the distinct economic, social and cultural welfare of indigenous people.

It is however one thing to propose a right, and it is yet another to ensure its optimum implementation. The next section will argue that a separate environmental court will be necessary to enforce the proposed *eco-anthropocentric* right.

### 6.3 The Need for an Environmental Court

There are two factors favouring the relevance of the judiciary in environmental matters. On the one hand, the normative autonomy achieved by environmental law is guaranteed by the consolidation of principles which, coming from the international level (that produced mainly soft law), have moved to the national level, building a constitutional environmental order that represents the ground for the creation of Environmental Courts.<sup>6</sup>

On the other hand, the affirmation of environmental law as a law of principles makes it capable of guiding legislative and administrative powers, but especially the judicial power, both in the interpretation of environmental law and in the direct application of the principles to practical cases.<sup>7</sup>

The most frequent reasons for the creation of environmental courts and tribunals mentioned in literature and interviews are efficiency, economy, expertise, uniformity (to

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<sup>5</sup> The proposed section 2(a) and (b) are similar to the provisions in s 5, Art XII and s 4, Art XIII respectively.

<sup>6</sup> A discussion on the establishment of an International Environmental Court is outside the scope of this thesis, instead see for example A Rest, 'The Indispensability of an International Environmental Court' (1998) 7(1) RECIEL 63, 64-65; E Hey, *Reflections on an International Environmental Court* (Martinus Nijhoff 2000) ch 1; S Murphy, 'Does the World Need a New International Environmental Court?' (2000) 32 Geo Wash J Intl L & Econ 333; P Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (OECD 2008) <http://www.oecd.org/investment/globalforum40311090.pdf> accessed 15 November 2012; L Kotze and A Paterson, *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law 2009) 451-472; O Pedersen, 'An International Environmental Court and International Legalism' (October 2012) JEL 1

<sup>7</sup> See O Fagbohun, 'Jurisdiction of Nigerian Courts in Environmental Matters: A Note on *Shell v Abel Isaiah*' (2006) 24 JENRL 209, 210; A Tolentino, 'Improving Environmental Governance & Access to Justice' (2011) 41(2) JEPL 95, 98-100



increase consistency in the application of environmental laws), access to justice, reduction of backlog, demonstration of government's commitment to environmental protection, encouragement of public participation and confidence, fostering accountability in governmental decision making and preventing marginalization of environmental cases.<sup>8</sup>

Lord Woolf proposed a multifaceted, multi-skilled body which would combine the services provided by existing forums in the environmental field to act as 'one stop shop' for faster, cheaper and more effective resolution of environmental disputes because scientifically unsound or delayed decisions, may wreak havoc in terms of irreversible environmental damage and irreparable economic loss; especially because of the nature of remedies which may provide for multiple appeal routes under different statutes.<sup>9</sup> Furthermore, it has also been argued that environmental law has grown as a specialised area of law requiring separate adjudication due to certain unique features, namely, (1) existence of complex technical/scientific questions; (2) overlapping of civil and criminal remedies as well as public and private interests in any environmental adjudication; (3) development of fundamental environmental law principles such as the precautionary approach, polluter pays, sustainable development, prevention at source, and procedural transparency.<sup>10</sup>

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<sup>8</sup> For detailed discussions of these reasons, see S Legomsky, *Specialized Justice – Courts, Administrative Tribunals and a Cross-National Theory of Specialization* (Claredon Press 1990) 20-32 H Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 JEL 1; R Carnwath, 'Environmental Enforcement: The Need For a Specialist Court' [1992] JPL 799; R Macrory and M Woods, 'Modernizing Environmental Justice: regulation and The Role of an Environmental Tribunal' (2003) <http://www.ucl.ac.uk/laws/environment/tribunals/index.shtml> accessed 19 November, 2012; Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts* (Sept. 2003) <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf> accessed 20 March 2012; Scottish Executive Environment and Rural Affairs Department Environment Group, *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (2006) <<http://www.scotland.gov.uk/Publications/2006/11/22152827/0>> accessed 20 March 2012; J Gao, *Environmental Public Interest Litigation and the Vitality of Environmental Courts: The development and future of environmental courts in China* (March 2010) <<http://www.greenlaw.org.cn/enblog/?p=2295>> accessed 20 March 2012; D Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' (2012) 29 (2) PELR 566; N Robinson, 'Ensuring Access to Justice Through Environmental Courts' (2012) 29(2) PELR 363

<sup>9</sup> See H Woolf (n 8) 3

<sup>10</sup> R Macrory and M Woods (n 8) 20

There are however, counterarguments advanced against specialized environmental courts or tribunals. While a minority view, criticisms include the existence of other fields with legal and factual complexity, resistance to ‘fragmenting’ the judicial system, reluctance to set environmental law apart, preference for incremental reforms in the general judicial system, concerns about sufficient caseload to warrant a specialty court, added costs, susceptibility to ‘capture’ by special interests, lack of judges with knowledge and training in the subject area, court bias, judges substituting their judgment for that of an administrative agency or conversely relying too heavily on agency/political positions, and so on.<sup>11</sup>

Cheng has argued that the reasons for maintaining environmental litigation in traditional courts are somehow ‘systemic’; the development of environmental law as new discipline with a limited degree of autonomy, the absence of environment in the original framework of constitutions, and the reluctance towards a complete reassessment of the judicial system that would be required by the creation of new courts.<sup>12</sup> He however argued that this ‘generalist’ view can deprive the judiciary of potential expertise which could be extremely useful in cases involving complex doctrines and specialized knowledge like environmental law.<sup>13</sup> Thus Damle argues that no judiciary can operate in isolation. Judges almost always need to borrow ideas from other fields, therefore he proposed that a specialist judge in a traditional court would be more practicable than a specialist court.<sup>14</sup>

Inspite of the arguments against the establishment of environmental courts and tribunals, the 21st century has witnessed an astonishing growth of Environmental Courts and Tribunals. As of September 2010, around 360 environmental courts and tribunals were

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<sup>11</sup> See R Macrory, ‘Environmental Courts and Tribunals in England and Wales: A Tentative New Dawn’ (2010) 3 J Ct Innovation; G Pring and C Pring (eds), *Greening Justice: Creating and Improving environmental Courts and Tribunals* (The Access Initiative 2009) 17-18; E Cheng, ‘The Myth of the Generalist Judge’ (2008) 61 Stan L Rev 521; S Damle, ‘Specialize the Judge not the Court: A Lesson From the German Constitutional Court’ (2005) 91 Va L Rev 1267

<sup>12</sup> E Cheng (n 11) 521 - 525

<sup>13</sup> Ibid 524

<sup>14</sup> S Damle (n 11) 1267-1269

in place all around the world, and the majority of them was created in the last 5 years.<sup>15</sup> Each is unique, developed in response to different environmental issues, laws, political institutions, cultural and religious norms, and advocacy pressures, but all have much in common and much to learn from one another.<sup>16</sup>

This thesis agrees with Lord Woolf and Macrory that technical questions arise from environmental matters; civil and criminal liabilities may also merge in environmental matters; and also the need for skill needed to address the emerging fundamental principles of environmental law. However, it can be contended in agreement with Damle's that a specialization of the judge and not necessarily the court will suffice in tackling the above. Among the reforms proposed in chapter four was the need to consolidate the laws on criminal and civil liability; first to avoid a haphazard environmental protection framework and then to tackle the obvious overlapping of criminal and civil liabilities in environmental protection in Nigeria.<sup>17</sup> Arguably, that proposal will effectively handle the issue of the overlapping of civil and criminal liabilities which Lord Woolf and Macrory raise. Also in chapter four, the need for judges to be specialized was proposed as a way of enhancing effective implementation of environmental laws in Nigeria.<sup>18</sup>

This recommendation, it is also argued, can tackle the issue of the fundamental principles as well as the scientific components of environmental litigations. Thus, it is believed that if the judicial system is strengthened in terms of its independence and inclination to an environmental jurisprudence (through the specialization of judges) that

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<sup>15</sup> G Pring and C Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment* (2010) <[www.law.uoregon.edu/org/oril/docs/11-2/Pring.pdf](http://www.law.uoregon.edu/org/oril/docs/11-2/Pring.pdf)> 3 accessed on 26 March 2012

<sup>16</sup> See IJIEA, 'Giving Force to Environmental Laws: Court Innovations Around the World' (March 12, 2011) [www.pace.edu/school-of-law/sites/pace.edu.school-of-laws/files/IJIEA/IJIEABriefingPaper.pdf](http://www.pace.edu/school-of-law/sites/pace.edu.school-of-laws/files/IJIEA/IJIEABriefingPaper.pdf) accessed 13 April 2012

<sup>17</sup> See section 4.3.2 above

<sup>18</sup> See section 4.3.3 above

would enhance the effectiveness of the enforcement of the current environmental laws in Nigeria.<sup>19</sup>

However, following the proposal to constitutionalize nature's right, this chapter argues for a separate environmental court to handle the nuances that would come with the enforcement of nature's right. This is because litigations with nature as a right holder will be substantially different from those with nature as an object. The Nigerian courts have, all this while been preoccupied with the latter, thus interpreting laws that apply to humans. Laws that would apply to nature are expected to be more intricate. For example, as it was noted in chapter five, guidelines would need to be made with respect to standing, admission of evidence, award of damages and right to participate.<sup>20</sup>

When guidelines on the *eco-anthropocentric* right are established, a citizen can have an idea on how to establish himself/herself as the proper voice to sue on nature's behalf. If this is not so, a lot of complications will ensue. For example, a multinational oil company has polluted a water body in the Niger Delta area and enraged citizens prepare to sue for an injunction to enforce nature's constitutional right to exist. An action is filed. A crucial problem will be which of these representatives will be granted standing, and what must such a person prove, if the court awards damages, how will the money judgement be executed and to whom will it be payable; what are the contours of the causation requirement for showing the root of the environmental damage in question.

Another major area of concern is, what is the extent of protection that can be given to nature in a relative context – that is, what happens when nature's right clashes with other human constitutional rights?

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<sup>19</sup> For example, as at 2010, the Brazilian High Court had decided over three thousand environment related matters, earning it the title 'Brazil's Green Court' by United Nations Environmental Programme. See N Bryner, 'Brazil's Green Court : Environmental Law in the *Superior Tribunal de Justica* (High Court of Brazil) (2012) 29 PELR 470, 475-476; see also A Benjamin, 'We The Judges, and the Environment' (2012) 29 PELR 582

<sup>20</sup> See fns 172, 181 and 188

These are critical issues that a court must address in form of guidelines. Such a court however has to be one set up specially for this task that borders on a completely novel jurisprudence in Nigeria. It will be too much of an extreme for the regular courts which have all along been dealing with matters relating to human litigants to drift into making and applying guidelines for the enforcement of nature's rights when in fact a lot is left to be done to enhance the regular environmental proceedings. It is against this back drop that a special environmental court is proposed to initiate and enforce guidelines (rules) with respect to the enforcement of the *eco-anthropocentric* right. Further, as part of the need to have an organised environmental justice system, other environmental matters may also be brought under the proposed environmental judicial system, thereby having a separate court for environmental matters in Nigeria.

#### **6.4 The Nature of the Proposed Environmental Court**

The word 'court' is used at first connote the special function of the court, however this section will use 'courts' to show the need to decentralise the environmental court with a view to effectively administering environmental justice.

The proposed environmental courts should be courts of first instance that are equivalent to a State High Court in Nigeria. In view of this, section 6 (5) of the 1999 constitution should be amended to include the environmental court as a superior court of record in Nigeria. There should also be Environmental Appeals Courts to which appeals from the courts of first instance will lie, and appeals from the Environmental Appeals Courts will be determined at the Supreme Court. The Environmental courts and the Environmental Appeals Courts will have their special procedural rules which the Supreme Court may adopt as part of its procedural rules (that is, a rule of procedure for environmental cases). The rules should include: best practices in environmental

adjudication, including provisions preventing Strategic Legal Actions Against Public Participation; a statement adopting the Precautionary Principle, and an Environment Protection Order, which empowers a court to direct or enjoin any person or government agency to perform an act to protect, preserve or rehabilitate the environment, or stop performing an act that causes it harm; a Writ of Continuing Mandamus (which allows the court to compel the performance of an act specifically required by law, and to also retain its jurisdiction after judgment to monitor compliance with the decision) and a Writ (of nature) which seeks to protect the constitutional right of entities to a healthful and ecologically balanced environment by directing a private person, an entity, or a public official to perform a lawful act, or stop committing an unlawful act involving environmental damage of such magnitude as to prejudice the life, health, or property of humans or nature in a particular area. The rule should also have provisions to expedite the hearing of environmental cases, including a reasonable period to try and decide the case, preferably, one year.<sup>21</sup> The rules should also specify that the courts will not apply the rules of Evidence in the Nigerian Evidence Act to cases before it but rather it will be guided by principles of strict liability especially in cases dealing with hazardous substance, polluter pays principle, precautionary principle, preventive principle, doctrine of public trust, Intergenerational equity and sustainable development.

To maximize its effectiveness, it is also recommended that the court should have criminal contempt power – that is the power to impose criminal sanctions or violations of its rulings. Criminal contempt is considered one of the most important features in an injunctive relief system<sup>22</sup>

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<sup>21</sup> In April 2010, the Supreme Court of the Philippines adopted a similar Rule of Procedure for Environmental Cases

<sup>22</sup> See A Brewer-Carias, 'Constitutional Protection of Human Rights in Latin America: A Comparative Study of *Amparo* Proceedings' (CUP 2009) 153, 394; M Whittemore, 'The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments have no Bite' (2011) 20 (3) Pac Rim L & Pol J 659, 690

The composition and jurisdiction of the proposed environmental courts should be as follows:

1. In view of the involvement of complex scientific and specialized issues relating to environment, the courts should be manned only by persons having judicial or legal experience and assisted by persons having scientific qualification and experience in the field of environment.
2.
  - (a) Each proposed Environment Court should consist of a Chairperson and at least two other members. Chairman and other members should either be a retired Judge of Supreme Court or High Court, or having at least 20 years experience of practicing as an advocate in any High Court. The term of the Chairperson and members shall be for a period of 5 years.
  - (b) Each Environment Court should be assisted by at least three scientific or technical experts known as Commissioners. However, their role will be advisory only.
3.
  - (a) Each proposed Court shall have all powers of civil court.
  - (b) The minimum quorum for hearing a case shall be two members including the Chairperson. At least one Commissioner should also remain present during the hearing of a case.
  - (c) Each proposed Court can make all kinds of orders, final or interlocutory. It can also award damages, compensation and can also grant injunctions (permanent, temporary and mandatory). The Court should have considerable flexibility to regulate its own proceedings. It should operate an active case management system. In addition to standard adjudication proceedings, it should use a range of techniques to resolve disputes and prepare cases for

hearing, including case management tracks,<sup>23</sup> conferences and Alternative Dispute Resolution (ADR).

## 6.5 Conclusion

Effective enforcement is key to ensuring that the ambitious goals of environmental statutes are realized. Such enforcement will usually connote a set of actions that a government can take to promote compliance with environmental laws including giving ‘teeth’ to the legislation. This chapter has argued that an effective way of giving teeth to the proposed *eco-anthropocentric* right would be through guidelines set up and enforced by an environmental court – a court that has the capacity (in terms of jurisprudence and independence) to adjudicate on matters bordering on nature’s right when they are brought before it.

The guidelines will be necessary to clarify issues that border on standing, giving of evidence, award of damages, scope of nature to be protected, the relationship between the *eco-anthropocentric* right and other rights in Nigeria.

The chapter further established the need to use the platform of Nature’s right to bring all other environmental matters under the jurisdiction of the proposed court with a view to promoting a consolidated environmental justice system in Nigeria.

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<sup>23</sup> This will involve tracking cases as ‘Standard’, ‘complex’ or ‘Parties Hold’ as practiced in New Zealand. See M Oliver, ‘Implementing Sustainability –New Zealand’s Environment Court-Annexed Mediation’ A paper presented to the Indian Society of International Law (ISIL)Fifth International Conference on *International Environmental Law*,8 - 9 December 2007, New Delhi, India. Under the New Zealand Environmental Court System, standard cases are determined within six months.



## CONCLUSION

*The day will come when the failure of our laws to recognize the right of a river to flow, to prohibit acts that destabilize Earth's climate, or to impose a duty to respect the...right to exist of all life will be as reprehensible as allowing people to be bought and sold.<sup>1</sup>*

### Summary of the Argument

The thesis began by introducing its central argument, namely, an effective way of managing the increasing environmental degradation in Nigeria's Niger Delta region for future generations is by guaranteeing nature's right in the Nigerian Constitution, which can be enforced by a 'guardian'(private persons, NGOs, NESREA) in a specialist environmental court.

Chapter one established a general premise of this thesis which was applied to the situation of environmental degradation in Nigeria's Niger Delta region. While examining the major themes that ran through the thesis – 'sustainable development', 'future generations', 'eco-anthropocentrism', 'law as an instrument of social change', It demonstrated that the objective of sustainable development to promote the protection of the environment for future generations is in favour of a balance – economic development and environmental protection. Thus it argued that efforts to achieve this objective with an ethic that is not characterized by this balance are misguided.

Having examined the major theoretical underpinnings of environmental law and some scholarly opinions on an effective ethic for preserving the environment, it concluded that although sustainable development has an anthropocentric objective, a less/weak anthropocentric ethic (as opposed to a *strict* one) is more adaptable to achieving sustainable development. To demonstrate this, it argued that an effective way of using a less anthropocentric ethic to achieve sustainable development is by using nature's legal right to

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<sup>1</sup> C Cullinan, 'If Nature Had Rights What Would people Need to give Up? *Orion Magazine* (New York, January-February 2008) 5

exist (ecocentric) to protect future generations' moral rights to a clean environment (anthropocentric) – *eco-anthropocentrism*. It further argued that a shift to this ethic could be done through law (usually a primary law) facilitated by economic, social, cultural and political reforms which reforms will also be necessary for the change envisaged by the new ethic.

Chapter two projected the case study of the thesis. That is, the area in which the general premise established in chapter one was going to be tested - Nigeria's Niger Delta region – a region that contains Nigeria's major source of revenue (oil). It demonstrated the Nigerian Political system to be a federalist one with a rigid constitution with a view to showing how difficult it would be to accommodate a new ethic through a constitutional amendment. It proved that the socio-economic status of the indigenes of the region was very much tied to the environment which was constantly degraded and how, as a result of penury, access to justice is a luxury and will most likely remain so even if the new law is adopted without necessary reforms.

Chapter three examined the existing regimes of environmental protection in the Niger Delta region and found most of the regimes to be largely defective and therefore failing to achieve the objective of sustainable development in the region. It however left it to chapter four to determine whether the ineffectiveness of the laws was due to: (a) a need for specific reforms (like making environmental rights justiciable, making fines more deterrent, creating comprehensive compensation guidelines, amending the laws on ownership of resources and proof of causation and expanding claims in foreign environmental litigations) and general reforms like (Good Governance, Consolidation of laws, Judicial reforms, environmental agency reforms and hybrid enforcement mechanisms); or (b) a need for a more fundamental reform like an ethical change from the *strict* anthropocentric ethic that has been influenced by religious and economic assumptions to one that would favour the

balance advocated by sustainable development. After examining (a) at the beginning of the chapter, it demonstrated that even after reforming the laws in (a) based on the *strict* anthropocentric ethic on which they were founded, an ethical change – (b) would still be required to enhance the effect of (a) with a view to achieving the objective of sustainable development more effectively in Nigeria's Niger Delta region. Thus, having tested the credibility of the general premise which was established in chapter one, the chapter argued for a change to a balanced (management) ethic as against the existing (protection) one.

In applying the less/weak anthropocentric ethic which was proposed in chapter one – *eco-anthropocentrism* to the Niger Delta situation, chapter five (using the Ecuadorian Constitution as a model) proved that it is possible, though difficult for Nature's right to be entrenched in the Nigerian constitution. It achieved this by rendering the argument on the non-justiciability of economic, social and cultural rights (by extension, environmental rights) in Nigeria to be a flawed one and went on to demonstrate that having constitutional environmental rights in Nigeria is crucial. Following a justification based on comparative constitutionalism, it showed that the soundness of the right would be determined by clarity with respect to duties owed by state and non-state actors, standing rules, and provisions on damages and injunctive reliefs.

Chapter six - having titled the *eco-anthropocentric* right 'a right to a balanced and healthful ecology' attempted a draft of the right based on the pathways established in chapter five. It however argued that although the *eco-anthropocentric* right was meant to be an enhancement of the reforms in chapter four, the right would require a concomitant reform to enhance its efficacy. Thus it argued for the establishment of an environmental court to address the nuances that would arise from the administration of nature's right. For example, issues with respect to standing, giving of evidence, award of damages, the scope of nature to be protected and the conflict between nature's right and human rights.

This conclusion re-emphasizes the validity of the of the general premise which was established in chapter one, tested in chapters three and four (after examining Nigeria's political system and its Niger Delta Region in chapter two) and applied in chapters five and six.

The logic of the argument of this thesis therefore moved from a general premise to a particular premise, and then to a deduction as follows:

**General Premise** – Environmental protection laws based on a less anthropocentric (*eco – anthropocentric*) ethic will be more effective in achieving sustainable development than those based on a *strict* anthropocentric ethic. (Chapter one)

**Particular Premise** – (a) Sustainable Development is Imperative for Nigeria's Niger Delta Region; (Chapter two) (b) *But* the environmental protection laws in the region are not very effective in achieving sustainable development because they are based on a *strict* anthropocentric ethic; (Chapters three and four)

**Deduction** – *therefore*, a less anthropocentric (*eco-anthropocentric*) ethic should be adopted to underpin the existing environmental protection laws in Nigeria's Niger Delta region with a view to achieving sustainable development in the region more effectively. (Chapters five and six).

### **A Projection of the Impact of the Ethical Change in Nigeria's Niger Delta Region**

The incorporation of an *eco-anthropocentric right* – 'a right to a healthful and ecologically balanced environment' in the Nigerian Constitution will create a platform for environmental degradation (actual or potential) to be challenged by private individuals or NGOs in an environmental court on behalf of themselves, other individuals or as guardians of nature. Such actions will be brought with a view to either obtaining an injunction against the perpetrator(s), making orders as for the remediation of the environment or awarding damages as the case may be. This should invariably change the attitudes of the Federal

Government, the Multinational Companies (MNCs), Oil Producing Communities (OPCs) and other perpetrators of environmental damage in the Niger Delta Region. The Federal Government will begin to explore development measures that are compliant with the objective of sustainable development; the MNCs especially, are likely to be more cautious in their oil exploration activities. This will in turn affect the attitude of the OPCs who spill oil and damage other elements of the environment in response to the seeming recklessness of the MNCs.

Also by virtue of the proposed Constitutional provision, every person in Nigeria has a procedural right (whether in their personal capacity or as guardians of nature) to a healthful and ecologically balanced environment. This implies that any person can institute an action against the Government or its environmental agency if refused the opportunity to make an input in environmental matters, as well as have information on environmental projects to be carried out in a particular area. It will amount to a breach of this procedural right where no consultation is made or input sought. For this, the aggrieved person(s) - man or nature will be entitled to an injunction, damages or remediation as the case may be. If this provision is strictly adhered to, most of the hazardous projects carried out or intended to be carried out in the Niger Delta region will hardly go unchallenged.

Where however nature's right conflicts with existing human rights, the court may weigh the harms to the interests, and then decide how to balance them. Given that ecosystems and nature provide a life support system for humans, their interests must, at times, override other rights and interests otherwise we will not have a planet to inhabit that would support our continued existence; also, since man is an integral part of nature, human needs must also be considered when the rights and interests of ecosystems come into conflict with those of humans.

## **Concluding Remarks**

The concept of nature's rights has been around since 1972 when a Professor at the University of Southern California, Christopher Stone first asked in his article, 'Should Trees Have Standing?'<sup>2</sup> He explains that the historic trend in law continually extends rights. What was earlier property such as slaves, wives and children, over time have been granted rights.

Today, not only humans, but corporations, trusts, cities and nation-states are recognized to possess rights. Each of these struggles requires changes in existing laws as well as culture – with law sometimes pushing culture forward, and other times the culture demanding and driving changes in law. To move law and culture to consider a 'rightless' entity as possibly possessing rights, requires a fundamental shift in consciousness, a shift that if it is to have meaning, must necessarily be codified into fundamental governing frameworks – constitutions – to be enforced and upheld.

Chapter four demonstrated how the Judeo-Christian theology that the earth and all its creatures exist for man has influenced the broad spectrum of laws regulating the protection of the environment in Nigeria. The Government has put in place a lot of environmental laws, yet these laws are failing to protect the Niger Delta ecosystem and as such, these ecosystems have been pushed to the brink. The environment of the region is in crisis - species are disappearing at accelerating rates, the natural states of air and land are being jeopardized, rainforests are being felled, fisheries are collapsing coral reefs are dying and so on yet the Government continues to adopt environmental laws and treaties, and negotiate new ones.<sup>3</sup>

Nigeria is in a situation similar to the slave trade era. Treating nature as a slave allows us to consider and behave as though nature is inferior. The evidence is overwhelming

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<sup>2</sup> C Stone 'Should Trees Have Standing: Towards Rights for Natural Objects' (1972) 450 Cal L Rev 306.

<sup>3</sup> As discussed in chapters two and three

that humankind has pushed many ecosystems and species past any possible recovery. If nature is given rights, what will become of those who benefit from the ‘resource’ status of nature? Environmental laws continue to be enacted as though if lots of them are passed, the environment will be better protected.

It was noted in chapter five that in spite of anthropocentric pressures, people and communities in the United States, Ecuador, Switzerland, Spain, Germany and Bolivia are beginning to shift their thinking in line with the recommendation of Professor Stone.<sup>4</sup> He proposes that legal rights be granted to forests, oceans, rivers and the natural environment as a whole. He argues for three criteria of rights holders: they require standing in their own right; their damages count in determining outcome; they can be beneficiaries of awards. A guardian could oversee the interests of the natural feature.<sup>5</sup> Stone also points out that under legal systems, when suits on behalf of nature prove successful, it is human persons who are compensated, rather than nature being restored.<sup>6</sup> This recommendation for nature’s rights in this thesis is thus in line with Stone’s argument and thus encourages a fundamental change in the relationship between humankind and nature in Nigeria.

It may take generations for the idea of Rights of Nature to influence Nigerian laws and Culture, and to be implemented and enforced as proposed. It may similarly take decades to make fundamental shifts in human consciousness, laws and culture, to move nature from being considered to be property, as a thing to be exploited for our own enjoyment and use, to being recognized as having the inalienable right to exist and flourish. No matter how long it takes, this step in the right direction is necessary if the Nigerian ecosystems are to survive and thrive for future generations.

The proposal for a shift in ethic in this thesis has therefore been made in order to enhance the effectiveness of the current laws when due reforms are made to them. For this

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<sup>4</sup> See section 5.4 generally

<sup>5</sup> C Stone (n 2) 307-398

<sup>6</sup> Ibid 310

shift to take place however, the primary law of Nigeria - the Constitution should be amended to grant rights to nature. Unless this is done, other legislations will not reflect this shift. It is against this backdrop that a constitutional right to a *healthful and ecologically balanced environment* is recommended with a view to strengthening the environmental protection system in Nigeria, thereby curbing to a reasonable extent, the nagging menace of environmental degradation in Nigeria's Niger Delta region.

In sum, this thesis has argued that the current *strict* anthropocentric environmental protection laws in Nigeria are insufficient to keep the water bodies, air and land from being polluted and flora and fauna from being endangered and therefore unpreserved for future generations (the objective of sustainable development). It has also projected an *eco-anthropocentric* ethic as a way of enhancing the current environmental protection regime to achieve the objective of sustainable development in Nigeria's Niger Delta region.

This *eco-anthropocentric* ethic has been so called because this thesis has argued that an effective way of preserving the environment for future generations (anthropocentrism) is by giving nature a right to exist for them. The shift in ethic is therefore in favour of a balance and not an extreme because 'presumption in favour of the natural is not a presumption against the common good. Those who extend legal rights to nature may not deny them to men'.<sup>7</sup> At the same time, 'whoever plans to dump quantities of waste, kill myriads of pests, or uproot acres of natural growth should customarily have to make the case that sound reason warrants disturbing nature'.<sup>8</sup> Thus these rights do not defend a virgin Nature, which might cause the stopping of farming, fishing or animal breeding activities. These rights defend the maintenance of life systems and groups. Meat, fish, and grains can be eaten, for example, as long as we can guarantee that ecosystems with native species will continue to thrive.

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<sup>7</sup> C Morris, 'The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects' (1964-1965) 17 J Legal Educ 185,191

<sup>8</sup> Ibid 190



**Treat the earth well...it was not given to you by your parents  
...it was lent to you by your children...<sup>9</sup>**

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<sup>9</sup> Kenyan proverb

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