APPRAISAL OF THE CONTEMPORARY JURISPRUDENCE ON THE RIGHT TO ENVIRONMENT: A CASE STUDY OF NIGERIA AND SOUTH AFRICA

BY

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DECLARATION

I declare that the work in this thesis titled *Appraisal of theContemporary Jurisprudence on the Right to Environment: A Case Study of Nigeria and South Africa* has been carried out by me in the Department of Public Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institution to the best of my knowledge.

..... …… ……

Name of Student Signature Date

CERTIFICATION

This dissertation titled: *Appraisal of theContemporary Jurisprudence on the Right to Environment: A Case Study of Nigeria and South Africa*by Ebunoluwa Odunayo POPOOLA meets the regulations governing the award of the degree of Doctor of Philosophy (Ph.D.) in Law of the Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

I dedicate this work to the LORD God Almighty, the Creator of the universe.

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LIST OF ABBREVIATIONS

Abbreviation	Meaning
AGAttorney General	
ACtHPR	African Court of Human and Peoples' Rights
AHRLR	African Human Rights Law Report
CA	Court of Appeal
CBO	Community Based Organisations
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Child Rights Convention
ECOWAS	Economic Community of West African States
EIA	Environmental Impact Assessment
FWLR	Federation Weekly Law Reports
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
KeHc	Kenyan High Court
LFN	Laws of the Federation of Nigeria
LPELR	Law Pavilion Electronic Law Report
MEC	Member of the Executive Council
MJSC	Monthly Judgments of the Supreme Court
NESREA	National Environmental Standards and Regulations Enforcement Agency
NgHc	Nigerian High Court
NGO	Non-governmental organisation
NOSDRA	National Oil Spill Detection and Response Agency
NWLR	Nigerian Weekly Law Reports
SC	Supreme Court
UNEP	United Nations Environment Programme

ABSTRACT

The thesis explores environmental rights protection in Nigeria and South Africa. The research questions are: Are the identified elements of environmental rights reflected in the law and policy of Nigeria? What role has regulatory bodies, the judiciary and civil society played in promoting and protecting the right to a healthy environment in Nigeria and South Africa? What are the social, political and economic factors affecting the implementation and enforcement of environmental rights in Nigeria and South Africa? What are the obstacles to using legal processes for environmental protection in Nigeria? The objectives of the thesis include: to find out whether there is promotion and protection of the right to a healthy environment in Nigeria and South Africa; to find out the factors, if any, responsible for inefficient and ineffective promotion and protection of the right to a healthy environment; to find out the greatest obstacles to using legal processes for environmental protection in Nigeria and to proffer suggestions to make the promotion and protection of the right to a healthy environment effective and efficient. The research is situated in the historical context of environmental degradation in Nigeria and South Africa, where patterns of environmental degradation and pollution are rooted in decades and centuries of massive natural resource exploitation that benefitted a tiny minority while adversely affecting the majority of citizens. Nigeria and South Africa are the largest economies in Africa and face major environmental challenges. Both countries share the Common Law tradition and are state parties to the African Charter on Human and Peoples' Rights. The different approaches to environmental rights protection in their respective constitutions and legislations also provide a fertile ground for comparison. Doctrinal research (documents), interviews and questionnaires provide the data. Data was analysed via descriptive analysis. This thesis finds that framing the right to a healthy environment as a justiciable fundamental right offers many advantages over directive policy principles and it would not hamper development activities that are guided by environmental laws. The advantages include enlarged access to justice in environmental matters; relaxation of rules of legal standing; entrenching public participation in environmental management; increased accountability and adherence to due process by corporations and government; and increasing the importance of environment in the public consciousness. Other advantages include: an enhanced role for human rights bodies; development of environmental rights jurisprudence; and empowering citizens in implementation and enforcement thereby complementing efforts of environmental protection agencies. Findings from the thesis are that although Nigeria has environmental rights in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, the absence of a direct, justiciable environmental right in the Nigerian Constitution has rendered the environmental right ineffectual. Factors affecting environmental law enforcement in Nigeria include ignorance of citizens; lack of capacity of environmental agencies, corruption; and lack of political will. In South Africa, the high economic cost of remediating legacy environmental problems,competing socio-economic challenges and the economic and political clout of large corporate polluters are major factors affecting the enjoyment of the environmental right enshrined in the Constitution. Compared to South Africa, Nigeria is weak in public participation, access to justice, environmental data and the development of environmental rights jurisprudence. Major hindrances to using legal processes to achieve environmental protection in Nigeria include: ignorance by the public of the legal framework; inordinate delay in the judicial system; high cost of litigation and restrictive rules of *locus standi*. These have contributed to a trend in which oil-producing Nigerian communities adversely affected by environmental degradation are suing multinational oil companies in their parent countries. From the survey, majority of legal practitioners are in favour of amending the Nigerian Constitution to make the right to a healthy environment justiciable. They are also in support of interpreting fundamental rights to life, human dignity and property to encompass environmental protection.

CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background of the Study

In an era of looming global environmental crises from climate change and environmental degradation it is indisputable that the quality of human life is tied to the quality of the environment. The quality of life and man's existence is adversely affected by various environmental problems, for which man is the major architect. Those who suffer most from environmental disasters and adverse effects of climate change are the poor, disadvantaged and vulnerable segments of the society and these are found mostly in developing and underdeveloped countries.

The sheer scale of environmental issues at the national and global levels means that national action by itself, while important, is insufficient, and that significant international cooperation is required. Thus environmental protection, like human rights, has evolved through a process of national concern to the stage of internationalisation and globalisation.

A significant development in the global development of environmental law is the articulation of the link between the human rights discourse and environmental jurisprudence. The first formal recognition of the link between the environment and human rights is Principle 1 of the 1972 *United Nations Declaration on the Human Environment* which declared that man has the "fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits of a life of dignity and wellbeing…" A healthy environment has thus been internationally acknowledged as a prerequisite to the effective enjoyment of human rights.

The growth in the magnitude of environmental problems, increasing awareness of environmental issues, increasing recognition of the importance of the environment to the realisation of the right to life and other human rights, and hence the need to provide for

constitutional environmental protection all contributed to the conceptualization of environment in terms of a right.

Recognition of the right to a healthy or safe environment finds expression in regional human rights treaties[1] and constitutional guarantees on the environment. It has also resulted in the development of environmental rights jurisprudence. The growing trend of recognition of constitutional environmental rights is illustrated by a recent study that analysed national constitutions. Out of 192 national constitutions, environmental protection was incorporated in one form or the other in 140 national constitutions with 86 constitutions explicitly recognizing the right to a healthy environment.[2]

Nigeria and South Africa provide valuable material for in-depth national studies on environmental rights jurisprudence. In the past decades Nigeria and South Africa have experienced major developments in the area of environmental protection. The adoption of a new legal order in South Africa has seen the adoption of a national Constitution that provides for a substantive environmental right. It is worthy to note that the Constitution and framework environmental law was the product of wide ranging consultations at all levels of the society. There has also been a dramatic rise in environmental activism and this has been well documented.[3]

In Nigeria, the return to democratic rule after almost two decades of unbroken military rule (with its attendant human rights abuses), has seen a rising awareness of human rights and some increase in environmental awareness. The national Constitution, introduced in 1999 at the restoration of democratic civilian rule, followed the post-1972 trend of constitutionalising

[1] The African Charter on Human and Peoples' Rights (article 24) and the Additional Protocol to the American Convention on Human Rights (article 11).

[2] Boyd, D.R. (2010). The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment. Unpublished PhD Dissertation, Resource Management and Environmental Studies, University of British Columbia, Vancouver, p. 364.

[3] Cock, J. and Koch, E. (eds.) (1991). *Going Green: People Politics and the Environment in South Africa*. Oxford University Press, Cape Town. McDonald, D. (2002) *Environmental Justice in South Africa*. Ohio University Press, Ohio.

environmental protection by its inclusion of an environmental objective.[4] It is also worth noting that the 1999 Nigerian Constitution was largely imposed by the out-going military administration with minimal public participation.

Both countries have enacted far reaching environmental laws in the past few years and there is the need to assess these laws. The courts in both jurisdictions have also recognised the link between human rights and the environment. The best of laws cannot solve deep-seated environmental problems or guarantee environmental protection in the absence of effective enforcement. There is a need to properly understand the social, economic, political and legal factors responsible for the inadequate enforcement of existing laws and proffer solutions.

It is in this wise that this dissertation examines the development of environmental rights jurisprudence, with particular reference to Nigeria and South Africa, implications of the differences in constitutional environmental protection in Nigeria and South Africa. The study also examines how international environmental law and international human rights law aids the courts in giving effect to the right to a healthy environment. The choice of Nigeria and South Africa is informed by the facts that both are major economies in Africa and share the Common Law tradition. Nigeria and South Africa have major environmental challenges that affect the right of their citizens to a healthy environment. The different approaches to environmental rights adopted in their respective national Constitutions and legislations also provide a fertile ground for comparison.

1.2 Statement of the Problem

Nigeria and South Africa are located in Africa and have economies that are dependent to a large extent on extractive industries. However, Nigeria's rate of dependence is far greater. The contribution of the mining industry to South Africa's Gross Domestic Product has declined in the past decades and the country has pursued an aggressive policy of

[4]Section 20, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

industrialisation as a major means of augmenting the shortfall from the mining industry. Instability in the Niger Delta and the volatility of oil prices as well as the dwindling nature of oil and gas reserves have however necessitated policy changes that promote agriculture and manufacturing as alternative sources of revenue for development goals in Nigeria.

Both Nigeria and South Africa have ratified the African Charter on Human and Peoples Rights which provides for the right to environment. However, it remains to be examined and documented, the problems in the promotion and protection of environmental rights.

Thus the dissertation seeks to answer the following questions-

(i) Are the identified elements of environmental rights reflected in the law and policy of Nigeria?

(ii) What role has regulatory bodies, the judiciary and civil society played in promoting and protecting the right to a healthy environment in Nigeria and South Africa?

(iii) What are the social, political and economic factors affecting the implementation and enforcement of environmental rights in Nigeria and South Africa?

(iv) What are the obstacles to using legal processes for environmental protection in Nigeria?

1.3 Justification

It is expected that the practical outcome of this thesis will be of benefit to the following:

1. Nigeria's policy makers as it could guide them in considering what environmental policies to adopt.
2. Members of Nigeria's legislative houses (federal and state) and other bodies responsible for environmental legislation as they seek to enact or amend laws.
3. Members of environmental agencies and bodies as they enforce and implement international and municipal laws and standards.

4. Members of the Nigerian judiciary as they seek to interpret or apply our local laws on the environment together with international law on the environment.
5. Legal practitioners, students, nongovernmental organizations, people engaged in research and the general public.

1.4 Aim and Objectives of the Study

This thesis, which builds upon existing works on environmental rights protection, aims at assessing the promotion and protection of the right to environment in Nigeria and South Africa. Thus the objectives of this thesis include:

1. To find out whether there really is a right to environment in Nigeria and South Africa.

2. To find out whether there is promotion and protection of the right to a healthy environment in Nigeria and South Africa.

3. To find out the factors, if any, responsible for inefficient and ineffective promotion and protection of the right to a healthy environment.

4. To find out the greatest obstacles to using legal processes for environmental protection in Nigeria?

5. To proffer suggestions to make the promotion and protection of the right to a healthy environment effective and efficient.

1.5 Scope of the Study

This study focuses on the promotion and protection of environmental rights in Nigeria and South Africa. It also considers relevant international instruments which strengthen and add vigour to the laws of the two countries.

1.6 Research Methodology

The first methodology is doctrinal. This includes surveying international initiatives and instruments and national instruments on environmental rights. Data is sourced from primary sources such as the laws of the federation and other domestic legislations, and secondary

sources such as journals, textbooks, law reports, reports and newsletters of environmental and civil society groups, reports of regulatory bodies, official statistics, and bulletins. The study analyses the relevant texts from the perspectives of human rights and the environment.

The empirical method of the research consists of interviews with host communities in the locations of research as well as questionnaires administered to target groups in the six geo-political zones of Nigeria. This enabled the researcher to obtain data directly from those most affected by industrial pollution. This also enables the researcher to get different perspectives on the subject matter of the research. Persons who were interviewed are acknowledged accordingly and the sample copy of the questionnaire is attached as appendix A.

1.7 Literature Review

Environmental protection and human rights is a major area of scholarly interest today and a considerable amount of research has been devoted to the subject. A considerable number of books, articles and scholarly writings exist on the area. Several literature and scholarly writings would be relied upon in this proposed study, such as books, law reports, journals and articles. In the main, the major area of concern will be environmental law. In some cases, it will be international environmental law, in others it will be international human rights law, while in others it will relate to the national environmental law of particular states.

Environmentalists are divided on the need for an international declaration or covenant on substantive environmental rights. Shelton argues in favour of giving substantive content to environmental rights as a supplement to procedural rights which have their limitations in securing environmental protection.[5] She notes that instances of legal texts proclaiming the existence of a right to a safe and healthy environment as an independent substantive human right are found predominantly in national constitutions and regional human rights treaties and that there is a need for similar measures at the international level. This is based on her view

[5] Shelton, D. (2009). Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration. A Draft Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 – Dec 1.

that rights based approaches are preferable in achieving environmental protection because human rights are maximum claims on society and elevate concern for the environment above a mere policy choice that may be modified or discarded at will. Shelton, in another article,[6] opines that environmental quality standards, precaution and principles of sustainability can establish the limits of environmental decision making and continue to give specific content to environmental rights in law. Shelton's articles, while relevant for their treatment of environmental rights jurisprudence, are focused mostly on the jurisprudence of the European Court of Human Rights and other regional treaty monitoring bodies and do not deal specifically with Nigeria or South Africa.

Boyle, in contrast, suggests that environmental rights are imprecise and incapable of definition, and are anthropocentric by nature.[7] In a latter work[8] he argues that even in the absence of a clear text articulating the link between human rights and the environment, the existing national and regional human rights instruments, as interpreted by regional and domestic courts, are already going a long way in achieving environmental protection. According to Boyle what is more important is for each society to determine what constitutes sustainable development and an acceptable environment according to its own values and choices, albeit within the confines of internationally agreed rule to some degree and principles and subject to some degree of international oversight. To this extent, Boyle is aligned with the 'proceduralists' who view environmental rights basically in terms of procedural rights.

Boyle, similarly, focuses more on the jurisprudence of the European Court of Human Rights and how it has interpreted the core rights to life, privacy and human dignity to encompass the right to live in a healthy environment. Its gap lies in its failure to discuss the

[6] Shelton, D. (2010). Developing Substantive Environmental Rights. In: *Journal of Human Rights and the Environment*, Vol. 1, No.1, pp. 89-120.

[7] Boyle, A.E. and Anderson, M.R. (eds.). (1996) *Human Rights Approaches to Environmental Protection*. Clarendon Press, Oxford.

[8] Boyle, A. (2009). Human Rights and the Environment: A Reassessment. A Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 – Dec 1.

situation in African countries. It should also be noted that the definitional dilemma is not peculiar to environmental rights but is applicable to many legal terms.[9]

The conceptualization of environmental rights in terms of procedural rights seems to find wide support in the writings of distinguished scholars like Ebbeson, Du Plessis, Pallemaerts and Sands. In the article titled 'Participatory and Procedural Rights in International Matters: State of Play'[10], Ebbeson identifies the support in international law for participatory and procedural rights in environmental matters. He notes that the recognition of these rights has developed essentially from both environmental law and human rights law and that while there is support for these rights in international law; the greatest developments have taken place at the regional level. The shortcoming of the work lies in its focus on participatory and procedural rights in the European Union whereas the instant research is focused on Nigeria and South Africa.

Many African countries have included provisions relating to the environment in their national constitutions. While some confer a justiciable environmental right, others provide for environment as a directive principle. The research by Bruch, Coker and Van Arsdale[11] explores how African constitutional provisions can be utilized to create real, enforceable environmental rights. The report highlights relevant provisions from the constitutions of 53 African countries that could be used to protect the environment. The authors note that although most African states have constitutional provisions that could be expansively interpreted to further environmental protection, there is a marked dearth of cases interpreting and applying them. Various reasons proffered for this include the novelty of the subject matter of these

[9] Definition of the term 'law' is fraught with differing and opposing views by the different schools of jurisprudence.

[10] Ebbesson, J. (2009). Participatory and Procedural Rights in Environmental Matters: State of Play. A Draft Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 – Dec 1.

[11] Bruch, Coker and Van Arsdale (2000). *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*. Environmental Law Institute.

provisions; a general lack of public interest environmental litigation; and a lack of judicial familiarity with public interest litigation.

While the research provides enlightenment on the state of environmental rights in Africa, it is in several respects prone to generalizations; an unsurprising fact given the scope of the research. Moreover, several states in Africa have since implemented constitutional reforms. On-going developments internationally and globally are influencing the perception of the judiciary and this is reflected in decisions increasingly giving effect to environmental rights.

C.S. Ola's *Town and Country Planning and Environmental Laws in Nigeria*[12]is one of the earliest works on environmental law in Nigeria. The author focuses on the use of town planning laws to regulate the use of the environment and various laws pre-1988 laws relating to pollution. The limitations of the work lie in the fact that it was published in 1984, before the enactment of more relevant laws on the environment and before the articulation of environmental rights. Nevertheless, the work is helpful for an understanding of the historical origins of environmental and town planning laws in Nigeria and forms a basis for more recent studies on the environment.

Sada and Odemerho's book titled *Environmental Issues and Management in Nigeria's Development*[13] examines a wide range of issues including the pre-1988 legal and institutionalframework for environmental management. This was written prior to Nigeria's first framework legislation on the environment and provides an understanding of the early history of environmental management. The authors identified the conflict betweenindividual human rights and the operation of the environmental sanitation task forces setup by past administrations. The major highlight of the work was the identification of theneed to respect the fundamental rights in the enforcement of environmental sanitationlaws. In assessing the legal framework for environmental protection and enforcement, theauthors strongly asserted

[12]Ola, C.S. (1984) *Town and Country Planning and Environmental Laws in Nigeria*.Evans Publishers, Ibadan.
[13]Sada, P.O. and Odemerho, F.O. (eds.) (1984).*Environmental Issues and Management in Nigerian Development*.Evans Publishers, Ibadan.

that the legal protection of the environment depends on thetechnological development attained by Nigeria. The work, to the exclusion of recentenvironmental legislation, focuses mainly on common law, criminal law, and theenvironmental sanitation edicts of the various states as tools for environmental management. Since the publication of the book, environmental jurisprudence in Nigeria has highlighted the limitations of the Common Law and Criminal Law in protecting the environment.

Ajomo and Adewale's*Environmental Law and Sustainable Development in Nigeria*[14]examines the relevance and essence of environmental law from the perspective of sustainable development. In it, the authors point out that the problems that hinder the enforcement of sanctions on violators of the environment are political, social, and economic. They asserted furthermore that the environmental laws themselves are products of an environmental paradigm and a state apparatus that are biased in favour of narrow technist views, and the interests of the rich and powerful elements in the society. According to the authors, environmental laws would be effective and achieve sustainable development only if they are integrated with popular environmental management to become participatory environmental management. The gap of the book lies in its failure to provide empirical evidence of the socio-economic factors affecting the effectiveness of Nigeria's environmental protection laws.

On its own part, Omotola's[15] work emphasises the role of private citizens as a compliment to state enforcement of environmental laws. The work also provides measures that should guard against abuse of citizen suit 'provisions' in environmental legislations. The text contains a critical examination of the role of FEPA as well as stresses the need to educate the public about the dangers of environmental pollution. On the need for preventive action to protect the environment, Omotola asserts that the post injury compensation approach is of

[14]Ajomo, M.A. and Adewale,O. (eds.) (1994). *Environmental Law and Sustainable Development in Nigeria*.Nigerian Institute of Advanced Legal Studies, Lagos and the British Council.
[15]Omotola, J.A. (ed.) (1990). *Environmental Laws in Nigeria (including Compensation)*. Caxton Press Ltd, Ibadan.

limited utility when resources of life or its quality which cannot sometimes be replaced are involved. The book did not provide empirical evidence of the socio-economic factors affecting the effectiveness of Nigeria's environmental protection laws.

Ladan, in his recent work, *Trends in Environmental Law and Access to Justice in Nigeria*[16], examines the statutory role of the National Environmental Standards and Regulations Enforcement Agency (NESREA), the principal agency responsible for environmental protection at the federal level as well as some of the environmental regulations made pursuant to the NESREA Act. He discusses some decided Nigerian cases on the environment in analysing the barriers to accessing environmental justice in Nigeria. The work did not provide evidence based research, by way of factors affecting the enforcement of the existing environmental laws and regulations.

In another work[17] taken from the perspective of water pollution, emission control, waste disposal, and the protection of plant and animals, Ladan examines the use of criminal law sanctions for environmental degradation and non-compliance as a tool for environmental protection. According to him, sanctions alone cannot curb pollution. Rather, pollution abatement is dependent upon a number of other features, amongst which are technology, finance, and political support for industries complying with the standards. The work did not provide evidence based research, by way of factors affecting the enforcement of the existing environmental laws.

Ladan, in *Biodiversity, Environmental Litigation, Human Rights and Access to Environmental Justice*,[18] raises the need for an attitude of judicial activism by the Nigerian judiciary in environmental matters as is the trend in other jurisdictions. He examines the relationship between environmental protection and human rights and how the protection and

[16]Ladan, M.T. (2012). *Trend in Environmental Law and Access to Justice in Nigeria.*Lambert Academic Publishing, Berlin.
[17]Ladan, M.T. (2004). *Materials and Cases on Environmental Law*.Econet Publishers, Zaria.
[18]Ladan, M.T. (2007). *Biodiversity, Environmental Litigation, Human Rights and Access to Environmental Justice.*Faith Printers, Zaria.

enforcement of basic rights such as the right to life, right to health and right to privacy have formed a foundation for the articulation of the right to a safe and healthy environment. This work was mostly based on the environmental rights jurisprudence of the Indian courts and the European Court of Human Rights and not the courts in Nigeria and South Africa, a gap which this thesis intends to fill.

Thornton and Beckwith's work titled Environmental Law[19] considers environmental law from domestic, European Union and International Perspectives. According to the authors, coherence in a legal regime may be said to come from the fact that the everyday rules are underpinned by a set of principles, and that these principles are in turn underpinned by an ethical philosophy. There, however remains some difficulty in arriving at the precise definition of some of the principles of environment law. This is a critical issue in view of the fact that the courts apply the concepts of sustainable development and precautionary principle when adjudicating matters relating to environmental rights.[20] The limitations of the work lie in the fact that it tackles the issue of enforcement of environmental law minimally and fails to address the growing role of individuals and groups in the enforcement of environmental law and standards.

Bell and McGillivray[21] address extensively the role of judicial review in the development and enforcement of environmental law. On the issue of standing in judicial review actions, they are of the view that there is still a degree of uncertainty as there have been cases where the courts have required a special interest in the subject matter of the challenge. A major gap of the book is that its primary focus is United Kingdom law.

[19] Thornton, J. and Beckwith, S. (1997). *Environmental Law*. Sweet and Maxwell, London.
[20] See for example the judgment of the High Court of Kenya in *Waweru vs. Republic* (2007) AHRLR 149 (KeHc2007) where the judge grappled with the definition of the precautionary principle.
[21] Bell, S. and McGillivray, D. (2000).*Environmental Law*. Blackstone Press, London.

Okorodudu-Fubara's work[22] is a detailed legal study of environmental issues in Nigeria. The main focus of work is the legal measures for the protection of the environmental media, namely, air, water and land. However, the work adopted the strict legal approach in analysing environmental issues and failed to relate the law to the socioeconomic rights of those affected by industrial pollution. The proposed dissertation seeks to fill this vacuum by placing the law within its social context. Furthermore, the laws analysed in the work have been supplanted by the enactment of legislations that lay down a new legal framework with regard to industrial pollution. The proposed dissertation purposes to critically examine these issues both from a rights perspective and from the perspective of international law.

These texts by Nigerian authors all highlight the importance of environmental issues and how they are no longer viewed as the exclusive preserve of the rich but as issues that affect daily existence of all categories of people. Furthermore they are now global issues that transcend national borders. However there is a marked failure to critically examine the concept of environmental rights as a means of securing environmental protection.

Usman's very recent work titled *Environmental Protection Law and Practice*[23] covers a wide range of environmental protection law issues in Nigeria ranging from analysis of environmental legislations to environmental litigation. He opines that the Nigerian Constitution fails to create any right in favour of citizens to a sound environment and the failure to insert the constitutional provision dealing with environment in the part dealing with fundamental rights points to an intention by the Constitution framers to exclude the right to a sound environment from the fundamental rights of citizens. He argues that the constitutional provision on the environment is not justiciable but a mere policy statement whose breach by the state is unattended by legal consequences. Thus the only useful purpose to be served by the provision is one of fostering a favourable normative climate for environmental protection.

[22]Okorodudu-Fubara, M.T. (1998). *Law of Environmental Protection: Materials and Text*. Caltop Publications, Ibadan.
[23]Usman, A.K. (2012). Environmental Protection Law and Practice. Ababa Press, Ibadan.

Usman's book, like most other Nigerian texts on environmental law only mentions environmental rights, if at all, in passing. There is a failure to mention or discuss how the right to life has been interpreted by the Nigerian court to encompass the right to a healthy environment.[24] He also fails to mention or discuss the environmental right provided for in the African Charter on Human and Peoples Rights. This treaty which has been domesticated into Nigerian law has formed the basis of several litigations in domestic and regional courts.

The Law of Oil Pollution and Environmental Restoration: A Comparative Review[25] by Fagbohun addresses the issue of restoration and remediation. The work examines the existing legal and policy framework for compensation and environmental restoration in Nigeria and attempts a comparison of the existing legal and policy frameworks with those of other jurisdictions involved in oil exploration and production and faced with similar challenges of environmental restoration with regard to oil pollution. Environmental restoration is a pertinent issue in the Nigerian context where oil pollution has wreaked much havoc on the environment and any discussion of environmental rights must tackle this burning issue. The work, however, did not examine the practice of environmental restoration in Nigeria and factors affecting the practice.

Ebeku's work titled *Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues*[26] offers a fresh perspective on environmental issues related to Oil and the Niger Delta people. The work examines issues of oil pollution, resource rights and equity from a 'group rights' perspective. The work examines how the control and ownership of land has been vested in the government by means of legislation such as the Land Use Act thereby depriving the indigenous people of control over the land. The rights of indigenous peoples are treated in detail in this work as well as how their rights under

[24] The case of *Jonah Gbemre vs. Shell Petroleum Development Company and two others*(2005) AHRLR 151 (NgHC 2005)

[25] Fagbohun, O. (2010). The Law of Oil Pollution and Environmental Restoration: A Comparative Review. Odade Publishers.

[26] Ebeku, K. (2005).*Oil and the Niger-Delta People in International Law: Resource Rights, Environmental and Equity Issues*. Oil Gas and Energy Law Intelligence.

international law have been adversely affected by oil exploration and production in the Niger Delta. The work is a good study of the socio-economic impacts of oil pollution. Since the emphasis of the work is on oil pollution and resource control, there is a total failure to examine pollution from manufacturing industries, which is a gap that the proposed dissertation purposes to fill.

The issue of environmental rights has attracted scholarly attention in South Africa most especially in the context of socio-economic rights which are expressly recognized in the South African constitution. Kotze and Du Plessis provide an insight into the important role of environmental rights jurisprudence in South Africa[27].They argue that environmental rights jurisprudence is important for an improved understanding and subsequent strengthening of the environmental protection afforded by section 24[28] of the Constitution; and that the courts' interpretation and application of section 24 may, by virtue of the status of the Constitution, be of significant theoretical value for the subsequent design, amendment, implementation and interpretation of South African environmental law, generally. They note that the elusive wording of section 24(a) and the ambiguity of the positive duties listed in section 24(b) still leave room for speculation about the scope of protection afforded by the environmental right. In this regard, the possibilities and options are legion; the courts have a clean slate since no court has yet attempted to expound on the meaning of a significant part of the environmental right. They conclude that notwithstanding several opportunities presented to the courts to expound on the nature and scope of the right, the role that the courts have played in the

[27]Kotze, L.J. and Du Plessis, A. (2010).Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa.*Journal of Court Innovation*, vol. 3 (1), pp. 157-176.

[28] Section 24 provides that Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

development of constitutional environmental rights jurisprudence since 1996 has been minimal. However, given the impact that environmental rights-based decisions could have, the potential role that the courts could play in the future is significant.

The authors failed to explore possible underlying factors that may be responsible for the alleged underutilization of the environmental right such as the role of social movements in environmental litigation and the influence of environmental education and awareness. These issues are addressed in the thesis.

In another work,[29]Kotze examines the history and development of constitutional environmental provisions in the South African Constitution tracing how the environment has evolved from being regarded as the concern of white elitists to an issue of national concern. He discusses how the environmental right can be related to other human rights such as the right to life, the right to human dignity, right to property, procedural rights, among others, noting the relevance of these to environmental protection in South Africa. He concludes, from the wording of section 24 that the environmental right constitutes the primary source of constitutional entitlements relating to the environment, while various other rights play a supplementary role in giving effect to the substantive elements of the environmental right. A shortcoming of the work is the inability to include recent developments in environmental rights jurisprudence.

Feris and Tladi similarly adopt a strictly legal approach in 'Environmental Rights'[30]. They note that most of the problems on the formulation of the right that exist under international and regional systems are absent under the domestic South African system as its constitution expressly and unequivocally provides for the existence of the right. They argue that a regulatory framework needs to be in place to give effect to the right and that, to the

[29]Koetze, L.J. (2007). The South African Environment and the 1996 Constitution: Some Reflections on a Decade of Democracy and Constitutional Protection of the Environment. *DreitosFundamentais and Justica* N, 1-OUT./DEZ.2007. Retrieved on July 4, 2015 from www.dfj.inf.br/Arquivos/PDF_Livre/DOUTRINA_2.pdf

[30]Feris, L.A. and Tladi, D. (2005).Environmental Rights. In: Brand, D. and Heyns, C. (eds.) *Socio-economic Rights in South Africa*. Centre for Human Rights, University of Pretoria Press.

extent that present legislation does not meet constitutional requirements, section 24 imposes an obligation on the state to bring current legislation in line with the environment. A shortcoming of the work is the inability to include recent developments in environmental rights jurisprudence, a gap this thesis intends to fill. We examine how the courts have practically interpreted section 24 to give effect to the environmental rights of individuals and groups affected by pollution from manufacturing industries, more particularly their right of access to environmental information.

The historical background of South Africa's environmental problems as well as the role of social movements in environmental protection is well documented in several texts. *Going Green: People, Politics and the Environment in South Africa*[31],edited by J. Cock and E. Koch, is a collection of articles on the environment in South Africa as well as the role played by social movements. The work analyses the environmental problems of South Africa from a historical background and traces the roots of the environmental decay and pollution to the apartheid policies which promoted environmental racism. It shows how the apartheid's environmental policies focused on conservation while fostering industrial policies that adversely affected the blacks and coloureds.

The work covers several environmental issues ranging from air and water pollution, biodiversity, ozone depletion to topical subjects like asbestos waste and environmental racism. A major feature of the work is the divergent definitions given to environment including the definition of 'environment' to include the working conditions of workers. Improved socio-economic conditions for black South Africans are seen as issues that environmental policies must necessarily take into account. A shortcoming of the work is the differing, and sometimes contradictory viewpoints of the various authors who are preoccupied with different aspects of environmental protection

[31]Cock, J. and Koch, E. (eds.) (1991).*Going Green: People, Politics and the Environment in South Africa*. Oxford University Press, Cape Town.

Ramphele and McDowell's text[32] follows a similar trend. It traces the historical basis of South Africa's environment challenges and examines how they are rooted in the injustices of the past. The work provides vivid illustrations of the socio-economic effect of industrial pollution on the lives of hitherto marginalized South Africans as well as the linkage between poverty and environmental degradation.

The works are invaluable for an understanding of the very roots of South Africa's environmental problems. However, they are treated mostly from a social-science based perspective that lays emphasis on the role of social movements without a corresponding analysis of the role of the state in formulating environmental policy. Furthermore, a lot of developments have taken place in South Africa since the publishing of these books. There has been the emergence of a new legal order; a constitution which explicitly provides for environmental rights; increased role of social movements in environmental protection and the enactment of comprehensive environmental legislations and aimed at industrial pollution control. In an era of increasing regional integration, the works fail to properly assess its impact as well as that of international law.

Environmental Justice in South Africa[33] provides a critical review of environmental justice in the post-apartheid years particularly how they relate to environmental issues. Written by leading activists and academics in the field of environment, it examines environmental issues from the conceptual framework of environmental justice and traces developments that have taken place since the emergence of a new legal order. It also identifies those areas that are yet to significantly change. The book relates environmental issues to issues of poverty, race, and class. A part of the book is devoted to concrete explorations and illustrations of environmental injustice in the country as well as real-life stories of struggles by workers and communities for environmental change.

[32]Ramphele, M. and McDowell, C. (eds.) (1991).*Restoring the Land: Environment and Change in Post-Apartheid South Africa*.Panos Institute, London.
[33] McDonald, D. (ed.) (2002). *Environmental Justice in South Africa*. Ohio University Press, Ohio.

The Bottom Line: Industry and the Environment in South Africa[34]edited by Bethlehem and Goldblatt comprises of articles written from various perspectives- legal, economic, social and by authors from a wide range of disciplines. It is aimed primarily at incorporating environmental considerations into industrial strategy in Post-Apartheid South Africa. It recognizes the environmental injustices and problems inherent in apartheid South Africa as well as the state's complicity in these problems. An analysis of the Thor Chemicals Case (one of the events that gave impetus to the environmental movement in South Africa) provides a case study of the role played by trade unions in environmental protection. The work is, admittedly, written from the perspective of industry and therefore fails to treat issues primarily from the perspective of environmental rights. Issues relating to the influence of internationalization and globalization on environmental issues in South Africa are treated primarily from the perspective of international trade.[35] It therefore fails to tackle environmental issues from a rights based perspective as its (admitted) objective is industrial development which takes the environment into account.

Du Plessis's thesis titled *Fulfillment of South Africa's Constitutional Environmental Right in the Local Government Sphere*,[36] questions the extent to which the South African legal framework facilitates local government progress in the decentralised fulfilment of the section 24 environmental right in the *Constitution of the Republic of South Africa,* 1996. From a critical review of key international human rights and environmental laws, she identifies a number of generic elements required for the fulfilment of constitutional environmental provisions by governments. These elements are: public participation in environmental governance; collection and dissemination of environmental information; development and implementation of environmental laws, policies and programs; compliance and enforcement of

[34]Bethlehem, L. and Goldblatt, M. (1997).*The Bottom Line: Industry and the Environment in South Africa. Industrial Strategy Project*, Rondebosch, UCT Press.

[35] Bethlehem, L. (1997). Catalysing Change: International Environmental Pressures on South African Exporters.(Chapter 3). In: Bethlehem, L. and Goldblatt, M. op cit.

[36]Du Plessis, A. (2008). Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere.(Unpublished PhD Dissertation North-West University).

environmental laws and standards; provision and maintenance of environmental infrastructure; establishment of environmental partnerships; and environmental education. The focus of the work is local governments or municipalities - government at the grassroots - in South Africa, Germany and Namibia. It therefore did not address the situation in Nigeria nor how environmental jurisprudence has developed in Nigeria and South Africa.

A comprehensive, detailed and innovative work is to be found in *Environmental Change and International Law: New Challenges and Dimensions* edited by E. Weiss[37]. It is one of the earlier works to extensively articulate the link between human rights and the environment. It addressesnew directions in international environmental law including the growing acknowledgement of rights of future generations in international environmental law. Rights of participation, access toinformation, freedom of speech, among others, are highlighted as important for theeffective management of the environment.

Antonio CançadoTrindade, in his contribution titled "The Contribution of International Human Rights Law to Environmental Protection," examines the interrelationship between human rights protection and environmental protection. He notes that in both human rights law and international environmental law the trend has been first towards internationalization (i.e., a recognition of human rights and environmental problems that require limits on state sovereignty) and then towards globalization (i.e., a reflection of the indivisibility of fundamental human rights and of the global nature of environmental threats). CançadoTrindade analyses the emergence of absolute or objective obligations based on the "common good of mankind," framing the discussion in terms of the most fundamental of human rights, the right to life, being added to the right to health.

CançadoTrindade traces the right to a healthy environment to the right to health, which in turn follows from the right to life, with each of those fundamental rights serving to define

[37] Weiss, E.B. (ed.) (1992). *Environmental Change and International Law: New Challenges and Dimensions*. United Nations University Press, Tokyo.

more fully the broader right, the right to a healthy environment. He further illustrates the interrelatedness of human rights and environmental law by examining recent developments in international human rights law, international humanitarian law, and international refugee law, which encompass environmental concerns and thus provide support for the concern for human rights protection found in the realm of international environmental law.

CançadoTrindade then suggests several lessons to be drawn from the development of human rights law that may be applicable to the implementation of environmental rights. The works outlined above have all contributed immensely to the environmental rights debate as well as illustrating how the concept of environmental rights (initially articulated at the international level) is recognized in national constitutions.

Boyd in his recent work[38] examines the growing recognition of the right to a healthy environment and its potential influence on public policy and environmental protection. The work analyses environmental provisions in over 190 national constitutions, surveys 500 environmental law experts, and compares the environmental performance of nations with and without constitutional environmental protection using three comprehensive indices and three time-series. It finds that constitutional environmental protection is incorporated in 140 national constitutions, including 86 constitutions that explicitly recognise the right to a healthy environment. Boyd posits that the constitutional right to a healthy environment has in some states contributed to enhanced enforcement of environmental laws, greater government accountability, a level playing field with other rights, reduced environmental injustice, and improved access to information, public participation in decision-making, and access to justice.

While the preliminary analysis in Boyd's work suggests a positive relationship between environmental protection provisions in constitutions and environmental performance, the sheer bulk of the research involved in examining so many states creates the tendency to generalise, leading to a failure to take into account the peculiarities of respective states. Boyd also failed to

[38]Boyd, D. R., op cit. note 2.

critically examine factors responsible for the non-implementation and poor enforcement of existing constitutional environmental provisions. Nevertheless, the work remains useful in analysing the increasing recognition of the right to a healthy environment at national and regional levels.

Gaps Identified

A major gap identified in the works reviewed is the absence of empirical evidence to show the social, economic and political factors affecting the enforcement of existing environmental laws and hence the protection of the right to a healthy environment. The works also fail to show how the inclusion or non-inclusion of environmental rights in a national constitution affects protection of the environment and the human rights of those affected by industrial pollution. While Boyd's recent work examined the impact of constitutional environmental provisions on enactment of national environmental laws and policies, the sheer scale of his study made it prone to generalisations whereas the instant study is more detailed.

The domestication of environmental rights in a nation's legal system may be reflected in its laws and policies on the environment, the judicial attitude towards environmental protection, opportunities afforded for public interest litigation, and the protection of participatory and procedural rights. In line with Boyd's opinion that additional quantitative research is needed to further explore the impact of constitutional provisions on environmental outcomes, we build on earlier studies by undertaking an in-depth study of these parameters for the domestication of environmental rights in the two largest economies in sub-Saharan Africa - Nigeria and South Africa. We also present empirical evidence via the use of questionnaires, semi-structured interviews and government statistics to determine the major factors responsible for poor implementation and enforcement of existing environmental laws and policies.

The works highlighted have treated environmental rights from a generalized perspective encompassing climate change, conservation, waste management, pollution, among others. For purposes of in-depth analysis the focus of this work is on industrial pollution in

Nigeria and South Africa. Thus, the environmental laws to be analysed and the environmental enforcement agencies examined are primarily in the area of industrial pollution. South Africa is the most industrialized economy in Africa and industrial pollution is a factor affecting the human rights of individuals and groups living near industrial areas. At the same time South Africa, due to its legacy of apartheid, has to contend with third world environmental problems such as municipal waste, sewage disposal and provision of safe drinking water and other basic amenities for the poor majority.

1.8 Plan of the Study

Chapter one is the general introduction. It sets out the conceptual framework and objective of the research, the research problem, and scope of the research, literature review and the plan of study.

Chapter two provides conceptual clarification of the following key terms: human rights, environment, environmental rights, international law, and domestication, and industrial pollution. We examine the development of environmental rights protection in international law and also discuss the intersection between human rights and the environment.

In chapter three, we examine the nature and scope of environmental rights in international and regional instruments and selected national constitutions. We distil the scope of environmental rights from these instruments and constitutions.

Chapter four examines the legal and policy frameworks for the promotion and protection of environmental rights in Nigeria particularly in the area of industrial pollution control. Chapter five examines the legal and policy frameworks for the promotion and protection of environmental rights in South Africa. Chapter six examines the mechanisms for the promotion and protection of environmental rights under the national legal systems of Nigeria and South Africa including how the courts have developed environmental rights

jurisprudence. The chapter analyses the promotion of environmental rights, duties and obligations by states, social movements, and international institutions among others.

Chapter seven is devoted to empirical data presentation, interpretation and analysis of findings. In it we discuss the sources of data as well as analyse the data collected by way of factors affecting the protection of the right to a healthy environment in Nigeria.

Chapter eight is the conclusion of the dissertation. In it we summarize the work, highlight various observations and proffer recommendations.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF KEY TERMS AND HISTORICAL DEVELOPMENT OF THE RIGHT TO ENVIRONMENT

2.1 Introduction

This chapter clarifies key terms and concepts since a proper understanding of these is necessary for the purposes of this study. The chapter also examines how the concept of environmental rights evolved from the realization that environmental issues and human rights are interconnected and that the one cannot be realized or achieved in the absence of the other. It examines past and current important developments at global and regional levels in the area of the protection of the right to a healthy environment and how developments at international levels have affected national constitutions and vice versa.

2.2 Conceptual Clarification of Key Terms

2.2.1 The Concept of Human Rights

In order to explore and assess the conception of environmental rights as human rights, it is important to have a clear understanding of what we mean by 'human rights' and human rights law at the global level. This has important implications for the common classification of environmental rights as a third generation rights and for the differing treatment it receives in various national constitutions. As it is common with most legal terms, there is no universally accepted definition of human rights. This is partly due to the fact that the very concept is construed differently by different schools of jurisprudence and has thus been the subject of intense philosophical debate. Over the years, human rights have been the subject of a multiplicity of discourses, practices, and struggles by people from diverse backgrounds to

achieve particular objectives.[1] This has made it difficult to formulate a unifying theoretical framework encompassing it. Human rights have thus been perceived from different angles. For instance, from a philosophical perspective, it has been said to be "a set of moral principles whose justification lies in the province of moral philosophy".[2] Maurice Cranston defines it as "a universal moral right, something which all men everywhere, at all times ought to have, and something of which no one may be deprived without grave affront to justice… something which is owing to every human being simply because he is human."[3] Cranston's definition falls within the natural law school. However, human rights in Nigeria transcend morality because human rights are expressly enshrined in the Nigerian Constitution and other legislations. Thus human rights in Nigeria are legal rights and not moral rights.

Shestack[4] sees it as "the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit". In line with this reasoning, in *RansomeKuti vs. Attorney General of the Federation*,[5]KayodeEso JSC defined human right as follows:

> …it is a right which stands above the ordinary law of the land and which in fact is antecedent to political society itself. It is a primary condition to a civilized existence…and what has been done by our Constitutions since independence…is to have these rights enshrined in the Constitution so that the rights could be immutable to the extent of the non- immutability of the Constitution itself. [6]

Eze, acknowledging that rights may exist irrespective of legal recognition, posits that "human rights represent demands or claims which individuals or groups make on society, some

[1] According to Costas Douzinas: 'No single theory can capture the multiplicity of discourses, practices, agencies, events and struggles that are using the term 'human rights.'' .See Douzinas, C. (2007). *Human Rights and Empire*: *The Political Philosophy of Cosmopolitanism*. Abingdon: Routledge-Cavendish, p14.

[2]Shestack, J.J. (1998). The Philosophic Foundations of Human Rights. 20 *Human Rights Quarterly*, pp. 201-234, at 202.

[3]Cranston, M. (1973). What are Human Rights? Taplinger Publishing Company. Cited in Shivji, I.G. (1989) The Concept of Human Rights in Africa.CODESRIA.Page 21.

[4]Shestack, J.J. op.cit. note 2, p. 203

[5] (1985) 2 NWLR, (Pt 6), P. 211 At 230

[6] Ibid. p. 230

of which are protected by law and have become part of *ex lata* while others remain aspirations to be attained in the future"[7].

Related to this is the need for a proper distinction to be drawn between human rights and human rights law in the human rights discourse as a failure to do so is partly responsible for misunderstandings between multi-disciplinary participants in debates about human rights.[8] While human rights are claims based on extra-legal sources of authority, human rights *law*, on the other hand is the form in which these 'values' have been concretized in a codification or other legal text or in the form of custom, soft law or customary international law. Thus, while a particular person or category of persons may possess certain rights, the defects in the human rights law may deprive them of the necessary enjoyment of those rights.

For legal positivists, human rights are a set of claims by individuals which have been recognized and legitimized by any particular legal system. The notion of human rights therefore presupposes the existence of a legal relationship between the right-holder and the duty-bearer.[9] This likewise raises questions as to who has responsibility. In human rights jurisprudence states or governments, who constitute the ultimate organized authority in society, are responsible not to interfere with the freedoms and rights of individuals (negative obligations) as well as effect and help to realize certain rights (positive duties).

Human rights have also been understood in the context of claims thus, "those claims made by men, for themselves or on behalf of other men, supported some theory which

[7]Eze, O. C. (1984). *Human Rights in Africa: Some Selected Problems*. Nigerian Institute of International Affairs and Macmillan Nigeria Publishers.

[8]Viljoen, F. (2012). Disciplinary Beyondness: A Background to the Conference and Collection of Papers. In: Viljoen, F. *Beyond the Law: Multidisciplinary Perspectives on Human Rights*. Pretoria University Law Press, p.xiii.

[9] See Hohfeld, W.N. (1913). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *Yale Law Journal* 23, pp.16-59 at 28-37.

concentrates on the humanity of man, on man as a human being, a member of humankind."[10]Umozurike similarly views human rights as,

> Claims which are invariably supported by ethics and which should be supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, colour, sex or other distinctions and may not be withdrawn or denied by governments, people or individuals.[11]

Going by Umozurike's definition, rights may be claimed by groups as well as individuals. Also, rights are founded on ethical or moral considerations and exist prior to and independently of their codification (although codification gives the rights legal backing and enforceability). The existence of human rights is independent of whether they are guaranteed or enforced by legal codes or are socially recognized. For "if the existence of human rights depended on such recognition or enforcement, it would follow that there were no human rights prior to or independent of these positive enactments"[12]. Today human rights rely less on moral considerations having been formally recognized and codified in national and international instruments.

An appraisal of the various definitions of human rights shows that they are based on a belief in the intrinsic value of all human beings as being distinct from every other species and therefore being entitled to certain rights by the very fact of their humanness.

2.2.1.1 Human Rights at the International level

The beginning of a formal recognition of human rights on the international scene coincided with the end of World War II when the countries fighting Hitler's Germany decided after their victory that a new international organization would be needed to promote international peace and security, and that securing human rights in all countries would help

[10]Dowdrick, F. C. (1979) *Human Rights: Problems and Perspectives*. Texts West Mead, Saxon House, London, p.8.
[11]Umozurike, U.O. (1979) *The African Charter on Human and Peoples' Rights*. MartinusNjihoff Publishers, p.4.
[12]Gewirth, A. (1984) The Epistemology of Human Rights. *Social Philosophy and Policy*, Vol. 1 No. 2, pp.1-24

lessen the likelihood of the reoccurrence of large wars.[13] The United Nations was created and shortly after its founding established a committee with the charge of writing an International Bill of Rights, committing the signatories to a new era of respect for human rights — and it was at this time that the term 'human rights' was first used.[14] This international bill of rights emerged in December 1948 as the Universal Declaration of Human Rights (UDHR). Although some diplomats had hoped for a binding human rights treaty that countries joining the UN would have to adopt, the Universal Declaration was a set of recommended standards rather than a binding treaty.[15]

The preamble of the Universal Declaration of Human Rights states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Universal Declaration is regarded by many scholars[16] as embodying customary international law and has set the pattern for subsequent international and regional human rights treaties and in getting countries to include its list of rights in national constitutions and bills of rights.

In the years that followed the adoption of the UDHR the international community failed to agree on a single legally binding Covenant on human rights - a result of ideological differences between the USA and other European states and the USSR and other socialist

[13]Nickel, J.W. 'Human Rights'. The Stanford Encyclopedia of Philosophy (Fall 2010 Ed.) Available at http://plato.stanford.edu/entries/rights-human/ (last accessed 5/6/2013).

[14]Weston, B.H. (1984) Human rights.6 *Human Rights Quarterly,* p.257. See also McLean, K. (2009) *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*. Pretoria University Law Press.

[15] The very process that led to the drafting and adoption of the UDHR was characterized by political and ideological differences. In 1946 when the Commission on Human Rights was established to prepare and submit a report on the International Bill of Rights to the General Assembly of the UN, delegates from primarily English speaking countries in the Commission, argued for a legally-binding and enforceable treaty or convention. The Soviet Union, however, objected, and stated it was only prepared to support a declaration or manifesto of rights — a proposal later endorsed by the United States. Cranston, M. (1967) Human Rights, Real and Supposed.In D.D. Raphael (ed.) *Political Theory and the Rights of Man*, pp. 43- 45.Glendon, M.A. (2002) *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.* Random House, p.85.

[16] Olivier De Schutter (2014) *International Human Rights Law: Cases, Materials, Commentary*. Cambridge University Press, p. 63. Ladan, M.T. (2009) *Law, Cases and Policies on Energy*, *Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria*, A.B.U. Press, pp. 70-71. See also Meron, T. (1989) *Human Rights and Humanitarian Norms as Customary Law*. Clarendon Press, Oxford. Henkin, L. (1990) *The Age of Rights*. Columbia University, New York, p.19.

states in the Cold War era. Finally, in 1952, after much debate, the General Assembly instructed the Commission to draft two covenants, dealing with the two sets of rights separately.[17] These two covenants later became known as the International Covenant on Civil and Political Rights (ICCPR)[18] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19] At the time, the two Covenants were understood to deal with two distinct types of rights: ICCPR being concerned with civil and political rights and ICESCR, dealing with economic, social and cultural rights.

The Universal Declaration, and the treaties that followed it largely define and influence the human rights discourse today and have ensured the global recognition and articulation of human rights and led to the creation of a vast network of laws, treaties, and international organizations. According to Beitz, "if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights."[20]

2.2.1.2 Categorisation of Human Rights

Human rights have been classified into three categories or 'generations' of rights.[21] First generation human rights deal essentially with liberty and participation in political life. They are basically civil and political in nature and include the right to life, the right to fair

[17]Nickel, J.W., op. cit. note 8. Callaway, R. and Harrel-Stephens, J. (eds.) (2007) What are Human Rights: Definitions and Typologies of Today's Human Rights Discourse. In: Callaway, R. and Harrel-Stephens, J. (eds.) *Exploring International Human Rights: Essential Readings*, Lynne Rienner Publishers, pp. 4-10.

[18]International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), 21 U.N GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S 171; 6 I.L.M 368 (1967) (Dec. 16, 1966) [hereinafter ICCPR]. Nigeria acceded to this treaty on July 29, 1993 and South Africa signed it on October 3, 1994 and acceded to it on December 10, 1998.

[19]International Covenant on Economic, Social and Cultural Rights, art.13(1), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Dec. 16, 1966) [hereinafter ICESCR]. Ratified by Nigeria and acceded by South Africa on 29 July 1993 and 12 January, 2015 respectively. The Universal Declaration, ICCPR and ICESCR are together collectively known as the International Bill of Rights. These treaties embodying Universal Declaration rights received enough ratification to become operative in 1976 and have now become the two most important UN human rights treaties. These treaties have been ratified by about 75 percent of the world's countries. See Nickel, J. W. op. cit. note 8.

[20]Beitz, C. (2009) *The Idea of Human Rights*. Oxford University Press, Oxford.

[21] The division of human rights into three generations was initially proposed in 1979 by the Czech jurist, KarelVasek at the International Institute of Human Rights in Strasbourg. Vasek, K. (1977) A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights. 11 *UNESCO Courier*, pp.29-32 at 29.

hearing, freedom of expression, freedom of association and freedom of belief. These rights are enshrined in the UDHR, the International Covenant on Civil and Political Rights and are recognized in most national constitutions as fundamental human rights.[22]

Second generation rights refer to those groups of rights known as economic, social and cultural rights and include the rights to food, housing, healthcare, education, work, employment, culture, social security, among others. These rights are covered by the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These rights are codified as human rights in some national constitutions while in some others they are treated merely as directive principles, thereby placing them on a lower footing. These rights impose a duty on governments to respect, promote and fulfil them but made such duty dependent on the availability of resources. The ICESCR treated these standards as rights to be progressively realized. According to Article 2(1) of the ICESCR, each of the parties is to "take steps, individually and through international assistance and cooperation…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present convention."

Third generation rights are sometimes referred to as solidarity rights[23] or group rights and include the right to environment, the right to development, and the right to self-determination, among others.[24] Some countries and regions have constitutional or human rights mechanisms for safeguarding some of these rights. The right to environment, for example, is recognized in over 80 national constitutions[25] as well as in the African and inter-American

[22] See Chapter IV, Constitution of the Federal Republic of Nigeria, 1999 (as amended). See also Chapter II, Constitution of the Republic of South Africa, 1996 (as amended).

[23]Vasak emphasised the need for concerted action in the effort to deliver certain rights, hence the solidarity tag.

[24]Theron, C. (1997) Environmental Rights: An Overview of Interpretations. *South African Journal of Environmental Law and Policy*,4: 34.

[25] Boyd, D.R. (2010). The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment. Unpublished PhD Dissertation, Resource Management and Environmental Studies, University of British Columbia, Vancouver.May, J. R. (2006) Constituting Fundamental Environmental Rights Worldwide. 23 *Pace Environmental Law Review* 113. Appendix A (Listing constitutional provisions recognizing environmental rights).

human rights systems. In South Africa, for example, the right to a healthy environment is included in the Bill of Rights.[26]

2.2.1.3 Non-justiciability of Socio-economic Rights: A Critique

The notion of a 'hierarchy' of rights and the treatment of some as more important than others was largely created by the Western powers, especially the USA and UK.[27]The colonial history and Common Law heritage of most developing countries are additional influences on the preferred status given to civil and political rights compared to socio-economic rights. It has been noted that the long recognized basic needs of man were not civil and political rights but rather social and economic both in form and substance.[28] These are food, clothing and shelter. For example, Article 25 of the 1948 UDHR contains a formal statement of the right to food at the international level in the following words: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…" The UDHR espouses not merely a right to food, but to food that is adequate to sustain the health and well-being of a person and his family.

Where for example, the majority of people in a state are hungry and uneducated, they are incapable of properly participating in the political process and can be easily manipulated by the elite. Similarly, a polluted environment has adverse effects on life expectancy and the right to life. Notwithstanding the provision of both sets of rights in the UDHR, social, economic and cultural rights (socio-economic rights[29]) are regarded as being of a lower status. This bias

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Earth Justice, Environmental Rights Report, 2008, available at http://www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf.

[26]Section 24, Constitution of the Republic of South Africa, 1996 (as amended).

[27]Mutua, M. (2013).*Human Rights: A Political and Cultural Critique*. University of Pennsylvania Press, p. 2.

[28]Shue, H. (1996) *Basic Rights.*Princeton University Press, Princeton, New Jersey (2nd Ed.). See also Shue, H. (1996). *Basic Rights: Subsistence, Affluence, and US Foreign Policy*. Princeton University Press where Henry Shue argues that everyone has a right to subsistence and that this right is as important as the right to physical security.

[29] The term socio-economic rights is used broadly in this work to refer generally to all the rights referred to as social, economic and cultural rights as well as other rights otherwise known as 'solidarity rights' such as the right

in the human rights discourse towards civil and political rights and the relegation or marginalization[30] of socio-economic rights is contrary to the indivisibility, interdependence and interrelatedness of all human rights.[31]

The international bias is perpetuated on the regional[32] and domestic scene. Consequently, in many national constitutions, while civil and political rights are regarded as fundamental human rights and justiciable, socio-economic rights are recognized only as non-justiciable directives of state policy.[33] Some national constitutions do not even contain socio-economic rights provisions at all.[34]

Justiciable and Unjusticiable Rights Debate

The academic debate on the justiciability of socio-economic rights has a long history. Justiciability concerns the question of whether a matter is suitable for judicial resolution[35] and

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to a safe environment and the right to development. These rights are enshrined in the African Charter on Human and Peoples' Rights.

[30] The failure by the human rights movement to place proper emphasis on economic, social and cultural rights has led scholars to variously refer to this set of rights as 'marginalized', 'second class', 'relegated'. See Agbakwa, S. (2002).Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights.*Yale Human Rights and Development Law Journal*. Vol. 5, pp. 177-216. Odinkalu, C. (2001) Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights*, Human Rights Quarterly*, 23: 327, 339.

[31] The Second World Conference on Human Rights held in Vienna in 1993 reaffirmed the universality, indivisibility, interdependence and interrelatedness of all human rights. This is reflected in many other international instruments. The preamble of the African Charter on Human and Peoples Rights affirms that "Civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality…" Udombana, N.J. (2003) *Human Rights and Contemporary Issues in Africa*.Malthouse Press, Lagos.

[32] For example, although the African Charter affirms the importance of economic, social and cultural rights and provides for them, the African Commission on Human and Peoples' Rights, at its inception, accorded priority to civil and political rights. The then Chairman of the African Commission claimed that the Commission would be overwhelmed with cases if it attempted to make economic, social and cultural rights an immediate priority. See Umozurike, U. O. (1988) The Protection of Human Rights under the (Banjul) African Charter on Human and Peoples' Rights. 1 *African Journal of International Law*, p. 62.The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention] (signed in 1950 and came into force in 1953) contained only civil and political rights and established the European Commission and European Court of Human Rights in order to investigate and adjudicate alleged breaches of the European Convention.

[33] For example, the constitutions of Nigeria (Constitution of the Federal Republic of Nigeria, 1999), Cameroun and Uganda.

[34]For example the Constitutions of Gambia, Cote d' Voire, Zambia, Zimbabwe and Congo.

[35]Addo, M.K. (1988) TheJusticiability of Economic, Social and Cultural Rights. *Commonwealth Law Bulletin* 14: 1425.

is derived from the word 'justiciable' which means proper to be examined in a court of justice.[36] The process leading to the adoption of the ICESCR was characterized by objections as regards the legal nature of socio-economic rights. A number of countries, mostly from the 'West', argued that these rights were incapable of legal enforcement because they are imprecise in nature and their realization is dependent on resources. The rights were also perceived as engendering only positive obligations as opposed to the negative obligations engendered by civil and political rights. In contrast, countries, mainly from the 'East', argued for the legal protection of socio-economic rights, regarding these rights as necessary to guarantee people's socio-economic development and for the protection of the basic needs of the poor such as shelter, food, clothing, access to medical care and work.[37]

The argument that socio-economic rights engender only positive obligations (and so should not be justiciable) while civil and political rights engender negative rights (and so should be justiciable) is based on the conception of human rights as a negative protection of the individual from the state. Hence the state may not interfere with the individual's freedom and liberty (negative obligation not to interfere or infringe on the individual's right). Positive obligations are regarded as a departure from this, as intrusive and likely to result in interference in the functioning of government since they require the government to take particular actions.[38]

This view is misleading as civil and political rights also create positive obligations just as socio-economic rights may also create negative obligations.[39] Civil and political rights are not limited to state abstinence but also impose mandatory duties to undertake specific actions with a view to realizing the rights guaranteed. Realization of the right to life, for example, not

[36] This definition was adopted in *Attorney General of Oyo State vs. Adeyemi* (1982) 3NCLR 846 at 869.
[37] See generally Craven, M. (1995) *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development.* Oxford University Press.
[38] Mbazira, C. (2009) *Litigating Socio-economic Rights*, Pretoria University Law Press, 2009.
[39] Shue, H. (1996). *Basic Rights: Subsistence, Affluence, and US Foreign Policy*. Princeton University Press.

only requires the state not to arbitrarily take away life (negative) but also imposes a duty on the state to protect life (positive). It requires the state to provide for a police force to secure lives and property and maintain law and order, to build courthouses and prisons for the prosecution and detention of those persons who unlawfully deprive others of their lives or who attempt to do so.[40] The right to fair hearing requires the government to provide legal aid to indigent parties[41] and the right to vote raises positive and negative obligations[42]. Human rights bodies have similarly interpreted the right to life to entail positive duties which include taking steps to reduce infant mortality and increase life expectancy[43].

Similarly, while socio-economic rights largely raise positive obligations, they may also engender negative obligations. *In Re Certification of the Constitution of the Republic of South Africa*[44]the Constitutional Court held that at "the very minimum, socio-economic rights can be negatively protected from improper invasion". It is wrong to conclude that only rights which give rise to negative obligations are rights since human rights is viewed, not only in terms of protection, but also in terms of entitlements.[45]

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[40] Scott, C. and MacKlem, P. (1992) Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution.*University of Pennsylvania Law Review*,141 (1): 48-71.

[41] Section 46(4)(b) of the CFRN provides for a Fund to be set up for fundamental human rights enforcement

[42] In *August and Another vs. The Electoral Commission and Others* (1999) 3 SA 1 (CC), the South African ConstitutionalCourt held that the right to vote as guaranteed by section 19(3) of the South African Constitution'imposes a positive obligation upon the legislature and executive'. See Para. 16

[43] In General Comment 6 on the right to life, the Human Rights Committee indicated some of the positive measures that States Parties should take:

> 5. . . . *[T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and* ***the protection of this right requires that States adopt positive measures****. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. (emphasis added)*

General Comment 6, The Right to Life, adopted Apr. 30, 1982, U.N. Doc. HRI/GEN/1/Rev.7, at 128 (May 12, 2004).

[44] (First Certification case) 1996 10 BCLR 1253 (CC).

[45] Du Plessis asserts that a bill of rights is not only a shield against government intervention but a positive guide to opportunities, services, resources and empowerment. Du Plessis, A. (2008) Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere.(Unpublished PhD DissertationNorth-West University).

Another argument advanced for the non-justiciability of socio-economic rights is that they are not real rights but aspirations because their realization is dependent on certain conditions.[46] According to Bossuyt[47], while the realization of socio-economic rights is dependent on resources, civil and political rights can be realized immediately because their realization does not require resources. According to him, all the state has to do is to abstain from infringing them. Davis similarly argues that a social or economic right imposes a duty upon the state to provide certain resources, unlike civil and political rights that require a mere 'non-interference' from the state.[48] Some have justified the non-enforcement of socio-economic rights by reference to the poor economic conditions of many African states while others argue that development is a necessary pre-condition for the implementation of socio-economic rights.[49]

It is submitted that this view is faulty and misconceived and is based on the perception of civil and political rights as negative rights and socio-economic rights as creating positive obligations. Implementation of civil and political rights has immense cost implications yet lack of resources is never accepted as justification for violation of such rights. For the right to life to be protected, a well-trained and equipped police force and army have to be in place. This requires regular and adequate funding. For the right to a fair hearing to be enjoyed, courts have to be built and staffed, the judges and members of the legal profession have to be trained and legal aid has to be provided to the indigent. All these compel expenditure on the part of the government. The cost implication of organizing elections as well as maintaining elected

[46]Cranston, M. (1967). Human Rights Real and Supposed. In: Raphael, D.D. (ed.) *PoliticalTheory and Rights of Man.* Macmillan, London.

[47] See Bossuyt, M. (1975). *La distinction juridique entre les droits civil etpolitiques et les droiteconomiques, sociaux et culturels*' (The legal distinction between civil andpolitical rights and economic, social and cultural rights) *Revue des Droits de l'Homme*. *Human Rights Journal*, 8: 783. Bossuyt, M. (1993) International Human Rights Systems: Strengths and Weaknesses. In Mahoney, K. and Mahoney, P. (eds.) *Human Rights in the Twentieth Century.* MartinusNjihoff, 52.

[48]Davis, D. M. (1992). The Case against the Non-inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles, 8 *South African Journal of Human Rights*, pp. 475, 478

[49]Gittleman, R. (1982) The African Charter on Human and Peoples' Right: A Legal Analysis, *Virginia Journal of International Law*, 22: 667 - 687.

representatives can be very high.[50] In *Re Certification of the Constitution of the Republic of South Africa*,[51]the South African Constitutional Court, in response to the claim that the enforcement of socio-economic (as opposed to civil and political) rights must be dependent on the capacity of a state to afford the cost, stated:

> It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. Acourt may require the provision of legal aid, or the extension of state benefits to a class of people who were formerly not beneficiaries of such benefits.[52]

It is submitted that the claim of lack of resources is a hollow one and insincere since the same governments that claim not to have adequate funds for programmes in health and education devote huge resources to prestige and white elephant projects,[53] while corruption and mismanagement are rife. An enforceable system of socio-economic rights would certainly make fewer resources available for looting as well as providing a platform for citizens to hold government accountable for its actions or inaction. It is also noted that even the very Western countries that refuse to recognise socio-economic rights indirectly recognise it by their provision of a functioning welfare system. The provision of socio-economic goods, which are generally taken for granted in Western countries, is sadly lacking in most of Africa, hence the need to move beyond rhetoric to make express provision for them.

Moreover, while development of a state is likely to boost the realization of socio-economic rights, it is hard to see how a state can develop in the absence of some basic socio-

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[50] It is commonly known that Nigeria has a high cost of governance with AlhajiLamidoSanusiLamido, the then Governor of the Central bank of Nigeria, stating severally that a large percentage of Nigeria's budget is used to maintain the legislature. Editorial (2015) The New National Assembly and Cost of Governance. *The Guardian Newspaper*, 15 May. Retrieved on 12/8/2015 from http://www.ngrguardiannews.com/2015/05/the-new-national-assembly-and-cost-of-governance/... http://www.ngrguardiannews.com/2015/07/high-cost-of-governance-bane-of-nigerias-development/

[51]Op cit.

[52]Op cit. at 1289, Paras.E-F.

[53] An ongoing issue in Nigeria is the construction of multi-billion naira international airports by some states with a large percentage of impoverished and uneducated citizens lacking access to basic necessities of life. While classrooms are often dilapidated with pupils receiving lessons under trees, some of these airports are used by less than 1% of the citizens.

economic rights like education, food, housing and access to health care. It is impossible for a state to develop where the majority of its citizens are illiterate. A report to UNESCO underscores that "[n]ational development hinges on the ability of working populations to handle complex technologies and to demonstrate inventiveness and adaptability, qualities that depend to a great extent on the level of initial education"[54]

Another argument advanced for the non-justiciability of socio-economic rights, what Mbazira describes as the 'Institutional competence based objections',[55] is that judicial enforcement is neither appropriate or feasible for socio-economic rights because their implementation requires allocation of resources among competing objectives of social policy and other forms of affirmative action that should be left to the discretion of politically accountable public officers. The argument that courts are not the democratically legitimate institution to decide matters of policy is not an argument that pertains solely to review of socio-economic rights, but to judicial review in general. It cannot, therefore, be regarded as a blanket objection to socio-economic rights in that it fails to provide a valid reason for distinguishing socio-economic rights from other types of rights.

This view further ignores the shortcomings of democracy and proceeds on the faulty assumption that the representatives will always represent the interests of their constituencies and be responsive to their wishes. The reality in many African states is that those purportedly

[54] *See* Odile Jacob ed. (1996) Report to UNESCO of the International Commission on Education for the Twenty-First Century: the Treasure Within. Quoted in Mustapha Mehedi, *The Realization of Economic, Social and Cultural Rights: The Realization of theRight to Education, Including Education in Human Rights*, Working Paper Presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 50th Sess., U.N. Doc. E/C.N.4/Sub.2/1998/10 (1998). Retrieved on 12/2/2012 from http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame1d70ebdbb5988e7c1802566420051e693?Opendocument. See also Agbakwa, S. C. (2002). Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights.*Yale Human Rights and Development Journal*, Vol. 5

[55] The objection bases its arguments on issues relating to separation of powers and democracy concerns to questioning the democratic nature of the courts and whether they have the technical capacity to perform certain tasks. For a more detailed discussion, see Mbazira, op cit. note 38 (detailing the arguments on this score and the answer to such arguments). McLean, K. (2009) *Constitutional Deference, Courts and Socio-Economic Rights in South Africa.*Pretoria University Law Press.Sachs, A. (1989) A Bill of Rights for South Africa: Areas of Agreement and Disagreement.*Columbia Human Rights Law Review* 21: 1325.

elected are neither representative nor accountable. While some are beneficiaries of rigged elections, the majority is often distanced from their constituencies and is perceived to represent their own interests. Their decisions are often influenced by other factors such as selfishness, political manoeuvrings and political party interests. In such a scenario the judges, who are independent (or supposed to be) of political pressures and impartial arbiters hold out hope as a means of holding the executive and legislature accountable. They are better able to entertain and consider complaints of aggrieved members of the public who consider themselves to have been let down by the political process. In this way the courts act as checks on the other arms of government and ensure that public power is being exercised consistently with the constitution.

The fact that objections are not raised to the justiciability of civil and political rights - which also involve political questions, raise issues of economic and social policy and have budgetary implications- leads to the conclusion that those who oppose the justiciability of socio-economic rights are motivated mainly by ideological preferences.[56] In reality civil and political rights are closely related and inextricably woven with socio-economic rights and the enjoyment or non-realization of the one has far reaching effects on the other. Illiteracy, poverty and other social disadvantages have the effect of curtailing the enjoyment of civil and political rights. According to Justice Bhagwati -

> [for]… the large majority of people who are living in almost sub-human existence in conditions of abject poverty and whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation though representing some of the cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and the well to do, and the only solution for making these rights meaningful to them was to re-make the natural conditions and usher in a new social order where socio-economic justice will inform all institutions

[56]Mutua posits that from the very start, the founders of the human rights movement did not see themselves as charged with the responsibility to address economic powerlessness and that socio-economic rights were marginalized even in the UDHR. According to him, "…the problem is …a fundamental philosophical commitment by movement scholars and activists to vindicate "core" political and civil rights over a normative articulation that would disrupt vested class interests and require a different relationship between the State and citizens and between citizens…***itwas a bias that was more than strategic- it was ideological***." (emphasis provided). See Mutua, M. W. (2009). The Transformation of Africa: A Critique of the Rights Discourse. In: Felipe Gomez Isa and Koen de Feyter, (eds.) *Human Rights and Diversity: International Human Rights Law in a Global Context*, University of Deusto , Bilbao, 2009; Buffalo Legal Studies Research Paper No. 2010-002., pp. 899-924, at p.916.

> of public life so that the preconditions of fundamental liberties of all may be secured.[57]

It is in this light that the that the African Charter on Human and Peoples' Rights, in recognition of the interdependence and indivisibility of human rights, declares in its preamble that "the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights".

The failure of many African governments to safeguard the socio-economic rights of their citizens have contributed in no small measure to the widespread incidence of civil unrest and internal conflicts which in turn hamper development and have grave consequences for civil and political rights.[58] Because governments are increasingly expected to meet the basic needs of their citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action.[59]

Moreover, since a government's legitimacy is largely a function of its ability to guarantee and protect the socio-economic rights of its people, a government loses its legitimacy in the eyes of its citizens when it is perceived to be insensitive to their basic needs.[60] This is especially true of many African states where the failure to provide human

[57] Per Justice Bhagwati in the Indian case of *Minerva Mills v. Union of India* A.I.R. 1980 SC 1

[58] The violence in the Niger Delta has been variously traced to socio-economic injustices, non-enjoyment of most socio-economic rights, while the Boko Haram and the rise of other terrorist groups in the North has a linkage to widespread poverty and lack of education. The Marikana incident in South Africa (where striking miners were shot dead by policemen) involved socio-economic issues.

[59] In its 1979-80 annual report, the Inter-American Commission on Human Rights noted the existence of an "organic relationship between the violation of rights to physical security on the one hand, and neglect of economic and social rights . . . on the other." It further noted that "neglect of economic and social rights, especially when political participation has been suppressed, produces the kind of social polarization that leads to acts of terrorism by and against the government." Inter-American Commission on Human Rights, *Annual Report* 1979-80, at 151 (1980). The Commission reiterated in 1991 that "it is evident that in many cases poverty is a wellspring of political and social conflict." Annual Report 1991, at 305 (1991).Agbakwa, S.C. op. cit. pp. 180-182.

[60]Alemika, E.O. (2000) Fundamental Objectives and Directive Principle of State Policy within the Framework of a Liberal Economy. In: Ayua, I.A. et al (eds.) *Nigeria: Issues in the 1999 Constitution*, NIALS, Lagos, where Alemika notes that the individual's attribution of legitimacy to a government is dependent on his/her subjective evaluation of the extent to which the state has or is promoting interests he or she believes to be important. Going further he states that-

> *The crisis in politically unstable nations such as Nigeria is that the basis for the state is questioned and as a result regimes do not enjoy the consent of important segments of society. In our circumstances both the state and regimes suffer from legitimisation crises*.

survival needs has rendered the state remote and irrelevant from the lives of the citizens. The result is that people lose faith in the process of governance and identify more with their ethnic groupings than the state. Identity politics has, incidentally, been shown to be a contributing factor to internal conflicts within Nigeria.[61]

2.2.1.4 Socio-economic Rights in the South African and Nigerian Constitutions

The South African Constitution[62] provides for justiciable socio-economic rights in its Bill of Rights. The adoption of the Constitution was preceded by debates relating to the justiciability of socio-economic rights as some were of the opinion that such rights should merely exist as directive principles. However the dominant and prevailing view was that justiciable socio-economic rights were necessary to ensure social justice and reduce inequality in a state with a legacy of gross injustice and inequality[63]. The Socio-economic rights provided for include the right to a safe and healthy environment,[64] the right to basic education and further education,[65] the right to gain equitable access to land[66], the right to have access to adequate housing and prohibition of arbitrary evictions[67], the right to have access to health care services, sufficient food and water and social security and assistance[68]. Section 28(1) (c) entrenches children's rights to shelter and to basic nutrition, social services and health care services.

The Constitution first places a duty on the state actively to implement socio-economic rights. Section 2 requires the state to fulfil constitutional duties; section 7(2) requires the state

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[61]Osaghae, E. E. and Suberu, R. T. (2005) *A History of Identities, Violence and Stability in Nigeria*. Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford.
[62]Constitution of the Republic of South Africa of 1996.
[63]Mbazira, C. (2009) op cit. note 38 and Davis, D. (1992) op cit. note 48 for an overview of the debates relating to the justiciability of socio-economic rights that preceded the adoption of the Interim Constitution and the final Constitution of South Africa.
[64] Section 24 Constitution of South Africa
[65] Ibid. section 29.
[66]Ibid. Section 25 (5).
[67] Ibid. Section 26.
[68] Ibid. Section 27

to respect, protect, promote and fulfil rights; and a number of the socioeconomicrights themselves indicate that affirmative steps must be taken to give effect to them.[69] Apart from requiring their implementation, the Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others havefailed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights are translated into legal entitlements that can be enforced against the stateand society by the poor and marginalized to ensure thatappropriate attention is given to their plight.[70]

The Constitutional Court of South Africa has, in its judgments in landmark cases, given legal effect to these rights.[71] These show commendable evidence of the enforceability of socio-economic rights. The protection of these socio-economic rights is crucial in ensuring access of the formerly marginalised black and coloured South Africans to basic goods and services that are needed to make life meaningful.

The 1999 Nigerian Constitution (as amended)[72], in contrast, provides for justiciable civil and political rights and fails to provide for justiciable socio-economic rights. Instead a separate Chapter 2 titled 'Fundamental Objectives and Directive Principle of State Policy' provides the nearest articulation of socio-economic rights. The sections contained therein provide, *inter alia*, for the control of the economy to secure maximum welfare, freedom and happiness of every citizen on the basis of social justice[73]; provision of suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and

[69] Ibid. Sec 26(2) ('the state must take reasonable legislative and other measures' to realise the right to have access to adequate housing).
[70]Brand, D. and Heyns, C. (2005).*Socio-economic Rights in South Africa*. Pretoria University Law Press, p.2.
[71] Some of the well-known Constitutional Court cases in South Africa, which show enforceability of socio-economic rights, include the cases of: *Soobramoney vs. Minister of Health, Kwazulu Natal*1998 1 SA 765 (CC), *Government of the Republic of South Africa and Others vs. Grootboom and Others* 2001 1 SA 46 (CC), *Minister of Health and Others vs. Treatment Action Campaign*2002 5SA 721 (CC), and *Khosa and Others vs. Minister of Social Development and Others* 2004 6 BCLR 569 (CC).
[72]Chapter C 23 LFN 2004.
[73] Ibid. Section 16(1)(b)

pension, unemployment and sick benefits and welfare of the disabled[74]; ensuring just and humane conditions of work[75], adequate medical and health facilities[76], equal and adequate educational opportunities at all levels[77]. Section 20 provides that the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. Section 13, sets out the fundamental obligations of the government to its citizens (as provided for in Chapter II), and states that "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of the Constitution."

These rights were however rendered non-justiciable by virtue of Section 6(6) (c)[78] of the Constitution and therefore cannot be claimed as an entitlement. They have therefore been described as serving symbolic and ideological purposes rather than giving any concrete effect to the security and welfare of the people.[79] The non-justiciability of the provisions of the Constitution on fundamental objectives and directive principles is a major weakness of the Constitution and has generated criticism by constitutional scholars and writers.[80] This has been described by Ladan as evidence of deliberate ignorance of the internationally recognized principle of interdependence of all human rights and evidence of insensitivity to the plight of the poor, homeless, illiterate and marginalized citizens of Nigeria.[81]

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[74] Ibid. Section 16(2)(d)
[75] Ibid. Section 17(3)(b)
[76] Ibid. Section 17(3)(d)
[77] Ibid. Section 18(1)
[78] Ibid. Section 6(6)(c) provides that-

> The judicial powers vested in accordance with the foregoing provisions of this section…shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by authority or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of state Policy set out in Chapter II of this Constitution.

[79] Alemika, E.O. (2000).*Op. cit*. note 60, p. 200
[80] Alemika, E.O. (2000). *Op cit*. note 60. Gye-Wado, O. (2000) Fundamental Human Rights and Corresponding Civic Obligations under the 1999 Constitution. In: Ayua et al. (eds.) Op cit. Joyce, E.M., and Igweike, K. (1982) *Introduction to 1979 Nigerian Constitution*. The Macmillan Press, p. 56.
[81] Ladan, M.T. (2009) *Law, Cases and Policies on Energy*, *Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria*. A.B.U. Press, p.329

To take away a right from judicial enforcement is to render it ineffective and meaningless to the majority of citizens since judicial remedies constitute the principal guarantees of human rights. Where adherence to the principles encapsulated in Chapter II is left to the discretion and will of the very organs of government whose responsibility it is to conform, observe and apply, such principles are likely to be observed more in the breach than in practice.

While human dignity is sought to be protected by the UDHR and all international human rights instruments, real human powerlessness and indignity arise mostly from social and economic conditions. Non-enjoyment of basic rights like food, housing, work and education represent a major assault on the dignity of man and ensure the non-realization of civil and political rights, for as Justice ChukwudifuOputa stated:

> The fundamental rights provisions of our Constitution (dealingwith civil and political rights) cannot be appreciated let aloneenjoyed in a state of utter illiteracy and abject poverty. To attaintrue liberty and freedom the average [citizen] needs to have equalaccess to . . . decent housing and health services. If theseopportunities are not equal and, or, equally accessible, then the talkof liberty, of equality or even justice will be a far cry . . . [82]

While the fundamental objectives and directive principles are not directly justiciable, they can be made enforceable by the National Assembly enacting implementing legislation. Read together with section 4 of the Constitution, Item 60(a) of the Second Schedule to the Constitution empowers the National Assembly to establish and regulate authorities for the federation or any state "to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution."

It is for this reason that the Supreme Court held in the case of *Attorney-General of Ondo State vs. Attorney-General of the Federation and Others*[83] that, while the fundamental objectives and directive principles are not directly justiciable, they can be made justiciable by

[82] C. A. Oputa, *Commentary*, *in* All Nigerian Judges Conference Papers, 1982, at 290(A. G. O. Agbaje ed., 1983).
[83] (2002) FWLR Part III p. 1972 (Hereinafter referred to as Attorney-General of Ondo State)

the National Assembly enacting implementing legislation.[84]Laws that have been enacted to give effect to the provisions of Chapter II include the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, the National Minimum Wage Act 2011, the Child's Right Act 2003, Compulsory, Free, Universal Basic Education Act 2004 and the National Health Act, 2014.

2.2.2 The Concept of Environment

Writings indicate that there does not appear to be a universally accepted definition of environment. The definitional dilemma was well articulated by Kiss and Shelton who observed that 'environment' can signify any point on a continuum between the entire biosphere and the immediate surroundings of a person or a group.[85] However, a proper understanding of the term is required as it also affects ones perception of environmental law. This agrees with the view of Kiss and Shelton who consider the definition of the term 'environment' crucial for setting the boundaries for the assessment of environmental issues and for determining the legal regime that applies for resolving questions on legal responsibility or harm to the environment.[86] The definition of the term also indicates the value placed on the environment and the focus of environmental legislation in a particular jurisdiction.

The legal definition or concept of the environment is characterized by diverse views and definitions. For the purpose of Nigerian law the statutory definition is to be found in the *National Environmental Standards and Regulations Enforcement Agency (NESREA) Act*[87], which defines the environment as including 'water, air, land and all plants and human beings and animals living therein and the interrelationships which exist among these or any of

[84] See Chapter 4 for a more detailed discussion of the decision in AG Ondo state v. AG Federation and others.
[85]See Kiss, A. and Shelton, D. (1991) *International Environmental Law*. Transnational Publishers Inc., p. 22.
[86]Kiss, A. and Shelton, D. (1997). *Manual on European Environmental Law* (2nd Ed.)
[87] No.25, July 30, 2007.

them'[88]. This definition is restricted to the physical or natural environment, comprising God-given natural resources and natural elements, whether or not modified by man.

The *Environmental Impact Assessment (EIA) Act*[89] defines environment broadly to mean the components of the earth, and includes land, water and air including all layers of the atmosphere. It also includes all organic and inorganic matter and living organisms and the interacting natural systems that include the components referred to. The term 'environment' is sometimes understood to refer to the basic elements of the earth, such as the air, land and water. These are also known as the environmental media. Some definitions consider the environment to consist only of those natural resources upon which humans place a value, that is, aspects of the earth, sky and waters that can be polluted or used up. Another definition might include all living elements of the earth as resources, but not include humans in that definition or define the environment as it relates to humans. Such definitions are deficient for their failure to place humans within the environment, divorcing humans from the natural environment and implying that humans are somehow above or beyond nature.[90]

The place of humans in the environment is increasingly being reflected in definitions of the environment. The *World Charter for Nature* adopted by the United Nations General Assembly in 1982 states that:

> Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. Civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement and living in harmony with nature gives man the best opportunities for the development of his creativity and for rest and relaxation.[91]

The Judicial definition in Nigeria seems to depart from the broad trend in favour of a narrow interpretation. In considering the meaning of 'environment' in the case of

[88]Section 37, NESREA Act.
[89] Chapter E12, LFN 2004, section 61.
[90]Ladan, M. T. (2004) *Materials and Cases on Environmental Law*. Econet Publishing Co Ltd. Zaria, Nigeria, p. 1
[91]World Charter for Nature, UN Resolution37/7, 1982; 22LLM 455 (1983).

AttorneyGeneral of Lagos State vs. Attorney General of the Federation[92] and others the Supreme Court referred to the Collins English Dictionary which defines environment as "External condition or surroundings in which a plant or animal lives which tend to influence its development and behaviour' The Supreme Court in its judgment defined the environment as "the natural conditions, for example land, air and water, in which people, animals and plants live."

The definition is narrow in scope as it excludes from the meaning of environment the non-natural environment such as aesthetic and social circumstances and the built-up environment. In the same case, however, Justice Niki Tobi(JSC) of the Supreme Court of Nigeria adopted the definition of environment in the *Black's Law Dictionary* which defines environment as the "totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of peoples' lives."[93]

A critical examination of the instant case reveals that the Supreme Court preferred the narrow definition of environment over the broad one in a bid to exclude matters relating to town and country (urban and regional) planning, which are residual matters within the competence of the states only, from the power of the Federal government over the environment under Section 20 of the 1999 Constitution. The learned Justices of the Supreme Court agreed with the Attorney General of Lagos state in his contention that Section 20 is concerned entirely with environmental objectives under the State Policy and was never intended as a basis for the conception, design and implementation of an urban/town and regional plan for the Federation of Nigeria.[94]

[92](2003) 7 MJSC 1 at 156.
[93]*Black's Law Dictionary* (6th ed.), St. Paul, Minn. West Publishing Company. (1990) at p. 1045
[94] See Chapter 4.2 for a review of the judgment of the Supreme Court in the instant case on the meaning, nature, and scope of the environmental provision in Section 20 of the Nigerian Constitution.

A holistic definition of environment should recognise the place of man in the environment. It should also encompass both natural and man-made components of the environment, including the entire range of living and non-living factors that influence life on the earth. For environmental law and regulation to be meaningful it must adequately recognize the mutual relationship and interdependence between humans and the environment. It is on this score that the World Commission on Environment and Development (WCED) warns that "environment" does not exist as a sphere separate from human actions, ambitions and needs and that any attempt to define it in isolation from human concern will give that very word a connotation of naivety in some political circles[95].

The broad approach is evident in the definition of environment under the South African *National Environmental Management Act* (NEMA).[96] According to NEMA, environment means the surrounding within which humans exist made up of –

(i) the land, water, and atmosphere of the earth;

(ii) microorganism, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.[97]

On the international scene, the definition given to the environment has been wide. The *International Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*[98] includes in its definition of environment, both biotic and abiotic natural resources. This definition has the effect of covering not only the natural environment but also

[95]World Commission on Environment and Development, (1997) Our Common Future, Oxford University Press, New York, pp1-2.
[96]Act 107 of 1998.
[97]Section 1, ibid.
[98] June 21,1993, Lugano, 32 LLM 1228 (1993)

the man-made environment, including man-made landscapes, buildings and objects which form part of man's cultural heritage. The definition also, as in the Environmental Impact Assessment (EIA) Act, makes specific mention of the interactions between various elements of the environment. The *1972 Declaration of the United Nations Conference on the Human Environment*,[99] in its preamble, provides that both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.

The term environment can thus be understood to include the ways in which the environmental media interact with one another, and the ways in which they interact with the man-made environment and with the flora and fauna which inhabit them. The broad approach to understanding the environment is adopted in this study.

2.2.3 The Concept of Environmental Rights

Writings on environmental rights and legal instruments providing for the right define environmental right in varying ways. This indicates that there is no universally accepted definition of the term.[100] However, a survey of national, regional and international legal instruments, judicial decisions and comments of human rights bodies on environmental rights reveal that environmental rights can be classified as either substantive environmental rights or procedural environmental rights.

Treaties, constitutions and legislations codifying the substantive environmental right use several adjectives to qualify the right. Words such as healthy, satisfactory, clean, ecologically balanced, viable, satisfactory, suitable have been used in different legal instruments to describe the environmental right. Procedural environment rights essentially

[99] Available at www.unep.org/documents.Multilingual/Default.asp?documentid=97&articleid=1503 (last accessed on July 5, 2012)

[100] It has been argued that this definitional dilemma is not peculiar to environmental right as it is pervasive in law, especially in human rights law. See Kiss, A. and Shelton, D. (2007) *Guide to International Environmental* Law.MarthinusNijhoff Publishers, Leiden, p.23.

includes freedom of environmental association, public access to information on the environment, public participation in environmental decisions making processes and access to judicial and administrative redress and remedies (access to justice)[101] Procedural environment rights are enabling and empowering rights as they make it possible for people to participate in environmental governance and contribute actively to the protection of their environment.[102]

Procedural rights are largely derived from two branches of international law- international human rights law and international environmental law. The international debate on procedural rights was trigged by the *Rio Declaration on Environment and Development*[103]when it was recognized that environmental governance even in national contexts could no longer be considered a national concern only.[104] According to Ebbesson, "the national contexts thus became internationalized"[105]. In general, procedural human rights linked to environmental protection receive more attention than substantive environmental rights in legal instruments, jurisprudence and in doctrine[106]. In jurisdictions where there is no provision for substantive environmental rights, existing constitutional rights have been mobilized for environmental protection[107]. This researcher is of the view that the bias towards procedural rights is reflective of the primacy afforded civil and political rights (which are participatory in nature) over socioeconomic rights.

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[101] Part III, Draft Principles on Human Rights and the Environment op. cit., provides a comprehensive formulation of procedural environmental rights. See also Principle 10 of the Rio Declaration.

[102] See Boyle, A. (2009). Human Rights and the Environment: A Reassessment. A Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 – Dec 1. Procedural environmental rights have been described by Gearty as important vehicles in conveying the message of environmental protection. Gearty, C. (2010) Do Human Rights Help or Hinder Environmental Protection? Vol. 1 No.1 *Journal of Human Rights and the Environment*, pp. 7-22.

[103]United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N Doc.A/CONF.151/26 Rev.1 (vol. I), Annex I (Aug. 12, 1992).

[104]Ebbesson, J. Participatory and Procedural Rights in Environmental Matters: State of Play, A Draft Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 –Dec 1, 2009.

[105] Ibid

[106] Shelton, D. (2010). Developing Substantive Environmental Rights.Vol. 1, No. 1, *Journal of Human Rights and the Environment*, pp. 89 – 120, p.90.

[107] See Bruch, C. Coker, W. and Van Arsdale, C. (2000) *Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa*. Environmental Law Institute.

According to Dejeant-Pons and Pallemaerts[108],

> (i)n its most basic form, the right to environment could be equated with the existence of an environment fit to sustain human life and the right implies a level of environmental quality which is sufficient to ensure not only bare survival, but also the satisfaction of basic human needs when read with the right to dignity."

Shelton[109] views the right to environment in terms of a substantive right. She notes that instances of legal texts proclaiming the existence of a right to a safe and healthy environment as an independent substantive human right are found predominantly in national constitutions and regional human rights treaties and that there is a need for similar measures at the international level.

Boyle, on the other hand, adopts the procedural approach of conceiving the right in terms of procedural rights of public participation in environmental decision making, access to information on the environment and access to justice in environmental matters. He regards substantive environmental rights as imprecise and incapable of definition. According to Boyle what is important is for each society to determine what constitutes sustainable development and an acceptable environment according to its own values and choices, albeit within the confines of internationally agreed rules and principles and subject to some degree of international oversight.[110] In his opinion then what is more important is to ensure the right processes for making this determination both internally and internationally, rather than to define some vision of its substantive outcome.

In reality it is difficult to draw a rigid separation between substantive and procedural environmental rights since procedural environmental rights are not ends in themselves, but meaningful as means towards the end of protecting the substantive right to live in a healthy

[108]Dejeant-Pons, M. and Pallemaerts, M. (2002) *Human Rights and the Environment*.Council of Europe Publishing, Germany.
[109] Shelton, D. (2010). Op cit., note 106.
[110] Boyle, A. (2009) Op cit., note 102.

environment. Also, legal instruments providing for the right to a healthy environment provide for both substantive and procedural components of the right.

The right to a healthy environment, as understood in the context of human rights, is anthropocentric in nature[111]. While there are attempts to view environmental rights from an ecocentric lens[112] (Ecuador, for example, in 2008 adopted a new Constitution that grants legal rights directly to Nature[113]), a definition of the right in terms of animals or of nature does not fit the human rights discourse because the right holders, if an environmental right is so understood, are not humans.[114] Moreover, environmental rights in this study are viewed as human rights which are a human centred field of law. There are increasing calls for environmental rights to move beyond rigid anthropocentrism or mere people-centredness to a flexible anthropocentrism that takes into account ethical, aesthetic, historical, cultural and religious convictions based on the instrumental worth of the environment.[115]

While the right has been criticized as being anthropocentric, it is hard to distinguish any part of the ecosystem that is not of benefit to the well-being of present and future generations. It is therefore impossible to separate human interest from the protection of the environment,

[111] The anthropocentric, human-centred approach holds, in an environmental context, that a healthy and sustainable natural environment should be maintained for the sake of human well-being as opposed to for the environment's own sake. As a holistic approach to the environment, the anthropocentric approach rejects the separation of human beings and their environment but acknowledges a symbiotic relationship of existence between them. Glazewski, J. (2005) *Environmental Law in South Africa* (2nd Ed.) LexisNexis Butterworths, Durban.

[112] The ecocentric approach suggests that on the one hand, rights should be afforded to the natural environment and on the other hand, that existing environmental rights (as rights afforded to people) should be interpreted not in terms of the value they afford to humanity, but in line with the environment's intrinsic worth. Stone, C.D. (2010) *Should Trees Have Standing?Law, Morality and the Environment*.Oxford University Press.

[113] Anonymous (2008) Ecuador Constitution Grants Rights to Nature,' *New York Times*, September 30. Art. 71 of the Ecuador Constitution provides:

> *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 the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution*.
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> Cited in Boyd, D. op cit. note 2, p.111.

[114] Nickel, J. W., op. cit., note 13.

[115] See Du Plessis, A. (2008).Fulfilment of the Constitutional Environmental Right in the Local Government Sphere (Unpublished PhD Dissertation, North West University), pp. 40-56. Bosselman, (2003) *Yearbook of Human Rights and Environment*, p. 20.

which reasoning is deducible from the draft Declaration of Principles on Human Rights and the Environment which proclaims that "All persons have the right to 'a secure, healthy and ecologically sound environment" and "to an environment adequate to meet equitably the needs of present generations and does not impair the rights of future generations to meet equitably their needs".[116]

Section 24 of the South African Constitution provides for an environmental right in the following words: Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This provision is a fundamental human right[117] in South Africa since it forms part of the South African Bill of Rights. It forms the basis of the environmental governance regime in South Africa and has inspired the enactment of a substantial number of environmental laws.[118] The Supreme Court of Appeal in the case of *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd vs. Save the Vaal Environment and Others ('Save the Vaal')*[119]

[116] Draft Declaration of Principles on Human Rights and the Environment. E/CN.4/Sub.2/1994/9, Annex I (1994). Retrieved on 03/11/2014 from https://www1.umn.edu/humanrts/instree/1994-dec.htm

[117] While human rights refer generally to the rights enshrined in international law instruments, fundamental rights refer to those rights that are incorporated in special provisions (E.g. the Bill of Rights) in National Constitutions. See Venter, F. (2000). *Constitutional Comparison Japan, Germany, Canada and South Africa as Constitutional States.*Juta, Cape Town, pp.129-130, stating that in most cases where fundamental rights have been incorporated in a constitution, some classic human rights are 'transformed' into constitutionally enforceable fundamental rights. See also Du Plessis, A. (2008) op cit.; Theron, C. (1997) op cit., p. 29 (on the classification of the environment as a fundamental human right). While the above is the case for South Africa and some other jurisdictions, in Nigeria the environment cannot be described as a fundamental right due to its non-inclusion in the Chapter Four Fundamental Human Rights.

[118] See Chapter 5.

[119][1999] 2SA 709 SCA.

further recognized the special status of the environmental rights describing them as *fundamental, justiciable human rights*.[120]

For the purpose of this study, environmental right is viewed as encompassing both substantive environmental rights and procedural rights. A substantive environmental right is considered in this study to be the right of a person or group to a healthy environment or an environment adequate to human wellbeing.[121]It refers to basic substantive legal entitlements derived from environmental clauses contained in instruments such as regional human rights instruments, some international and regional environmental law instruments and domestic constitutions. A substantive environmental right provides for the promotion of an environmental of a particular quality and may be expressed in terms of such as 'all persons shall have the rights to a secure, healthy and ecological sound environment'[122] Procedural rights, in the context of this study, is based on common usage in international and regional law and encompasses public participation in environmental decision making, access to information on the environment and access to justice.[123]

Questions arise as to the subjects of the right (i.e. those entitled to the right). Is the right an individual right or a group right (i.e. to be enjoyed collectively). The answer depends on the context or perspective from which the right is viewed. Where environment is treated as a collective or solidarity right[124], it gives communities (or people) rather than individuals the right. Where environment is treated as an economic or social right, for example in the South

[120]Ibid.,para. 19, at 718–719 (italics added).

[121] For a detailed discussion of the relationship between human rights and the environment and a proposed Draft Principles on Human Rights and the Environment, see UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Final Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1994/9, princ.4 (July 6, 1994).

[122] See Article 2 of the proposed Draft Principles on Human Rights and the Environment, op cit. For different national formulations of the right, see Environmental Rights Report (2008) Human Rights and the Environment. Available at www.earthjustice.org/sites/default/files/library/reports/2008-environmental-rights.report.pdf (last accessed July 4, 2012). See also May, J. R. (2005). Constituting Fundamental Environmental Rights Worldwide, *Pace Environmental Law Review,* 23: 113.

[123] In this study the terms, procedural rights and participatory rights are used interchangeably and may refer to any or all of the procedural rights.

[124]As in the African Charter on Human and Peoples Rights.

African Constitution, comparable to those whose progressive realization is promoted by the UN Covenant on Economic, Social and Cultural rights, it could be asserted or claimed by individuals.

Environment degradation often affects groups of people[125] and thus it may be argued that the right should protect groups and not just individuals. The African Charter on Human and Peoples Rights frames environmental rights as a group right by its use of the words "all peoples." They are not individual, but collective; they belong to groups, communities or peoples .When the group secures the rights in question, then the benefits redound to its individual constituents and are distributed as individual human rights.[126] On the other hand, some instruments formulate the right as an individual right. Majority of domestic constitutions and statutory provisions formulate the right in terms of an individual right. Section 24 of the South African Constitution, for example, frames the right as an individual one. The Additional Protocol to the American Convention on Human Rights also frames it as an individual right.[127]

Confining the environment right to group rights will not cover instances where an environment problem is so localized as to affect only the person(s) living near the source of the problem. In such a situation, the individuals whose rights have been infringed by the state or private actor would be foreclosed from bringing an action except the entire community or population of the area is involved,[128] e.g. the Ogoni people.

[125] See for example, the cases of indigenous oil producing communities in the Niger Delta that have been devastated by decades of oil pollution; the 1984 Bhopal gas disaster in India which claimed many lives and affected the health of hundreds more.

[126]Kiwanuka, R. N. (1988). Meaning of People in the African Charter on Human and Peoples' Rights.*American Journal of International Law,* 82: 80.

[127] Article 11 provides that everyone shall have the right to live in a healthy environment

[128] Boyle posits that environmental rights are not inherently collective in character except in certain contexts where collective rights (such as the protection of indigenous people and minority cultures) have environmental implications. See Boyle, Op. cit. note 102, p. 2. Glazewski, on the contrary, notes that since environmental rights fall within the scope of third generation rights, they cannot be exercised by individuals per se, but rather by groups of people. Glazewski, J. (1991). The Environment, Human Rights and a New South African Constitution.*South African Journal on Human Rights*, pp. 167-172.

Limiting the environmental right to an individual is also not satisfactory as in most cases environmental degradation affects groups of people. Feris and Dire[129] argue that although the South African constitution frames the right as an individual right and not a collective one, groups may utilize the broadened standing provisions in section 38 of the South African constitution to enforce the environmental rights where the infringement is of a collective nature. From the foregoing it can be seen that the environmental right has both collective and individual aspects.

Determining the subjects of the rights also raises the question: is the right to environment to be enjoyed by the present generation only or does it include future generations? This question arose in the landmark case of *Minors Oposa vs. Secretary of the Department of Environment and Natural Resources*,[130] a case based on the environmental rights provided in the Philippines Constitution[131]. In its judgment, the Supreme Court of the Philippines held that every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology. They held further that "the minors' assertion of their rights to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come." This is a notable instance of a judicial decision upholding the rights of future generations to environment[132].

The extension of the rights to future generations is reflected in section 24 of the South African constitution which provides that "…everyone has the right… to have the environment

[129]Feris, L. and Dire, T., op cit. pp. 258-259

[130] The full citation is *Juan Antonio Oposa et al vs. Fulgencio S. FactoranJr (acting in his capacity as the Secretary of the Department of Environment and Natural Resources) et al* (G.R, No. 101083). Retrieved on 5/7/2016 from www.elaw.org/node/1343.

[131] Section 16, Article II of the Philippines 1987 Constitution explicitly provides: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

[132] See also the judgment of Weeramantry of the ICJ in the case of *The Gabcikovo-Nagymaros Dam Project (Hungary/Slovakia)* 37 I.L.M. 162 (1998) 200

protected for the benefit of present and future generations". This is in line with international environmental law developments.

The principle of intergenerational equity, which has been popularized by Edith Brown Weiss provides that the present generation owes a duty to future generations to preserve the environment.[133] Each generation is thus entitled to inherit the earth in at least as good condition as it had been in for the previous generation and to have as good access to it as previous generations.

Opponents of the principle, on the other hand, argue that future generations cannot have rights because rights exist only when there are identifiable interests, which can only happen if we can identify the individuals who have interests. Their view is that since we cannot know who the individuals in the future will be, it is not possible for future generations to have rights[134].

Edith Brown Weiss counters this argument by asserting that the reasoning behind it is based on narrow traditional view of rights as applicable only to identifiable individuals. She posits that on the contrary, generational rights are not rights possessed by individuals but are, instead, generational rights which must be conceived of in the temporal context of generations. Moreover, those generations hold these rights as groups in relation to other generations-past, present and future[135]. This view is related to other approaches to rights, such as the Islamic approach which treats human rights not only as individual rights, but as "rights of the community of believers as a whole."[136] With regard to the thorny issue of standing to sue, Weiss advocates that the enforcement of these intergenerational rights can be done by "a

[133] Weiss, E.B. (1990). Our Rights and Obligations to Future Generations for the Environment.*American Journal of International Law*, pp. 198-207.
[134] See Parfit, D. (1976). On Doing the Best for Our Children.In Bayles, M. (ed.) *Ethics and Population*, 100; and Parfit, D. (1982). Future Generations, Further Problems. *Philosophy and Public Affairs*, 11: 113. Cited in Weiss, E.B. (1990) Our Right and Obligations to Future Generations for the Environment, op cit., note 133, pp. 30-31.
[135] Weiss, E.B. (1990). Our Rights and Obligations for Future Generations for the Environment.Op cit., note 133.
[136] See Khaduri, M. (1984). The Islamic Conception of Justice, 223.Cited in Weiss, E.B. (1990) Our Rights and Obligations for Future Generations for the Environment op. cit. note 133.

guardian or representative of future generations"[137]. This, she argues, could take the role of an ombudsman who will have standing to sue on behalf of future generations.

The principle of intergenerational equity is not foreign to Nigeria but is also reflected in the indigenous land law of Nigerian ethnic groups. Chief Elesi of Odogbolu, confirmed this while testifying before the West African Lands Commission in 1908 as follows, "I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn."[138] In *Olowosaga vs. AlhajiAdebajo and others*,[139] the court noted that, under native law and custom, land is regarded as inheritable property not only belonging for the use of the current generation, but also for generations' unborn belonging to the family. The current generation of children is therefore holding land in trust and as a sacred object for their own use and generations after then.

Thus the principle of intergenerational equity is inherent in indigenous land law and has been expressed severally as an element of sustainable development and supported by several international instruments on the environment.[140] It is the opinion of the researcher that any discussion of the right to environment that excludes future generations is deficient.

A relevant question in the discussion of the nature and scope of the environmental right is, 'who is the respondent of the right?' Who is the person or persons who have correlative duties or responsibilities or to whom do the corresponding duties entailed by the right apply? Does the right apply only to the state or to both the state and private individuals? In other

[137] Weiss, E.B., op cit. note 133.

[138] *West African Lands Commission Report* (1908) p.183, para. 1048. Chubb noted that under the land tenure of the Igbos, the interest of the dead and unborn count more than that of the living with the living serving only as trustees. See Chubb, L.T. (1961). *Ibo Land Tenure*. Ibadan University Press, Ibadan, p. 18.

[139] (1988) 4 N.W.L.R (pt. 88) 275.

[140] Principle 2 of the 1972 Declaration of the United Nations Conference on the Human Environment and principle 3 of the Rio Declaration on Environment and Development. Retrieved on 5/7/2012 from (www.unep.org/documents.multilinguoal/Default.asp?documentid=78&articleid=1613, last accessed July 5, 2012)

words, does the right have both vertical and horizontal application? According to Gewirth[141], the human beings are both subject and respondents of human rights, although in certain respects governments have special duties to secure the rights. This view is based largely on the traditional conception of human rights as civil and political rights.

Although human rights are addressed primarily to governments, and require compliance and enforcement, this however does not mean that persons do not bear duties. It is the opinion of the researcher that the right to a healthy environment also places corresponding duties on individuals. These duties are conceived mostly in the form of negative duties not to carry out activities that impair or endanger the environment. Thus there should be no distinction between addressees and beneficiaries of the right, because in order to effectively implement the right the holders also bear a duty to participate in the enhancement of the environment.

Section 8 of the South African Constitutionprovides for the application of the Bill of Rights. It states that the Bill of Rights applies to all law; and binds the legislature, the executive, the judiciary and all organs of the State. According to Section 8, a provision of the Bill of Rights also binds a natural and/or a juristic person. Juristic persons include, *inter alia*, companies and associations. These may be industries such as oil companies, manufacturing companies and mining companies that in most instances are responsible for pollution.

Extending the duty to persons would cover corporate organizations whose activities adversely impact the environment as well as individuals who engage in environmentally destructive behaviour. This is needful in an era where multinational corporations often exert tremendous influence over states. The vandalising of oil pipelines and illegal oil bunkering by individuals has contributed to oil pollution in the Niger Delta environment. The right to a healthy environment seeks not only to ensure effective enforcement by government action, but

[141]Gewirth, A. op cit., p. 188

also to provide remedies to individuals and groups to assert this right where their health and/or well-being is affected by, for example, the polluting activities of industry. Thus, people may assert their environmental right against private persons who may affect their right negatively.

The assertion of the right to a healthy environment against a juristic person whose activities affected the enjoyment of the right is reflected in the decision of the high court in the case of *Jonah Gbemre vs. Shell Petroleum Development Company and two others*.[142]The court held that the rights to life and dignity guaranteed by the Nigerian Constitution inevitably includes the right to clean, poison-free, pollution-free and healthy environment and that the actions of the first and second respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of the applicant's fundamental rights to life (including healthy environment) and dignity of human person

The deleterious effects of gas flaring on the environment and human health have been well documented[143] yet Nigerian legislation permits the practice. Gas flaring is the practice of burning natural gas, a by-product of oil extraction. The oil TNCs in Nigeria flare gas because it is cheaper to dispose of the gas by burning it than it is to collect it for use or to re- inject it into the subsoil.[144] A report funded by the International Union for the Conservation of Nature and Natural Resources ("IUCN") and produced by Environmental Rights Action on the Niger Delta states that Nigeria flares 75% of its gas, which far exceeds that of other oil producing countries.[145]

[142](2005) AHRLR 151 (NgHC 2005). See 6.3.5 for a more detailed discussion of the case.

[143] See Human Rights Watch, (1999). *The Price of Oil, Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*. Human Rights Watch, New York. Nigeria is estimated to be the second largest emitter of Green House Gases in Africa (after South Africa). This is mostly due to the harmful practice of gas flaring. Doctors have found unusually high occurrence of asthma, bronchitis, skin and breathing problems in communities where gas flaring has been practiced most.

[144] Human Rights Watch, ibid.

[145]*See* Commission on Environmental Law of IUCN (2000). *Draft International Covenant on Environment and Development*, XI (2nd Ed.)

The Jonah Gbemre case (involving a major transnational corporation) also illustrates the need for a critical re-examination of the legal status of transnational corporations (TNCs)[146] in international human rights law. While human rights was historically conceived as a safeguard against state abuse, the omission of TNCs as duty bearers is problematic since it unnecessarily restricts the scope of entities that have duties for human rights violations. Notwithstanding the important role they play internationally, their widespread influence and power, and the global detrimental effects of TNCs on the environment and on human rights, they are excluded as subjects of international law.

The legal effect of the exclusion of TNCs as subjects of international law was reflected in the case of *Socio-Economic Rights and Accountability Project (SERAP) vs. Nigeria*[147] where the ECOWAS Court of Justice declined jurisdiction over six oil companies alleged to have committed violations of human rights associated with oil pollution in the Niger Delta. This was on the ground that the six oil companies were not parties to the ECOWAS Treaty.[148]

2.2.4 Justification for Environmental Rights

The recognition of the right to a healthy environment is controversial with supporters and opponents. Opponents are of the view that it is unnecessary since existing rights can be interpreted to achieve environmental protection. They further argue that the introduction of new rights devalues the concept of human rights and diverts attention from the need to

[146] A TNC is "a national company in two or more countries operating in association, with one controlling the other in whole or in part." Donaldson, T. (1992).The Ethics of International Business p. 30. The economic and political clout of the TNCs has become so huge that today the assets of many TNCs is larger than the GDPs of many small and /or developing nations. TNCs are now so powerful that many governments are unable to stop exploitation in their own states. The immense influence exerted on the Nigerian government by Shell Petroleum Company is well known and extends to matters of petroleum laws, environmental laws and regulations, taxation policies. *Shell Game in Nigeria*, New York Times.Dec. 3, 1995, at 14.

[147] ECW/CCJ/APP/08/09.Retrieved on July 14, 2014 from http://www.reports-and-materials.org/Complaint-to-ECOWAS-Court-re-Nigeria-oil-pollution-25-Jul-2009.doc.www.courtecowas.org/.../SERAP_V_FEDERALREPUBLIC_OF_NIGERIA.pdf

[148] The case proceeded against the Nigerian government alone. Chapter 6.2

implement existing civil, political, economic and social rights fully.[149] Some opponents of the recognition of environmental rights further claim that the right is hard to define, cannot be given content and that no justiciable standards can be developed to enforce the right because of the inherent variability of environmental conditions.[150]

It is the opinion of this researcher that while environmental conditions vary from state to state, the right can be interpreted by the courts in each jurisdiction to suit their peculiar circumstances. The legislature and courts in many jurisdictions have given content to the right (as illustrated in subsequent chapters of this thesis). Moreover the widespread reliance on the right by citizens, legislations, courts and treaty monitoring bodies demonstrates that the right is not too vague to be implemented.

Environmental rights appeared on the international scene because of the widespread harm and impairment caused to the environment and to human well-being by man's activities. In recognition of the adverse effects environmental degradation was having on the realization and enjoyment of various human rights and the necessity of taking concerted action, environmental groups and human rights bodies, among others, in many parts of the world have placed environmental degradation squarely on the agenda as an issue that is open to political contestation. The environmental right is therefore a response to a global and local problem.

A major benefit of the right to a healthy environment is the stimulus it serves for the development and enhancement of framework and domestic environmental law[151] and

[149] Alston, P. (1984). Conjuring up New Human Rights: A Proposal for Quality Control.*American Journal of International Law*, 607-621. Cited in Boyle, A. (2009).*Human Rights and the Environment: A Reassessment*, op cit., note 102, p.2.

[150]Handl, G. (1992). Human Rights and Protection of the Environment: A Mildly Revisionist View. In: Cancado-Trindade, A.A. (ed.) *Human Rights and Environmental Protection.* IIHR, San Jose, Costa Rica.

[151] The Nigerian Supreme Court in considering the objective of Section 20 of the Nigerian Constitution stated that it is "…to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences". See the case of *AG Lagos State vs. AG Federation* (2003) 12 NWLR (pt. 833) pp. 159-160, paras. H-A; 161, paras.B-A. In South Africa, for example, the section 24 environmental right in the Constitution gave rise to the development of key framework environmental law such as the NEMA and a number of sectoral environmental laws.

international environmental law. Environmental rights can also facilitate and legally compel the formulation and preservation of minimum acceptable environmental standards, thus serving an important preventative function. Preventative legal measures are necessitated by the reality that often, when environmental degradation occurs, environmental quality cannot be restored and the cost of repair or remediation is too high.

While instruments aimed at environmental protection exist at both the national, regional and international level and human rights such as the right to life have been interpreted to achieve environmental protection, existing laws are practically meaningless in the absence of effective enforcement. Ordinarily, the proper implementation or enforcement of national, regional and international instruments would ensure a decent environment adequate for human health and well-being, which is the major objective of the right to environment.

The reality, however, is that in most countries on the African continent, these instruments on environmental protection are observed more in the breach than in practice. A major reason for this is that environmental laws are generally dependent on the state for their implementation and enforcement. In many cases the state itself is a major cause and beneficiary of environmentally destructive activities.[152] For this reason, among others, the government and its agencies fail to enforce the law. Environmental laws are flouted with impunity, leading to the continued degradation of the environment of the environment with adverse consequences for the health and well-being of the citizens.[153]

This necessitates the need for a right to environment as it would permit citizens not only to enforce environmental regulations against the state and private actors but also to

[152] Nigeria, for example, is an oil dependent state where the Department of Petroleum Resources (DPR), the government agency charged with overseeing the enforcement of environmental standards in the oil and gas industry is under the oversight of the Ministry of Petroleum Resources. The same Ministry, through the Nigeria National Petroleum Corporation (the state petroleum corporation) holds a major stake in oil and gas operations in Nigeria, thereby creating a conflict of interest.

[153] See Eaton, J.P. (1997). The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment. *Boston University International Law Journal*, 15: 261 at 278-292.

compel the state to enforce, adopt, and where necessary, amend environmental regulations. This is especially relevant where national environmental standards are deficient or where domestic law permits environmentally destructive behaviour (such as gas flaring).[154] Framing environment as a right would provide a remedy to stop the environmentally harmful behaviour. An environmental law compliance and enforcement regime is enhanced by a solid environmental rights base. The right would be justified since measures short of declaring a right to environment would fall short of providing adequate protection against pollution and other destructive impacts which in turn would endanger the life, health and well-being of people.

While existing human rights can be reinterpreted to achieve environmental protection, this is dependent on a progressive and activist judiciary as the court is required to make a connection between the alleged human rights violation and the environmental problem in question.[155] This quality is lacking in the judicial systems of many African countries.[156] In addition, the victim of an actual or potential environmental degradation has to prove that such degradation has violated or will violate one of his rights. Failure to establish this link will lead to the failure of the action.[157] Even though existing human rights allow pursuit of environmental aims to a certain extent, the requirements for direct causation, level of harm to the claimant and the inability to represent future generations limit their efficiency greatly and limit the advantages associated with the reinterpretation of existing human rights for environmental protection. An express recognition of environmental rights would dispense with the necessity of establishing injury to the health or well-being of a claimant and relieve the

[154] See for example the case of *Jonah Gbemre vs. SPDC and Others*, op cit., note 143.

[155] See Douglas-Scott, S. (1996). Environmental Rights in the European Union—Participatory Democracy or Democratic Deficit. In: Boyle and Anderson (eds.) *Human Rights Approaches toEnvironmental Protection*. Clarendon Press, Oxford, p. 111-112.

[156] See for example, *Oronto-Douglas vs. Shell Petroleum Development Corporation and Others,*(1999) 2 NWLR (Pt. 591) at 466. (In this suit, the plaintiff's application to compel the defendants to observe the provisions of the EIA Act was dismissed at the High Court for lack of *locus standi*).

[157] Shelton, D. (2009). Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration. A Draft Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 –Dec 1.

court of the technicalities of making a connection between the environmental harm and the violation of other human rights. All that a claimant would need to establish is the fact that the environmentally degrading activity will result in an environment unfavourable to his health and well-being. The rights of future generations, which are not recognised by other human rights, would find expression under environmental rights.

The recognition of environmental rights has a significant impact in the realisation of procedural rights by empowering individuals and groups most affected by environmental problems to participate in environmental governance. The opportunity for such groups to participate in environmental decision-making is the most useful and direct means of influencing the balance of environmental, social and economic interests.[158]

Relaxation of Locus Standi

The application of *locus standi* has often posed a problem to litigants and non-governmental organizations seeking to enforce environmental laws as well as participate in environmental decision making. This has resulted in a sorry situation for the environment in cases where the regulatory bodies fail to enforce the environmental regulations and individuals or groups are precluded by the *locusstandi* rule from taking action to enforce the laws. The recognition of environmental rights would result in a relaxation of the *locus standi* rule as the litigant need not show that he or she has suffered damage over and above others. This would also enhance and promote public interest litigation as environmental groups would be empowered to challenge environmentally destructive behaviour on public interest grounds.[159] Public interest litigation is especially important where those whose rights are affected by

[158] Boyle, A. (2009). *Human Rights and the Environment: A Reassessment*, op cit., note 102.

[159] Where a constitution includes a right to environment courts have often allowed public interest litigation. In *Antonio Horvath KisyOtros vs. National Commission for the Environment* (Reported in Boyd, D.R. op cit.) the Supreme Court of Chile granted standing to citizens not directly affected because it found that the constitutional right to a healthy environment does not impose a requirement that the affected people themselves present the action.

environmental degradation are the poor who are relatively powerless and cannot afford the costs of litigation.

The enforcement of human rights by the courts often involves a balancing of competing rights and interests as no right is absolute. There will be circumstances where environmental objectives and the rights of particular individuals or groups may come into conflict. The regulation of polluting activities or control of resource extraction, for instance, may interfere with the use of property and this necessitates a balancing of interests. Recognition of environmental rights would ensure that environmental considerations are given considerable weight when decisions likely to affect the environment are being taken. Among the arguments advanced by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[160] for adopting an autonomous right to a healthy and decent environment are the enhanced status it would give environmental quality when balanced against competing objectives, and that it would recognise the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights.[161]

According to Shelton,[162] a rights based approach would afford environmental protection greater moral weight and elevate concern for the environment above a mere policy choice that may be modified or discarded at will. Recognition of the right will complement and reinforce other human rights, such as the right to life and the right to health, and therefore will not lead to the proliferation or devaluation of human rights. At a time when the non-enforcement of environmental regulations by the state has become a critical issue threatening

[160]ECOSOC, *Human Rights and the Environment*, Final Report (1994), UN Doc. E/CN.4/Sub.2/1994/9, p.59.
[161]Brown Weiss, E. (1993).*Environmental Change and International Law,* Tokyo, Ch. 8. See also the separate opinion of Judge Weeramantry in the *Gabcikovo-Nagymaros Case*, ICJ Reports (1997).
[162]Shelton, op. cit. note 86.

the environment, health and well-being of citizens,[163] the recognition of the right to environment has become a necessity if the trend of environmental degradation on the African continent is to be halted and reversed.

2.3 Establishment of the Right to Environment

The historical development of environmental rights protection has been analysed in many academic works. An overview of some of the most relevant developments relating to the environment in international law would undoubtedly be of benefit in establishing recognition of the right to a healthy environmental. Reasons include the fact that International law influences municipal law and is generally thought to illuminate and reinforce ill-defined and inadequate domestic constitutional law.[164] Therefore International law influences environmental rights development in South Africa.[165] The South African Constitution requires courts to have regard to international law in their interpretation of the Bill of Rights[166] (including the environmental right in Section 24). The environmental right in Nigeria is largely derived from a treaty - the African Charter on Human and Peoples' Rights - which has been domesticated[167] and the environmental agencies in Nigeria and South Africa are both enjoined to enforce relevant international agreements[168].

Environmental rights are not explicitly provided for in the major international human rights instruments, namely the UDHR, the ICCPR and the ICESCR. This omission has been

[163] For example, a recently released UNEP report on the environmental pollution in the Ogoni region of the Niger Delta in Nigeria cites weak enforcement of environmental laws and regulations, underfunded institutions with duplicative roles, dearth of environmental information, and limited capacity of the regulatory bodies as major contributors to the environmental catastrophe in the Niger Delta region. See UNEP (2012). *Environmental Assessment of Ogoniland*.Doc. No.DEP/1337/GE (2011).Retrieved on 27/1/2013 from http://www.unep.org/nigeria/.

[164] Du Plessis, A., op cit. p. 67.

[165] Glazewski, J. (2005).*Environmental Law in South Africa* 2nd ed. LexisNexis Butterworths, Durban, p.29.

[166] Section 39 Constitution of South Africa.

[167] The African Charter has been domesticated as Chapter A9 LFN 2004.

[168] Section 7(c) of the NESREA Act mandates the Agency to '…enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment,…and such other agreements as may from time to time come into force. Section 2(4) (n) of the NEMA provides that '… [G]lobal and international responsibilities relating to the environment must be discharged in the national interest'.

attributed to the fact that these instruments were negotiated and drafted at a time when the pace, magnitude and adverse consequences of human-induced environmental degradation were not widely recognized[169]. Notwithstanding this, scholars, international and national courts and human rights bodies have derived the right to environment from rights such as the right to life, right to property and right to health.

While some writers trace the development of international environmental law to the 1972 Stockholm Conference on the Human Environment, there were already developments on the international scene prior to this period. Prior to 1950, states began to conclude agreements to protect commercially valuable species and fauna and flora. Examples of agreements concluded around this period include the 1902 Convention for the Protection of Birds Useful to Agriculture, the 1916 Convention for the Protection of Migratory Birds in the United States and Canada, the Treaty for the Preservation and Protection of Fur Seals, signed in 1911, the 1933 London Convention on Preservation of Flora and Fauna in their Natural State and the 1940 Washington Convention on Nature Protection and Wildlife Preservation.

At this period there was little development and application of customary international norms to environmental issues. An exception to the general trend was the *Trail Smelter Arbitration*.[170] The case involved the emission of sulphur fumes from Canadian smelting works which were causing damage to crops, trees and pasture in the USA. In its decision the tribunal held that under international law, "…no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the parties or persons therein, when the case is of serious consequence and the injury is established

[169]Shelton, D., (2009). Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration. Op cit.Gormley, W. P. (1976).*Human Rights and Environment: The Need for International Cooperation*. A.W. Sijthoff, Netherlands.

[170]*United States v. Canada* (1941) 3 Reports of International Arbitral Awards, 1905.

by clear and convincing evidence."[171] It has been suggested that the *Trail Smelter* reaffirmed the importance of the principle: *sic uteretuoutalienum non laedas* (use your property so as not to harm that of another). Because the *Trail Smelter Arbitration* is a rare example of international environmental adjudication in this period, it has acquired an important place in the jurisprudence of international environmental law.

The ruling of the International Court of Justice in the *Corfu Channel Case*[172] has also influenced international law, even though the case did not concern actual environmental harm. In this case, the court confirmed the principle that every state has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states. In the *Lac Lanoux Arbitration*[173] the court confirmed the limitations on the rights of states in the case of shared watercourses.

Internationally, during the 1950s and 1960s, multilateral environmental agreements increased significantly. Conventions negotiated related mostly to measures to prevent oil pollution at sea and to impose civil liability for oil pollution damage.[174] The African Convention on the Conservation of Nature and Natural Resources was concluded in 1968.[175] A

[171] The language of the Arbitral Tribunal has been cited widely as confirming the principle that a state is responsible for environmental damage to foreign countries, caused by activities within its borders.
[172] *United Kingdom vs. Albania* (1949) ICJ Reports 244.
[173] *France vs. Spain* (1957) 24 International Law Reports 101.
[174] The 1954 International Convention for the Prevention of Pollution of the Sea by Oil and the 1958 UN Convention on the Law of the Sea involved concerns about marine pollution. The Torrey Canyon tanker accident of 1967, which resulted in the spilling of over 100 000 tons of crude oil into the English Channel and caused black tides and great damage to both the French and English coastlines, has been described as a defining moment in the concern for marine pollution. See Adetoro, D. and Adetoro, H. (2009). Resolving Disputes Involving Accidental Pollution by Oil.*European Energy and Environmental Law Review*, pp. 209-214.
[175] The African Convention on Nature and Natural Resources, art.XVI, OAU Doc. CAB/LEG/24.1, (1968) [hereinafter African Nature Convention I]. Retrieved on 7/7/2012 from http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention_Nature%20&%20Natural_Resources.pdf . This Convention has been revised. The revised Convention was adopted on 11 July 2003. The Convention when in force will replace the original Algiers Convention for those African states that have ratified it. African Convention on Nature and Natural Resources (Revised Version) (not yet in force) [hereinafter Revised African Nature Convention], available at http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/nature%20and%20natural%20recesource.pdf (last visited July 2012).

common feature of these early environmental treaties was that they mostly constituted narrowly focused responses to environmental problems.

2.3.1 Historical Development of Environmental Rights

The modern era of international environmental law coincides with the international recognition of the link between human rights and the environment. This era is said to date from the 1972 United Nations Conference on the Human Environment.[176] The conference produced a Declaration comprising 26 principles (the Stockholm Declaration[177]) linking the notion of environmental protection with those of economic development and human rights. These principles may be considered as the foundation of modern environmental law and the international recognition of the link between human rights and the environment.

The Stockholm Declaration proclaims that both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself. It is furthermore proclaimed that the achievement of the environmental goal will demand the acceptance of responsibility by citizens and communities and that local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions[178].

Principle 1 of the Stockholm Declaration provides:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.

[176] The conference was attended by 114 states as well as international institutions and non-governmental organizations. It produced a Declaration of 26 principles and an Action Plan embracing 109 detailed recommendations aimed at giving effect to its broad strategy of environmental assessment and management and incorporating the necessary supporting measures. See Bowman, M. J. (1993). Shaping International Environmental Law- The Road to Rio and Beyond.*Environmental Liability*, Vol. 1, Sweet and Maxwell, London, pp. 20-23.

[177]Declaration of the United Nations Conference on the Human Environment.Retrieved on 12/4/2015 from http://www.unep.org/Documents.Multilingual/Default.asp.

[178]The Preamble, Stockholm Declaration, op cit.

Principle 21 provides that

> States have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[179]

Principle 24 emphasizes the requirement for international cooperation to "effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states."

An outcome of the Stockholm Convention was the creation of the United Nations Environment Programme (UNEP) with the mandate of providing leadership and encouraging partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations.[180]

The Stockholm Conference was followed in 1980 by the elaboration of the World Conservation Strategy, a joint effort by UNEP, the International Union for the Conservation of Nature (IUCN), and the World Wildlife Fund (WWF), which sought to harmonize the objectives of environmental protection and economic development. They argued that only forms of development that were sustainable on the basis of the earth's natural resources and natural processes could be successful in the long run.[181] The World Conservation Strategy's concept of sustainable development and nature conservation was incorporated into the World Charter for Nature, which was adopted in 1982 by the General Assembly.[182] The Charter is soft

[179] Principle 21 is regarded as customary international law and forms a fundamental principle in international environmental law

[180] United Nations Environment Programme (UNEP), Environment for Development. Retrieved on 8/7/2012 from : http://www.unep.org.

[181] See Bowman, M. J. (1993). Shaping International Environmental Law- The Road to Rio and Beyond.*Environmental Liability*, Vol. 1, Sweet and Maxwell, London, pp. 20-23.

[182] The World Charter for Nature was adopted by 111 votes to 1. The USA was the sole dissentient.

law and not legally binding. However, according to Bowman[183], the use of the expression "shall" throughout the text suggests the existence of an obligation.

The following year the UN General Assembly established the World Commission on Environment and Development (WCED), also known as the Brundtland Commission, a group of independent experts under the chairmanship of Gro Harlem Brundtland, then Prime Minister of Norway, with a view to proposing an environmental strategy for achieving sustainable development by the year 2000 and beyond. The Brundtland Commission submitted its report in 1987 and appended to its report was a set of 22 Proposed Legal Principles for Environmental Protection and Sustainable Development, drafted by a sub-group of experts in environmental law.[184]

The Report noted that the 1980s witnessed a dramatic increase in the number of global environmental crises such as the drought and subsequent famine in Africa, which put 35 million people at risk and took approximately one million lives. It concluded that "if natural resources continued to be used at the current rate, if the plight of the poor was ignored, and if pollution and the waste of resources continued, the quality of life of the world's population could be expected to deteriorate."[185] It called upon wealthy nations to change their lifestyles by recycling waste and conserving energy and land.

The Brundtland report popularized the concept of 'sustainable development' defining the concept as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[186] The concept is an important one that underpins much of international law on the environment and is often referred to by judicial

[183]Bowman, op.cit.p.21.
[184]*Report of the World Commission on the Environment and Development: Our Common Future* (1987).
[185]Thornton, J. and Beckwith, S. op. cit., p.35.
[186]Ibid. It is sometimes stated, erroneously that the term, 'sustainable development' was framed or coined by the Brundtland Commission. (See the statement of Ngcobo, J. of the South African Constitutional Court in the case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 6 SA 4 (CC) para. 47) However, as early as 1980, the World Conservation Strategy contained references to sustainable development.

bodies and tribunals in their decisions on environmental law and environmental rights. No steps were taken to transform the Report into a legally binding text and its importance is reflected more in the influence it wielded on subsequent conferences such as the United Nations Conference on Environment and Development.

In August 1990 the (then) Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted a Special Rapporteur, Ms FatmaZohraKsentini with the task of undertaking a study on human rights and the environment.[187] The Special Rapporteur submitted her final report to the Sub-Commission in 1994. In this report she noted that normative developments at the international, regional and domestic levels since the adoption of the Stockholm Declaration had led to the recognition of a right to a satisfactory environment as a human right and strengthened the interconnectedness between human rights and environmental protection. She noted in particular that environmental degradation and pollution adversely affect the enjoyment of a series of human rights including the right to health, life, and an adequate standard of living, among others. She also noted that human rights violations may in turn cause damage to the environment.

The report included a draft Declaration of Principles on Human Rights and the Environment. This represents an early example of an international text addressing the relationship between human rights and the environment. The Draft Principle, however, lacks a binding character since it was not adopted.

Twenty years after the 1972 Stockholm Declaration, in 1992, the United Nations Conference on the Environment and Development (UNCED) was held in Rio de Janeiro, Brazil.[188] The UNCED produced the Declaration on Environment and Development[189] (the Rio

[187] E/CN.4/Sub.2/1990/7

[188] This was the largest environmental conference ever and attended by over 176 governments including over 100 heads of state (described by Grubb et al. as the largest ever meeting of heads of state). See Grubb, et al. (1993). *The Earth Summit Agreements: A Guide and Assessment*, Earthscan, London.

Declaration);[190] the reaffirmation of the Stockholm principles and Agenda 21[191], the Convention on Biological Diversity[192] and the UN Framework Convention on Climate Change.[193]

Of all the principles contained in the Rio Declaration, Principle 10 has the greatest impact on environmental rights. It provides for procedural rights in the following words:

> Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information on the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.

The Rio Declaration is a compromise between environmental protection and development, and between the developed and developing world. Principle 3 acknowledges the right to development which was the major concern of the developing countries[194], whilst Principle 4 moves environmental protection to the core of developmental policies.[195] Principle 7 introduces the important concept of the 'common but differentiated responsibilities' of developed and developing nations.[196] This is appropriate in view of the recognition of the fact

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[189] The Rio Declaration is a statement of twenty-seven principles, some of them restatements of the Stockholm principles setting out the basis on which states and individuals are to cooperate and further develop international law in the field of sustainable development.

[190] Rio de Janeiro Declaration on Environment and Development, June 16, 1992, UN Doc.A/CONF.151/5.

[191] Agenda 21 is an ambitious 800 page document containing a global action plan that links development and environmental action for the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.

[192] 5 June 1992 Rio de Janeiro, 31 *International Legal Materials* 822 (1992).

[193] United Nations Framework Convention on Climate Change, art. 3, opened for signature June 4, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849, (1992), [hereinafter Climate Change Convention].

[194] Principle 3 reads "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

[195] Principle 4 provides "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[196] Principle 7 states "In view of their different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibilities that they have in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

that it is the developed states that are primarily responsible for environmental degradation on the planet and they are the major emitters of greenhouse gases responsible for global warming. Principle 11 provides that states shall enact effective environmental legislation and environmental standards, management objectives and priorities should reflect the environmental and development contexts to which they apply.

The *UN Vienna Declaration and Programme of Action* (the Vienna Declaration) was adopted by the World Conference on Human Rights in 1993. The preamble to the Vienna Declaration recognizes and affirms that:

> '(a)ll human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realisation of these rights and freedoms.'

Articles 1 and 5 provide that the protection and promotion of human rights and fundamental freedoms is the first responsibility of governments. Article 11, which is of particular relevance in the environmental context, provides that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. Article 13 recognizes that there is a need for states to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights and provides that states should eliminate obstacles to the enjoyment of these rights. Article 83 states that governments are urged to incorporate standards as contained in international human rights instruments in domestic legislation and to also strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights.

In 2000 the former U.N. Commission on Human Rights, in its *Resolution on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, recognised a substantive environmental right. In its

introductory paragraphs it acknowledged the existence of the right to a wholesome environment asserted in other international human rights instruments and reaffirmed that such a right exists in the fourth substantive resolution. The Resolution restated the danger the illegal movement of dangerous and toxic products presents to the rights to life, health and a sound environment and condemned the illegal movement in Article 3.

It is to be noted that even where the movement of toxic and dangerous products and wastes is legal (for example, as provided under the Basel Convention[197]) it nevertheless presents a real danger to the rights to life, health and a sound environment. This is illustrated by the Thor mercury incident in South Africa which involved a British company using its South African subsidiary to import mercury waste into South Africa resulting in the death of several workers and large quantities of mercury leaking from the plant into the Umgeni River.[198] Increasingly, wealthy industrialised states are shipping their hazardous chemical waste to poor underdeveloped states.In Nigeria, for example, in 1987 five shiploads of about 18 000 drums and weighing about 3,800 tons, of toxic and hazardous wastes were secretly dumped at the small port town of Koko in the former Bendel State (now Delta state) by an Italian company.[199] Today, Nigeria is listed as one of the major destinations for large-scale shipments of hazardous wastes, including electrical and electronic equipment, from industrialised countries.[200] While such a trade may in certain instances be legal, it nonetheless

[197] Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal 1989.

[198] In February 1990 water and soil samples were taken from the surrounding area, and the tests conducted showed high levels of mercury poisoning, with one sample being over 100 times the recommended limit. Butler, M. (1997) 'Lessons from Thor chemicals: the Links between Health, Safety and Environmental Protection. In: Bethlehem, L. and Goldblatt, M. (eds.). *The Bottom Line: Industry and theEnvironment in South Africa*. Industrial Strategy Project, Rondebosch, UCT Press, pp. 194 – 213.

[199] Koko Toxic Waste Dump, *National Mirror*, December 12, 2012. http://nationalmirroronline.net/new/koko-toxic-waste-dump/. Some reports put the figure at 1,079,000 metric tonnes (http://www.vanguardngr.com/2011/07/24-years-after-%E2%80%98the-drums-of-death-a-new-air-in-koko/)

[200]Rucevska, I. et al. (2015). *Waste Crime – Waste Risks Gaps in Meeting the Global Waste Challenge*.A UNEP Rapid Response Assessment.UNEP and GRID-Arendal, Nairobi and Arendal. See also, Clapp, J. (1994). The Toxic Waste Trade with Less-Industrialised Countries: Economic Linkages and Political Alliances. *Third World Quarterly.*Vol. 15, No. 3, pp. 505-518. See also Leigh, D. and Hirsch, A. (2009) Papers prove Trafigura ship dumped toxic waste in Ivory Coast. *The Guardian*, Thursday 14 May.

presents a threat to the human rights of citizens of the recipient state and is a glaring example of exploitation and international environmental injustice.

In September 2000, at the UN Millennium Summit, government leaders reaffirmed their support for Agenda 21. The *UN Millennium Declaration*[201] of 2000 contains eight major development goals often referred to as the Millennium Development Goals. The seventh of the eight Millenium Development Goals addresses the vision to ensure environmental sustainability. The Millenium Declaration is proof of the increasing importance of environmental protection in the International Law discourse and serves as international support for respect and protection of environmental rights by governments.

Taking off from Rio, the World Summit on Sustainable Development was held in Johannesburg in September 2002. The meeting did not produce any declarations of principles. The main focus was on the eradication of poverty, and specific actions were agreed to in respect of the environment, apart from a continued commitment to sustainable development.

In the past decade, international negotiations on environmental issues have centred largely on climate change. Climate change is among the most daunting environmental challenges ever confronted by humanity and was recently described as the paramount threat to public health in the 21st century[202]. In series of resolutions, the former United Nations Commission on Human Rights and the United Nations Human Rights Council[203] has drawn attention to the relationship between a safe and healthy environment and the enjoyment of human rights. On 28 March 2008, the Human Rights Council adopted its first resolution on "human rights and climate change."[204] The resolution recognised the threat that climate change

[201] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) [hereinafter Millennium Declaration], *available at* http://www.un.org/millennium/declaration/ares552e.pdf (last visited Sept. 7, 2013).
[202] Editorial. 2009. A Commission on Climate Change, *The Lancet* Vol. 373, Iss. 9676, p. 1659 cited in Boyd.
[203] The U.N. Human Rights Council (HRC) replaced the U.N. Commission on Human Rights in 2006. See G.A. Res. A/RES/60/251 (3 April 2006).
[204] (Res. 7/23).

poses to human rights and requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) conduct a detailed study on human rights and climate change. The study was prepared and submitted to the tenth session of the Council held in March 2009.[205]

On 25th March 2009, the Council adopted resolution 10/4 "Human rights and climate change" in which it, *inter alia*, notes that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights …"; recognizes that the effects of climate change "will be felt most acutely by those segments of the population who are already in a vulnerable situation …", recognizes that "effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change … is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts", and affirms that "human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change".[206]

A recent and notable development in the international development of environmental rights is the UN Human Rights Council's recent resolution on Human Rights and Environment[207] establishing a Special Procedure[208] on Human Rights and the Environment. The resolution appoints an Independent Expert on Human Rights and the Environment as an

[205] See *Report of the Office of the High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*U.N. Doc. A/HRC/10/61 (15 January 2009)

[206] Ibid.

[207] Resolution 19/10. (A/HRC/RES/19/10) The resolution followed the Report of the United Nations High Commissioner for Human Rights on human rightsand the environment (see the A/HRC/19/34, Analytical Study on the Relationship between Human Rights and the Environment) presented to the Human Rights Council for adoption during its 19th Session. The Report develops a thorough analysis of the mutual impact between human rights and the environment. It highlights the tensions and cross-fertilization that occurred over the last 3 decades between international environmental and human rights laws. The analysis covers national constitutions, international jurisprudence and the work of United Nations human rights treaty bodies. Among the final recommendations of the Report was the establishment of a special procedure on environment and human rights by the Human Rights Council. The Report was adopted on 20 March 2012 at the conclusion of 19th session of the Council. The Council adopted it by consensus, with more than 80 States co-sponsoring. Available at www.ohchr.org/EN/HRBodies/HRC/…/Session 19/…/ResDecStat.aspx

[208] 'Special procedures' refers to the mechanism within the UN human rights system for human rights monitoring and advocacy termed 'special.

institutional vehicle to advance the linkages between human rights and the environment. The Expert is appointed for a period of three years to study human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in consultation with all stakeholders including those representing indigenous peoples and other persons in vulnerable situations. The expert is also to identify, promote and exchange views on best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, especially in the area of environmental protection and to make recommendations that could help the realization of the Millennium Development Goals, particularly Goal Seven (7) on the environment.

The resolution includes direct and explicit reference to climate change negotiations, particularly Earth Summit 2012 (popularly referred to as Rio+20).[209] For example, it mandates the Independent Expert: "(*d*)To take into account the results of the United Nations Conference on Sustainable Development to be held in June 2012, and to contribute a human rights perspective to follow-up processes." The resolution also, "*Encourages* the Office of the High Commissioner to participate in the United Nations Conference on Sustainable Development, in order to promote a human rights perspective."

The resolution constitutes an important step towards the international recognition of the right to environment as the establishment of a Special Procedure[210] may be regarded as one step towards official recognition of the human right to a healthy environment. A recent precedent is the human right to safe water and sanitation recognized by the UN General Assembly and the Human Rights Council in 2010 following up on the work of the independent

[209] Earth Summit 2012 was the third international conference on sustainable development aimed at reconciling the economic and environmental goals of the global community.

[210] "Special procedures" is the general name given to the mechanisms assumed and continued by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel and logistical assistance to aid them in the discharge of their mandates. Special procedures' mandates usually call on mandate holders to examine, monitor, advise, and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates.

expert appointed in 2008.[211] The recognition of environmental rights would take account of the advances occurred at regional and national levels and would affirm the unity of the system of international law.

Prior to most of these developments at the global level, the environmental right was already recognized at the regional level. The 1981 *African Charter on Human and Peoples Rights*[212] provides that "all peoples shall have the right to a general satisfactory environment favourable to their development".[213] In 1988, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*[214] was adopted. It provides that "everyone shall have the right to live in a healthy environment and to have access to basic public services. The states shall promote the protection, preservation and improvement of the environment".[215] In 1998 the UN Economic Commission for Europe (UNECE) adopted the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (commonly known as the Aarhus Convention after the Danish city of that name). The Aarhus Convention concentrates only on procedural rights and is limited to the UN European region.

The developments at the international and regional level have influenced environmental rights protection at the national level as evidenced by the post-1972 incorporation of environmental provisions in many national constitutions. It is currently estimated that over 140 countries have environmental provisions in their national constitutions and over ninety (90) recognise a Constitutional environmental right.[216]

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[211] Resolution A/RES/64/292. Available at www.un.org/waterforlifedecade/human_right_to_water.html (last visited 2/5/2013)

[212] African Charter on Human and Peoples' Rights (27 June 1981) (1982) 21 ILM 58.

[213] Ibid. Article 24.

[214] The Protocol was adopted in San Salvador on 17 November 1988 and entered into force in 1999.

[215] Ibid. Article 11.

[216] See Report of Independent Expert on the regional consultation on constitutional environmental rights, Johannesburg, 23-24 January 2014, available at: http://ieenvironment.org/2014/11/21/report-on-constitutional-environmental-rights.

2.4 Industrial Pollution and its Impact on Human Rights

An understanding of what exactly constitutes environmental pollution is vital to this study and several definitions have been given by scholars, international bodies, statutory and treaty provisions. This study will consider a few in understanding how industrial pollution, a major form of pollution, affects the right to a healthy environment and other human rights. The legal regime on the environment in Nigeria and South Africa is primarily concerned with the prevention and control of pollution and the case is the same for most other countries.

Pollution has been defined as, 'the introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity or interferences with legitimate uses of the environment'.[217] This definition places man squarely as the sole cause of pollution.

Pollution however may be classified into anthropogenic pollution and natural pollution. Natural pollution includes volcanic ash and gases, windblown dust, decomposition of organic matter and pollution caused by tsunamis or earthquakes. With increased industrialization humankind has become the major source of pollution through their various activities, most especially industrial activities. As a matter of fact, it was during the industrial revolution in Europe in the 18th and 19th centuries that air pollution came to be recognized as a major environmental health hazard, and resulted in the passing of several legislations. [218] The industrial revolution also contributed to the current global warming and climate change

[217] Holdgate, M.W. (1977). *Ecology and the Future of the World*. University of Cardiff Press, Cardiff, p. 17.

[218] In the United Kingdom, legislations passed to control the harmful effects of air pollution included the 1875 Public Health Act, the 1926 Smoke Abatement Act (aimed at reducing smoke emissions from industrial sources); the Clean Air Acts of 1956 and 1968; the 1974 Control of Air Pollution Act (included regulations for the composition of motor fuel and limits for the sulphur content of industrial fuel oil) and the Environment Act in 1995. See Heinsohn, R.J and Kabel, L.K. (1999). *Sources and Control of Air Pollution*, Prentice Hall International, UK. Thornton and Beckwith, (1997) *Environmental Law*, Sweet and Maxwell, London.

crises[219] by initiating the massive burning of fossil fuels emitting carbon dioxide and other greenhouse gases (GHGs).

Other definitions of pollution identify humans as the major cause of pollution, for while the earth can easily absorb pollution from natural causes, the absorptive or carrying capacity of planet earth may be overstretched by the introduction of anthropogenic pollutants. The European Community in its Directive on Integrated Pollution Prevention and Control defined 'Pollution of the environment' as:

> … the direct or indirect introduction as a result of human activity of substances, vibration, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment.[220]

According to the World Health Organization "the environment is considered polluted when it is altered in composition directly or indirectly, as a result of activities of man so that it becomes less suitable for some or all of the uses for which it would be suitable in its natural state". [221]

These definitions all illustrate that pollution has an undesirable effect by working a negative change on the quality of the environmental media- air, water and land. The environment is thus altered in composition or condition such that it is unsuitable for its natural uses. It is also rendered harmful to the health and/or well-being of humans and other creatures. In recognition of the broad understanding of environment, the resulting harm or damage may extend to material property. This encompasses, for example, damage caused to roofing as a result of acid rain.

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[219] United Nations Intergovernmental Panel on Climate Change [IPCC], Climate Change 2007: *Synthesis Report Summary for Policymakers 5* (2007) [hereinafter IPCC Report], *available at*http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf (last visited 20/8/2012).

[220]E.C. Council Directive 96/61, 24 September 1996, Art.2(2).

[221] Quoted in Ola,C.S. (1984) *Town and Country Planning and Environmental Laws in Nigeria*, Evans Publishers, Ibadan , p.155.

The Nigerian statutory definition is contained in Section 37 of the *NESREA Act*[222] which defines pollution as "…man made or man aided alteration of chemical, physical or biological quality of the environment to the extent that is detrimental to the environment or beyond acceptable limits". This suggests that it is not every alteration of the quality of the environment that would qualify as pollution; rather it is a question of degree. It is to the extent that the alteration is detrimental to the environment or beyond the limit (set by the environmental body) that such alteration would amount to pollution. However, there are many acts of pollution which, when viewed separately, may not result in an alteration of the quality of the environment to an extent that is detrimental to the environment or beyond acceptable limits; yet such acts, when viewed collectively, would fall within the definition of pollution. For example sections 8 and 20 of the NESREA Act empower the NESREA to establish such environmental criteria, guidelines, specifications, standards for the protection of the nation's air and interstate waters as may be necessary to protect the health and welfare of the population from environmental degradation. The Agency can thus make recommendations to the Minister of the Environment for the purpose of establishing water quality standards for inter-state waters. It can establish minimum essential air quality standards and effluent limitations. It is thus the Agency that determines whether an alteration in the quality of the environment (or any of the environmental media) falls within acceptable limits.

Furthermore, although environmental pollution can be perceived by an ordinary man (as exemplified by discoloured and foul-smelling streams, oil polluted land and thick black fumes discharged into the atmosphere), environmental matters are sometimes technical, involving scientific proof and beyond ordinary human understanding. It would be difficult, for example, for the ordinary man to determine if the level of mercury or chromium in a stream is

[222] No. 25, July 30, 2007.

within acceptable limits or not, or to carry out tests that reveal that the pH[223] of the same stream is highly acidic. Increasingly, however, Citizen Based Organisations in industrial areas who are concerned about the effects of pollution on their environmental rights and the non-disclosure by polluters are collaborating with environmental groups to monitor the pollutants released into the environment by industries and thereby hold them accountable.[224]

A recent illustration is the pollution of the Baynespruit River[225] by toxic industrial effluents from a leaking pipeline. Distressed members of the Pietermaritzburg public complained to GroundWork (an environmental group) which visited the site of the pollution and took a sample of the industrial effluent and sent it to a laboratory. The results showed dangerously high levels of benzene[226] and helped pinpoint the source of the pollution to a glue-manufacturer located up the road from the pipeline[227].

Pollution is broadly defined in Section 1 of the South African National Environmental Management Act (NEMA)[228] as

> any change in the environment caused by substances; radioactive or other waves; or noise, odours, dust or heat, emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services whether engaged in by any person or any organ of state, where that change has an adverse effect on human health and well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have any such effect in the future.

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[223] *pH*, a scientific term, stands for 'potential of Hydrogen'. It is a measure of acidity or alkalinity of a solution that is a number on a scale on which a value of 7 represents neutrality and lower numbers indicate increasing acidity and higher numbers increasing alkalinity. Pure water is neutral, being neither acidic nor alkaline. *Merriam Webster's Learner's Dictionary*.Http://www.merriam-webster.com/dictionary/pH (last accessed on 12/10/2016).

[224] The work of the Bucket Brigade in South Durban (one of the most polluted places in South Africa) and the use of the MiniVol by environmental groups and CBOs are discussed in detail in Chapter 6.

[225] The Baynespruit River is near the suburbs of Eastwood and Sobantu Township in Pietermaritzburg and leads to the Umgeni River in Durban in the South eastern part of South Africa. At the time of the incident the Baynespruit River was used by neighbouring communities for washing clothes and drinking as well as by subsistence farmers. See *Groundwork*, Vol. 14 No. 2 June 2012, pp. 15 and 16

[226] Benzene is used in various industrial activities and has numerous health impacts, ranging from drowsiness, unconsciousness from inhalation, to anaemia. A study by the International Agency for Research on Cancer (IARC) and the US Environmental Protection Agency shows that long term exposure to benzene is carcinogenic and in particular is known to cause acute myelogenous leukaemia (AML). *Groundwork*, Vol. 14 No. 2 June 2012, p.16.

[227] *Groundwork*, Vol. 14 No. 2 June 2012, pp. 15 and 16.

[228] Act 107 of 1998.

The last phrase is intended to cover effects of pollution which do not manifest immediately. Injuries arising from pollution may take decades or even a generation to manifest. Instances of such are illnesses occasioned by radiation or toxic emissions.

The South African statutory definition is broader than the Nigerian statutory definition in detailing the detrimental effects of pollution on the environment and people. While the Nigerian definition merely states that an alteration of the environment constitutes pollution if it is detrimental to the environment or beyond acceptable limits, NEMA goes further to demonstrate that pollution has an adverse effect on the '*composition,resilience and productivity*' of the ecosystem. NEMA's definition also recognizes the place of human beings as an integral part of the environment by specifically providing that pollution may have adverse effects on human health and well-being. This is a clear recognition of the detrimental effect of pollution on the right to a healthy environment.

NEMA's definition of pollution is deliberately couched to cover the role organs of the state may play in causing pollution and a tacit acknowledgement of the role played by the government in environmental degradation especially during the apartheid era[229]. It also alludes to notorious instances of pollution in the history of the country.[230]

A common denominator of the supplied definitions is that most pollution is caused by humans and that the effect is harmful to the environment. There are numerous causes of

[229] Scholars have written extensively on how enforcing environmental control measures were difficult due to the direct involvement of the South African government in the economy and the near untouchable status of the state and state-owned industries. Through Escom, ISCOR and the South African Railways, the government was one of the major polluters in the country. Rabie, M. A. (1976). *South African Environmental Legislation*. Institute of Foreign and Comparative Law, University of South Africa, pp. 93-108. See also Fuggle, F.R. and Rabie, M.A. (eds.) (1983) *Environmental Concerns in South Africa: Technical and Legal Perspectives*,Johannesburg, pp. 296-298; Steyn, P. (2008) Industry, Pollution and the Apartheid State in South Africa. *History Teaching Review Yearbook*, *22*, pp. 67-75.

[230] The phrase "…including the storage or treatment of waste or substances" could be construed to cover cases like that of Thor Chemicals which involved a British company using its South African subsidiary to import mercury waste into South Africa resulting in the death of several workers andlarge quantities of mercury leaking from the plant into the Umgeni River, which flows into the Inanda Dam, Durban's main water source. Butler, M. (1997). Lessons from Thor Chemicals: the Links between Health, Safety and Environmental Protection. In: Bethlehem, L. and Goldblatt, M. (eds.) *The Bottom Line: Industry and theEnvironment in South Africa*. Industrial Strategy Project, Rondebosch, UCT Press, pp. 194 – 213.

environmental pollution and these include: agricultural activities involving the use of fertilizers, pesticides and other chemicals; industrial activities; mining and extractive industries; human population explosion and unplanned urbanization (with its challenges of sewage and solid waste). All these are occasioned by man's activities on the planet.

Industrial pollution is a major form of environmental pollution that has gained prominence within the past hundred to three hundred years and has greatly accelerated the national and global dimensions of environmental pollution and degradation. Industry, in this research, generally refers to the manufacture of goods from raw materials.[231] Industrial production has overtaken agriculture and mining as the major means of socio-economic development and income generation and productive and technology bases today form the prime movers of the real economy. Those states considered developed are those that are industrialised and have a strong technological base. States with an agrarian based economy or extractive industry based economy have come to realize the necessity of industrial development as a means of adding value to raw materials.

Industrial activities however present a threat to the environment by their propensity to pollute the environment. Industrial production involves numerous processes involving the use of various machines, chemicals, substances, and metals and generating immense amounts of solid, liquid and gaseous wastes that are harmful to the environment and to human health.

Industrial pollution is defined in this study as-

> The direct or indirect introduction, as a result of manufacturing or processing activities, of substances, vibration, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment.

[231] Industry, in the context of this research includes the manufacturing industry as well as the power generation industry.

Industrial pollution is heavily affected by the scale of industrial production, by its sectoral composition and by the type of process technology used in production. The extent of environmental pollution also depends on the types and quantity of waste generated by industries and the methods of management of the waste. The effects of industrial pollution may be observed in all environmental media- air, water and land- although the extent to which a particular medium is affected depends on the industrial activity or processes. Air pollution, for example, is commonly recorded in proximity to cement industries, steel industries, coal-based power stations, refineries and petro-chemical industries while water pollution is experienced in areas of operation of textile mills, tanneries, petrochemical and paints, pharmaceutical, food and drinks. Noise pollution is associated with most industrial facilities.

Pollution is exacerbated when untreated or partially treated waste and bye-products of industrial processes are discharged into the atmosphere, land, streams and open drainages. These find their way into the water used for drinking, fishing, agriculture and other purposes; the air which provides man and organisms with oxygen; and the land which sustains life.

The harmful effects of industrial pollution on human health and well- being and in general on human rights are more glaring when industries are sited in proximity to residential areas.[232] This is common in developing countries where often times industries are located without due regard to physical planning. Even in the industrialized countries, studies have revealed that environmentally hazardous facilities or waste treatment plants are usually located in proximity to poor or racially marginalized neighbourhoods.[233] It is this trend that became known as environmental injustice and the struggles against this form of discrimination gave birth to the environmental justice movement.

[232] The south Durban Basin in SA, for example, has a mix of heavy industrial activity and residential settlements in close proximity. The same is true of Lagos, the commercial centre of Nigeria.

[233]Hippolyte, A.R. (2012). Negative Environmental Sovereignty in the Third World: A TWAIL Analysis of ICSID'S Disregard for Environmental Justice in the South. Available at SSRN 2124645, pp. 4-9.

Industrial waste and emissions contain toxic and hazardous substances, most of which are detrimental to human health. These include heavy metals such as lead, mercury and chromium and toxic organic chemicals such as persistent Organic Pollutants (POPs)[234] and poly-chlorinated biphenyls (PCBs).[235] Lead and mercury have been shown to have serious and irreversible impacts on the mental development of children and may in large concentrations result in death.[236]

In the Minamata incident in Japan, residents living near Minamata Bay in the 1950s and 1960s developed nervous disorders, tremors and paralysis in a mysterious epidemic. More than four hundred people died before authorities discovered that a local plastic industry had released untreated effluent containing mercury into Minamata Bay. This toxic element accumulated in the bodies of local fish and eventually in the bodies of people who consumed the fish[237]. The persistent nature of the chemicals commonly used in industrial production mean that the impact of pollution will, in many instances, continue to be felt for generations, thereby affecting the rights of future generations.

The Bhopal incident is another illustration of how industrial pollution infringes on the right to life, the right to health, the right to environment and other human rights. The worst industrial accident in the world occurred in Bhopal, India on December 3, 1984 when a pesticide factory owned by Union Carbide, an American company and located in a crowded

[234] POPs are chemicals that are extremely stable and persist in the environment. They bio-accumulate in organisms and food chains and are transported in the environment over long distances to places far away from the point of release. They are toxic to humans and animals and have chronic effects such as the disruption of reproductive, immune and endocrine systems as well as being carcinogenic. See African Ministerial Conference on the Environment, *Africa Environment Outlook: Our Environment, Our Wealth*, Nairobi, Kenya: United Nations Environment Program, 2006, p. 357.

[235] PCBs are persistent organochlorines; they permeate the air, water and soil and bio-accumulate in organisms and food chains and are toxic to humans. Research has shown that most foods can carry tiny traces of these toxic chemicals.

[236] Karunakara, U. (2012). Lead Poisoning and Remediation in Zamfara.*The Punch*, 25 December.

[237] In South Africa serious mercury contamination at the Thor Chemicals plant outside Durban in the 1990s led to the deaths and poisoning of a number of workers and nearby residents, Butler, M. (1997). Lessons from Thor Chemicals: the Links between Health, Safety and Environmental Protection In: Bethlehem, L. and Goldblatt, M. (eds.) op cit., pp. 194 – 213.

and poor neighbourhood of Bhopal leaked many tons of poison gas into the air. The warning system in the factory was turned off, so the community heard no alarms of any kind. The poison gas killed many people that night. After 3 days 8,000 people had died and over the next 20 years, more than 20,000 people died from the poison that remained in their bodies. Many more developed terrible illnesses including cancer;and children and grandchildren of the survivors suffer from severe birth defectsincluding withered limbs, slow growth, and many different reproductive and nervous system disorders.[238]

Industrial pollution has adversely affected the rights to life, dignity and health of communities in Nigeria. In a fieldwork visit to a community located near a cement factory in South West Nigeria, the researcher witnessed first-hand the release of cement dust by the factory into the atmosphere, covering everywhere with fine cement dust particles harmful to the respiratory system. Residents of the area were full of complaints about the pollution of their environment and narrated various ways in which it has adversely affected their health and well-being. In another community, located in the neighbourhood of a steel factory, residents have been reported to experience high incidences of cancers, asthma and other severe respiratory diseases.[239] These have been traced to the uncontrolled emission of toxic gases by the steel factory and this has been corroborated by medical evidence. Medical tests conducted on 16 randomly selected residents of the area revealed toxic metals like chromium, cadmium, zinc, and iron in their blood and urine. The concentration of toxic metals was much higher than the World Health Organisation permissible levels. Heavy metals were also detected in the borehole water, well water and coconut water samples in the community. Scientific research has linked those toxic metals to cancer, asthma, and other life-threatening illnesses.[240]

[238] Available at www.hesperian.org (last visited 4/7/2012)

[239]Ogunseye, T. (2012). The Rich also Cry: A Tale of Deaths and Diseases in a Heavily Polluted Upscale Estate. *Sunday Punch*, December 16.

[240]Ogunseye, T. (2012). The Rich also Cry: Killer Metals in the Blood. *Sunday Punch*, December 23. Ogunseye, T. (2012). The Rich also Cry: When Investment is a Curse. *Sunday Punch*, December 30.

The environmental problems from industry are mostly rooted in inappropriate development patterns where industry has been developed in isolation from environmental issues and goals. A 2000 study of industrial policy in Nigeria concluded that industrial policy had not been directed specifically to address the issues of pollution intensity or the general environmental impact of industry as a whole[241]. Several studies of industrial policy in South Africa[242] also reveal that historically, industrial policy excluded environmental considerations. Little was written on the environmental management of industries at the macro level. Detailed research to understand and address the specific contribution of industrial air pollution was not undertaken in the Apartheid era.[243] It is under the new legal order in South Africa[244] that efforts have been made to integrate environmental considerations with industrial strategy.[245] It is perhaps for this reason that industrial activities are currently recorded as the leading causes of pollution in Nigeria[246] and in South Africa.[247] Environmental agencies in both countries regard industrial pollution as priority areas to be tackled in achieving environmental protection through the elimination or reduction of pollution.[248]

[241]Nigeria Common Country Assessment, March 2001. Available at http://www.ng.undp.org/documents/CCA_2001.pdf (last visited 29/2/2014).

[242]Bethlehem, L. and Goldblatt, M. (eds.) Op cit. Steyn, M.S. (1998). Environmentalism in South Africa, 1972 – 1992 An Historical Perspective. MA Thesis, University of the Free State, Bloemfontein, South Africa, pp. 109 – 111.

[243]Department of Environmental Affairs and Tourism (2005).*South Africa Country Report*, the Fourteenth Session of the UN Commission on Sustainable Development.

[244] The New legal order in South Africa commenced with the end of Apartheid, the enactment of an Interim Constitution, the election of a black-led majority government and the adoption of the current Constitution of the Republic of South Africa.

[245]Bethlehem, L., and Goldblatt, M. (eds.) op. cit.

[246] See Nigeria Common Country Assessment, op. cit.

[247]Department of Environmental Affairs and Tourism (2005).*South Africa Country Report*, the Fourteenth Session of the UN Commission on Sustainable Development.

[248] Industrial pollution was regarded by the defunct Federal Environmental Protection Agency (FEPA) (the first national environmental body to be established in Nigeria) as a priority environmental problem and hence the first ever *National Guidelines and Standards for Environmental Pollution Control* was more of an industrial pollution control guidelines and standard. See FEPA (1991): National Environmental Protection (Effluent Limitation) Regulations (S.1.8), Federal Environment Protection Agency, FGPL, Lagos, Nigeria. See also Adelegan, J. (2008). Environmental Compliance, Policy Reform and Industrial Pollution in Sub-Saharan Africa: Lessons from Nigeria. In: *Proceedings, VIII International Conference on Linking Concepts to Actions: Successful Strategies for Environmental Compliance and Enforcements*. Cape Town, South Africa, April 2008. International Network for Environmental Compliance and Enforcement, pp. 109 -119. See also Department of Environmental Affairs and

The courts have similarly grappled with the question of how much pollution is permissible or acceptable in the pursuit of industrialisation. A cursory look at some major decisions where the courts and international bodies extended the right to life or the right to health or the right to private life to environmental protection, reveals that a common feature of these cases was an industrial nuisance.[249] In some instances, the industrial activities were operating in violation of environmental laws and emission standards and in some there was a failure by the state to adequately regulate industrial activities that posed known risks to life health or property. In *Lopez Ostra vs. Spain*[250], the European Court of Human Rights for the first time held that a failure by the state to control industrial pollution was a violation of Article 8 (on the right to privacy) of the European Convention where there was a sufficiently serious interference with the applicants' enjoyment of their home and family life.[251]

Industrial pollution has also been held to be a violation of the right to a healthy environment. In the South African case of *Minister of Health and Welfare vs. Woodcarb (Pty) Ltd and another*[252] the Respondent's conduct of dispersing vast amounts of smoke generated from its sawmill operations was held not only to have contravened certain legislations but also to constitute an infringement of the rights of the respondent's neighbours to "an environment which is not detrimental to their health or well-being."[253]

Tourism (2005). *South Africa Country Report*, the Fourteenth Session of the UN Commission on Sustainable Development.

[249] In *Guerra vs. Italy* (1998) 26 EHRR 357, the facility in question was a chemical factory plant. The European Court of Human Rights (ECHR) held that Italy's failure to provide essential information about the severity and nature of toxic emissions from the chemical plant constituted a breach of the right to private life; see Para 60. In India, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in New Delhi and in some instances the courts issued orders to cease operations. In the India case of *Mehta vs. Union of India* (1998) AIR 115, the Court granted a writ of mandamus directing the closure of tanneries that were polluting the river Ganga by the discharge of untreated trade effluents into the river.

[250] ECHR [1994] Ser.A, No. 303C.

[251] The decision in *Lopez Ostra vs. Spain* (ibid.) is typical of the extensive environmental rights jurisprudence of the European Court of Human Rights (ECHR) in which the Court regards environmental right as a component of the right to life, the right to privacy and the right to life and the right to peaceful enjoyment of possessions and property.

[252] (1996) 3 SA 155(N)

[253] While this case was considered under the interim South African Constitution (Act 200 of 1993) it is still of relevance owing to the similar wording of the environmental right retained in the final constitution.

Studies have shown a clear link between industrial pollution and loss of life or lowered life expectancy.[254] Air pollution has been linked to a number of health problems among humans, including respiratory difficulties, cancers and lung disease. Bhagirath and Ratna[255] studied the environmental impact of water pollution from industries on rural communities, human health and agricultural production and analysed the linkage between industrial development and changes in the local environment. Scientific evidence as well as the pronouncements of courts and international tribunals in cases involving pollution[256] lends credence to the assertion that industrial pollution adversely affects the right to a healthy environment as well as other human rights such as the right to life, the right to health, the right to dignity, the right to privacy and property rights.

[254]Jerumeh, T. R. et al (2015).Industrial Pollution and its Attendant Effects on Public Health in Nigeria.*Journal of Economics and Sustainable Development*. 6 (24): 165-175. Available at www.iiste.org/JED/article/viewfile (Last accessed 13 November 2016).
[255]*Ibid*., p. 165.
[256] See 3.3.1 illustrating how a substantial part of the jurisprudence of national and regional courts in the enforcement of human rights relates directly to the infringement of human rights by industrial pollution.

CHAPTER THREE

THE NATURE AND SCOPE OF ENVIRONMENTAL RIGHTS

3.1 Introduction

The manner in which international law and national instruments have elaborated on environmental rights forms the focus of this chapter. The researcher will show the manner in which international and national instruments provide for the right to a healthy environment. We will also discuss the various approaches that global bodies, regional bodies and national courts have adopted in interpreting these provisions and developing the jurisprudence on environmental rights.

This approach is important as it sheds light on the status of environmental rights internationally and nationally, and because of the linkage between international law and domestic jurisprudence on the right to a healthy environment. There is the need to consider the extent to which international agreements and court decisions contribute to national jurisprudence and vice versa as well as examining the manner in which some countries have incorporated and implemented the environmental right.

From the environmental rights jurisprudence, the right to a healthy environment is regarded as a corollary to the right to life, the right to human dignity and the right to privacy. This approach has been adopted by the European Court of Human Rights, the Supreme Court of India and United Nations Treaty Monitoring Bodies like the UN Committee on Economic, Social and Cultural Rights.

Another approach regards the environment as a right in itself by providing for the right to an environment of a substantive quality. Words such as ‘healthy’, ‘clean’, ‘ecologically balanced’ are often used to define the particular quality required. This approach providing for a distinct and independent environmental right is found in regional treaties like the African Charter on Human and Peoples’ Rights and the Additional Protocol to the American

Convention on Human Rights in the Area of Economic, Social and Cultural Rights. It is also found in the national constitutions of some states.

The third approach we shall be examining, views environmental rights in terms of procedural rights of public participation in environmental decision-making, access to information on the environment and access to justice in environmental matters. It is reflected in a number of national constitutions and in theConvention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters (Aarhus Convention)

3.2 The Nature and Scope of Environmental Rights under International Instruments.

An indirect rights approach may be used to recognise the right to a healthy environment. The indirect rights approach, which has been adopted by the European Court of Human Rights and some national courts,interprets human rights, such as the right to life, dignity, health, property, adequate standards of living and food, to include an environmental component.

The indirect rights approach can be adopted from some international human rights instruments. Environmental rights can be deduced from major instruments such as the *International Covenant on Civil and Political Rights* (ICCPR)[1], the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[2], The *UN Convention on the Rights of the Child*[3] and the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW)[4].

[1]International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), 21 U.N GAOR Supp. (No. 16) at 52, U.N. Doc.A/6316 (1966), 999 U.N.T.S 171; 6 I.L.M 368 (1967) (Dec. 16, 1966) [hereinafter ICCPR]. Nigeria ratified the ICCPR on 29th July, 1993 and South Africa ratified it on 10th December, 1998.

[2]International Covenant on Economic, Social and Cultural Rights, art.13(1), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Dec. 16, 1966) [hereinafter ICESCR]. Ratified by Nigeria on 29th July, 1993 and ratified by South Africa on 12th January, 2015.

[3]Convention on the Rights of a Child, G.A. Res. 44/25, annex, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S 3, 28 I.L.M 1456 (1989) (Nov. 20, 1989).Ratified by Nigeria on 19th April, 1991 and by South Africa on 16th June, 1995.

[4]Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, 19 I.LM 33 (1980) (Dec. 18, 1979) [hereinafter CEDAW].

The ICCPR provides that every human being has the inherent right to life and this right shall be protected by law[5]. It is generally agreed that the right to life for humans is threatened in an environment that is polluted by toxic and noxious substances and this is particularly true for children, who are most vulnerable. In the words of LedumMitee "why should it matter if murder of a citizen is caused by an assassin's bullet or by cloud of poisonous gas or some toxic effluents from oil exploitation activities?"[6] Klaus Toepfer, the former executive director of UNEP, similarly commented that the fundamental right to life is threatened by environmental pollution and degradation and a contaminated environment prevents the enjoyment of human rights, particularly the right to life.[7]

It is for this reason that the Supreme Court of India has for some time recognized that the right to life extends beyond the right to mere existence, and includes an entitlement to the "finer graces of human civilization which make life worth living"[8]. It is therefore clear that Article 6(1) of the ICCPR that guarantees the right to life offers an indirect rights approach for recognizing a right to a healthy environment.

Within the UN system, the former Human Rights Committee[9] has examined a number of cases under the Optional Protocol to the ICCPR dealing with threat to life in violation of Article 6(1) of the ICCPR. In *EHP vs. Canada*,[10] Canadian residents alleged that radioactive waste that remained after the government had conducted a clean-up constituted serious risk to health in violation of article 6 of the ICCPR. Although the Committee declared the case

[5] See Article 6, ICCPR.

[6] MiteeLedum, Oil Exploitation, the Environment and Crimes against Nature. Retrieved on 1/7/2014 from www.ogoninews.com/ogoni/oil-exploitation-the-environment-and-crimes-against-nature-ledum-mitee

[7] See UNEP, Living in a Pollution-free World, A Basic Human Right, UNEP News Release 01/49, Available at http://www.grida.no/news/. Last accessed 17 July 2015.

[8] The cases of *Board of Trustees Port of Bombay vs. Dilip Kumar*, MANU/SC/0184/1982; *Kharak Singh vs. State of Uttar Pradesh*, 1963 AIR 1295. Retrieved on 9/1/2015 from http://www.legalserviceindia.com/issues

[9] The former Human Rights Committee monitored state party implementation of the ICCPR and has been replaced by the Human Rights Council. See 2.2.

[10] Communication 67/80, reported in 2 Selected Decisions of the Human Rights Committee under the Optional Protocol (1990) 20.

inadmissible, it noted that the case "raised serious issues with regard to the obligation of state parties to protect human life."[11]

The ICESCR guarantees the right of everyone to the highest attainable standard of physical and mental health and in this context requires states parties to take steps for "the improvement of all aspects of environmental and industrial hygiene" and for "the prevention, treatment and control of epidemic, endemic, occupational, and other diseases."[12] A fundamental right to a safe and healthy working condition is guaranteed in Article 7 and the right to an adequate standard of living with continuous improvement of living conditions is guaranteed in Article 11. These rights all have environmental implications because the basic rights provided for in the ICESCR, particularly the right to favourable conditions of work, adequate standard of living, food, housing and health are all dependent on a healthy environment.

The UN Committee on Economic, Social, and Cultural Rights has stated that Article 12(2) (b),

> includes, *inter alia*,…the requirement to secure an adequate supply of safe and potable water and basic sanitation to prevent and reduce the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.[13]

The UN Committee on Economic, Social and Cultural Rights also noted that States violate their duty to protect the right to health if they fail to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.[14]

Environmental pollution and degradation prevent people from enjoying the highest attainable standard of physical and mental health. According to the World Health Organization

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[11] Ibid.

[12] Article 12, ICESCR.

[13] UN Committee on Economic, Social, and Cultural Rights, 2000.*General Comment No. 14. Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: The Right to the Highest Attainable Standard of Health*. Twenty-second Session, Geneva, April 25-May 12, 2000, Item 3 of the Agenda. E/C. 12/2000/4, para. 15.Retrieved on 8/9/2015 from http://www.unhcr.org/refworld/publisher,CESCR,GENERAH,,4538838d0,0.html

[14] UN Committee on Economic, Social and Cultural Rights. 2000. General Comment 14 on the Highest Attainable Standard of Health, E/C.12/2000/4, para. 51.

approximately one quarter of the burden of disease globally is attributable to environmental factors[15]. It can therefore be said that the ICESCR offers an indirect approach for recognizing a right to a healthy environment even though most of the provisions linking the environment with the right to health were drafted before environmental protection became a prominent issue on the international scene.

Environmental pollution and degradation have particularly harmful effects on children who are a vulnerable group entitled to special care and assistance. The *UN Convention on the Rights of the Child* (CRC) contains several provisions that could be linked to environmental protection. Article 6(1) of the CRC recognizes the right to life of the child. Children are more susceptible to diseases caused by a contaminated environment, such as water borne diseases and asthma and as such require special protection.[16] The vulnerable and susceptible nature of children can be illustrated by the recent cases of lead poisoning in Zamfara State of Nigeria where the greater majority of the victims are children[17].

Where the child does not die from environmental pollution his development is threatened and he or she may become physically or mentally retarded. Article 24 of the Convention on the Rights of the Child guarantees to the child the highest attainable standard of health. In furtherance of this, state parties are to take appropriate measures to diminish infant and child mortality as well as combat disease and malnutrition. Among others, the state is required to provide clean drinking water and adequate nutritious food, taking into consideration the dangers and risks of environmental pollution. Article 29 furthermore provides that the education of children shall be directed, *inter alia*, to the development of respect for the natural environment.

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[15]Pruss-Ustun, A. and Corvalan, C. (2006).*Preventing Disease Through Healthy Environments: Towards an Estimate of the Environmental Burden of Disease*. World Health Organization,Geneva.

[16] Scientific studies have established that up to 90 percent of diarrhoea infections are caused by environmental factors, like contaminated water and lack of sanitation. Acute respiratory infections are estimated to kill about two million children below the age of five every year and about 60% of these are linked to environmental factors. See Children's Environmental Health Programs and Projects, World Health Organization. Retrieved on 11/6/2012 from http://www.who.int/ceh/en/

[17]Karunakara, U. (2012). Lead Poisoning and Remediation in Zamfara.*The Punch*, 25 December.

It can therefore be seen that the *Convention on the Rights of the Child* expressly recognizes that environmental pollution and degradation pose a direct threat to the child's basic rights to life and health. The CRC further recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development[18]. These provisions of the CRC offer an indirect rights approach for recognizing the right to a healthy environment. The Convention on the Rights of the Child links a state's implementation of the economic, social, cultural rights provided in the instruments to the resources available to the state.[19]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Article 11(1) (f) guarantees women the right to protection of health and to safety in working conditions including the safeguarding of the function of reproduction. Several literatures have established that pollutants may have adverse effects on women's reproductive health.[20]Women are particularly vulnerable in this regard due to their natural agricultural and domestic roles.

It is argued that most binding international human rights instruments did not make express provisions for the right to a healthy environment because they pre-dated the international concern for the environment which began with the 1972 UN Conference on the Human Environment.[21]These legally binding international instruments considered above can be interpreted to provide for the right to a healthy environment as corollary to the rights contained therein.

[18] A polluted environment would undoubtedly be inimical to the child's physical, mental, spiritual, moral and social development. The environment is thus a prerequisite for all the rights guaranteed in the Convention and should be read accordingly.

[19] Article 4 CRC.

[20]US President's Science Advisory Committee, (1965) Environmental Pollution Panel on restoring the Quality of our Environment, U.S Govt. Printing Office, Washington.

[21] See Churchill, R.R. (1996). Environmental Rights in Existing Human Rights Treaties. In: Boyle, A., and Anderson, M. (eds.) *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, p.90.

United Nations General Assembly Resolution 64/292[22], recognizing the human right to water and sanitation, is a recent international instrument with implications for environmental rights. The resolution acknowledges that clean drinking water and sanitation are essential to the realization of all human rights. In General Comment No. 15[23], the CESCR recognized that while the right to water is protected by certain international instruments on the environment[24], it is indispensable to many rights protected by human rights instruments. These include the right to life and to human dignity.

General Comment 15 elaborates on the right by defining the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses.[25] Safety means that the water must be free from micro-organisms, chemical substances and radiological hazards (in other words, pollutants) that constitute a threat to a person's health.

From the foregoing the right to a healthy environment and the right to water are linked. Environmental degradation and pollution constitute a major threat to the fulfilment of the newly recognized right to water. It can therefore be argued that the right to water presupposes a right to environment with unpolluted water bodies as well as conservation of water resources. Jan Glazewski has argued that courts could rely on environmental provisions in their respective constitutions to protect water from pollution or ensure access to water to meet basic human needs.[26]

Climate change is projected to adversely affect the right to water by impacting the availability and quality of drinking water through the contamination of rivers and reservoirs

[22]GA Resolution A/RES/64/292.
Available at http://www.un.org/waterforlifedecade/human_right_to_water.html. Last accessed 17 July 2015.
[23]Adopted in November 2002 by the Committee on Economic, Social and Cultural Rights. UN Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water E/C.12/2002/11 (2002) para 2.
[24] See *e.g. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992*.
[25] Ibid.
[26]Glazewski, J. (1999). Environmental Justice and the New South African Democratic Legal Order.*ActaJuridica* 1.

during high floods and the overflow of effluents from sewage and industrial discharges.[27] This would deteriorate water quality and increase the spread of water borne diseases like diarrhoea and cholera thereby affecting the right to health. Climate change is also expected to put stress on water resources and lead to water scarcity and droughts.[28]

The *U.N. General Assembly Resolution 45/94* contains recommendations to ensure a healthy environment for every person.[29] The fourth paragraph pronounces that women and men have a firm duty to safeguard and enhance the environment for current and future generations. This is recognition of the concept of intergenerational equity. In the first resolution the General Assembly asserts its recognition that every person is entitled to reside in a satisfactory environment for that person's health and well-being. Resolution 45/94 links the fulfilment of rights to life, adequate health and well-being to the quality of the environment. Like the Stockholm Declaration it clearly recognizes that adequate environmental quality is a precondition for enjoying basic human rights.

The judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[30] is of relevance to environmental rights when viewed from the perspective of sustainable development. In that case, the Court approved the concept of sustainable development when it held—

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit

[27] See Osman-Elasha, B. and El Sanjak, A. (2009). Global Climate Changes: Impacts on Water Resources and Human Security in Africa. In: Leroy, M. (ed.) *Environment and Conflict in Africa: Reflections on Darfur*.University for Peace, Addis Ababa. Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change, 2001.Retrieved on 13 July 2015 from http://www.grida.no/publications/other/ipcc%5Ftar/?src=/climate/ipcc_tar/wg2/382.htm.
Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: The Physical Science Basis.* Contribution of Working Group I to the FourthAssessment Report of the Intergovernmental Panel on Climate Change, 2007a; Intergovernmental Panel on Climate Change (IPCC). (2007b). *Climate Change 2007: Impacts, Adaptation and Vulnerability.* Contribution of Working Group II to theFourth Assessment Report of the Intergovernmental Panel on Climate Change.

[28] See Osman-Elasha, B. and El Sanjak, A. Op cit.

[29] U.N. General Assembly Resolution 45/94, A/RES/45/94, 68th Plenary Meeting, (Dec. 14, 1990)

[30] 37 I.L.M. 162 (1998) 200

> of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[31]

Recently, on March 20, 2012 the Human Rights Council adopted a resolution on the linkages between human rights and the environment and appointed an Independent Expert on Human Rights and the Environment.[32]

3.2.1 Environmental Rights at the Regional Level

3.2.1.1 The African Charter on Human and Peoples' Rights (the African Charter)[33]

The African Charter is significant for being the first regional treaty to provide for a substantive environmental right. Article 24 confers on African peoples the right to a general satisfactory environment favourable to their development. The right created by section 24 of the African Charter is regarded as peoples' right and not individual rights.[34] In its instructions on how to submit a communication, the African Commission on Human and Peoples' Rights (the African Commission), the principal supervisory body of the African Charter, considers 'peoples' right" to be a right held by the entire community at the local or national level[35]. This suggests that the environmental right of the entire community (and not that of an individual) should have been infringed before a communication can be brought under Article 24. In this sense, the African Charter is unique for incorporating collective rights. The African human

[31] Ibid. at para. 140. In a Separate Opinion, Vice-President Weeramantry held that the concept of sustainable development is part of international customary law. See Separate Opinion at 207.

[32] Resolution 19/10. See 2.3.1 for a discussion of this recent development.

[33] The African Charter forms the normative framework of the African human rights system. It was adopted by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) on 27 June 1981 and came into force 21 October 1986. The African Charter guarantees civil and political rights as well as economic, social and cultural rights.Ratified by Nigeria on 22nd of June, 1983 and by South Africa on the 9th of July, 1996.

[34] See Boyle, A.(2009).Human Rights and the Environment: A Reassessment. A Paper Presented at the High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR in Nairobi, Nov 30 – Dec1, p.5.

[35] See African Commission on Human and Peoples' Rights, *Guidelines for Submission of Communications*. Retrieved on 15/6/2015 fromhttp://www.achpr.org/english/_info/guidelines_communications_en.html

rights system is also the first regional system to pronounce on the meaning and content of the right to a satisfactory environment.[36]

This opportunity arose in the case of *Social and Economic Rights Action Centre (SERAC) vs. Nigeria (SERAC communication)*[37], where the African Commission interpreted the scope of the right to a satisfactory environment. The communication alleged that the Nigerian government, through its involvement in oil production in the Niger Delta, contributed both directly and indirectly to gross violations of the rights of the Ogoni people. The rights that were allegedly infringed include the rights to a healthy or satisfactory environment, the rights to an adequate standard of health, the rights to property and the right to housing.

In its decision the Commission stated that Articles 16[38] and 24 of the African Charter recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as environment affects the quality of life and safety of the individual.[39] The Commission outlined the obligations of state parties under Articles 16 and 24 of the African Charter as well as other relevant international instruments. According to the Commission,

> The right to a general satisfactory environment, as guaranteed under 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16 (3)[sic] already noted obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to

[36]Van der Linde, M. and Louw, L. (2003).Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication.3 *African Human Rights Law Journal*, p.170

[37]*Social and Economic Rights Action Centre for Economic and Social Rights (SERAC) vs. Nigeria, African Commission on Human and Peoples' Rights* Communication No 155/96 (2001).

[38] Article 16 of the African Charter provides for the right to enjoy the highest achievable level of mental and physical well-being.

[39]Paragraph 51.

> respect the just noted rights and this entails largely non-interventionist conduct from the state for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[40]

The ACHPR further elaborated on the positive obligations of governments in the light of Article 24. It held that government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[41]

The obligations highlighted by the African Commission provide for substantive aspects of environmental rights such as the duty of the government to promote sustainable development and conservation as well as preventing pollution and ecological degradation. It also contains procedural aspects such as the rights of people to be heard where their environmental rights are affected, provision of environmental information to affected communities and public participation in environmental making processes.

The decision in the SERAC case is commendable for seizing the opportunity afforded it to interpret the environmental right thereby providing guidance to state parties on their positive and negative obligations under Article 24 of the African Charter and enriching existing jurisprudence on the nature and scope of the environmental right. Taking both the substantive and procedural aspects of the right into consideration is appropriate since both are necessary elements of the right and complement each other.

The SERAC communication has been described as a remarkable decision which goes further than any previous human rights case in the substantive environmental obligations it

[40]Para. 52.
[41]Para. 53.

places on states.[42]According to Shelton, it offers a "blueprint for merging environmental protection, economic development and guarantees of human rights."[43]Anel du Plessis regards the 'guidelines' provided by the African Commission as more obligatory than voluntary, thereby making it a highly significant decision more so as the decision confirmed the enforceability or justiciability of environmental rights in Africa.[44]

While the real impact of the decision has been modest,[45] the decision is important in establishing the rights of Africans to a substantive environmental right. Furthermore, the references made to the decision by other human rights bodies[46] and legal scholars suggest that the decision has contributed to the growing jurisprudence of environmental law and human rights. In this context the SERAC decision is likely to influence judicial decision making.

3.2.1.2 The Inter-American Convention on Human Rights[47]

The Inter-American Convention provides mainly for civil and political rights. Several of its provisions can be interpreted to recognize the environmental right as a corollary. Some of these rights include the right to life (Article 4) which provides that "every person has the right to have his life respected and this right shall be protected by law and, in general, from the moment of conception" and the right to property (Article 21). A healthy environment is a necessity for the realization of these rights.

Indeed, the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights have interpreted the rights to life, health and property to

[42] Boyle, A., op cit. p.4.

[43]Shelton, D. (2002).Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/ Centre for Economic and Social Rights v. Nigeria).*American Journal of International Law*,96: 941.

[44] Du Plessis, A. (2008). Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere (Unpublished PhD Dissertation, North-West University, Potchefstroom) p. 113.

[45] This is in the light of the fact that the decisions of the Commission are not binding but merely recommendatory.

[46] For example the case of *Maya Indigenous Community of Toledo District vs. Belize*, Case 12.053, Report No. 40/04, Inter-American Court of Human Rights (IACHR), OEA/Ser.L/V/II.122 Doc.5 rev at 727 (2004) where the IACHR cited the SERAC Case.

[47] Adopted in San Jose, Costa Rica on 22 November 1969 and came into force on 18 July 1978. It has been ratified by 24 states, not including the USA and Canada.Organization of American States, Department of International Law 2009.Retrieved on 23/1/2013 from http://www.oas.org/juridico/english/Sigs/b-32.html.

afford protection from environmental destruction and unsustainable development. The IACHR established a link between environmental quality and the right to life in response to a petition brought on behalf of the Yanomani Indians of Brazil. The petition alleged that the government violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomani territory and authorizing the exploitation of the territory's resources. These actions led to the influx of non-indigenes who brought contagious diseases which remained untreated due to lack of medical care. The IACHR found that the government had violated the Yanomani rights to life, liberty, and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI).[48]

The Convention failed to provide explicitly for economic, social and cultural rights. This necessitated the adoption of an Additional Protocol to the American Convention on Human rights in the area of Economic, Social and Cultural Rights, 1988 (The Protocol of San Salvador).[49]

3.2.1.3 The Additional Protocol to the American Convention on Human rights in the area of Economic, Social and Cultural Rights (The Protocol of San Salvador)

Article 11 of the Protocol recognizes the right to a healthy environment as follows:

1. Everyone shall have the rights to live in a healthy environment and to have access to basic public services.
2. The state parties shall promote the protection, preservation, and improvement of the environment.

The environmental right in the Protocol of San Salvador is an individual one in contrast to the collective nature of the right in the African Charter. The Protocol also links environment

[48] Case 7615 (Brazil), IACHR, 1984 -1985 Annual Report 24, OE/Ser.L/V/II.66, doc.10 rev.1 (1985)
[49] Adopted at San Salvador, El Salvador on November 17, 1988 and came into force on November 16, 1999. It has been ratified by 15 states. Available at www.oas.org/en/iachr/mandate/Basics/sansalvadorat.asp. Last accessed 23 May 2015.

to the provision of basic public services like water, sanitation, electricity. The language of the Protocol is clearer than that of the African Charter which is ambiguous and open to multiple interpretations.The Protocol of San Salvador also provides for the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.[50]

In a situation involving the effects of oil and gas development on Ecuador's Yanomani people, the IACHR conducted an investigation and concluded that toxic chemicals were contaminating the Yanomani's drinking and bathing water, air, and soilandjeopardizing their health and their lives[51]. The IACHR observed that:

> The realization of the right to life, and to physical security and integrity is necessarily related to, and in some ways dependent upon ones physical environment. Accordingly, where physical contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[52]

A significant feature of the decisions of the IACHR is that it draws heavily on the rights of indigenous peoples to their traditional lands and means of livelihood[53]. The rights of indigenous peoples are of particular importance in the Americas where the indigenous peoples have historically suffered oppression and dispossession by European settlers and have, in some cases, almost been decimated by war and imported diseases.

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[50]Ibid. Article 10.

[51]Inter-American Commission on Human Rights, 1997. Report on the Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96, Doc. 10, rev. 1. *Report on the Human RightsSituation in Ecuador* ("Ecuador Report"), OEA/Ser.H/R/DD.96, Ch. 9. Retrieved on 30/1/2015 from http://cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm,

[52]Ibid. p. 88.

[53]*Mayagna (Sumo) AwasTigni Community vs. Nicaragua* (2001)Ser. C, No.20. In *Maya Indigenous Community of the Toledo Disrict vs. Belize*, Case 12.053, ReportNo.40/04, IACHR, OEA/ Ser.L/V/II. Doc.5 rev1 at 727 (2004), the Commission found that Belize violated the Maya people's right to use and enjoy their property by granting concessions to third parties to exploit resources that degraded the environment within lands traditionally used and occupied by the Maya people. In*Yanomani Indians vs. Brazil*, Decision 7615, Inter Am. C.H.R, Inter-American Yearbook on Human Rights. 264 (1985), the Commission recognized that harm to people resulting from environmental degradation violated the right to health in Article XI of the American Declaration. . . . The Inter-American Commission found that "by reason of the failure of the Government of Brazil to take timely and effective measures [on] behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the . . . right to the preservation of health and to well-being."

A major limitation of the San Salvador Protocol is that it provides for the progressive, rather than immediate, implementation of the rights guaranteed and parties are to adopt the necessary measures for the realization of the rights to the extent of their available resources and taking into account their degree of development.[54] A state may on this ground, seek to avoid its obligations under international law.

3.2.1.4 The European Convention on Human Rights (European Convention)[55]

The European Convention does not proclaim environmental rights. However there are several rights in the European Convention that could be interpreted to give effect to environmental rights. The right to life (Article 2), the right to respect for private and family life (Article 8), and the right to a fair hearing (Article 6) all have an indirect impact on claims relating to the environment.

The European Court of Human Rights has adopted the indirect approach of fashioning environmental rights from the rights proclaimed in the European Convention. In *Lopez Ostra vs. Spain*,[56] its first major decision involving environmental harm as a breach of the right to private life under Article 8 of the European Convention, the applicant suffered serious health problems from the fumes from a tannery waste treatment plant which had been operating only a few metres from her home. The European Court found a breach of the European convention as a consequence of environmental harm and held that severe environmental pollution may affect individuals' well-being to the extent that it constitutes a violation of Article 8.

In subsequent cases the right to life and the right to private life have been used by the European court to regulate environmental risk, enforce environmental laws or disclose

[54] Article 1 provides that-The States Parties to this *Additional Protocol to the American Convention on Human Rights* undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislation, the fullobservance of the rights recognized in this Protocol.

[55] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention] (signed in 1950 and came into force in 1953).

[56](1994) 20 EHRR 277.

information[57]. The European court has consistently interpreted the convention in the light of present day conditions which include the increasing concern for the environment and has developed an extensive and growing environmental jurisprudence. This, according to scholars, has obviated the necessity of the adoption of an environmental protocol.[58] Boyle considers that in this sense (through evolutionary interpretation) environmental rights are "already entrenched in European human rights law".[59]

In spite of this, the European Convention has its shortcomings: it must be shown that there is an existing or imminent infringement of the human rights of a person(s) arising from the environmental pollution or degradation. This is because none of the articles of the European Convention are specifically designed to provide general protection of the environment. Thus, if the applicant's life, health, private life and other rights are not sufficiently affected by environmental loss, he or she would have no standing to proceed. Judge Loucaides has aptly observed that there is no *actiopopularis* under the European Convention.[60]

3.2.1.5 The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention)[61]

The Aarhus Convention provides for procedural environmental rights in Europe. In 1990, the United Nations Economic Commission for Europe adopted a Draft ECE Charter on

[57]Boyle, A. (2009).Human Rights and the Environment: A Reassessment. op cit., p.15.*Guerra vs. Italy* (1998) 26 EHRR 357; *Fadeyeva vs. Russia* (2005) ECHR 376; *Oneryildiz vs. Turkey* (2004) ECHR 657; *Taskin vs. Turkey* (20040 ECHR, Paras. 113-119, *Tatar vs. Romania* (2009) ECHR, Para 88. See also Shelton, D (2010). Developing Substantive Environmental Rights.*Journal of Human Rights and the Environment*, Vol. 1 No. 1, pp. 89–120.

[58]Boyle, A. (2009). Human Rights and the Environment: A Reassessment, op cit., p.15. See Council of Europe: Committee of Experts for the Development of Human Rights, *Final ActivityReport on Human Rights and the Environment*, DH-DEV(2005)006rev, Strasbourg, 10 November2005), 2-3 . Cited in Boyle, A. op cit., pp. 13-15.

[59]Boyle, A. (2009) op. cit.

[60]Loucaides, L. (2004). Environmental Protection through the Jurisprudence of the European Court of Human Rights) 75 *British Yearbook of International Law*, 249. Cited in Boyle, A. op cit. p. 31 (This means that litigants and NGOs were unable to challenges environmentally destructive or unsustainable development on public interest grounds).

[61]Adopted on June 25, 1998 in Aarhus, Denmark at the Fourth Ministerial Conference in the "Environment for Europe" Process. It entered into force on October 30, 2001. See UN Economic Comission for Europe, Introducing the Aarhus Convention at http://www.unece.org/env/pp/ctreaty.htm (last accessed July 30, 2012).

Environmental Rights and Obligations[62], which sets forth twenty four principles that relate to public participation in decisions that affect the environment.

The Aarhus Convention asserts that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty both individually and in association with others, to protect the environment for the benefit of present and future generations."[63] It recognizes in its preamble that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself". It goes on to set out minimum standards on access to information, public participation and access to justice to be complied with and implemented in domestic law by the parties.

The Aarhus convention is widely ratified in Europe[64] andis open to ratification by any state. It has had significant influence on the jurisprudence of the European Court of Human Rights[65]. The Aarhus Convention, which is strictly procedural in content and does not provide for a substantive environmental right, is nevertheless considered the most advanced international instrument on participatory and procedural rights in environmental matters by setting relatively detailed minimum standards for different participatory procedures.[66]. According to Pallemaerts, it is the first multilateral environmental agreement whose main purpose is to impose on its contracting parties obligations toward their own citizens.[67] An important contribution of the Aarhus Convention to environmental rights is the opportunity it

[62] Draft ECE Charter on Environmental rights and obligations, adopted at the experts meeting, U.N Economic commission for Europe, Oslo, Norway 29-31 October 1990 (Charter Draft ECE Charter).

[63] Preamble, U.N. ECE, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, U.N. Doc. ECE/CEP/43.

[64]Ratified by more than 40 parties in Europe and parts of Asia.

[65] Boyle, A., op. cit.p.7. The Aarhus Convention has been used by the ECHR in jurisprudence relating to article 8 of the European Court of Human Rights in *Taskin and others vs. Turkey*, op cit. Boyle, on this ground posits that the Aarhus Convention owes little to Principle 1 of the Stockholm Declaration and everything to Principle 10 of the 1992 Rio Declaration.

[66]Ebbesson, J. (2009). Participatory and Procedural Rights in Environmental Matters: State of Play. High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, UNEP and OHCHR, 30 November – I December.

[67]Pallemaerts, M. (2002).The Human Right to Environment as a Substantive Right.In Dejeant-Pons M. and Pallemaerts, M. (eds.)*Human Rights and the Environment*.Council of Europe Publishing, Strasbourg, pp. 11-21 at 18.

gives to public interest activism by NGOs[68]. In this way it fills a lacuna in the European Convention of Human Rights.

3.3 The Incorporation of Environmental Protection in National Constitutions

While the link between the environment and human rights was first articulated at the international level, it is apparent that the implementation and enforcement of international human rights are, at the first instance and to a large extent, dependent on municipal legal systems. This raises the necessity for domestication of international law into national legal systems. The right to environment has been domesticated in a large number of states and one of the ways in which this has been done is by the provision of environment in national constitutions.

Environmental Law may be incorporated in a state's legal system in a variety of ways. According to Okidi[69] environmental law may be said to fall under three broad categories as follows: Firstly, old principles and rules under common law and civil law jurisdictions.[70] Secondly, rules and principles entrenched in constitutional provisions on environment and natural resources and thirdly, statutory law relating to the environment.

Okidi's categorization fails to take into account other important sources of environmental law like case law consisting of judicial pronouncements on the environment and International law on the environment which includes binding and non-binding instruments. Of the above categories, the right to a healthy environment is reflected at the national level in the form of constitutional provisions on the environment. These, according to Bruch et al., offer "broad and powerful tools for protecting the environment".[71]

[68] Article 6 of the Aarhus Convention.

[69] Okidi, C.O. (2004).Structure and Function of Environmental Law. A paper presented at the symposium of Environmental Law lecturers in Africa, Nakuru, Kenya , 29th September-2nd October and organized by UNEP and University of Nairobi.

[70] These laws include rules and principles of nuisance, negligence and strict liability which, although not directed at the protection of the environment, have been applied to achieve environmental protection.

[71] Bruch, Coker and Van Arsdale, (2000).*Constitutional Environmental Law: Giving Forceto Fundamental Principles in Africa*, Environmental Law Institute.

An important indicator of the widespread development and recognition of an environmental human right is the extent to which it has emerged in national constitutions.[72] Several scholars[73] note that virtually every constitution revised or adopted since 1970 has addressed or included environmental issues. This is a reflection of the Stockholm Declaration.[74] Since the Stockholm conference, about ninety (90) nations have adopted constitutionally entrenched fundamental environmental rights and these include both developing and developed nations, Sub-Saharan African, European, Asian, Latin American, Caribbean states; states with a common law tradition and states with a civil law tradition.[75] Moreover the constitutions of many other states contain directive principles to guide national policy on environmental issues, e.g. Nigeria.

Writings on constitutional provisions relating to the environment note that domestic constitutions tend to reflect environmental norms in one or more of the following: as a policy directive or statements of policy; as a procedural right; or as a fundamental environmental right.[76] Boyd, on the other hand, identifies five categories of provisions related to environmental protection in national constitutions. Firstly, a substantive right to a healthy environment; secondly,procedural environmental rights; thirdly, government's duty to protect the environment; fourthly, individual environmental responsibilities; and fifthly, miscellaneous other provisions with the most common being the imposition of a duty on the government.[77]

Environmental provisions in constitutions of African states fall within any or several of the categories mentioned above and a constitutional environmental provision(s) may include

[72]Kiss, A. and Shelton, D. op. cit.
[73] See Bruch, et al. op cit., May, J.R. op cit., Boyd, D. R. op cit.
[74]The Preamble of the Stockholm Declaration states that local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. It further calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.
[75]May, J.R. and Daly, E. (2009).Vindicating Fundamental Environmental Rights Worldwide.*Oregon Review of International Law*, Vol. 11, pp. 365-437. Available at http://www.law.uoregon.edu/org/oril/docs/11-2/May.pdf
Boyd, D. R. op cit.
[76]Hayward, T. (2005).*Constitutional Environmental Rights*, Oxford University Press, pp.12-13.May, J.R. op cit. pp.116-117, Bruch, C. et al. op. cit. Glazewski, J. (1991).The Environment, Human Rights and a New South African Constitution. 7*South African Journal of Human Rights*, pp. 167, 173-175.
[77] Boyd, D.R. Op cit. pp. 75, 87-100.

all categories. An example of a fundamental environmental right is found in the Constitution of the Democratic Republic of Congo which provides that '[e]very Congolese shall have the right to a healthy environment that is favourable to his development.'[78] The Namibian Constitution does not provide for a substantive environmental right but couches its environmental provision as a state policy:

> The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the… maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.[79]

The Ethiopian Constitution imposes a duty on the government in the following words: "government shall have the duty to ensure that all Ethiopians live in a clean and healthy environment."[80]

The varying approaches are a reflection of legal opinion on the extent of level of protection that should necessarily be afforded to the environment. These different constitutional approaches inevitably result in different legal implications for environmental protection. Policy directives can be instrumental in providing environmental norms that aid environmental protection. They are intended to influence governmental decision-making but are generally not directly judicially enforceable[81]. While procedural rights are valuable and can be enforceable they do not impart a substantive right to a quality environment.

A fundamental environmental right generally offers the strongest form of protection to the environment. According to May,

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[78] Article 54, Constitution of the Democratic Republic of Congo.

[79] Article 95 Constitution of Namibia. Retrieved on 30 July 2015 from http://209.88.21.36/opencms/export/sites/default/grnnet/AboutNamibia/constitution/constitution1.pdf

[80] Article 92(1) Constitution of Ethiopia.

[81] May notes that a basic shortcoming with policy statements is that they are not enforceable by citizens who are aggrieved by environmental degradation. See May, J.R., op. cit., p. 116., while Brandl and Bungert note that "although the existence of a statement of public policy must be given some consideration in a constitutional (claim), only a fundamental right grants the individual the legal remedy of a constitutional complaint". See Brandl, E. and Bungert, H. (1992). Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad. 16 *Harvard Environmental Law Review*, p.32.

> …(fundamental rights) are more indestructible than statements of policy or procedural norms, enjoy the highest level of legal norms, are less subject to political whims and tend to be better understood by both the polity and citizenry.[82]

The inclusion of environment in a state's constitution has some significance because of the legal position of Constitutions. Constitutions have an important role to play in the polity of any state and constitutionalism has been around since antiquity.[83] Even then, for many states, constitution making is a fairly recent experience. Goldwin and Kaufman estimate that "of the 160 … written constitutions in the world, more than half have been written since 1974".[84]

A constitution has been defined in several ways. It is the supreme law of a land. According to Charles Borgeaud, "a constitution is the fundamental law according to which the government of a state is organized and the relations of individuals with society as a whole are regulated…." It is "the expression of the sovereign will of the nation."[85] A constitution has also been defined as the "fundamental and paramount law of the nation"[86]. According to Bruch, "A nation's constitution is more than an organic act establishing governmental authorities and competencies: the constitution also guarantees citizens basic fundamental human rights such as the right to life, the right to justice and increasingly the right to a clean and healthy environment."[87]

Constitutions further guide national values and aspirations, and the constitutional basis buttresses the values and influences provisions of statutes, including environmental law. So important are constitutions that any law or action that contravenes the constitution is regarded as null and void. For example, the Nigerian Constitution provides that, "[I]f any other law is

[82]See May, J.R., op. cit. p. 118. Brandl, E. and Bungert, H. (1992). Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad. 16 *Harvard Environmental Law Review*, pp. 4-5.
[83]See Schochet, D.J. (1979). Introduction: Constitutionalism, Liberalism, and the Study of Politics. In Pennock, J.R. & Chapman J.W. (eds.) *Constitutionalism*.New York University Press.
[84]Goldwin, R.A. and Kaufman, A. (eds.) (1988).*Constitution Makers on Constitution Making: The Experience of Eight Nations*. (No. 479) American Enterprise Institute for Public Policy Research.
[85]Borgeaud, C. (1895). *Adoption and Amendment of Constitutions in Europe and America* 35 (Charles D. Hazen trans.). Cited in May, J.R., op cit., p. 117. Venter states that the legal foundations of the authority of the state are in almost all modern states to be found in a written constitution. Venter, F. (2000).*Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*.Juta, Cape Town, p. 7.
[86]Marbury vs. Madison, 5 US (I Cranch) 137, 177 (1803).
[87]Bruch, C. et al. op cit., p. 1.

inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."[88]

3.3.1 Analysis of Environmental Provisions in Selected Constitutions

This section takes a look at some constitutional provisions on the environment as well as a brief discussion of how the courts in several jurisdictions have, in relevant cases, interpreted these provisions. Based on a review of environmental rights jurisprudence, the researcher has selected states from several continents to have a representative picture.

3.3.1.1Kenya

Article 42 of the new Kenyan Constitution[89] states that

> Every person has the right to a clean and healthy environment, which includes the right –
> (a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
> (b) To have obligations relating to the environment fulfilled under Article 70.

Environmental provisions are included in Chapter Four, under 'Rights and Fundamental Freedoms' and are therefore justiciable rights. Chapter Five also provides for 'Environment and Natural Resources'. The entrenchment of environmental rights and principles in the new Kenyan constitution is an improvement on the 1964 Constitution and has been described as "signalling unwavering environmental commitment."[90] The environmental provision in the Kenyan Constitution is very similar to that in the South African Constitution except that the provision in Kenya is expressed in positive terms '*a clean and healthy*

[88]Section 1(3), Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[89]Available at http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.(Last accessed 24 August 2016). The 2010 Constitution of Kenya, currently in force, replaced the 1969 constitution, that itself had replaced the 1963 independence constitution. The constitution was presented to the Attorney General of Kenya on April 7, 2010, officially published on May 6, 2010, and was subjected to a referendum on August 4, 2010. The new Constitution was approved by 67% of Kenyan voters. The constitution was promulgated on 27 August 2010. http://www.bbc.co.uk/news/world-africa-11106558. (Last accessed 24 August 2016).
[90]Mwenda, A. and Kibutu, T.N. (2012).Implications of the New Constitution on Environmental Management in Kenya', 8/1 *Law, Environment and Development Journal* (2012), p. 76. Retrieved on2 February 2016 from http://www.leadjournal.org/content/12076.pdf

environment' while that of South Africa isexpressed in negative terms '*an environment that is not harmful to their health or well-being*'.

The World Health Organization has defined health as a 'state of complete physical, mental and social well-being',[91] thus extending the meaning of health beyond human physical well-being to include human mental integrity. Clean means to be free from harmful or unpleasant substances.[92]This implies that the environment envisaged should be pollution-free.

Although the previous 1964 Kenya constitution did not contain explicit environmental provisions, the right to a clean and healthy environment is acknowledged in the Environmental Management and Coordination Act of 1999 (EMCA)[93]. The Kenyan courts in constitutional references have interpreted the 'right to life' provided for in Section 71 to include environmental protection.

In the 2007 case of *Peter Waweru vs. Republic*[94] the applicants sought to quash criminal proceedings against them in a subordinate court for violating public health legislation by disposing of raw sewage into River Kiserian, a public water source, through laid down underground pipes. Surpassing prayers sought in the judicial review application, the court stated that the outcome of the case would concern the country's treatment of environmental issues. To justify their decision, the judges noted that the basic right to life depended on a clean and healthy environment, and the two were coterminous. They noted that water tables and clean rivers exist for thepresent and future generations and their quality of life. For this reason a *mandamus* order was issued to compel the Nairobi Water Services Board and the Olkejuado County Council (none of them party to the suit) to construct sewerage treatment works and

[91]Preamble of the Constitution of the World Health Organisation, 1978.

[92] Hornby, A. S. (2005). *Oxford Advanced Learner's Dictionary of Current English*, 7th edition. Oxford University Press, Oxford.

[93]Section 3 of EMCA creates a universal right to a clean and healthy environment for every person resident in Kenya; Environmental Management and Coordination Act, EMCA (Act No 8 of 1999, Kenya Gazette Supplement No. 3, Acts No. 1, January 2000). EMCA is the framework environmental law applicable to Kenya. It was enacted by Parliament in 1999 and came into force in 2000.

[94](2007) AHRLR 149 (KeHC 2007)

remedy the situation. The applicants were allowed leave to return to the court for further orders in the event of non-compliance.[95]

In its decision the court repeatedly made reference to the law of sustainable development as it was of the opinion that it went to the heart of the matter. On the link between the right to life and the environment, the Court noted that-

> Under section 71 of the Constitution all persons are entitled to the right to life. In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent restatement in the statutes and the Constitutions of the world notwithstanding.[96]

The status of the environmental right in Kenya has been elevated by its inclusion as a fundamental constitutional right. Moreover the content and meaning of the environmental right has been elaborated on by reference to other sections of the Constitution. The environmental right in the Constitution is to be understood in the context of sustainable development. Article 69(1) (a) provides that 'The State shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits'. The environmental right also encompasses biodiversity protection as reflected in Article 69(1) (b) of the new constitution which states that 'The State shall work to achieve and maintain a tree coverof at least ten per cent of the land area of Kenya'. This is recognition of the obligation of the State and its organs, including the Ministry of Forestry and Wildlife and the Kenya Forest Service, to ensure that the present forest cover is increased, so as to adequately meet the needs placed upon forests in Kenya.[97]

Article 69(1) (e) provides that '[T]he State shall protect genetic resources and biological diversity.' Together with biodiversity conservation, the medical, economic and

[95]Op cit. p. 164-5; Kibugi, R. (2011).Development and the Balancing of Interests in Kenya. In: Faure, M. and Du Plessis, W. (eds.) *The Balancing of Interests in Environmental Law in Africa*. Pretoria University Law Press, pp.167-196, p.184-5.
[96]Op cit. Para.26 at p.156.
[97]Mwenda, A. and Kibutu, T.N., op cit. p.81

additional benefits of natural resources are increasingly recognized internationally. Tied to this is the role of local communities as custodians of traditional knowledge of natural resources. The interests of local communities is explicitly recognized and safeguarded by Article 69(1) (c) which provides that the State shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.

It is needful to acknowledge the vital role that local communities play in biodiversity conservation as these communities have from time immemorial depended on these natural resources for sustenance. They possess traditional or indigenous methods of conservation, from which modern environmental management systems could learn. Conservation programs such as the Reduced Emissions from Deforestation and Degradation (REDD) which are likely to affect the rights of indigenous communities should necessarily involve them in planning and execution at the local level. This is borne out by Article 69(1) (d) of the Constitution which states that '[T]he State shall encourage public participation in the management, protection and conservation of the environment'. Kibugi[98] has noted that using the term 'encourage' as opposed to using mandatory terms requiring the Kenyan state to implement public participation may reduce the legal effect of the provision.

The right of participation is important in view of the fact that local communities are likely to have their rights affected by proposed projects and ought to have a say in the planning and execution. Moreover, where property rights are adversely affected, the local communities should be paid adequate compensation and /or provided with alternative lands.

Article 69(2) places a corresponding duty on the people of Kenya, and provides that: 'Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural

[98]Kibugi, R. op. cit. p.179

resources.' The definition of the term 'person' by the Constitution includes natural persons and artificial entities like a company, business or association.[99]

The constitutional provisions for the enforcement of the environmental right are important in determining how effective the right is likely to be in practice.Article 70 of the Constitution which deals with the enforcement of environmental rights provides that-

> If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
> On application under clause (1), the court may make any order, or give any directions, it considers appropriate
> (a) To prevent, stop or discontinue any act or omission that is harmful to the environment;
> (b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
> (c) To provide compensation for any victim of a violation of the right to a clean and healthy environment.

The import of this provision is that the environmental right can be enforced like any 'first generation' human right. Environmental harm need not have occurred to give rise to an action under Article 42. It may be imminent or impending. This serves an important preventive function as it is often difficult and sometimes impossible to completely restore a damaged environment.

The Constitution also eliminates the need to show that anyone has suffered harm[100] (which would likely be required if an action to protect the environment were to be brought under the right to life or other rights in the previous Constitution). The ability of citizens to apply to a court for redress on environmental issues, whether affected directly or indirectly, has been acknowledged as one of the great innovations of the Kenyan Constitutions.[101] Thus

[99]Article 260 Constitution of Kenya.
[100]Article 70 states: *'For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury'*
[101]Kameri-Mbote, P.(2005). *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* (Geneva: International Environmental Law Research Centre, Working Paper 2005-1).

Kenya has come a long way from the past when the lack of standing to sue constituted a major problem in the enforcement of environmental laws.[102]

That the Kenyan judiciary has come a long way is further evidenced by the decision in *Waweru vs. Republic*[103] where the judge displayed commendable knowledge of the international law on the environment as well as foreign case law on environmental rights. The siting of UNEP in Nairobi, Kenya as well as training programs tailored for judicial officers seems to be a major factor in the current trend in environmental law in Kenya.[104]

3.3.1.2 Argentina

In many South American states, the 1980s and 1990s witnessed a transition from authoritarian regimes to democracy. Constitutional reforms during this period incorporated a range of social and economic rights, including the right to healthy environment; as well as stronger and more independent judiciaries.[105] In South America, most States have made fundamental changes to their legal systems to include environmental protection. The changes range from environmental impact assessment to constitutional guarantees of a clean environment[106] leading Aguilar to assert that "no other region in the world has witnessed the promotion and protection of environmental rights with the enthusiasm and progressiveness as in Latin America"[107].

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[102]For example, in 1989 the application for an injunction to stop a massive building construction at a major city park in Nairobi by WangariMaathai (who later won the Nobel Peace Prize) was refused by the court on the ground that the plaintiff lacked *locus standi.WangariMaathai vs. Kenya Times Media Trust*(1989) Civil Case No. 5403, High Court of Kenya. Mekete, B.T. andOjwang, J.B.(1996).The Right to a Healthy Environment: Possible Juridical Bases. 3 *South African Journal of Environmental Law and Policy*,173.

[103]Op cit., note 94.

[104]Kameri-Mbote notes thatKenyan High Court and Court of Appeal judges were trained in environmental law principles between 2005 and 2007. Kameri-Mbote, P. (2009). Kenya. In: Kotze, L. and Paterson, R.A. (eds.) *The Role of the Judiciary in Environmental Governance*. Kluwer Law International, pp. 451-78.

[105]McAllister, L. K. (2005). Public Prosecutors and Environmental Protection in Brazil. In Romero A. and West, S. (eds.) *Environmental Issues in Latin America and the Carribean*. Springer,New York, pp. 207-229. Boyd, D.R. op cit. p. 165.

[106] According to Boyd, the right to a healthy environment is now entrenched in 16 Latin American constitutions, and is evidence that this right has influenced both legislation and litigation in the majority of these nations. See Boyd, D.R. Op cit., pp.165-180.

[107]Aguilar, A. I. (1994). Enforcing the Right to a Healthy Environment in Latin America.*Review of European Community and International Environmental Law*, Vol. 3(4), p. 215. See also Fabra, A. and Arnal, E. (2002).

In Argentina, the National Constitution (enacted in 1994) recognises the right to a healthy environment. The Argentinean Constitution in Article 41 states:

> All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law. The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education. The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden.

The environmental right is linked to development and the objective here is to ensure that development and the productive activities it entails are carried out in a sustainable manner. Section 41 recognises future generations. The inclusion of future generations in this constitutional environmental right as well as that of other states is evidence that the concept of inter-generational equity has, by state practice, become incorporated as a component of the environmental right.

Alongside the right are corresponding obligations imposed on all inhabitants to preserve the environment. This duty would extend to artificial persons like companies and businesses who are the source of much environmental harm. The Polluter-pays principle is implied in the obligation to repair the environment when it is damaged.

The section 41 right outlines measures for the realization of the right such as: rational use of natural resources; preservation of the natural and cultural heritage and of biological diversity; and environmental information and education (procedural rights that are a necessary complement to a substantive environmental right). The provision explicitly prohibits the importation of hazardous wastes into Argentina. The trade in toxic waste constitutes a glaring

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Review of Jurisprudence on Human Rights and the Environment in Latin America.Joint UNEP-OHCHR ExpertSeminar on Human Rights and the Environment, 14-16 January.Geneva. Background Paper No. 6. Available at www.ohchr.org/english/issues/environment/environ/bp6.htm (last accessed 17/5/2015).

example of environmental injustice whereby poorer developing countries are made to bear the brunt of toxic wastes generated by the consumptive lifestyle of richer developed countries.[108]

The right to a healthy environment can be asserted by communities at risk to fight the importation of toxic waste into their country as illustrated by the 1994 decision of the Colombian Court of First Instance in the case of *Fundepúblico vs. Tradenet S.A y otros*[109]. The plaintiff organization, Fundepúblico, on behalf of the inhabitants of Santa Marta filed an action against the importation of toxic wastes into Colombia. Based on the human right to healthy environment, the court ordered that a Croatian ship which had unloaded a cargo of waste containers in the Colombian port should reload the waste cargo and depart Colombia in less than 24 hours.

The Argentinean Constitution authorizes the use of expedited and simplified legal proceedings to deal with alleged and threatened violations of constitutional rights. The "amparo", a form of legal action or proceeding used to guarantee constitutional rights, other than the right of physical freedom covered by the writ of habeas corpus, is commonly used in many Latin American countries.[110] Section 43 of the Argentinean Constitution permits, where there is no other legal remedy, the filing of prompt and summary proceedings for the enforcement of the environmental right by the affected party, the ombudsman and relevant NGOs, thus recognizing and sanctioning Public Interest Litigation. The Constitution empowers an independent agency, known as the MinisterioPublico, ('Public Ministry') to protect collective interests, including the environment.[111] This agency functions as a public prosecutor, independent from the state and with financial autonomy, to which the public can turn to enforce environmental laws and prevent actions that could cause ecological damage and violate the right to a healthy environment.

[108]Hippolyte, A.R. (2012).Negative Environmental Sovereignty in the Third World: A TWAIL Analysis of ICSID'S Disregard for Environmental Justice in the South. Available at SSRN 2124645. (Last accessed 25 August 2016)
[109]*Fundepúblico v. Tradenet S.A y otros*.Tribunal de la Magdalena. 1994. Reported in Fabra, A. and Arnal, E. op cit.
[110] Boyd, D. R. Op cit.
[111] See Article 120, Constitution of Argentina.

According to Carballo[112], in Argentina, the constitutional right to a healthy environment "constitutes the main principle around which environmental law and governance revolves". However, even before the law provided for such explicit recognition, courts had acknowledged the existence of the right to live in a healthy environment.

In 1983, an administrative court stated that "the right of any citizen to preserve his or her habitat amounts to a subjective right" and that such right would entitle any person to initiate an action for environmental protection.[113]Later on, in the 1993 case of *Margarita vs. Copetro SA*[114]the court asserted that pollution arising from a coal burning industry, and particularly as a result of the cancerous substances that emanated from it, constituted a violation of the right to life, as recognized in the regional human rights instruments. This was before the right to the environment was recognised in the Argentinean Constitution. The court asserted as follows:

> The right to live in healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up to becoming a threat to life itself and to the psychological and physical integrity of the person -- which is based on ecological balance [.].

Even before the recognition of an environmental right in the national constitution the Argentine courts have linked the right to life and health to the quality of the environment. In the case of *Bustos Miguel y Otros vs. Dirección de FábricasMilitares,*[115]the Court stated that "…it is obvious that environmental harm finds legal coverage in positive law because it prejudices life, health and the psychological and physical integrity of those who …are affected by polluting substances". In the case of *Almada Hugo N. vs. Copetro and others*,[116] the court

[112]Carballo, J. (2009). Argentina. In Kotze, L., and Paterson, A., (eds.) *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*. Kluwer LawInternational, pp. 269-94 at 270.
[113]*Kattan, Alberto and others vs. National Government*.JuzgadoNacional de la Instancia en lo Contenciosoadministrativo Federal.Nº2.Ruling of 10.5.1983, La Ley, 1983-D, 576.
[114]*Margarita vs. CopetroSa. Cámara Civil Y Comercial De La Plata. Ruling Of 10.5.1993. Available In* www.eldial.com . This and other South African cases involving the right to environment are discussed in Fabra, A. and Arnal, E. Op cit.
[115]*Bustos Miguel y otros vs. Dirección de FábricasMilitares*. S/Acción de Amparo. Juzgado Federal de PrimeraInstancia Nº 2. La Plata, 30.12.1986.
[116]*Almada Hugo N. vs. Copetro and others*,Suprema Corte de Justicia de la Ciudad de Buenos Aires. Ruling of 19.5.1998. LLBA, 1998-943 - RCyS, 1999-530.

considered that in situations of environmental pollution the rights to life and health are directly affected and threatened.

After the Constitution's modification, this right has been often recognized by the judiciary and interpreted broadly. In the 1994 case of *Alberto Sagarduy*[117]the court considered the right to defend everyone's environment as a "natural human right", which allows citizens to place any complaints to government agencies regardless of the existence of a specific administrative procedure.

A recent Argentine case based on the constitutional right to live in a healthy environment is*Beatriz Silvia Mendoza and others vs. National Government and Others*.[118] In 2004, a group of concerned citizens sued the national government, the provincial government, and the City of Buenos Aires, along with 44 industrial facilities for polluting the Riachuelo River, asserting a violation of their right to a healthy environment. Millions of people, many of them poor, live near the Riachuelo River, one of the most polluted rivers in South America. In 2006, the Supreme Court issued an order requiring the government to conduct an environmental assessment of the state of the river and initiate an environmental education program. The Court also required all of the polluting facilities to provide information about their wastewater treatment equipment and programs.[119]

In 2007 the Supreme Court ordered the government defendants to establish a comprehensive clean-up and restoration plan for the river. Recognizing the limits of its own expertise in evaluating this plan, the Court commissioned an independent evaluation by scientists at the University of Buenos Aires. The Court also called five public hearings to ensure that broad-based community participation informed its judgment. In 2008, the Supreme

[117]*Alberto Sagarduy*. Cámara de Apelaciones en lo Civil y Comercial de La Plata, Sala III.Ruling of 15.11.1994. LLBA, 1998-943 - RcyS, 1999-530.

[118]*Beatriz Silvia Mendoza and others vs. National Government and Others in regards to damages suffered (Damages stemming from contamination of the Matanza-Riachuelo River)*, 2008, M. 1569, 8 July 2008. See www.espacioriachuelo.org.ar. See Carballo, J. (2009). Argentina. In: Kotze, L. and Paterson, A. (eds.) *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*. Kluwer Law International, pp. 269-94 at 285.Boyd, D. R. Op cit. pp.176-178.

[119]Ibid.

Court issued a comprehensive final ruling in which it identified three objectives: improved quality of life of the inhabitants of the basin; the reconstruction of the environment in the basin in all of its components (water, air and soil); and the prevention of injury with sufficient degree of predictability.

Accordingly, the Court ordered the following- ongoing judicial oversight of the implementation of the plan; creation of a public information registry to monitor developments; inspections of all polluting enterprises, creation of wastewater treatment plans, and implementation; closure of all illegal dumps; redevelopment of legal landfills. Others include: cleaning up of the riverbanks; improvement of the drinking water treatment systems in the river basin; improvement of the sewage treatment and storm water discharge systems; development of a regional environmental health plan, including contingencies for possible emergencies. The Court further ordered that the federal Auditor General supervise the budget allocation for implementation of the restoration plan. That the NGOs involved in the litigation form a committee to monitor compliance with the Court's decision. That a federal court judge be empowered to resolve any disputes related to the implementation of the Court's decision and that any violations of the timelines established by the court would result in daily fines against the President of the Matanza-Riachuelo Watershed Authority (the new intergovernmental body responsible for implementing the restoration plan).

The Court's decisions were grounded on Articles 41 and 43 of the Constitution of Argentina, recognizing the right to a healthy environment and the citizen's power to defend their rights through recourse to the judicial system. The decision reflects the growing use of creative approaches to ensuring compliance with court orders, including daily fines, reports to the judge, and entrusting compliance to a third party.[120]

[120]Carballo, J., Op cit. pp. 269-94. Dug, S. and Faggi, E. (2003). Access to Environmental Justice, the Effectiveness of Judicial Procedures, and the Efficacy of Environmental Decisions: The Experience of Argentine Courts. In: Di Paola, M.E. (ed.)*Symposium of Judges and Prosecutors of LatinAmerica: Environmental Compliance and Enforcement*. Buenos Aires: FundacionAmbiental y RecursosNaturales, pp. 97-109.

3.3.1.3 India

India has emerged as a world leader in the judicial protection of environmental rights. Bruch et al asserts that India has the most experience in interpreting constitutional environmental provisions and has generated by far the largest body of jurisprudence regarding the environmental aspects of the right to life.[121] So pervasive is the influence of India's environmental jurisprudence that its courts decisions have been cited in a host of cases involving the environmental right in countries on different continents.

This is in spite of the absence of a specific environmental right in the Indian Constitution. The Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of State policy through the insertion of Article 48A which provides that the state "shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". Article 51A (g) similarly states that it "shall be the duty of every citizen of India… to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures." Both are principles of state policy and unenforceable.[122] In recent decisions, however, the Indian Supreme Court has reversed itself to hold that legislation triggered by directive principles falls within the purview of the fundamental rights chapter of the Constitution.[123] In the case of *SachidanandPande vs. State of West Bengal*[124] the Indian Supreme Court noted that whenever ecological concerns are brought before it, it is bound to keep Article 48A of the Indian Constitution in mind. The Court said,

> [W]hen the Court is called upon to give effect to the directive principles, the fundamental duty of the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority . . . [I]n

[121]Bruch, Coker and Van Arsdale, op. cit. p.19, 31. This opinion is shared by several environmental scholars. See Lau, M. (1995). The Scope and the Limits of Environmental Law in India.4 RECIEL 15. Boyd, D.R., op cit.

[122] The legal effect of the directive principles is governed by article 37 of the Indian Constitution, which provides that although the principles "shall not be enforced by any court", they "are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

[123]*State of Madras vs. ChampakanDorairajan*, 1951 AIR (SC) 226. The judgments of the Supreme Court of India and several High Courts can be found at http://judis.nic.in/

[124] 1987 AIR (SC) 109

> appropriate cases the court may go further but how much further must depend on the circumstances of the case. The court may always give necessary directions.

The court in *Kinkri Devi vs. Himachal Pradesh*[125]was even more explicit in applying a directive principle due to the severity of the environmental damage at issue in a mining case. Thus, the Supreme Court of India has decided cases in a way that effectively interprets the directive principle regarding environmental protection as enforceable and legally binding.

In *M.C. Mehta vs. Union of India (Tanneries)*[126]and *M.C. Mehta vs. Union of India*[127] the Indian Supreme Court found that in order for the constitutional provision imposing a citizen duty to protect the environment to achieve real significance, it needed to interpret the provision as extending corollary duties on the government, the media, and the educational system. It found that imposing a constitutional duty on ordinary citizens to protect the environment is in vain if there is no knowledge of the subject matter.

The jurisprudence of the Indian courts illustrates the role of the courts in giving teeth to the constitutional environmental rights and duties, particularly where the legislature fails to enact the necessary legislation detailing the scope of the rights or the executive branch fails to establish or effectively apply the administrative machinery needed to enforce the constitutional provisions.

An additional constitutional approach adopted by the Indian courts in protecting the environment is the fundamental right to life provided in Article 21 of the Indian Constitution. Procedurally, most of the Article 21 cases protecting the environment are brought in the Supreme Court pursuant to Article 32, which grants citizens standing to sue directly in the Indian Supreme Court for violations of constitutional rights.[128] In India, the Constitution does not provide any specific test for standing to enforce fundamental rights and Indian courts apply

[125]*Kinkri Devi vs. Himachal Pradesh*, 1988 A.I.R. (Himachal Pradesh) 4.
[126]*M.C. Mehta vs. Union of India (Tanneries)*, 1988 A.I.R. (S.C.) 1115
[127]*M.C. Mehta vs. Union of India*, S.C. of India Writ Petition (Civil) No. 860 of 1991
[128] Article 32 also allows public interest litigation for the enforcement of constitutional rights. See Bruch, Coker and Van Arsdale, op. cit. p. 31.

the "sufficient interest" test. According to Razzaque, absence of any specific rule of standing is one of the reasons behind the development of Public Interest Litigation in India.[129]

Article 21 of the Indian Constitution has been frequently invoked to protect the environment.*Rural Litigation and Entitlement Kendra vs. State of Uttar Pradesh*[130] was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. In *T. DamodharRao vs.Municipal Corp., Hyderabad*,[131] for example, the high court of Andra Pradesh court stated that Article 21:

> …embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution. . . . It therefore becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance. In this case, the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance.

In *L.K. Koolwal vs. Rajasthan*,[132] the High Court of Rajasthan found that a city had violated residents' right to life by failing to implement adequate sanitation measures. The court held that maintenance of health, preservation of sanitation, and environmental protection fall within the purview of Article 21's right to life. The court found the problem of sanitation to be "very acute in Jaipur City… creating hazard to the life of the citizens," and ordered the municipality "to remove the dirt, filth etc. within a period of six months and clean the entire Jaipur City."

[129]Razzaque, J. (2002). Human Rights and the Environment: the National Experience in South Asia and Africa.Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January, 2002, Geneva, Background Paper No. 4.Available at www2.ohchr.org/english/issues/environment/environ/bp4.htm. (Last accessed 24 July 2015).
[130]AIR 1985 SC 652.
[131]1987 A.I.R. (A.P.) 171 (Andhra Pradesh High Court, 1987).
[132]1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988). The judgments of the Supreme Court of India and several High Courts can be found at http://judis.nic.in/. (Last accessed 25 August 2016). See also, Bruch, et al. op. cit. pp. 19-35 for a discussion of these and other Indian cases.

Similarly, in *Subash Kumar vs. State of Bihar,*[133] the Indian Supreme Court observed that the 'right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the Court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

In *Vellore Citizens Welfare Reform vs. Union of India,*[134] the Indian Supreme Court found that tanneries in the state of Tamil Nadu had violated citizens' right to life by discharging untreated effluents into agricultural areas and local drinking water supplies. The discharges had made thousands of hectares of agricultural land unfit for cultivation and had severely polluted the local drinking water. In granting the petitioners' requested relief, the Court invoked the "precautionary principle," the "polluter-pays principle," and sustainable development as components of the Article 21 environmental protections. The Court defined the precautionary principle to mean that (1) the state must anticipate, prevent, and attack the causes of environmental degradation; (2) lack of scientific certainty should not be used as a reason for postponing measures to prevent pollution; and (3) the onus of proof is on the polluter to show that his or her actions are environmentally benign. The court adopted the Brundtland Commission's definition of sustainable development as development "which meets the needs of the present without compromising the ability of the future generations to meet their own needs." The polluter-pays principle was defined to mean that

> polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water . . . [and] liability for harm . . . extends not only to compensate victims of pollution but also the cost of restoring the environmental degradation.

[133] AIR 1991 SC 420.
[134] (S.C.) 2715 (1996)

Applying these principles to the facts of the case, the court ordered more than 900 tanneries operating in Tamil Nadu to "compensate the affected persons and also pay the cost of restoring the damaged ecology."

In *Indian Council for Enviro-Legal Action vs. Union of India*,[135] the Supreme Court found that the national government's failure to control an industry's release of toxic chemicals violated citizens' right to life. The plaintiff-petitioner brought this action to stop and remedy pollution caused by several chemical industrial plants in the village of Bichhri in Rajasthan. The defendant/respondents operated chemical plants producing highly toxic chemicals, such as sulfuric acid, without permits and discharged pollutants into aquifers and to the soil. The defendants had failed to obey several previous court orders directing them to control the discharge of toxic materials. Using the constitutional right to life, the court ordered the appropriate governmental regulatory agency to impose controls on the industry, carry out remedial measures, and charge the industry for the cost of clean-up.

One of the more innovative approaches taken by the Supreme Court of India is known as continuing mandamus, a remedy that is intended to overcome problems with the non-implementation of court orders. Rather than issuing a judgment and closing a case as is customary, continuing mandamus involves a court issuing directives to be implemented by specific deadlines and requiring the government to report back to the court on its progress.[136]

The Indian Supreme Court has through its decisions played a significant role in the protection of environmental rights. The Law Commission of India acknowledged that "the Supreme Court of India has made (an) immense contribution to (the) environmental jurisprudence of our country".[137] The Indian courts have filled the vacuum left by the executive and legislative arms of government in the area of environmental protection thereby protecting the rights of communities who bear the burden of environmental degradation. It has exerted

[135] 3 S.C.C. 212 (1996)
[136] Boyd, R.D. op cit., p.251-5
[137] Law Commission of India, (2003).*One Hundred Eighty Sixth Report: On Proposal to Constitute Environment Courts*. Law Commission of India, New Delhi.

pressure on the legislature to enact environmental friendly laws.[138] It also pushed the executive to implement existing laws and policies on the environment and extended the relaxed standing rules for the protection of constitutional human rights to environmental protection, thereby removing traditional barriers to environmental litigation. According to Sharma, the "extension of constitutional umbrella over environmental issues through dynamic judicial activism has augured well for environmental governance in India."[139] The jurisprudence of the Supreme Court has particularly served as a model for courts in other states like Pakistan[140], Bangladesh[141] and Malaysia[142].

The Indian Supreme Court has also been criticized for exceeding its powers and trespassing onto the domain of the executive and legislative arms of government. According to Razzaque, some of the novel remedies fashioned by the Supreme Court to attain a given result encroach on the domain of the executive.[143] Dam and Tewary argue that "the Court's overenthusiasm in environmental matters has severely dented India's institutional balance and

[138] In India, in *K. Ramakrishnan vs. State of Kerala*[AIR 1999 Kerala 385] the court held that smoking of tobacco in any form in public places is illegal, unconstitutional and violates article 21. Smokers pose a serious threat to lives of innocent non-smokers who get exposed to tobacco smoke, thereby violating their right to life guaranteed under article 21 of the Constitution of India. Several years after this Supreme Court decision, the Indian legislature passed the Anti-Smoking Act of 2004. Dresler, C. and Marks, S. P.(2006).The Emerging Human Right to Tobacco Control.*Human Rights Quarterly,* 28(3): 599-651.

[139] Sharma, R. (2008). Green Courts in India: Strengthening Environmental Governance.*Law, Environment and Development Journal*,4(1): 50-71 at 52.

[140] The Pakistani judiciary has consistently mentioned and applied Indian cases where the Indian judiciary prioritised environmental and human rights aspects. For example: *Case General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum vs. The Director, Industries and Mineral Development*, Punjab, Lahore 1994 SCMR 2061. In *Shehla Zia vs. WAPDA*(PLD 1994 SC 693), the Pakistani Supreme Court applied Indian cases such as: *Rural Litigation and Entitlement Kendra vs. State of Uttar Pradesh*(AIR 1985 SC 652) *and M.C. Mehta vs. Union of India*(AIR 1988 SC 1115 and AIR 1988 SC 1037).

[141] The ruling of the Bangladeshi court in *Dr. M. Farooque vs. Bangladesh*, (1997) 49 Dhaka Law Reports 1, is similar to several decisions of the Indian Supreme Court. See Razzaque, J. (2004)*Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*. Kluwer Law International, The Hague, p. 107.

[142] In several cases, the Malaysian Court of Appeal followed the lead of the Supreme Court of India by interpreting the right to life broadly as including "the right to live in a reasonably healthy and pollution free environment." See *Tan TekSeng vs. SuruhanjayaPerkhidmatanPendidikan*(1996) 1 MLJ 261 at 288*; Malaysian Vermicelli Manufacturers (Melaka) SdnBhd vs. PP*(2001) 7 CLJ. Cited in Asia Pacific Forum of National Human Rights Institutions (2007).*Human Rights and the Environment: Final Report and Recommendations*, Sydney. Boyd, D.R., Op cit. p.263

[143]Razzaque, J. (2004). *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*op. cit.

has contributed to a polity that isbecoming consistently reliant on the judiciary for remedying all its problems, of both life and law."[144]

It is pertinent to note thatconstitutions empower courts to safeguard human rights and this duty becomes more urgent in the face of government inaction. Where the enjoyment of fundamental rights are threatened by environmental degradation the intervention of the judiciary would be justified on the basis of the executive's persistent failure to implement and enforce relevant environmental laws, as mandated by the Constitution.

3.3.1.4 Philippines

Section 16, Article II of the Philippines 1987 Constitution explicitly provides that "*The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature*." The environmental right is provided under the Philippines Constitution's *Declaration of Principles and States Policies* and not under the Bill of Rights. Notwithstanding this, the Courts have held that the right is legally enforceable without need forfurther legislation, i.e. a self-executing provision.[145] The Philippines has incorporated the right to a healthy environment throughout its domestic environmental legislation, including the Clean Air Act of 1999[146], the Clean Water Act of 2004[147]Ecological Solid Waste Management Act[148]National Environmental Awareness and Education Act of 2008,[149] and the ClimateChange Act of 2009[150].

One of the earliest cases on the right to a healthy environment was decided in 1993 in the case of *Minors Oposa*[151], a lawsuit seeking cancellation of all of the timber harvesting licenses in the Philippines. The applicants, a group of children, including those of renowned

[144]Dam, S. and Tewary, R.(2005).Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?*Journal of EnvironmentalLaw*,17(3): 383-393 at 385.
[145] See *Minors Oposa vs. Factoran, Jr., Secretary of the Department of the Environment and Natural Resources* 33 ILM 173 (1994)
[146] Clean Air Act,Republic Act No. 8749, June 23, 1999
[147]Clean Water Act, R.A. No. 9275, March 22, 2004.
[148]Ecological Solid Waste Management Act, R.A. No. 9003, Jan. 26, 2001.
[149] Section 2, National Environmental Awareness and Education Act of 2008, R.A. No. 9512, Dec. 12, 2008,
[150] Section 2,Climate Change Act of 2009, R.A. No. 9729, July 27, 2009,
[151]*Minors Oposa vs. Factoran, Jr., Secretary of the Department of the Environment and Natural Resources*, op cit.

environmental activist Antonio Oposa, and the Philippine Ecological Network, Inc. (an NGO), sought to stop the destruction of the fast disappearing rain forests in their country.

In its decision, the Supreme Court of the Philippines held that every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology. They held further that "the minors' assertion of their rights to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."

In a subsequent lawsuit brought by a timber company, the Supreme Court upheld the government's ability to cancel licenses, based in part on the *Minors Oposa*precedent.[152] The Philippines courts have made several other decisions based on the right to a balanced and healthful ecology. They have urged a concerted government effort to stop illegal logging, and refused to recognize private title to land in public forests.[153]

In *Laguna Lake Development Authority vs. Court of Appeals*,[154] (a case involving waste dumping) the Philippine Supreme Court upheld the authority of a government agency attached to the Department of Environment to issue cease and desist orders against a city that was illegally dumping garbage. In dismissing the challenge to the authority's police and regulatory powers to regulate the dumping, the court relied on the constitutional right to a "balanced and healthful environment" and the right to health to uphold the authority's charter and laws.

In the 2008, the Supreme Court of the Philippines in the case of *Concerned Residents of Manila Bay et al vs. Metropolitan Manila Development Authority, Department of Environment and Natural Resources and others*[155]released another landmark judgment protecting the environment. The Supreme Court noted that-

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[152]*C & M Timber Corporation vs. A.C. Alcala, Secretary of the Department of Environment and Natural Resources*(1997) GR. No. 111088, June 13, 1997.

[153]*A.L. Momongan vs. R.B. Omipon*, No.MTJ-93-874 March 14, 1995 Supreme Court, Third Division.*J.C. Reyes et al. vs. Republic of the Philippines*G.R. No. 150862, August 3, 2006, Supreme Court. Boyd, D. R., p.234

[154] G.R. No. 110120, March 16, 1994 (Supreme Court).

[155]*Concerned Residents of Manila Bay* (2008) G.R.Nos. 171947-48 Supreme Court. http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm

> The importance of the Manila Bay as a sea resource, playground, and as a historical landmark cannot be over-emphasized. It is not yet too late in the day to restore the Manila Bay to its former splendour and bring back the plants and sea life that once thrived in its blue waters. But the tasks ahead, daunting as they may be, could only be accomplished if those mandated, with the help and cooperation of all civic-minded individuals would put their minds to these tasks and take responsibility. This means that the State, through petitioners, has to take the lead in the preservation and protection of the Manila Bay…[T]hus, we must reiterate that different government agencies and instrumentalities cannot shirk from their mandates; they must perform their basic functions in cleaning up and rehabilitating the Manila Bay.

In furtherance of this, the Court ordered twelve government agencies to develop a comprehensive plan, within six months, to rehabilitate and restore Manila Bay to a level of water quality adequate for all kinds of recreation. More specifically, the Court ordered the responsible agencies to install and operate sewage treatment facilities; clean up hazardous and toxic wastes; prevent pollution and wastes from ships; develop adequate facilities and programs for the proper disposal of solid waste; remove structures that obstruct the free flow of waters to Manila Bay; revitalize the marine life by re-introducing indigenous aquatic species; require septic and sludge companies to use adequate treatment facilities; prevent all forms of illegal fishing; establish a comprehensive environmental education program; and allocate a budget sufficient to carry out the restoration plan.

Borrowing from the jurisprudence of the Supreme Court of India, the Court adopted theremedy of continuing mandamus, giving itself on-going supervision of the implementation of the restoration plan with the goal of ensuring that its decision would be executed. The government agencies are required, by court order, to submit quarterly progress reports. The Supreme Court also established an expert advisory committee to review the government's reports and ensure that progress is satisfactory. In conclusion, the Court stated that the responsible government agencies "cannot escape their obligation to future generations of

Filipinos to keep the waters of the Manila Bay as clean and clear as humanly possible. Anything less would be a betrayal of the trust reposed in them."[156]

The case of Manila Bay illustrates the important role of the courts in enforcing the environmental right. Wherethe judiciary makes orders for the protection of a right provided by the legislation it would be within its ambit.The judiciary must however avoid overstepping their judicial functions and encroaching on the province of the executive. By arrogating to itself the responsibility of supervising the implementation of the restoration plan in the Manila Bay case, the Supreme Court of Philippines may have offended the principle of separation of powers.

3.3.1.5 Portugal

Portugal is cited as a positive example of the influence of environmental rights in Europe contributing to stronger environmental laws, enhancing access to justice and leading to court decisions that favour the environment. Portugal's 1976 Constitution was one of the first constitutions in the world to recognize environmental rights. Article 66 on 'Environment and Quality of Life' provides that-

> (1) Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it.
> (2) It is the duty of the State, acting through appropriate bodies and having recourse to or taking support on popular initiatives, to:
> a) Prevent and control pollution, its effects and harmful forms of erosion;
> b) Order and promote regional planning aimed at achieving a proper location of activities, a balanced social and economic development, and resulting in biologically balanced landscapes;
> c) Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;
> d) Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

[156]Velasco, P. B., Jr. (Associate Justice, Supreme Court of the Philippines) (2009).*Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Restoration*. Paper presented at Supreme Court of the Philippines. Forum on Environmental Justice: Upholding the Right to a Balanced and Healthful Ecology from April 16-17 2009. Retrieved on 13/5/2013 from http://sc.judiciary.gov.ph/publications/ejforum/index.php

The Portuguese Constitution thus combines several types of provisions related to environmental protection- a substantive right to environmental quality, the government's duty to protect the environment and individual duty or responsibility to protect the environment- and illustrates the basic human rights concept that there can be no right in the absence of a corresponding duty.

While Boyd is of the opinion that the legal purpose of individual environmental duties in national constitutions is unclear and appears to be more symbolic, hortatory, and educational,[157] the researcher is of the view that the provision imposing an individual duty to protect the environment serves an important function in covering not only natural persons but artificial persons like corporations and business who are major contributors to environmental degradation. In an era of privatization where state ownership of business enterprises has significantly reduced, the recognition of individual duties serves to facilitate the horizontal application of the environmental right.

The Portuguese provision is striking because, while acknowledging the usual vertical relationship between citizens and authorities, it lays greater emphasis on a horizontal relationship. The state is obliged to fulfil its duties by *having recourse to or taking support frompopular initiatives*.[158] The Portuguese example is illustrative of a common trend in the formulation of environmental human rights; the imposition of both individual rights and duties, together with the imposition of a more extensive role for authorities.[159]

In addition to recognizing the right to a healthy and ecologically balanced environment, the Constitution established the *actiopopularis*, enabling individuals and NGOs to protect collective rights through the judicial system without meeting the traditional *locusstandi* requirement of a direct personal interest.[160] In addition to the Constitution, a series of laws

[157]Boyd, D. R. op cit. p. 88.
[158] Article 66(2)(italics added)
[159]Kiss, A. and Shelton, D. (1991).*International Environmental Law*. Transnational Publishers, p.27.
[160] Article 52 Constitution of Portugal

expand upon the environmental rights.[161] Portugal's *Framework Law on the Environment* expands on the constitutional right and outlines the State's responsibility to protect the right.[162] The *Framework Law* reiterates the right to a healthy and ecologically balanced environment, guarantees public participation in decision-making, ensures access to courts to prevent environmental harm, seekcompensation, or compel government action, and encourages the formation of and participation in ENGOs.[163] ENGOs and citizens also are exempt from a number of fees usually imposed in judicial and administrative processes. As a result of these progressive actions, Portugal is regarded as the EU country 'with the widest accessibility to administrative and judicial remedies' in environmental matters.[164]

The Organisation for Economic Cooperation and Development (OECD) similarly observed that in Portugal 'the Constitution designates protection of the environment and conservation of natural resources as being among the *essential tasks of the Portuguese State*, and sets out the State's obligations regarding the prevention and control of pollution and its effects' (emphasis in original).[165]

3.4 The Distilled Scope of Environmental Rights

Environmental harm, (as manifested in deforestation, water and air pollution, mining degradation, oil spills, and climate change) has consequences for other human rights, such as the right to life, the right to human dignity, to privacy and family life, collective rights of indigenous and other communities, and for future generations. Thus, as illustrated by the case law from different jurisdictions, even where there is no explicit provision for a substantive environmental right in a national constitution, other constitutionally recognized human rights

[161] *Popular Action Law,* Law 83/95 (31 Aug. 1995). *Environmental NGOs Law* (Law 35/98).
[162] *Framework Act on the Environment*, Available at http://faolex.fao.org/ (last visited 20/3/2013)
[163] Ibid.
[164] Milieu Ltd, *Summary Report on the Inventory of EU Member States Measures on Access to Justice in Environmental Matters*. Report Prepared for the EuropeanCommission. 2007 Brussels: Milieu Ltd, p. 7. Cited in Boyd, D. R. Op cit, p. 314.
[165] Organization for Economic Cooperation and Development. 2001. *Environmental Performance Reviews: Portugal*. Paris, OECD, pp. 41-42.

like the right to life and to human dignity can provide an approach for recognizing the right to a healthy environment.

The Constitutions of Nigeria and South Africa, like most constitutions of the world, provide for the right to life.[166] The right to life is threatened or adversely affected by a polluted or degraded environment since environmental media (such as air, water and land) and environmental resources (like plants and animal life) are means necessary to sustain life. The right to life has been understood to encompass, not just the prohibition of the unlawful taking of life, but also the positive duty to ensure that life is qualitative. Thus any act or omission that could contribute to the loss of life or that threaten the minimum quality of life would be contrary to the spirit of the right to life provision and unconstitutional. Such acts could include the deliberate failure by the government to take legislative and other measures necessary to prevent severe pollution of air and water thereby causing the loss of life and debilitating illnesses.

The Nigerian legislature has recognised the link between environmental pollution and the right to life.[167] Pursuant to reports it received on the dumping of toxic wastes in communities in Nigeria by international oil companies, the House of Representatives stated that toxic wastes endanger human health and the environment. The House further noted that the practice of dumping toxic wastes is in violation of Nigerian environmental legislations and, more importantly, sections 33(1) and 34(1) of the 1999 Nigerian Constitution (as amended) which guarantee the rights to life and the dignity of the human person. The House mandated the Committee on Environment to investigate the alleged incidents. It is the opinion of the researcher that, having recognised the threat that environmental degradation and pollution poses to health and life, the honourable legislators should have gone a step further by taking

[166] Section 33(1) CFRN, 1999; Section 11 Constitution of the Republic of South Africa.
[167] See *Votes and Proceedings of the House of Representatives*. 7th National Assembly, Third Session, 28th May, 2014, pp. 1305- 1306. Retrieved on 15 October 2016 from nass.gov.ng/document/download.

steps to amend the Constitution to make the right to environment enforceable by communities who suffer from the unscrupulous activities and impunity of oil companies.

The right to life and environmental protection intersect and reinforce each other. Just as the right to life has been employed in the protection of the environment, the quality of life is undoubtedly enhanced by a healthy environment. Likewise industrial activities that failed to adequately provide for environmental protection have resulted in the loss of lives and adverse health impacts, as illustrated by the Bhopal incident.[168]

An analysis of the case law from India where the courts have employed the constitutional right to life provision expansively to include environmental protection reveals that this trend started shortly after the Bhopal incident and was strongest in the mid-to-late 1980s up to the early 1990s.[169] While there may be other contributory factors; including the judicial activist stance of the Supreme Court of India on the enforcement of socio-economic rights, it is argued that the Bhopal incident may be a contributory factor to the judicial activism subsequently adopted by the Indian Supreme Court in the field of environmental protection and the right to life.

From the preceding discussion, it is apparent that courts and international human rights bodies have held that the right to life, the right to health, the right to property and to human dignity can be affected by environmental degradation or pollution. According to the IACHR

> Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[170]

The concept of dignity forms the very basis of human rights law and is generally understood to be the quality of being worthy of respect. Suffering occasioned by ill health could have the effect of robbing persons of their dignity as well as shortening life expectancy.

[168] See Chapter 2.4 for details of the Bhopal incident.
[169] See 3.3.
[170] Inter-Am.Comm.H.R., *Report on the Situation of Human Rights in Ecuador*, OAS doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, at 92 [hereinafter Report on Ecuador].

Environmental degradation also infringes on the right to property and the right to movement. Much litigation involving the environment in Nigeria involves damage to property resulting in the infringement of the right to property.In *Seismograph Service (Nigeria Ltd.) vs. Ogbeni*[171] the plaintiff alleged that the explosions carried out by the agents of the defendant/ appellant, in the course of their oil exploratory activities, around the region of the plaintiff's building, caused excessive noise and vibrations which damaged his building. In *NNPC vs. Sele*[172] the plaintiffs sued for massive spillage of crude oil from the defendant's pipeline, which polluted and ravaged their economic trees and crops, fishing ponds, fishing contrivances, local gin distilleries, and fresh water wells over a very wide area.

The effect of environmental degradation on movement can readily be understood in the current plight of environmental migrants who are displaced by flooding, severe pollution, erosion, desertification and other forms of environmental degradation. In South Africa, the residents of Steel Valley in the Vaal Triangle instituted a series of lawsuits against ISCOR/ Arcelor Mittal Steel for the pollution of their landed property and health impacts suffered from the activities of the steel works. The Steel Valley area, which used to be a vibrant, productive community of over 500 smallholdingswith shops, a filling station, a church, post office, mobile clinic and school, collapsed as residents and land owners were forced to move and today the area is largely deserted.[173]

The right to water can also be affected by environmental pollution and degradation. In *Director, Industries and Mineral Development, Punjab Lahore*,[174] the Supreme Court of Pakistan found that mining companies had violated the right to life of citizens residing near

[171](1976) 4 SC 85. Although most of these cases were brought based on the Common Law torts of nuisance, negligence, trespass and strict liability the property rights of the plaintiffs were invariably affected by environmental pollution caused by the acts or omissions of the defendants.

[172](2004) All FWLR (pt. 223) 1859 CA.

[173] Information obtained from researcher's oral interview with Samson Mokoena (Secretary of the Vaal Environmental Justice Alliance) at Vanderbiljpark on August 20, 2012.See Cock, J. and Munnik, V. (2006).*Throwing Stones at a Giant: an Account of the Steel Valley Struggle Against Pollution From the Vanderbijlpark Steel Works*. Report for the Centre for Civil Society, University of Kwazulu Natal, March.

[174]*General Secretary,West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum vs. The Director, Industries and Mineral Development, Punjab Lahore*, Human Rights Case No. 120 of 1993, 1994 S.C.M.R. 2061 (1994).

mining operations by polluting local drinking water supplies. Invoking the right to life, the court found that "where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance do not have such right. The right to have unpolluted water is the right of every person wherever he lives." The court ordered the mining companies to take specific measures to prevent pollution of the drinking water, including changing the location of its operations. The court also appointed a commission with powers of inspection to monitor implementation of the court's orders and the ability to order further measures to ensure the area's drinking water remained unpolluted.

In addition to the substantive right to a healthy environment, procedural rights are indispensable in implementing and enforcing those substantive rights. These procedural rights provide citizens and civil society with the mechanisms for learning about actions that may affect them, participating in governmental decision-making processes, and holding the government accountable for its actions, as well as enabling civil society collaborate to protect environment. These rights are designed to provide transparency and democratic governance by allowing interested persons to have information about and input into decisions that affect their environment or redress when the environment is harmed.[175] They are therefore instrumental in achieving sound environmental decision-making and are critical complements to a substantive environmental right. National constitutions that provide for substantive environmental rights generally also provide for procedural environmental rights.[176] Even where a constitution that provides for a substantive environmental right fails to provide explicitly for procedural rights, it would be implied as a necessary ingredient for the fulfilment of the substantive right.

[175]Shelton D., and Kiss, A. (eds.) (2005).*Judicial Handbook on Environmental Law*, UNEP.Ladan, M.T. (2007).*Biodiversity, Environmental Litigation , Human Rights and Access to Environmental Justice*. Faith Printers, Zaria.

[176] The Ethiopian Constitution, for example, provides for substantive environmental right in Article 44 and for procedural environmental rights in Article 92(3) as follows: "People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly."

Procedural rights include access to information on the environment, public participation in decision-making affecting the environment, and access to justice in environmental matters. Each of these procedural rights is discussed briefly below.

3.4.1 Access to Information on the Environment

Access to environmental information is a prerequisite for effective and meaningful public participation in decision-making and in monitoring governmental and private sector activities that impact on the environment.[177] It is an important right that must be protected if the public are to effectively advocate for environmental protection. The public need to know of environmental threats and the origins of those threats in order to protect their environment and other human rights that would be threatened or infringed by environmental harm. Environmental harm or deterioration is difficult and sometimes impossible to reverse; therefore sufficient environmental information, especially at the planning stage of a project is needful to enable the public make informed choices and assist project executors take necessary preventative measures.

The right to information is well established at the international level with a right to freedom of information contained in several human rights texts.[178] While the right to information provided in most international and regional instruments refers generally to information held by public authorities, it can be invoked in cases involving environmental protection. Some international instruments, notably environmental treaties, in addition to the general right to information, provide specifically for the right to environmental information.[179]

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[177]Shelton D., and Kiss, A. (eds.) (2005).*Judicial Handbook on Environmental Law*, op cit.p. 27.Ladan, M.T. (2012) *Trend in Environmental Law and Access to Justice in Nigeria*.Lambert Academic Publishing, Berlin.

[178] Article 19 of the UDHR, Article 19(2) of the ICCPR, Article 9 of the African Charter, Article 13 of the American Convention on Human Rights and Article 10 of the European Convention.

[179] The Rotterdam Convention on the Prior Informed Consent for Certain Hazardous Chemicals and Pesticides in International Trade (Sept. 11, 1998) encourages parties to ensure that information on chemical and pesticide hazards is made available to the public. Article 15(2) requires each state party to ensure to the extent practicable that the public has appropriate access to information on chemical handling and accident managements and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention. Article 16 of the 2003 African Convention on the Conservation of Nature and Natural Resources (not yet in force), in addition to providing for public participation, obliges the parties to

Many countries, including some in Africa, have constitutional provisions or legislations explicitly granting citizens the right of access to information generally or specifically held by public authorities.[180] The right to environmental information is reflected in Environmental Impact Assessments (EIAs) since EIAs are to be made available to the public for comment. After the Bhopal disaster in India, some countries[181] instituted Pollutant Release and Transfer Registries, which specify toxic emissions and discharges which facilities are required to publicly disclose.[182]

3.4.2 Public Participation in Environmental Decision-making

Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future.The right of public participation can take many forms: the requirement that government consider citizen comments, the right to know about pending government decisions, public hearings, the opportunity to present written or oral comments and evidence, and the opportunity to present petitions, complaints, or grievances to administrative authorities.

Public participation is well established in international and domestic law. The 1992 Rio Declaration recognizes the need for public participation in environmental decision making.[183] Agenda 21 calls it "one of the fundamental prerequisites for the achievement of

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ensure timely and appropriate dissemination of environmental information and access of the public to such information.

[180] Article 27 of the Constitution of Congo, for example, provides access to information held by the government and by private parties:

> *Freedom of the press and freedom of information shall be guaranteed. . . . Access to sources of information shall be free. Every citizen shall have the right to information and communication. Activities relative to these domains shall be exercised in total independence, in respect of the law.*

[181] These include Mexico, Equador, Belarus, Cambodia, Australia, Israel, Japan, Canada, USA, UK, European Union Member states. The *European Pollutant Release and Transfer Register (E-PRTR),* for example, contains data reported annually by more than 30,000 industrial facilities covering 65 economic activities across Europe. See United Nations Institute for Training and Research (UNITAR) Pollutant Release and Transfer Registers. Last accessed on 10th October 2016 at https://www.unitar.org/cwm/prtr.

[182] Toxic or hazardous substances contained in PRTRs include mercury, lead, strychnine, sulphuric acid, polychlorinated biphenyls (PCBs) and hexachlorobenzene. Https://www.epa.gov/toxics-release-inventory-tri-program/tri-listed-chemicals (Last accessed 4 October 2016)

[183] See Principle 10 of the Rio Declaration on the Environment and Development, June 1992

sustainable development" and identifies major groups whose participation is needed, namely: women, youth, indigenous and local populations, non-governmental organisations, local authorities, workers, business and industry, scientists and farmers.[184] It calls for public participation in environmental impact assessment procedures and participations in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. Governments are further encouraged to create policies that facilitate a direct exchange of information between the government and the public in environmental issues, suggesting the EIA process as a potential mechanism.[185] The Aarhus Convention[186] and the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development[187] both provide for the right to public participation.

The Climate Change Convention requires state parties to promote public awareness and to "encourage the widest participation in this process including that of non-governmental organizations".[188] The Desertification Convention is unique in its participatory approach, involving the integrated commitment of all actors- national governments, scientific institutions, local communities and authorities, non-governmental organisations and international partners (both bilateral and multilateral).

General guarantees of public participation in international human rights instruments[189] can also be utilized to further the cause of environmental protection. This has been the case in Europe, the Americas and Africa where provisions providing for different recognized rights

[184] See Section III, Agenda 21.
[185] Ibid.
[186] Article 4 of the Aarhus Convention ensures broad, affordable access to environmental information with a few limited, explicit exceptions, and no reason needs to be stated in requesting the information.
[187] Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (Draft Policy Framework and Recommendations for Further Action, distributed Sept. 8, 1999 in Mexico City).
[188] Article 41(i), United Nations Framework Convention on Climate Change.
[189] Article 21 of the UDHR affirms the right of everyone to take part in governance of his or her country. See also Art. 25 of the ICCPR; Art.13 of the ACHPR; and Art.20 of the American Declaration of the Rights and Duties of Man.

have been construed as also including a right to be duly consulted or able to be part in decision-making procedures in environmental matters.[190]

3.4.3 Access to Justice in Environmental Matters

Constitutional or legislative human rights must be enforceable in order to be meaningful and there must be an effective remedy where rights are infringed or about to be infringed. For this reason human rights law, in addition to substantive human rights, generally makes provisions empowering citizens to have recourse to the courts. Accordingly, the ability of citizens and NGOs to enforce their constitutional environmental rights plays a significant role in whether these rights have practical effect. While the government has primary responsibility for implementing and enforcing laws, in some cases the government is unable or unwilling to act on its own and access to justice assumes importance in ensuring that guaranteed rights are fulfilled.

A major role of access to justice is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy.[191] Access to justice includes both the power of courts to review government actions and omissions and the right of citizens to appeal to the courts for this review.

The UDHR and the ICCPR as well as the African and Inter-American regionalhuman rights instruments provide for a right to a fair trial that applies also toenvironmental matters.A specific right to access to justice in environmental matters is provided in the Aarhus Convention and the North American Agreement on Environmental Cooperation. These both require that the parties ensure certain procedural guarantees or minimum standards, and

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

[191] Ladan, M.T., *Trend in Environmental Law and Access to Justice in Nigeria*, op cit., p.35.

remedies, and these requirements are set with some degree of details. The 2003 African Nature Conservation Convention also provides for access to justice in environmental matters.

Principle 10 of the Rio Declaration provides that "effective access to judicial and administrative proceeding, including redress and remedy shall be provided". Agenda 21 calls on governments and legislations to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organisations with a recognized legal interest.

CHAPTER FOUR

THE LEGAL AND POLICY FRAMEWORKS ON ENVIRONMENTAL RIGHTS IN NIGERIA

4.1 Introduction

This chapter addresses the meaning and scope of the environmental provision in the Constitution of Nigeria and in the African Charter on Human and Peoples' Rights. It also addresses the ways in which the executive, legislature and judiciary have responded to the constitutional environmental provisions. The chapter also assesses the incorporation of some identified ingredients of environmental rights in the laws and policies of Nigeria. These identified elements include- the development and implementation of environmental law and policy; compliance and enforcement; public participation in environmental governance; provision of environmental information; access to justice in environmental matters; environmental partnerships between government and citizens.

Legislation and policy remain the main ways of enforcing and implementing constitutional environmental provisions. Environmental provisions in national constitutions are expected to result in stronger environmental laws. However, constitutional environmental provisions are of different kinds and possess different legal implications, which may have an ultimate bearing on how far they actually go in protecting environmental rights. This chapter assesses the impact, if any; the constitutional environmental provision of Nigeria has on its environmental laws and policies.

4.1.1 Background of Environmental Issues and Law in Nigeria

The history of environmental degradation in Nigeria is commonly viewed from the perspective of oil pollution as a result of oil exploration and production activities. While Nigeria has undoubtedly experienced probably the worst cases and highest frequency of oil

pollution in the world, its environmental issues transcend oil pollution. They encompass urban and municipal waste pollution, industrial pollution, deforestation and land degradation, desertification, environmental disasters (e.g. flooding), climate change and loss of biological diversity.

In pre-colonial times, the environment was conserved and preserved largely for cultural and religious reasons, and for the instrumental worth of the environment. Long before the environmental rights debate at the international level, local traditions, customs and procedures existed to protect and safeguard the environment and conserve natural resources for current and future generations.[1]

The perception of the people of the forest as a barrier and wind breaker to wind erosion and home to wild animals and plants (including varieties of medicinal plants) acted as a conscious discouragement to the habit of indiscriminate tree felling. While the indigenous people made use of firewood as a source of fuel, they depended mostly on shrubs, dead wood and fallen branches. Economic and highly priced trees such as iroko, obeche, and mahogany were not normally touched except in rare circumstances.[2]

Wildlife conservation was also a conscious part of African tradition because Africans considered certain animals as worthy environmental companions with certain specific and special usage. Some animals were protected by virtue of traditional superstitious beliefs that

[1]Amokaye cites the local practices of the Yoruba people in Nigeria to preserve land for future generations of a family; including a farming practice to cultivate land based on different uses, personal and commercialHe also cites a century-old forestry practice not to cut down certain types of trees which are considered to have cultural and spiritual significance to the people, such as the Iroko tree. Amokaye, O.G. (2004). *Environmental Law and Practice in Nigeria*. University of Lagos Press, pp. 6 -10. See also Adewale, O. (1994). Customary Environmental Law. In: Ajomo, M.A., and Adewale, O. (eds.) *Environmental Law and Sustainable Development in Nigeria*. NIALS, Lagos, for customary practices on forestry.

[2]Lawal, K. (1998). Ecology and Culture: Reflections on Environmental Law and Policy in Sub-Saharan Africa. In: Simpson, S. and Fagbohun, O. (eds.) *Environmental Law and Policy*. Law Centre, Faculty of Law, Lagos State University, p. 31.

prohibit their killing or eating[3]. Thus, indiscriminate hunting of rare species and threatened animals was rare to pre-colonial Africa. The labelling of certain animals and birds as royal game contributed to their protection and preservation. These animals or parts of the animals had to be given to the king or leader of the community if they were killed. Hunters therefore preferred to kill ordinary animals for their personal consumption or sale.[4] In the south western areas, for example, hunting was prohibited in certain forested areas. These areas were considered sacred, thus the wildlife therein were protected.[5]

Most of the people lived in villages in contrast to the present population explosion in major urban centres with attendant problems of urban decay and municipal waste. Customary and traditional practices and laws on water resources existed and these served to ensure that the quality of water was not impaired.[6]

With the colonization of the constituent parts of Nigeria came urbanization and unsustainable exploitation of natural resources. Failure to regulate the growing settlements in mercantile and administrative centres like Lagos led to the development of slums. Utuama points out that the history of land development in Lagos metropolis chronicles how the uncontrolled split and build-up of hitherto large family compounds to accommodate the influx of immigrants in the wake of socio-economic prosperity of the metropolis was the origin of insanitary environment in the metropolis.[7] As colonialism gained ground, the discriminatory policies of the British colonizers in several areas was reflected in the widely divergent development patterns. While areas like Ikoyi were well planned as areas to be inhabited by

[3]Ibid. p. 31. The royal python, for example, is considered sacred in certain parts of eastern Nigeria. In Iroko community in South Western Nigeria, hunters were traditionally prohibited from killing lions. In some riverine areas of Rivers State like Bolo in Okrika, the crocodile called the 'Odimi' is sacred and is never killed during hunting or at other times. See Adewale, O. Op cit., note 1, pp. 160 – 162.

[4]Adewale, O. Op cit., note 1, p. 160

[5]Ibid, p.162.

[6]In the Iroko community, for example, certain streams have some taboos attached to them, forbidding the wearing of shoes into the streams as well as stooling or urinating anywhere near the stream.Adewale, O. Op cit., note 1, p. 167.

[7]Utuama, A. (1990). Planning Law and Environmental Protection. In: Omotola, J.A. (ed.) *Environmental Laws in Nigeria*, *(including Compensation*). Caxton Press Ltd, Ibadan, p. 22.

Europeans and with good environmental regulations and policies, indigenous areas of Lagos colony, like Lagos Island and Ajegunle were left unplanned.[8]

This type of lopsided urbanization process became a pattern that continued in the colonial and post-colonial period in various Nigerian cities and towns with the refuse in the areas occupied by whites and the privileged classes promptly disposed of while heaps of toxic wastes and dumps abound unattended in settlements occupied by the masses. The legacy is slum areas in most urban areas characterized by over-crowding, poor housing, lack of drainage and waste disposal systems and unregulated building and airspace. This led to situations where districts, that once had sanitary environments, later became slums of the most sordid type, described by a plague expert as the worst that he ever inspected.[9]

Notwithstanding the current existence of Town Planning Legislations, the problem of slums in most Nigerian cities persists and is attributed to a lack of adequate town planning legislation, government neglect and a general lack of enforcement of the existing town planning laws.[10] While environmental protection is not the main objective of town planning regulations, the environment nevertheless is adversely affected when towns are not properly planned. More recently, the condition in urban centres in Nigeria was described as -

> …characterized by large scale poverty, overcrowding in the low income settlements, inadequate provision of basic amenities such as water, roads, drainage, schools and health centred blighted dwelling places, insecurity of tenure of land, shelter and a generally poor quality of life. The urban environment in most low-income settlements often suffers from deliberate systematic neglect of the most basic services and infrastructure resulting in extensive pollution from poor waste management and industrial and other economic activities, perennial flooding and

[8] Lawal, K. Op cit., note 2, p. 32.

[9] *Nigeria: Colonial Annual Report on the Socio and Economic Progress of the People of NigeriaNo. 1904*, London (1938) pp. 30, cited in Utuama, A., op cit., note 7, pp. 14, 23.

[10] A recent example is the violation and non-adherence to the "FCT (Abuja) Master Plan" which led to the demolition of numerous structures under the former minister of the FCT, Abuja, AlhajiNasir El –Rufai.

> the exposure of the populace to a wide variety of environmental and health hazards.[11]

Environmental degradation and pollution had its roots in the colonial era. As observed by Boahen "[the] main raison d'etre [of colonialism] was the ruthless exploitation of human and material resources of the African continent to the advantage of the owners and shareholders of expatriate companies and metropolitan governments and their extractive, manufacturing and industrial firms."[12] For example, the early mining period witnessed very extensive destruction of existing forests and bush. When tin mining, for instance, became very profitable, direct land expropriation followed and adversely affected agriculture among the Beroms and other tribes in Plateau State.[13] The mining operations resulted in large scale destruction of the land and in water pollution and these are evident in the old tin mining areas of the present day Plateau state.[14]

Under the colonial government, it was difficult to moderate the activities of the expatriate companies, because the companies and the colonial government were really one and the same or very closely related. The colonial government was not a neutral arbiter between capitalists and indigenous land owners and their interests including that of the environment. Environmental laws and regulations enacted by the colonialists were directed at addressing the allocation and exploitation of natural resources rather than environmental management. Other environmental issues were treated as sanitation or environmental health issues. Thus, there were no laws requiring companies to carry out their activities in an environmentally responsible manner as the sole objective was profit and the enrichment of the colonial government.

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[11] See Aina, E. (1992) Transition to Sustainable Development through Environmental Protection. Annual FEPA Press Briefing at FEPA Complex, Abuja on 29th December 1992. Ajomo M.A. (1992) in Aina and Adedipe, FEPA Monograph 2,Towards Industrial Pollution Abatement in Nigeria, p. 185.

[12]Boahen, A. A. (1987) *African Perspective on Colonialism*. John Hopkins University Press.Quoted in Agbonifo, J. (2002) The Colonial Origin and Perpetuation of Environmental Pollution in thePostcolonial Nigerian State, pp.4-5.Retrieved from http://lilt.ilstu.edu/critique/fall2002docs/jagbonifo.pdf on 19/5/2013.

[13]Lawal, K., op cit. p. 38

[14] See Freund, B. (1961) *Capital and Labour in the Nigeria Tin Mines*, Longman, London, pp. 162 – 163 (noting that tin mining operations are extremely destructive to the land). What is true in Jos for tin is also true in Sokoto and Ilesa for gold and in Enugu for coal.

This trend persisted even after independence with economic development regarded as paramount and carried out in a reckless manner without due regard to the environment. The oil boom of the 1970s and early 1980s led to some economic prosperity that further fuelled rapid urbanization and the establishment of industries. These diverse industries were set up without any environmental impact assessments and without adequate concern for the environment. Environmental considerations were not incorporated into industrialization planning. Many industries have been described as either lacking waste treatment facilities to deal with the solid waste, effluents and air emissions they generate or using out-dated or malfunctioning waste treatment plants.[15] The environmental problems associated with the industrial sector include air pollution, especially from cement, petrochemical, asbestos and steel companies; land and water pollution from industrial effluents (leading to enormous amounts of heavy metals and toxic chemicals in inland waters) and noise pollution.

Desertification, deforestation, soil erosion, coastal erosion and flooding are major environmental problems in Nigeria. Nigeria is estimated to have one of the highest rates of deforestation in the world.[16] Desertification, which affects mainly the states in the far north of Nigeria, is caused by natural factors and by anthropogenic factors like: wood extraction for fuel and construction, bush burning, grazing, cultivation of marginal land, faulty irrigation management and poverty. Desertification comes with devastating social and economic consequences that include drought, drying up of rivers, disappearance of some species of animals, poverty, growing unemployment, forced migration and mass migration of cattle herders to a better pastoral region, and communal violence.[17]

[15]Ladan, M.T. (2012) *Trend in Environmental Law and Access to Justice in Nigeria*. Lambert Academic Publishing, Berlin, p.21.

[16]According to data taken over 2000 to 2005, Nigeria has one of the highest deforestation rates in the world, having lost 55.7% of their primary forests. The annual rate of deforestation in Nigeria is 3.5%, approximately 350,000-400,000 hectares per year. See http://rainforests.mongabay.com/20nigeria.htm (last accessed on 12/3/2016)

[17]Odiogor, H. (2010) Special Report on Desertification in Nigeria: The Sun Eats Our Land. *Vanguard Newspaper*, May 3, 2010. Nigeria: Desertification in the North. *Leadership Newspaper*, 13 July 2013.

With the discovery of oil in Nigeria in the 1950s and the development of the oil industry (Nigeria's paramount industry and its major source of revenue)[18] environmental degradation increased. Pollution and environmental degradation caused by the oil industry is currently the biggest environmental issue facing Nigeria.[19]

Oil in navigable inland and coastal waters comes from drilling operations, from coastal refineries, from natural seepage and through spillage during transportation. Pollution due to effluent discharges, emissions of noxious substances during gas flaring, frequent explosions and fire outbreaks, gas leakages and equipment malfunctions are associated with refinery and petrochemical operations.[20] Toxic chemicals and wastes generated by the industry have polluted the land and water bodies in Nigeria due to improper disposal and inefficient waste management practices of the industry. Apart from pollution of the air, water and land, noise pollution is caused by the movement of heavy equipment and vehicles, detonations of explosives during drilling operations and the operation of pumps and drilling rigs.[21]

Environmental pollution in the Niger Delta is a frequent occurrence[22] with the adverse environmental impacts of the Nigerian oil industry, borne mainly by the communities in the oil producing areas. In some communities the indigenous people who are mainly farmers and

[18] Oil and gas account for about 90 per cent of Nigeria's foreign exchange and about 80 per cent of government revenues. Nigeria is estimated to be the largest oil producing nation in Africa and has crude oil reserves of about 36.2 billion barrels and natural gas reserves of about 182. 8 trillion standard cubic feet (scf). Nigeria produces about 2.5mbpd of crude oil. Nigeria National Petroleum Corporation, *Annual Statistical Bulletin*. Available at http//www. nnpcgroup/PublicRelations/O…. *OPEC Annual Statistical Bulletin 2013*. Retrieved on 30/8/2014 from www.opec.org>Home>AboutUs>Member Countries.

[19] Ebeku, K. (2005) *Oil and the Niger Delta People in International Law, Resource Rights, Environmental and Equity Issues*. Oil Gas and Energy Law Intelligence, p. 173. Human Rights Watch, (1999) *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*. Human Rights Watch, New York.

[20] Anibogu, M. (2000) Environmental Law in Nigeria. In: Robinson, N.A. (eds.) *Comparative Environmental Law and Regulations*, Oceania Publications, New York, pp. 53 – 54.

[21] Ibid p. 54. See Ebeku, K. Op cit., note 19, p. 173; Human Rights Watch, (1999); Bagudu et al. (1998) Oil and Gas Exploration: Reconciling Contending Issues. In: Simpson, S., and Fagbohun, O. (eds.) *Environmental Law and Policy*, Law Centre, Faculty of Law, Lagos State University, p. 309.

[22] It is estimated that seven hundred and eighty four (784) oil spill incidents took place in the period 1976-1980 resulting in the loss of 1,336,875 barrels of oil. In January to May 1981, 121 incidents of oil spills were recorded, resulting to another loss of 9,750 barrels of oil. See Ebeku, K. op cit. In 1999, the Civil Liberties Organization (CLO) pointed out that recent records show that an average of three major oil spills are recorded in the Niger Delta every month. CLO, (1999) Annual Report of the Civil Liberties Organization, Lagos, Nigeria, p. 28.

fishermen have, as a consequence of mass pollution of their waters and land, lost their means of livelihood. This is borne out by the fact that most of the civil litigation related to the environment in the Niger Delta has to do with claims for damage for loss of fishing and farming rights.[23] In fact, the vast majority of Nigerian case laws on pollution and the environment are founded on claims for compensation for damage caused by oil exploration and production activities.[24]

The leading causes of oil spills in the Niger Delta are corrosion, equipment failure and sabotage.[25] The widespread environmental degradation coupled with long term neglect by the government and land laws perceived as unjust have resulted in restiveness, violence and conflict in the oil producing areas of Nigeria. The execution of the writer and environmentalist, Ken SaroWiwa and eight others in 1995, by the Nigerian Military Government brought the environmental disaster in the Niger Delta to global attention. A fall out of the violence in the Niger Delta is the attacking and sabotaging of oil installations and pipelines, resulting in further environmental pollution.

The Petroleum Act[26] and other laws regulating the oil industry were all aimed primarily at regulating the management of the resource. They failed to provide specifically for the protection of the environment, although they acknowledged the need for the prevention of pollution. Even where provisions on pollution control existed, lack of accountability in

[23] For example, in *Elf Nigeria Ltd. vs. OpereSillo* (1994) 6 NWLR (pt. 350) 258 SC, the plaintiff/respondent claimed *inter alia* damages against the defendant/appellant for loss of fishing rights in perpetuity in the Essesi River as a result of the geothermal activities of the appellants. See also *Shell Petroleum Development Company (SPDC) vs. H.B Fishermen* (2002) 1 NWLR (Pt. 723) p.505. In *SPDC vs. Abel Isaiah* (2001) 1 NWLR (pt. 723) p. 168, crude oil spilled form the pipeline belonging to Shell onto the respondent's land, swamps and streams and caused pollution damage. As a result, all the uses to which they had put the land, swamp and streams were terminated.

[24] The Nigerian case law includes the following cases: *AllarIrou vs. Shell BP Development Company (Nigeria) Ltd*. Suit No. W/89/71 Warri High Court 26/11/73; *Jonah Gbemre vs. SPDC and others* (2005) Suit No. FHC/B/CS/53/05; *Nigerian National Petroleum Corporation v. Chief Stephen Sele* (2004) All FWLR (pt. 223) 1859 CA; *SPDC vs. Chief Tiebo VII* (2005) 9 MJSC 158, *SPDC vs. Farrah* (1995) 3 NWLR (pt. 382) 142, *SPDC vs. Maxon* (2001) 9 NWLR (Pt. 7190) 541; *Seismograph Services Ltd. vs. Onokpasa* (1972) NSCC 231; *Seismograph Services (Nigeria) Ltd. vs. KwarbeOgbeni* (1976) ANLR; *SPDC vs. Chief Graham Otoko* (1990) 6 NWLR (pt. 159) 693.

[25] Ebeku, K. Op cit.

[26] Cap P10 LFN 2004. The Petroleum Act, enacted in 1969 was for many years the principal legislation on oil and gas.

government has constituted a major impediment to enforcement of such provisions. The situation is worsened by the fact that those who should be the enforcers of environmental laws are often the beneficiaries of non-enforcement.[27] The absence of the doctrine of arms-length during contract-making between foreign oil exploration companies and the Nigerian government also accounted for environmental degradation.[28]

Another reason for the legacy of poor-enforcement of environmental laws in the oil industry is the economic dependence of Nigeria on a monocultural product, oil, and the foreign-owned and controlled oil multinationals. With oil exports accounting for over 80 per cent of foreign exchange earnings and the oil companies having the monopoly of the sophisticated technology and skills, the Nigerian state has become a rentier state. As observed by Professor Onokerhoraye with regard to the enforcement of environmental regulations against oil companies in Nigeria, "[a] number of environmental laws geared towards protecting the environment exist but are poorly enforced. The economic importance of petroleum to national development is such that environmental considerations are given marginal attention"[29]. Effective enforcement has also been impeded by Nigeria's joint venture arrangement with most of the multinational oil companies which it is to monitor,[30] thus raising the problem of conflict of interest.

The overriding of environmental considerations by economic considerations was historically reflected in the lack of judicial activism in Nigeria. For example, in *AllarIrou vs.*

[27]Obi, C.I. (1994) Political and Social Considerations in the Enforcement of Environmental Laws. In: Ajomo, A.O. and Adewale, O. (eds.) *Environmental Law and Sustainable Development in Nigeria*. NIALS, Lagos, pp. 73 – 74.

[28] When two parties intend to enter into contract, they are supposed to negotiate on equal terms. Where one party is superior, e.g. the multinationals and the other party is inferior, e.g. the Nigerian Government, there is no arm's length in the contract. This was the situation in many contracts between multinationals and the Nigerian Government.

[29]Onokerhoraye, A.G., Towards Effective Environmental and Town Planning Polices for Delta State. Retrieved on 05/07/2013 from http://www.deltastate.gov.ng/enviromental.htm.

[30] The Nigerian National Petroleum Corporation (NNPC) holds at least 60 percent shares in joint venture with multinational oil companies.

Shell BP,[31] the judge refused to grant the plaintiff an injunction restraining the defendant's operations in spite of the extensive pollution of the plaintiff's land, fish pond and creek. The court stated that "… to grant the injunction would amount to asking the defendant to stop operating in the area… and cause the stoppage of a trade… which is the main source of the country's revenue".

Corruption is also identified as a major factor responsible for the non-enforcement of environmental laws and regulations. It has been asserted that state projects have been executed without regard to existing environmental regulations because some top officials have obtained a percentage of the contract sum as a bribe.[32] Similarly, in some instances funds earmarked for environmental projects have been diverted by public office holders.[33]

Background of Environmental Laws

Prior to 1988, Nigeria had no national policy on the environment. There were no uniform laws on major environmental issues such as industrial pollution control and hazardous waste. The statutory provisions relevant to the environment that existed were inadequate. Issues of environmental pollution and degradation were largely treated as part of the traditional common law of nuisance and negligence.[34] They were left to the victim to pursue in a private

[31]Op cit.

[32] A case in point is the Nigeria Liquefied Natural Gas (NLNG) plant project on Bonny Island in the Nigeria delta. Despite the magnitude of the project and its impact on the ecologically sensitive area, the mandatory EIA procedure was not followed and none of the regulatory environmental agencies intervened. It was later discovered that TSKJ, the joint venture formed by four foreign companies, that won the project paid 180 million dollars into accounts believed to be for bribing Nigerian government officials. The entire transaction was investigated by the USA department of Justice pursuant to the Foreign Corrupt Practices Act and led to the conviction of several company officials. To date, however, and despite the indictment of some Nigerian former public officials, no Nigerian has been convicted of any offence in connection with the scandal. See Anonymous, Halliburton and Nigeria: A Chronology of Key Events in the Unfolding of Key Events in the Unfolding Bribery Scandal', Halliburton Watch. Available at http://www.halliburtonwatch.org/about_hal/nigeria_timeline.html

[33]Ifesinachi, K., Abibe, R. and Wogu, C. (2015) The Management of Ecological Fund and Natural-Resource Conflicts inNorthern Nigeria, 2009-2013.*European Scientific Journal*, September edition vol.11, No.25. Ezekiel, E. (2010) Ecological Fund: Trapped in a Web of Endless Controversy. Available at http://world press.com/2010/08/19/Nigeria-ecological-fund-issue (Last accessed 10 September 2016).

[34] The inadequacy of common law principles in environmental protection is illustrated by cases like *JimohLawani vs. The West African Portland Cement Co. Ltd. (WAPCO)*, Suit No. AB/82/71, High Court of Western State Judicial Division, 13 July 1972; UILR Vol. 3 Part IV 459. It has also been discussed in texts on environmental protection

capacity.[35] Consequently there was very little on the environment in the public law domain. The criminal law provisions also failed to treat environmental issues with the required seriousness. For example, section 245 of the Criminal Code Act[36] provides that:

> any person who corrupts or fouls the water of any spring, stream, well tank, reservoir so as to render it less fit for the purpose for which it is ordinarily used is guilty of a misdemeanour and liable to imprisonment for six months.

Apart from the mild formulation of the offence as a misdemeanour, there was no case of prosecution for environmental crimes under the Criminal Code. This illustrates further the levity with which such issues were regarded.

The Public Health Laws and Environmental Sanitation edicts of the states were the major sources of environmental legislation in Nigeria. However, as commendable as they were, they were directed at the personal and communal hygiene of Nigerians and the aesthetics of the landscape and not to the overall health of the ecosystem. The environmental regulations that existed were characterised by the absence of clear scientific criteria and standards on toxic wastes and on pollution levels. The Common Law (as modified by English and local statutes) therefore, became the most common avenue for environmental protection, and in fact most environmental case law on the environment in Nigeria is founded on the common law principles of tort. The Common Law, however, only provided limited protection to the environment.

In 1988 five shiploads, weighing about 3,800 tons, of toxic and hazardous wastes were secretly dumped at the small port town of Koko in the former Bendel State (now Delta state) by an Italian company.[37] The discovery of these wastes woke the Nigerian government from its

[35]Ikhariale, M.A. (1998) A Constitutional Imperative on the Environment: a Programme of Action for Nigeria. In: Simpson, S. and Fagbohun, O., op cit. p. 56

[36] Cap C38 LFN 2004.

[37]Adegoroye, A. (1994) The Challenge of Environmental Enforcement in Africa: The Nigerian Experience. Proceedings of Third International Conference on Environmental Enforcement, Oaxaca, pp. 43-54. Available at http://www.inece.org/3rdvol1/pdf/ (last accessed 7/2/2015).

slumber in matters pertaining to environmental pollution.[38] This led to increased public environmental consciousness. Apart from exerting diplomatic pressure on the Italian government to pack away the toxic wastes brought by an Italian ship; legislative steps were taken to formulate a comprehensive environmental legislative framework in conformity with international standards. Thus the then Federal Military Government promulgated the *Federal Environmental Protection Agency Decree No. 58 of 1988* (FEPA Decree) and *Harmful Toxic Wastes (Special Criminal Provisions) Decree No. 5 of 1988*[39]. The FEPA was created as the federal body charged with the protection of Nigeria's environment and its creation represents a milestone in environmental management effort in Nigeria. The federal government mandated the states to enact their respective environmental protection edicts and create state environmental protection agencies.

The effectiveness of the FEPA Act and the coordinating agency, FEPA were limited by several factors such as conflicts between FEPA and the State Environmental Protection Agencies, and between FEPA and Department of Petroleum Resources. There were also bureaucratic wrangling, inadequate funding for environmental monitoring and enforcement, shortage of skilled personnel, and the manipulation of environmental institutions by members of the ruling class.[40] The enactment of the FEPA Act coincided with a period of rapidly dwindling economic fortunes and the FEPA had to depend partly on foreign funding. The national economic recession also meant that the majority of industries were operating well below capacity and paid no attention to environmental problems. Thus the Act did not have any significant impact in curbing pollution and in 2007 was repealed and replaced with the

[38] The slumber of the federal government was illustrated by the failure to promptly pass the bill for the establishment of a Federal Environmental Protection Agency which was placed before parliament since 1981. See Adegoroye, A. op cit.

[39] Cap H1 LFN 2004

[40] See Popoola, E. O. (2008) An Appraisal of the Domestication and Enforcement of the Preventive Principle of Environmental Protection Law in Nigeria (LL.M Thesis, Ahmadu Bello University, Zaria, Nigeria).

National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act).[41]

The political clime in Nigeria was also not favourable to the protection of the environment or environmental rights. For over 28 years, several totalitarian military regimes held sway with their attendant disregard for human rights. The absence of democratic rule meant that there was no public broad-based consultation before the enactment of laws that would have far reaching effects on peoples' lives. The courts lacked independence and ouster clauses in decrees effectively removed their jurisdiction on many issues and their decisions could be over-ruled by a military decree. Furthermore, apart from the oil companies, where the Federal government had a stake, most corporations were owned wholly or partly by the military government or by proxies of the ruling military class, thereby making it difficult to prosecute them for violations of the law.

The 1979 Constitution failed to provide explicitly for environment or environmental rights. The environmental provisions that existed in the 1979 Federal Constitution were centred on environmental hygiene, with emphasis on refuse clearance, and the management of liquid and solid wastes in abattoirs, residential homes and streets, all of which came under the supervision of local government councils.[42] The 1979 Constitution became a victim of the 1983 military coup which resulted in the overthrow of the civilian government and the return of Nigeria to military rule. Two major Constitutional conferences were held after the 1979 Constitution culminating in the 1989 and 1995 draft Constitutions[43] which in turn led to the

[41]No. 25, July 30, 2007.

[42]Ola, C.S. (1984) *Town and Country Planning and Environmental Laws in Nigeria,* University Press, Ibadan.

[43] The Constituent Assembly, headed by Honourable Justice A. N. Aniagolu, was established in 1988 under the military regime of General Ibrahim Babangida and on completion of its work sent the Draft Constitution to the Armed Forces Ruling Council (hereinafter known as the AFRC). The AFRC deliberated on the Draft Constitution and by the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 12 of 1989, promulgated the 1989 Constitution into law, after making amendments to the Draft submitted. However, political events and crises and the coup of General SaniAbacha ensured that the Constitution did not survive. General SaniAbacha subsequently convened a Constitutional Conference (albeit with a circumscribed agenda and scope) under the chairmanship of Hon. Justice A.G. Karibi-Whyte. The Draft Constitution was submitted to General Abacha in

enactment of the current 1999 Nigerian Constitution (as amended). Some common features of the post-1979 Constitutions are the very limited role of the populace in the constitution-making process and the tinkering of the final document by the military government in power then. The Constitutional Conference that gave birth to the 1995 Draft Constitution was, for example, dominated by government appointees.

The Constitutional Debate Coordinating Committee (CDCC) was inaugurated on November 11, 1998 by General AbdulsalamiAbubakar, who became Head of State after the death of General SaniAbacha, to organize a debate on the 1995 Draft Constitution. The Report of the Committee was submitted on December 30, 1998. The then Provisional Ruling Council (PRC), then the highest law making body of the Military Government debated the Report, accepted some of the recommendations of the Report and rejected some of them. The PRC was of the opinion that there was nothing basically wrong with the 1979 Constitution and so a large part of the 1979 Constitution was imported with modifications into the 1999 Nigerian Constitution.[44] The Constitution was promulgated on May 5 1999, by the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999 and came into force on May 29, 1999.

The 1999 Constitution, in providing explicitly for environment, went a step ahead of the 1979 Constitution. During the deliberations of the 1994/95 Constitutional Conference it was decided to insert a provision on "environment" in the constitution and the Conference made several resolutions and recommendations relating to the environment under the following headings: Afforestation and Reforestation; Devastation through mining activities; Desertification; Disasters and Emergencies Commission; and Federal Environmental

1995 but was not promulgated into law before the death of General SaniAbacha. See Achimu, J.V. (2000) The Legitimacy of Constitutional Change: The Enactment of the 1999 Constitution. In: Ayua, I.A., et al. (eds.) *Nigeria: Issues in the 1999 Constitution*, NIALS Lagos, pp.24-5; Ayua, I.A. (2000) Nigerian Constitutional Scheme on the Sharing of Revenue Resources and its Implementation. In: Ayua, I.A., (2000) et al. (eds.) Op cit. p. 131.

[44]Ayua, I.A., (2000) Nigerian Constitutional Scheme on the Sharing of Revenue Resources and its Implementation. Op cit., p. 131.

Protection Agency.[45] Thus, this attention paid to environment was reflected in section 21 of the Draft Constitution[46] which provides that "the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country."[47]

4.2 The Legal and Policy Frameworks for Environmental Rights in Nigeria

4.2.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)[48]

The 1999 Nigerian Constitution (as amended) is the supreme law of the country and it sets out the civil, political, environmental, economic, social, and cultural national policies for Nigeria. It guarantees fundamental human rights and duties for all Nigerians. It sets forth the obligations of the different branches of government, and affirms the federation status of Nigeria based on a three tier system of government.[49] The Constitution permits the enforcement of international and regional treaties in Nigeria, provided they have been domesticated in accordance with Section 12 of the Constitution.[50] Thus, apart from the Constitution, international and regional treaties ratified by Nigeria, customary international law and non-legally binding instruments also play an important part in the development of national environmental legislation in Nigeria.[51]

Although the 1999 Nigerian Constitution does not provide for a fundamental right to a healthy environment, the environmental right can be deduced as a component of the right to life in section 33 of the Constitution. The extension of fundamental rights provisions to environmental protection was demonstrated in the case of *Jonah Gbemre vs. SPDC and*

[45]Volume II of the Report pp. 171-172.
[46] Page 17 of Volume 1 of the Report
[47]Section 20, Constitution of the Federal Republic of Nigeria, 1999.
[48]Chapter C 23 LFN 2004.
[49]Sections 1(1) & 2(2). Ibid.
[50] See 2.7
[51]For example, The Oil in Navigable Waters Decree 1968 (now Oil in Navigable Waters Act, Cap. O6 LFN 2004) was enacted to give municipal effect to the International Convention for the Prevention of Pollution of the Sea by Oil 1954 which Nigeria acceded to on 22 April 1968. The Endangered Species (Control of International Trade and Traffic) Decree 1985 (Cap. E12 LFN 2004) gives municipal effect to the Convention on International Trade in Endangered Wild Species of Fauna and Flora which Nigeria ratified in 1974.

Others[52] where the judge applied the environmental right as a component of the rights to life and held that that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person. In addition to these substantive rights, the Constitution provides procedural rights that can also be utilised for environmental protection. These include the rights to fair hearing, freedom of expression and the press, and peaceful assembly and association.[53]

Environmental provisions in the 1999 Constitution are contained in Chapter II of the Constitution which deals with Fundamental Objectives and Directive Principles of State Policy. Principles of state policy constitute abstract objective constitutional provisions that are to guide the state in its decision-making processes.[54] Section 20 of the 1999 Constitution provides that "[T]he state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria."

The main object and essence of Section 20 of the 1999 Constitution, according to the Supreme Court in the case of *Attorney General Lagos State vs. Attorney General of the Federation and 35 others*,[55] is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences. This would be achieved by safeguarding the water, air and land, forest and wildlife. This idea is further reflected in the definition of 'safeguard' in Section 20, 1999 Constitution, given by the court, "...safeguard means 'safe conduct, proviso, stipulation, quality or circumstance that tends to prevent something undesired, guard or protect (rights, etc) by

[52](2005) AHRLR 151 (NgHC 2005).A fuller discussion of the case is provided in 6.3.5.
[53]Sections 36, 39 & 40 of the 1999 Nigerian Constitution.
[54] For example, section 13 of the Nigerian Constitution (on the implications of the educational, economic, political, social, foreign policy, and environmental goals for the country) provides that "it shall be the duty of all organs of government and of all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provision of this Chapter of the Constitution." Principles of Policy, however, are usually non-justiciable.
[55](2003) 12 NWLR (Pt. 833) 1.

precaution or stipulation..."[56] The very concepts of 'protection', 'improvement', and 'safeguarding' of the environment all convey the idea of prevention of harm to the environment.

Section 20 places a mandatory duty on the State to direct its policies towards achieving the above environmental objective. However, it does not place any corresponding legal right on the citizens to enforce such provision or any other provisions of the Chapter in the event of non-compliance by the State. This is by virtue of section 6 (6) (c) of the Constitution which provides that the judicial powers vested in the courts "shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution."

The non-justiciability of the provisions of the Constitution on fundamental objectives and directive principles is a major weakness of the Constitution and has led to a lot of criticism by constitutional scholars and writers.[57] It is contrary to Nigeria's posture on the international scene and her international obligations as contained in ratified treaties. In such a situation it is hard to see how organs of government can be made 'to conform to, observe and apply' the provisions of Chapter II except at their discretion or pleasure.

The legal effect of section 6(6) (c) of the 1999 Constitution has been judicially interpreted in a handful of cases.[58] *Bishop Okogie's case*[59] dealt with the constitutional issues of

[56] Ibid., p. 159.

[57] Alemika, E.O., (2000) Fundamental Objectives and Directive Principle of State Policy Within the Framework of a Liberal Economy. In: Ayua, I.A. et al (eds.) *Op cit*. Gye-Wado, O. (2000) Fundamental Human Rights and Corresponding Civic Obligations under the 1999 Constitution. In: Ayua et al. (eds.) Op cit. Joyce, E.M., and Igweike, K. (1982) *Introduction to 1979 Nigerian Constitution*. The Macmillan Press, p. 56.

[58] *Bishop Okogie (Trustee of Roman Catholic Schools) and Others vs. Attorney-General of Lagos State*(1981) 2 NCLR 337 CA. (Hereinafter referred to as Bishop Okogie's case);*Adewole vs. Jakande* (1982) 1 NCLR; *Attorney-General of Ondo State vs. Attorney-General of the Federation and Others* (2002) FWLR Part III p. 1972 (Hereinafter referred to as Attorney-General of Ondo State); and *Attorney-General of Lagos State vs. Attorney-General of the Federation and 35 Others* (2003) MJSC 1, [2003] 12 N.W.L.R. (Pt. 833) 1 (Hereinafter referred to as Attorney-General of Lagos State).The first two cases were decided based on equivalent provisions in the 1979 Constitution while the last two cases were decided based on the 1999 Constitution.

the Plaintiffs' fundamental right under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the Lagos State government to ensure equal and adequate educational activities at all levels under section 18(1), Chapter II of the 1979 Constitution. On reference to the Court of Appeal, the Court while considering the constitutional status of the said Chapter stated:

> While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution.[60]

The reasoning in *Bishop Okogie's case*[61] was affirmed in the case of *Adewole vs. Jakande*[62].

In *Attorney-General of Ondo State*[63], the Supreme Court reaffirmed the Court of Appeal's construction of section 6 (6) (c) and went on to hold that the directive principles could be made justiciable by legislation. The case involved the constitutional validity of the *Corrupt Practices and Other Related Offences Act No. 5 of 2000* (ICPC Act) and the Independent Corrupt Practices and Other Related Offences Commission (ICPC). Both the Act and ICPC were established to enforce observance of the Directive Principle set out in section 15(5) of the Constitution.[64] One of the main issues for the Court's determination was whether

[59]Op cit.
[60] Op cit. at p.350 per MammanNasir PCA (as he then was)
[61]Op cit.
[62]Op cit.
[63]Op cit.
[64]In holding that the Act and the ICPC were constitutional and valid, the Supreme Court referred extensively to the Fundamental Principles in Chapter II of the Nigerian Constitution. As stated by the Court, "it is incidental or supplementary for the National Assembly to enact the law that will enable theICPC to enforce the observance of

or not the ICPC Act enacted by the National Assembly pursuant to sections 4(2), 13 and 15[65] and item 60 (a) on the Exclusive Legislative List[66] of the 1999 Constitution was valid and in force in every state of the Federal Republic of Nigeria (including Ondo State).

Professor Ben Nwabueze, SAN and OlisaAgbakoba, SAN who both appeared as amici curiae in the case contended that the duty and responsibility of all organs of government and all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of Chapter II of the Constitution is limited by section 6(6)(c) of the Constitution which excludes from the court any issue or question as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy.[67]

Ogwuegbu JSC (as he then was) rejected this argument and held as follows:

> This argument in my view is limited to the extent that courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws as has been done in respect of section 15 (5) of the Constitution by enactment of the ICPC Act.[68](emphasis provided)

In support of this position, Uwaifo JSC (as he then was) in his judgment accepted the argument of AfeBabalola SAN (who also appeared as amicus curiae) and held as follows:

> … the directive principles (or some of them) can be made justiciable by legislation. This is the point Chief Babalola seemed to have elaborated upon when he said that the Fundamental Objectives and Directive Principles had laid dormant in our Constitution since 1979 and that the Act was the first effort to activate just one aspect of them in order that there may be good and transparent government throughout the Federation of Nigeria.[69] (emphasis provided)

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the Fundamental Objectives and Directive Principles of StatePolicy.... The ICPC was established to enforce the observance of the Directive Principle set out in s.15(5) of Chapter II which provides that "The State shall abolish all corrupt practices and abuse of power."

[65] Section 15 of the Constitution provides that the State shall abolish all corrupt practices and abuse of power.

[66]Item 60 (a) on the Exclusive Legislative List provides for '[T]he establishment and regulation of authorities for the Federation or any part thereof [t]o promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.

[67] Op cit. at p. 2102-3

[68] Op cit. at p. 2103.

[69] Op cit., p. 2136

The need for the adoption of appropriate legislation to ensure the justiciability of the provisions of Chapter II was further emphasised in the same case by Uwais CJN, who, after comparing the experience of India, Ireland and other countries, underlined that every effort must be made:

> … to ensure that the Directive Principles are not a dead letter. Whatever is necessary is done to see that they are observed as much as practicable so as to give cognisance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand.[70]

It is therefore settled that while the fundamental objectives and directive principles are not directly justiciable, they can be made enforceable by the National Assembly enacting implementing legislation. Item 60(a) of the Second Schedule to the Constitution empowers the National Assembly to establish and regulate authorities for the federation or any state "to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution."[71]

This position was restated in *Attorney General of Lagos State*[72] where the Supreme Court considered and interpreted the Section 20 environmental provision of the Constitution. The court followed the reasoning in *Attorney-General of Ondo State*[73] and held that:

> Section 20 of the 1999 Constitution is one of the sections under Chapter II. That is the Chapter confirming the Fundamental Objectives and Directive Principles of

[70] Ibid.

[71] In *Federal Republic of Nigeria vs. Alhaji Mika Anache& Others*(2004) 14 WRN 1-90 61, Justice Niki Tobi explained that 'the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the useof the words "except as otherwise provided by this Constitution". This means thatif the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts.' Tobi J emphasised that "… item 60(a) is one of the items that the National Assembly is vested withlegislative power … by item 60(a), the National Assembly is empowered to establishand regulate authorities to 'promote and enforce the observance of the provisions of chapter 2 of the Constitution'".

[72] Op cit.

[73] Op cit.

> State Policy. By virtue of item 60(a) of the Second Schedule to the Constitution, the subject matter of that section comes under the Exclusive Legislative List. It can only be legislated on by the National Assembly on behalf of the Federal Republic of Nigeria.[74]

In the above case the Attorney-General of Lagos State (as the representative of the Lagos State Government) sued the 1st defendant, the Attorney-General of the Federation (as the representative of the Government of the Federal Republic of Nigeria). On the order of the Supreme Court, the other 35 state governments of Nigeria were joined as defendants. The contention of the plaintiff was that the Nigeria Urban and Regional Planning Decree No. 88 of 1992, which provides, inter alia, for an urban and regional planning development and administration for the whole of Nigeria with the establishment of Federal, State and Local Government authorities charged with supervising the national physical development of Nigeria, made it impossible for the Lagos State Government to carry out and implement its master plan according to its existing Town and Country Planning Laws and Regulations regarding all physical development control of land within the State. The plaintiffs also contended that the Decree was intended to interfere with the powers of Lagos State under its existing laws.

The plaintiffs therefore sought, inter alia, a declaration that by virtue of sections 4 and 5 of the 1999 Constitution, Urban and Regional planning and physical development are residual matters within the exclusive legislative and executive competence of the State; a declaration that the relevant provisions of the said Decree which seek to control urban and regional planning as well as physical development of land in Lagos State is inconsistent with section 4 of the 1999 Constitution and to that extent null and void. They also sought a declaration that the grant of approvals, permits and licences for building and physical development in Lagos State are the residual responsibility of the plaintiff; and a declaration that all approvals, permits or licences granted or issued by the first defendant from the 1st of June 1999 for building or development of land within Lagos State without the consent of the plaintiff and in

[74]Op cit. per Uwaifo JSC.

contravention of the town planning laws and regulations of Lagos State are illegal, null and void.[75]

The Attorney-General of the Federation argued as part of his defence that section 20 of the 1999 Constitution empowers the National Assembly to enact any appropriate law on matters of environment as a subject item under the Exclusive Legislative List by virtue of the operation of Item 60(a) of that List. Therefore the National Assembly could enact a law on urban and regional planning to have effect throughout Nigeria. The Supreme Court, however, in its majority judgment,[76] rejected this argument and held that since the subject of town and regional planning is not in the Exclusive and Concurrent Legislative Lists of the 1999 Constitution, it is a residual matter and only the states can legislate on it. Moreover that section 20 of the 1999 Constitution which the 1st defendant relied on must be confined to pure matters of environment and not by extension to matters of pure town and regional planning. Uwaifo JSC, rejecting the argument of the AG Federation stated as follows:

> I have endeavoured to show from all these laws that it was never the intention that environmental matters could involve the National Assembly in proposing physical planning laws for Nigeria by virtue of a provision like that of section 20 of the 1999 Constitution. It can be seen that the said laws are essentially about how to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. This can by no means include or involve, in respect of land, physical town and regional planning as a means to "safeguard" land. It has been shown in this judgment what discussions and considerations led to the formulation of the text of section 20 which for the first time in the constitutional history of Nigeria came to be inserted in the Constitution under the Principles of State Policy. The Constitutional Conference Committee's discussion, recommendation and resolution on the subject make it clear beyond argument that it was after deliberating such purely environmental matters as afforestation, reforestation, devastation through mining activities, desertification, disasters and emergencies commission and the federal environmental protection etc. that the Committee came up with that provision.[77]

[75] Under the Land Use Act, the consent of the Governor is required for transactions involving land. See sections 21 and 22 of Land Use Act, Cap L5, LFN 2004.

[76] The Supreme Court unanimously granted the claims in part, with Uwais, CJN (as he then was), Ayoola and Tobi, JJSC expressing minority views on some reliefs.

[77] (op cit.) at p. 186, paras. D-H.

Kalgo JSC, similarly held that the main object and essence of section 20 of the 1999 Constitution is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences and it does not appear to involve the way people plan their buildings or develop the land they occupy.[78] Their Lordships further stated that section 20 is meant to support such laws as the Federal Environmental Protection Agency Act, the Harmful Wastes (Special Criminal Provisions) Act, the Environmental Impact Assessment Act, and the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991 etc.

Their Lordships relied on several factors in arriving at the conclusion that environmental matters are not directly concerned with the physical developmental planning of land use conceptions. These included the definition of environment[79]; the deliberation on environment by the Constitutional Conference; the general perspective and scope of the above mentioned laws on environment and the very aim of section 20.

While section 20 of the 1999 Constitution is directed primarily at environmental protection and does not encompass physical planning and development, environmental considerations play a vital role in urban and regional development and physical planning. Town planners need to provide for green areas in cities; industrial areas that are prone to pollution should of necessity be sited away from residential areas; and telecommunication masts and installations that emit radioactive waves should not be sited in residential areas. In this way planning regulation may also be used as an instrument of protecting and enhancing the environment.[80]

[78] Per Kalgo JSC, pp. 159-160, paras.H-A; 161-162, paras.B-A.

[79] The court defined 'environment' as 'the natural conditions, for example land, air and water, in which people, animal and plants live'.

[80] This is reflected in Halsbury's Laws of England (4th Edition) Vol. 46, para 1 (quoted in *Attorney General of Lagos State* (op cit.) per Ayoola JSC at p. 229, para. H) that- "The town and country planning system is designed to regulate the development and use of land in the public interest; and it is an important instrument for protecting and enhancing the environment in town and country…."

This important point was made by the learned justices of the Supreme Court as follows-

> …town and country planning may be influenced by environmental laws in appropriate circumstances. If, for instance, an environmental law is directed at preserving the beauty of an elegant landscape, or the existing archaeological or architectural works or monuments or historic or artistic interest, relevant town and country planning laws must take account of such a law. It must be expected that the operators of town and country planning will have to comply with such directions given by the appropriate authority in charge of environment to meet the objectives. That is the essence of the Environmental Impact Assessment Decree No. 86 of 1992….Again land can be safeguarded by relevant environmental laws which may prohibit any activities on land that could lead to, say landslide or erosion or land pollution with toxic waste with its catastrophic effect. And by similar laws for the purpose of the reclamation and rehabilitation of devastated land and environment, and to safeguard land against desertification and effect of indiscriminate burning activities.[81]

On this ground, the court noted that while the roles of the two types of law are distinguishable, they are complementary to each other.[82] It is therefore imperative that urban and regional planning must take account of environmental factors and seek always to protect and develop Nigeria's environment and conserve its biodiversity and promote the sustainable development of Nigeria's natural resources. While the states have residual legislative competence in regard to urban and regional planning, such planning must conform to federal environmental legislations. While the Supreme Court in the instant case commendably set a clear standard on how Federal and State governments should relate on physical planning matters, they failed to do so in relation to environmental protection.

The combined effect of sections 4(2), Chapter II and item 60 (a) on the Exclusive Legislative List of the Constitution and further affirmed by the Supreme Court in *AttorneyGeneral of Ondo State*[83]and *Attorney General of Lagos State*[84] is that the National

[81] (op cit.) at pages 188-190, paras. J-A.

[82] A similar view was expressed in the US case of *California Coastal Commission vs. Granite Rock Co*. 480 US 572 (1987) as follows:-

> The line between environmental and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land, but requires only that, however the land is used, damage to the environment is kept within its prescribed limits.

[83]Op cit.

[84]Op cit.

Assembly is competent to legislate on any of the matters in Chapter II of the Constitution. Thus, if the National Assembly enacts an Act on any aspect of Chapter II, as it did in the case of the ICPC Act, the executive arm of government is bound to ensure the implementation of such an Act. In this manner the fundamental objectives and directive principles can be made effectual and need no longer be dormant or mere declarations.

The Nigerian legislature has enacted several environmental laws aimed at giving effect to section 20 of the Nigerian Constitution. These include the National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act[85] and the National Oil Spills Detection and Response Agency (NOSDRA) (Establishment) Act.[86]

The Constitution provides generally for public participation by declaring that "the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution".[87] Although the provision is contained in Chapter II and non-justiciable, it could form a basis for a legislation providing for public participation in environmental matters.

4.2.2. African Charter on Human and Peoples' Rights (Ratification andEnforcement) Act[88]

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act provides for a substantive environmental right. Article 24 states that "All peoples shall have the right to a general satisfactory environment favourable to their development". The Act, which domesticates the provisions of the African Charter on Human and Peoples' Rights in Nigeria, now forms part of existing Nigerian legislation recognised under the Constitution. Thus the legal right to environment provided in the African Charter is recognized in Nigerian law and available to all Nigerians.

[85] No. 25 of 2007, Cap N164 LFN 2007.
[86] Cap N157 LFN 2006
[87] Section 14(2)(c) 1999 Constitution
[88] Enacted in 1983. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, LFN 2004. (Hereinafter African Charter Act).

The African Charter also requires that a State Party enact laws or measures to, among other things, give effect to the basic human rights, freedoms, and duties guaranteed in the African Charter.[89] It is the view of the researcher that this provision creates an obligation on the government of Nigeria to enact laws that will give effect to the environmental right guaranteed in the African Charter. This, the Nigerian National Assembly has done, by enacting environmental laws like the *National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act* and the *National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act*.

The legal status of the African Charter was examined by a full panel of the Supreme Court in the case of *Abacha and others vs. Fawehinmi*.[90]The respondent, a legal practitioner, was arrested without warrant at his residence by operatives of the State Security Service (SSS) and policemen, and taken away to the office of the SSS at Shangisha where he was detained. At the time of arrest the respondent was not informed of, nor charged with, any offence. He was later detained at the Bauchi prison. Consequently, he applied through his Counsel to the Federal High Court, Lagos to enforce his fundamental rights against the arrest and detention pursuant to the Fundamental Rights (Enforcement Procedure) Rules, 1979. Among others, he sought declarations against the Appellants that his arrest from his residence and detention without charge constituted violation of his rights under sections 31, 32 and 38 of the 1979 Constitution and articles 5, 6 and 12 of the *African Charter on Human and Peoples' Right (Ratification and Enforcement) Act* and was therefore illegal and unconstitutional.

The Defendants raised preliminary objection on the grounds of State Security (Detention of Persons) Decree 2, 1984, Federal Military Government (Supremacy and

[89] African Charter, article 1. Section 1 of the African Charter Act provides that:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

[90](2000) 6 NWLR (Pt. 660) 228. See also *Ogugu v The State* (1994) 9 NWLR (Pt. 366) 1.

Enforcement) of Powers Decree 12 of 1994 and Constitution (Suspension and Modification) Decree no. 107, that the High Court lacked jurisdiction to entertain the matter. The trial Judge sustained the objection and declined jurisdiction on the ground of the ouster clause in Decree 2, 1984. Dissatisfied with the decision of the High Court, the Respondent appealed to the Court of Appeal.

The Court of Appeal allowed the appeal in part and held that,notwithstanding the fact that the African Charter Act was promulgated by the National Assembly, it is legislation with international flavour and the ouster clauses contained in the Decrees cannot affect its operation in Nigeria. The court further held that

> "…the provisions of … The African Charter on Human and Peoples' Rights Act … are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the Court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the international law and the Federal Military Government is not legally permitted to legislate out of its obligations.

In what the Supreme Court described as a somersault, the Court of Appeal went on to find that "…by virtue of the provisions of Section 4 of Decree No. 2 of 1984 as amended by Decree No. 12 of 1994, the jurisdiction of the court is ousted to entertain the Appellant's case." The Court of Appeal remitted the case back to the trial court to consider the consequences of the detention of the appellant for the four days which were not covered by the Detention order. The Court of Appeal also held that the respondent had used the wrong procedure in commencing his suit at the trial court.

The appellants proceeded to the Supreme Court and the respondent cross-appealed parts of the decision. The Supreme Court, on the status of the African Charter in Nigeria, held as follows:

> Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification

> and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990 (hereafter is referred to simply as Cap 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning.[91]

The court further held,

> No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provision will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their lordships of the Court below that the Charter possesses a greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution….[92]

The court was therefore quick to clarify that such treaties with international flavour did not, by virtue of incorporation into domestic law, assume a status higher than the Constitution. On ousting of the court's jurisdiction, the Supreme Court overruled the Court of Appeal and held that,

> …Cap 10 remained in full force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any decree made after the commencement of Decree No. 107 of 1993, that is, after 17th November 1993. Cap. 10 was not inconsistent with any provision of the 1979 Constitution or any such decree.[93]

On the proper procedure to follow when bringing an action under the African Charter, the Supreme Court allowed the cross appeal and held that the respondent could have come by way of any action commenced by a writ or by any other permissible procedure such as the Fundamental Rights (Enforcement Procedure) Rules, 1979.[94]

[91] Ibid. PerOgundare, JSC (as he then was) Para. 14.
[92] Ibid. Para. 15.
[93] Ibid. Para 25.
[94] Here the court followed its decision in *Ogugu vs. The State* (1994) 9 NWLR (Pt. 366) 1, pp. 26-27.In that case,the Supreme Court held that by reason of its domestication, the African Charter has become part of Nigeria's domestic laws and "the enforcement of its provisions … fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto."

The implication of the domestication of the African Charter and the decision in *Abacha vs. Fawehinmi*[95] is that the country has adopted the African Charter as part of her municipal law, and the provisions of the African Charter (including the right to environment) are enforceable in the same manner as those of Chapter Four of the Constitution. Thus the provision of a right to the environment in Section 24 could be used by Nigerians to enforce their right to environment.

Bringing such action under the Act has many advantages such as removing the necessity to prove that the degradation affected a victim's life, dignity or property, except that it has created an unhealthy environment for him to live. It also has the advantage of decreasing the over reliance on the onerous rules of tort, thereby easily allowing access to judicial remedy for victims of actual or potential environmental degradation.

While there is no doubt as to the existence of social, economic and cultural rights in the African Charter Act, their justiciability remains a controversial issue with some scholars of the opinion that they are justiciable[96] while others argue that they are not justiciable.[97] The Supreme Court, in *Abacha vs. Fawehinmi*,[98] held that the entire Act is binding and our courts must give effect to it, without making any distinction between civil and political rights on the one hand and economic and social rights on the other hand. The African Charter itself does not create any distinction between civil and political rights and economic, social and cultural rights. Moreover, the legislature adopted the African Charter Act wholesale without making any reservation or exclusion with regards to economic, social and cultural rights. In addition, the sections of the African Charter Act that provide for socio-economic rights have not been

[95]Op cit.
[96]Ebobrah, S. T. (2007). The Future of Economic, Social and Cultural Rights Litigation in Nigeria.*CALS Review of Nigerian Law and Practice*.Vol. 1(2). See also Shehu, A.T. (2013) The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience. *AfeBabalola University Journal of Sustainable Development Law and Policy*.Vol. 2 Issue. 1, pp. 101-120.
[97]Nnamuchi, O. (2012) Rethinking Justiciability of Socioeconomic Rights in Nigeria: A Critique of the Dominant Position. Available at SSRN: https://ssrn.com/abstract=2191914 (Last accessed 11/10/2016)
[98]Op cit.

held by any court to be inconsistent with the Constitution. Neither have any of the relevant sections been suspended or repealed.[99] Until this is done, it is the humble view of the researcher that the entire African Charter Act remains part of Nigerian municipal law and enforceable by the courts.

In practice, the controversy on the justiciability of the socio-economic rights in the African Charter Act has discouraged lawyers from approaching the Nigerian courts with cases based solely on the African Charter socio-economic rights. At present there is no instance of an environmental litigation in Nigerian courts that is based primarily on Article 24 of the African Charter. Although the environmental right provided for in Article 24 was cited in the Jonah Gbemre case,[100] it did not form the major plank of the legal authorities forming the basis of the case but was instead a subsidiary provision to the constitutionally recognized rights to life and human dignity.

A possible reason for the paucity of litigation based on the environmental right in the African Charter is the status of the African Charter relative to the Constitution. The Supreme Court in *Abacha vs. Fawehinmi*[101] emphatically stated that the African Charter is not superior to the Constitution. Based on this, a litigation based on a constitutionally guaranteed right is more likely to succeed than one based on the African Charter.

Another reason is that the obligation of the state in connection to economic, social and cultural rights is that of progressive realisation and is often linked to the availability of resources. It is also heavily dependent on government policies. Hence, there is still some resistance to the idea of judges taking judicial review of executive decisions on these matters.

[99] *Abacha vs. Fawehinmi* op cit., held that the executive,legislative and judicial authorities in the country have obligations to obey and enforceprovisions of the African Charter pursuant to the Ratification Act, unless theprovisions have been expressly suspended or repealed by a later statute.
[100] *Op cit*.
[101] *Op cit*.

In Nigeria, however, mismanagement and not the lack of resources is the major reason why Nigeria continues to violate her international human rights obligations.

An additional reason is that much of the human rights activism in Nigeria is carried out by Non-Governmental Organisations (NGOs). Most of these emerged or became prominent during the totalitarian military era. Their struggles were mostly centred on bringing an end to military rule (with its disregard for the rule of law) and the restoration of democratic rule; thus their focus was on civil and political rights and remains so to this day. Prominent cases[102] brought by these activists were based on the civil and political rights in the African Charter.

Regional courts and treaty monitoring bodies have been willing to apply the environmental right under the African Charter in relation to Nigeria. In *Social and Economic Rights Advancement Project (SERAP) vs. Nigeria*,[103]the plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution. The Federal Government objected to the suit on the bases, *inter alia*, of non justiciability of socio-economic rights and lack of *locus standi* of the plaintiffs to bring the action. The court rejected both arguments and held that once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution. It stated as follows -

[102]*Abacha and others vs. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228, *Director, SSS vs. Agbakoba* (1999) 3 NWLR (Pt. 595) 314.

[103]ECW/CCJ/APP/08/09.Retrieved on July 14, 2014 from http://www.reports-and-materials.org/Complaint-to-ECOWAS-Court-re-Nigeria-oil-pollution-25-Jul-2009.doc.See also*Social and Economic Rights Action Centre and Centre for Economic and Social Rights vs. Nigeria (the SERAC communication)*.Communication No. 155/96 (2001), para. 68, where the African Commission stated that collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. It indicated its willingness to apply every one of these rights since "there is no right in the African Charter that cannot be made effective."

> the Federal Republic of Nigeria cannot invoke the non justiciability or enforceability of ICESCR as a mean for shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made vis-à-vis the Economic Community of West African States and the Charter.[104]

The Court also held that SERAP had *locus standi* to institute the action. *SERAP v. Federal Republic of Nigeria* and the *SERAC Communication* form the case law on the interpretation and effect of Article 24 of the African Charter and constitute persuasive precedents to Nigerian courts.

When bringing an action under the African Charter Act, the injured party could proceed against the polluter by way of the *Fundamental Rights (Enforcement Procedure) Rules 2009* (FREP 2009 Rules). This is by virtue of the overriding objectives of the Rules which provide, inter alia, that the Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposefully interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.[105] The Rules have further affirmed the economic and social provisions of the African Charter Act, including the right to a healthy environment, by expressly defining fundamental right as including "any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act".

A major advantage of the FREP 2009 Rules is the relaxation of the strict *locus standi* rule to permit public interest litigation for the protection of human rights. Preamble Rule 3 provides as follows:

> The court shall encourage and welcome public interest litigation in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

[104] Ibid. Para. 39.
[105] See the Preamble Rule 3a, FREP 2009 Rules.

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. Association acting in the interest of its members or other individuals or groups.

The Rules are commendable and should be applied to encourage and enhance the activities of environmental NGOs, civil society organisations and Community Based Organisations in the struggle for realization of environmental rights. It also signals a green light to activist judges who want to enforce the spirit of the Constitution, the African Charter and other international instruments ratified by Nigeria.

4.2.3. National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act)[106] and Regulations[107]

The NESREA Act is an important environmental legislation aimed at giving effect to section 20 of the 1999 Constitution. A major feature of the Act is the establishment of the National Environmental Standards and Regulations Enforcement Agency (NESREA or the Agency) as Nigeria's lead environmental protection agency. The NESREA was established on July 30, 2007 as a corporate body with responsibility for the enforcement of standards, regulations, rules, laws, policies and guidelines on the environment.[108]

The Agency is charged with responsibility for the enforcement of international agreements and treaties on the environment;[109] protection and development of the environment; biodiversity conservation and sustainable development of Nigeria's natural

[106]No. 25 of 2007. Parts of this sub-topic are drawn from the researcher's LL M Thesis where she examined the NESREA Act and the Agency. See Popoola, E.O. (2008) An Appraisal of the Domestication and Enforcement of the Preventive Principle of Environmental Protection Law in Nigeria (LL.M Thesis, Ahmadu Bello University, Zaria, Nigeria)

[107] The Minister of Environment in pursuance of section 34 of the NESREA Act (conferring on him the power to make delegated legislation), promulgated 24 Regulations between 2009 and 2011.

[108]NESREA Act No. 25 of 2007, sections 1 (2), 2 and 7.

[109] Ibid, section 7 (c)

resources as well as environmental technology.[110] Other functions include the enforcement of environmental control measures through registration, licensing and permitting systems.[111] Although the NESREA Act does not provide expressly for environmental rights; the elements of environmental rights may be implied from its provisions.

4.2.3.1 Mandate and Powers of NESREA

Part II of the NESREA Act contains the functions of the Agency. The Agency is authorized to enforce compliance with laws, guidelines, policies and standards of environmental matters.[112]Suchstandards would include the federal water and air quality standards. In carrying out its functions, it is to coordinate and liaise with stakeholders within and outside Nigeria, on matters of environmental standards, regulations and enforcement.[113] Relevant stakeholders would include the organized private sector, environmental groups at both national and international levels, and other ministries and government agencies.

A notable provision of the NESREA Act is section 7(c) which mandates the Agency to "enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment… and such other agreements as may from time to time come into force." Nigeria has ratified several international agreements on the environment in matters such as climate change, biodiversity, desertification, forestry, oil and gas, hazardous waste, marine and wildlife and pollution. However, many of these environmental treaties to which Nigeria is a state party are yet to be domesticated.

Under section 12 of the 1999 Constitution, a treaty has to be enacted into law by the National Assembly for it to be applicable domestically. For the purpose of implementing a treaty, the National Assembly can legislate on matters within and outside the exclusive

[110] Ibid, sections 2 and 7 (e).
[111] Ibid, section 7 (j)
[112] Ibid. Section 7(a)
[113] Ibid. Section 7(b)

legislative list.[114] Where the treaty relates to a matter outside the Exclusive Legislative List, the law has to be ratified by a majority of the state houses of assembly.[115]

As to the domestic effect of an unincorporated treaty, the Supreme Court held in *Abacha vs. Fawehinmi*[116] that by section 12(1) of the 1979 Constitution "an international treaty entered into by the government of Nigeria does not become *ipso facto* binding until enacted into law by the National Assembly and before its enactment, an international treaty has no force of law as to make its provisions actionable in Nigerian law courts." The court said such undomesticated treaties "might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty."[117]

The enforcement powers of NESREA of international environmental law are therefore limited to those international agreements and treaties on the environment that have been domesticated in Nigeria by an Act of the National Assembly.[118] Treaties on the environment that have been domesticated in Nigeria include the *Convention on International Trade in Endangered Species of Fauna and Flora*[119]and *Convention on the Prevention of Pollution by the Sea by Oil*.[120] The NESREA could play a vital role in the domestication process.

Section 7c of the NESREA Act has the laudable effect of highlighting the importance and relevance of international environmental law as a veritable source of Nigerian environmental law. Once ratified, a treaty becomes binding on the state party. Nigeria is

[114] Matters on the Exclusive Legislative List are listed in Part I of the Second Schedule of the Constitution.
[115] Section 12 (2) and (3) CFRN 1999 (as amended)
[116]*Op cit*.
[117]Ibid., p. 585.
[118]Section 12(1) of the 1999 Constitution (as amended) provides that "No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly". Section 12 (3) provides that where the treaty deals with matters not included in the Exclusive legislative list, it must in addition be ratified by a majority of all the state Houses of Assembly in the federation.
[119]Domesticated in Nigeria as the *Endangered Species (Control of International Trade and Traffic) Act*, Cap E12 LFN 2004.
[120] Domesticated in Nigeria as the *Oil in Navigable Waters Act*, Cap o6 LFN 2004

therefore under obligation to domesticate her environmental treaties by incorporating them as part of her national law to ensure effective implementation. This requires political will on the part of both the executive and legislative arms of government to comply with the provisions of Section 12 of the 1999 constitution.

The inclusion of 'oil and gas' in the list of international treaties on the environment to be enforced by NESREA, is contradictory in light of the sections of the Act which expressly remove oil and gas from the purview of the NESREA. Section 7(h) for example, empowers the NESREA to 'enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies *other than in the oil and gas sector*".[121]The inclusion of 'oil and gas' in Section 7c introduces some confusion as the other provisions of the Act have the effect of precluding the NESREA from exercising its enforcement powers in the oil and gas sector.

The Agency is mandated to enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation including pollution abatement.[122] The establishment of such policies and laws are primarily directed at the prevention of pollution and environmental degradation which threaten the environmental rights of residents. It can therefore be implied that the functions of the NESREA are directed primarily at the prevention of pollution and environmental harm rather than remedying harm that has already occurred to the environment. Where pollution is already occurring, the Agency is to enforce its abatement.

The NESREA is also concerned with the enforcement of the guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development

[121]See also Sections 7(g, j, k, l) and Section 7 (g, k, l, n) of the NESREA Act
[122] Ibid. Section 7(d)

of Nigeria's natural resources.[123] This provision confers broad powers on NESREA over a wide range of issues. Guidelines and legislations on the sustainable management of the ecosystem and biodiversity conservation include the Sea Fisheries Act[124] and the Regulations made pursuant to it; the Endangered Species (Control of International Trade and Traffic) Act[125], and the National Park Act[126].

The NESREA likewise possesses oversight functions over hazardous chemicals and waste other than in the oil and gas sector. It is to enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use handling and disposal of hazardous chemicals and waste. It is also to enforce compliance with legislation on sound chemical management, safer use of pesticide and disposal of spent packages.[127] This provision establishes beyond any doubt, the authority of NESREA in this important issue. It also has the effect of putting to rest the dispute in the 1990s between the defunct FEPA and the National Agency for Foods and Drugs Administration and Control (NAFDAC) on which agency had oversight/responsibility for the control of hazardous chemicals. This provision is commendable as it is the norm internationally to vest control of hazardous chemicals and wastes in environmental agencies.

This provision is also commendable as it takes cognizance of the fact that hazardous chemicals and wastes need to be strictly monitored at every stage. Having been victims of a reckless discharge of polluting substances from industries and of the dumping of toxic wastes,[128] Nigerians are becoming increasingly aware of the dangers posed by the careless use and disposal of harmful and toxic products of industrialisation. There is the need for strict regulation and monitoring of such substances from the point of their source to the point of final

[123]Ibid. Section 7(e)
[124]Chapter S4 LFN 2004
[125]Chapter E12 LFN 2004
[126]Chapter N 65 LFN 2004
[127]Section 7(f)(g) NESREA Act.
[128]Examples are the recurrent oil spills and ecological devastations in the oil producing Niger Delta and the Koko incident in June 1988 when 3,888 tons of highly toxic wastes from Italy were dumped on the land of a farmer.

disposal as handling at every stage poses great risks to the environment and man. The use and disposal of these chemicals has oftentimes posed a threat to man's rights to life, health, and healthy environment thus there is an urgent need for environmental protection agencies to take preventive action to forestall environmental harm due to the improper production, sale, use, handling and disposal of such substances. The laws to be enforced by the NESREA in relation to hazardous chemicals and waste include; The Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and their Disposal, the NESREA Act, the Harmful Waste (Special Criminal Provisions etc.) Act[129] and the National Environmental Protection (Management of Solid and Hazardous Wastes) Regulation of 1991[130].

Hazardous and waste chemical and waste management is a comparatively new field in Nigeria and requires multifaceted technical and expert services. In Nigeria, hazardous wastes with its hazardous and toxic components are often disposed of as municipal waste. Apart from industrial facilities, the hospitals also generate toxic waste. This can be found in used syringes, x-ray materials etc. most of these waste are supposed to be immediately incinerated. However, these wastes are often disposed of as ordinary wastes and sent to the dumpsites where street urchins and beggars regularly scavenge.[131]

The situation with regard to the management use and disposal of chemicals and pesticides and their packages is not different. These dangerous chemicals are sold in the open market without any form of regulation. Instances abound of the use of banned pesticides to kill mosquitoes. The instructions for disposal are usually not followed. Rather, they are simply disposed as household waste and sent to the dumpsites. This poses great dangers to the quality of the land, air, water and the environment as a whole.

[129]Cap. H1 LFN 2004
[130]S. 1:15 of 1991
[131]See Popoola, E. O., *op cit*.

NESREA is mandated to enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas oceans and other water bodies.[132] The NESREA is thus expected to enforce the environmental standards covering water quality, air quality, noise control and atmospheric protection. This would prevent an alteration of the chemical, physical or biological quality of the environment to an extent that is detrimental to the environment or beyond acceptable limits in accordance with the definition of 'pollution' under the Act. In fulfilling this mandate, the Agency is expected to establish effective monitoring mechanics to monitor emissions and discharges into the environment. The Act provides that 'the agency may establish monitoring stations or networks to locate sources of atmospheric pollution and determine their actual or potential danger'.[133]

The Agency possesses supervisory functions over environmental projects that are funded by donor organizations and support agencies. It is to ensure that such projects adhere to regulations in environmental safety and protections.[134] With the exception of the oil and gas sector, it is the body responsible for the enforcement of environmental control measures through registration, licensing and permitting systems.[135]

The use of licenses and permits is a useful tool for the prevention of environmental harm. This system enables the NESREA to set and enforce limits on the concentration of particular pollutants which are permitted to enter the environment. It regulates, for instance, the amount of substances released into water and thus prevents water pollution. The use of licenses and permits means that no one may discharge polluting substances to any of the environmental media without holding a permit or license to do so. In this way, the quality of the environment is preserved and safeguarded. All industrial facilities generating waste would be required to register with the agency and to obtain permits and licenses. For example, the

[132] Section 7(h) NESREA Act
[133] Section 20(2) Ibid.
[134] Section 7(i) Ibid.
[135] Section 7 (j) Ibid.

National Environmental Protection Pollution Abatement in Industries and Facilities Generating Waste Regulation[136] requires industries and other facilities to possess a permit issued by the Agency for the discharge of effluents with constituents beyond permissible limits into public drains and other waters.

The agency, in furtherance of its enforcement duties, is also mandated to establish data bank on regulatory and enforcement mechanisms of environmental standards.[137] This is necessary to enable the Agency carry out its functions and it also constitutes a veritable instrument for access to information on the environment. The bank would include current information on the number and state of industrial facilities operating in Nigeria, detailing persons (natural or artificial) engaging in activities that could impact adversely on the environment, for example, the storage, treatment and transport of harmful or toxic waste.

It is the opinion of this researcher that such data should be available on request to any interested party in fulfilment of the right of access to information. Also, a corresponding obligation should be placed on industrial facilities to maintain a pollution data bank specifying the chemicals they deal in, what pollutants they emit and the treatment given to waste before emission. In many countries there is the growing requirement for industrial facilities to establish and keep a Pollutant Release and Transfer Registry.

The NESREA Act empowers the Agency to develop environmental monitoring networks, compile and synthesize environmental data from all sectors (other than in the oil and gas sector) at national and international levels.[138] The monitoring networks and data are to assist the Agency in adequate and effective enforcement of the existing law. There is a critical need for legal requirements for self-reporting or for preparing and safekeeping of environmental and compliance information by corporations. This will make for an improved

[136] S. 1. 9 of 1991
[137] Section 7 (k) NESREA Act
[138] Section 8 (l), ibid.

compliance and enhance enforcement by the enforcement bodies that will make use of such information to build up a data bank.

The lack of such legal requirement for environmental self–reporting has complicated and rendered difficult the task of the enforcement agencies. Except for the petroleum industry where records are well maintained for purposes unrelated to the environment but scrupulously withheld from the public, a lot of the firms are unconcerned about tracking their pollution monitoring programs.[139] A lack of sufficient information on activities adversely affecting the environment and the opacity of environmental information does not augur well for the fulfilment of environmental rights.

In addition to the foregoing, the NESREA is to create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations and publish general scientific or other data resulting from the performance of its functions.[140]This is an important provision in light of the fact that the use of law as an instrument to obtain compliance has its limits. The mere existence of law (and a regulatory body) does not in itself create or bring about a change in behaviour. A clean and healthy Nigeria cannot be obtained solely by statutes. There is the added need for environmental enlightenment and education of the public.

Environmental education is an essential component of procedural environmental rights[141] and it has the powerful potential of bringing about a change in human behaviour thereby preventing environmental harm. There must be instilled in the minds of a sizeable number of the population an unambiguous message clearly urging the need for a healthy environment and educating them on their environmental rights and duties.

[139]Ladan, M.T., *Cases and Materials on Environmental Law*, op cit.
[140] Section 7(l) NESREA Act
[141]Some scholars advocate for the inclusion of a fourth pillar, namely 'a right to environmental education', in the procedural rights discourse. See Tamuno, A.(2012) The Legal Roadmap for Environmental Sustainability in Africa: Expansive Participatory Rights and International Environmental Justice (S.J.D. dissertation, Pace University School of Law), pp. 4-20.

The persistent use not only of the mass media but also education and social institutions to cause a change of thinking and behaviour in conformity with the demands of a healthy environment, will ease the duty of enforcement bodies. This is because enforcement will be against a minority. It will make it possible for the environmental agencies to succeed and not to collapse under the severe pressure of trying to contain large scale disobedience of the laws.

In furtherance of this objective, education on the environment should start at the primary school level and be continued at higher levels of education. It could be incorporated as part of the social studies curriculum and science curriculum.[142] The NESREA would need to liaise with the federal and state ministries of education in this regard. In this way, the citizen would be taught to value and protect the environment from a tender age. Public education and enlightenment could also be achieved through the mass media (which has been adjudged to play an important role in shaping and affecting people's perceptions and views), published walk through inspections of industrial facilities and residential quarters, attendance, hosting and sponsoring of workshops, seminars and conferences on the environment and information dissemination through newsletters, bulletins, and electronic text messages.

As the major environmental body charged with the protection of Nigeria's environment in line with section 20 of the Constitution, the NESREA is permitted to carry out "such activities as are necessary or expedient for the performance of its functions".[143] It has been conferred with broad powers including the power to prohibit processes and use of equipment or technology that undermine environmental quality,[144] conduct field follow-up of compliance with set standards and take procedures prescribed by law against any violator,[145,]and

[142] An examination by this researcher of the current primary science curriculum reveals that some form of environmental education is incorporated. Topics taught cover issues like air pollution and water pollution. This is in contrast to the curriculum 10 - 20 years ago. There is also the need to include more topical environmental issues like global warming and climate change in the curriculum.
[143]Section 7(m), NESREA Act.
[144] Ibid. section 8(d)
[145] Ibid. section 8(e)

establishment of mobile courts to expeditiously dispense cases of violation of environmental regulations.[146]

The purpose of the mobile courts is to ease pressure on the higher courts and to ensure that cases are treated with dispatch. The establishment of such courts must be in accordance with the provisions of the constitution or else their legality could be called into question. The NESREA is also empowered to conduct public investigations on pollution and the degradation of natural resources and to submit proposals for the evolution and review of existing guidelines, regulations and standards on the environment to the Minister of the Environment for approval.[147]

The NESREA is to undertake and promote research by public or private bodies on causes, effects, extent prevention, reduction and elimination of pollution and other matters related to environmental protection and natural resources conservation, enter into agreements with public or private organization and individuals to develop and share environmental monitoring programmes, research effects and data on the effect of various activities on the environment.[148] It is empowered further to collaborate with other relevant agencies and with the approval of the minister, establish programmes for setting standards and regulations for the prevention and control of pollution and environmental degradation in the environment and for restoration and enhancement of the environment and natural resources of Nigeria.[149]

The NESREA Act confers broad enforcement powers on the Agency for the purpose of enforcing the Act. Any officer of the Agency may, with the consent of the Attorney- General of the Federation, conduct criminal proceedings in respect of offences under this Act or

[146] Ibid. section 8(f)
[147] Ibid. section 8 (g, k)
[148] Section 8 (m) NESREA Act
[149] Section 8 (o), ibid.

regulations made under this Act.[150] This researcher considers the requirement of obtaining the consent of the Attorney-General (before the institution of criminal proceedings) as counter-productive and likely to increase the delay occasioned by bureaucracy. It is hard to see what it will contribute to the effective and speedy prosecution of environmental offences.[151]

The NESREA, in the exercise of its functions, is expected to collaborate with the State Environmental Protection Agencies and other bodies whose functions relate to the environment. This is necessary in a federation like Nigeria where the states and local governments may have established environmental bodies with overlapping functions or roles.

4.2.3.2 Limitation on the Mandate and Powers of the NESREA

The NESREA Act conferred the NESREA with the broad wide ranging powers for the protection and development of the environment in Nigeria. This power is, however, subject to important limitations. The functions and powers of the NESREA do not extend to the oil and gas sector. Sections 7 and 8 of the NESREA Act, dealing with the mandate and powers of the NESREA contain the recurring phrase "other than in the oil and gas sector"[152]. This has the effect of removing all environmental issues arising from the petroleum/oil and gas sector from the authority of the NESREA.

The limitation placed on the powers of the NESREA could be seen as a response to the conflict between the defunct FEPA and the regulatory arm of the Department of Petroleum Resources (DPR), the Petroleum Inspectorate Department of the Ministry of Petroleum

[150]Section 32(3), ibid.This is subject to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any person in a court of law, as provided in section 174 of the Constitution.

[151] The illogicality of the above requirement is further apparent when compared with similar provisions like section 7 of the Federal Inland Revenue Service (Establishment) Act (FIRS Act), which empowers officers of the FIRS to institute criminal proceedings without imposing a requirement of obtaining the consent of the Attorney General.

[152] Ibid. Sections 7(g, h, j, k, l) and Section 8(g, k, l, m, n, s)

Resources (PIDPR).[153] Prior to the creation of FEPA, the department had been responsible for monitoring pollution in the petroleum sector. Several years after the creation of FEPA controversy arose as to which among these two was the correct body to set the guidelines and standards for pollution control in the oil industry and which of them was to enforce these standards. The PIDPR and FEPA, after several years, resolved the issue as follows.

a) The PIDPR was to set guidelines and standards on operational safety and environmental pollution control in the petroleum sector. However such standards would not be weaker than and must be subordinate to the national standards that would be set by FEPA for the petroleum sector.

b) PIDPR would continue to monitor pollution and enforce compliance in the petroleum sector but on behalf of FEPA who reserved the right to carry out check inspections to determine how effective the PIDPR was in carrying out those functions.

The NESREA Act has therefore laid the issue to rest and it is now clear that the mandate and powers of the NESREA do not extend to the oil and gas sector. The situation at present is that the Department of Petroleum Resources (DPR) is responsible for the enforcement of environmental guidelines and standards in the oil and gas sector

Oil pollution is the most notorious form of pollution in Nigeria. The removal of oil and gas from the ambit of NESREA has resulted in a major whittling away of the mandate of the Agency and does not augur well for the Nigerian environment. It is a retrogressive step in the enforcement of environmental law. Vesting enforcement powers exclusively in the DPR is similar to asking a dog to guard a bone. The DPR is directly under the Ministry of Petroleum Resources which has a major stake in oil investments and production in Nigeria. Most of the oil fields in Nigeria are operated under Joint Venture Agreements (JVA) with the Nigerian

[153]Adegoroye, A. (1994) The Challenge of Environmental Enforcement in Africa: The Nigerian Experience.Proceedings of Third International Conference on Environmental Enforcement, Oaxaca, pp. 43-54, at p. 45.

National Petroleum Corporation (NNPC), which is also directly under the Ministry of Petroleum Resources. A roll call of environmental litigations reveals the NNPC as a major polluter.[154] The DPR therefore cannot be the independent and impartial body required for the effective enforcement of environmental laws, guidelines, regulations and standards in the oil sector. For example, while the DPR set a limit of 20ppm hydrocarbon contamination for effluent discharged to near shore waters and 10ppm for inland waters; FEPA's limit was 10ppm for coastal (near shore) waters.[155]

The removal of oil and gas from the monitoring and enforcement powers of NESREA is a deliberate attempt by government to ensure that the oil and gas industry, which is the mainstay of the Nigerian economy, is not limited by NESREA's regulatory measures, hence the removal of any interference in the oil industry. This is a case of the elevation of economy over environment.

4.2.3.3 Prevention and Control of Pollution

The NESREA Act provides for the prevention and control of pollution. Section 27 of the Act prohibits the discharge in harmful quantities of any hazardous substances into the air or upon the land and the waters of Nigeria or at the adjoining shorelines, except where such discharge is permitted or authorized by law. The definition of 'water' under the Act is construed widely and includes atmospheric, surface and subsurface and underground water resources, for example, wells and boreholes. It also includes inter-state waters, water resources in the Federal Capital Territory, territorial waters, the Exclusive Economic Zone, or in any area under the jurisdiction of the Federal Government.[156]

[154] *Douglas v. SPDC and Four Others*, *op cit*, *NNPC v. Chief Stephen Sele*,*op cit*., and *Gbemre v. SPDC and Others*, *op cit*.
[155] Human Rights Watch, *The Price of Oil: CorporateResponsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch, New York, 1999)
[156] Section 37 NESREA Act

Section 27(2) provides for a maximum fine of imprisonment of N1, 000,000.00 or a term of imprisonment of five years for a person who discharges harmful substances into the Nigerian environment. In the case of a corporate body, the Act provides for a maximum fine of N1, 000,000.00, with an additional fine of N5, 000.00 for every day the offence continues.[157] In addition, the Act provides for a lifting of the corporate veil. Thus, every person who was in charge of the body corporate at the time of commission of the offence shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished except if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.[158] This is a commendable approach in that persons responsible for running the affairs of such companies will appreciate that their personal liberty is at risk if they are negligent in their management of pollutants.

However, Section 27 of the NESREA Act raises several issues relating to burden and standard of proof. The prosecution has to prove that the substance was hazardous and that it was in such a quantity as to be harmful. This is a technical issue that would require expert evidence in proof of the facts alleged. To escape criminal liability, the person(s) in charge of the corporate body will have to prove either that he had no knowledge of the commission of the offence or that he exercised all due diligence to prevent it.

Some of the shortcomings of Section 27 are that it does not include oil in the definition of hazardous substances. Also, the discharge must be shown to be in harmful quantities. Finally, the Act does not provide a measurement for compensation or standard for restitution. It only provides in Section 28 that the Minister shall by regulations prescribe any specific removal method, financial responsibility, level for owners or operators of vessels, or onshore or offshore facilities, notice and reporting requirements. Under Section 21 of the FEPA Act, the owner or operator of the vessel was liable for the costs of removal, restoration or

[157]Section 27 (3) Ibid.
[158]Section 27 (4) Ibid.

replacement of natural resources destroyed as a result of the discharge and costs of third parties in the form of reparation, restoration, restitution or compensation as determined by the FEPA. The position under the FEPA Act is preferable to the NESREA position and could be said to reflect The *Polluter Pays Principle* which requires the polluter to bear the cost of putting the environment in an acceptable position.

The NESREA Act is a framework legislation not providing for specific scientific environmental criteria. Thus its effectiveness is largely dependent on the Minister of Environment or the NESREA adequately exercising their powers to make delegated legislation as provided for under the Act. On water quality standards, for instance, the NESREA Act simply states that the Agency shall in collaboration with other relevant agencies make regulations for the purpose of protecting public health or welfare and enhancing the quality of water to serve the purpose of the Act[159]. The Agency, in drawing up proposals for such regulations and standard is to take into consideration the use and value of the water for public water supplies, propagation of marine and wildlife, recreational purposes, agricultural, industrial and other legitimate uses.

The regulations made pursuant to the NESREA Act set limits on the concentration of particular pollutants which are permitted to enter the water and regulate the amounts of substances released into the water by a system of discharge consents. As part of its efforts to prevent water pollution, the NESREA is mandated to establish effluent limitations for new point sources and to review effluent limitation for existing point sources.[160] The new point sources shall require application of the best control technology currently available and implementation of the best management practices. For existing point sources, the required application is the best management practices under circumstances as determined by the

[159] Section 23 (1), NESREA Act.

[160]Section 24 (1) and (2) NESREA Act.Effluent limitation is any restriction established by the Agency of quantitative rates and concentration of chemical physical and biological or other constituents which are discharged from point sources into the waters of Nigeria. See section 37, NESREA Act.

Agency. Schedules of compliance for installation and operation of the best practicable control technology as determined by the Agency shall also be included.[161] In this way the agency may restrict, for example, the amounts and concentration of elements such as boron, chromium, sulphur and mercury that may be discharged into Nigeria's inland waters.

Environmental permits are required for all potentially environmental sensitive activities and are granted by the NESREA and the relevant state agencies. The National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Waste) Regulations SI.9 of 1991 provides that a permit will be required where effluents with constituents beyond permissible limits will be discharged into public drains, rivers, lakes, sea or as an underground injection. A permit will also be required where oil in any form will be discharged into public drains, rivers, lakes, sea or as an underground injection. An industry or facility with a new source or a new process line with a new point source shall be required to apply to the Agency for a discharge permit. Pursuant to the NESREA Act the National Environmental (Permitting and Licensing System) Regulations 2009 established a permitting and licensing system to enable consistent application of environmental laws, regulations and standards in all sectors of the economy and geographical regions.[162]

Under Section 20 of the NESREA Act, the Agency is mandated to make regulations setting specifications and standards to protect and enhance the quality of Nigeria's air resources so as to promote the public health or welfare and the natural development and productive capacity of the nation's human, animal, marine or plant life.

The inclusion of animal, marine, and plant health in the provisions of the Act suggests a shift from the anthropocentric philosophy to the biocentric. It is however not clear whether the underlying motivation is linked to the use of these plants and animal resources by humans. The

[161] Section 24 (2), NESREA Act.
[162] Regulation 1, National Environmental (Permitting and Licensing System) Regulations 2009.

provisions of the Act go beyond merely protecting the quality of the air to its enhancement. This is so, especially where the quality of the air has been lowered due to prior years of pollution.

However in order for the Agency to set standards as required to protect and enhance the air quality, Subsection 2 of Section 20 should be made mandatory. The relevant subsection provides that the agency *may establish monitoring stations or networks* to locate sources of atmospheric pollution and determine their actual or potential danger. The establishment of such monitoring stations ought to be mandatory rather than optional if effective prevention and control of air pollution is to be achieved. Just as the agency is able to monitor the quantity and concentration of substances discharged from point sources into waters it ought to monitor and ascertain the sources of air pollution and the concentration of substances discharged into the environment from such sources. Otherwise it would be practically impossible to effectively tackle air pollution.

Industries would then be encouraged (or forced) to adopt cleaner and environmental friendly technologies that resulting less pollution. While the use of effluent limitations and permits is good, the growing trend in environmental regulation of industrial pollution is focused more on controlling the type of machinery and processes adopted in industrial production and less on the end-of-pipe mechanisms.[163] It has been demonstrated that the use of environmentally friendly technology and processes are more effective in controlling pollution as opposed to end-of-pipe solutions.[164]

Contravention of air quality regulations made by the Agency is punishable by a fine not exceeding N200, 000.00 or by imprisonment for one year or by both fine and imprisonment.

[163] Regulation 2(4) of the National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations 2009 states that "[I]ndustries' emphasis on environmental planning shall be to prevent, reduce or eliminate pollutants at source and less emphasis shall be placed only on external hardware which are end-of-pipe mechanisms."
[164] Ibid.

An additional fine of N20, 000.00 is prescribed for every day the offence subsists[165]. In the case of a corporate body, the penalty shall be a fine net exceeding N2, 000,000.00 and an additional fine of N50, 000.00 for every day the offence subsists[166].

A notable feature of the NESREA Act is the wide power conferred on the Minister of Environment and the Agency to make regulations and prescribe environmental standards.[167] The role of the Agency in the making of regulations is implied in Section 8(k) of the Act which empowers the Agency to submit for the approval of the Minister, proposals for the evolution and review of existing guidelines, regulations and standards on environment other than in the oil and gas sector. Several sections expressly authorize the Agency to make regulations.[168] The power of the Agency to make delegated legislation in the form of regulations is to be exercised subject to the approval of the Minister of Environment.[169]

The advantage of delegated legislation in environmental law is that it can be made quickly by the Minister or the Agency without the need for lengthy legislative procedures. This enables a timely response to new environmental problems; for example, the discovery that a substance hitherto thought to be safe is causing environmental problems. Such flexibility is vital to the rapid development of environmental law, which requires continual modification in the light of scientific knowledge.

In addition to expediency, delegated legislation is usually done by persons who are possessed of skill or experts in the subject matter of legislation. Another advantage of delegated legislation is that it that it is anticipatory in nature and thus tends towards prevention

[165] Section 21 (3) NESREA Act
[166] Section 21 (4) Ibid.
[167] Section 34 (c) of the Act provides that the Minister shall make regulations generally for the purposes of carrying out or giving full effect to the functions of the Agency under the Act.
[168] Sections 20, 23 and 25 of the NESREA Act, for example, empower the Agency to make regulations in the areas of air quality and atmosphere protection, water quality standards, and environmental sanitation.
[169] Section 8(k)

rather than cure. For the preventive approach to be adequately implemented there is need to forecast and prevent rather than to react and correct.

The disadvantage of delegated legislation is that is reduces democratic accountability because, although statutory instruments may be scrutinized and overturned by the courts, they are made without the line-by-line scrutiny of the legislature which characterizes the passing of a statute.[170] The validity of delegated legislation may, on an application for judicial review, be challenged in the courts on the basis that it is ultra vires. In other words, that the law under which the delegated legislation has been made does not allow for the making of a particular rule. This would mean that the judiciary would be called upon to play a greater role in the development of national environmental law.

4.2.3.5The NESREA Regulations 2009-2011

Between 2009 and 2011 the Minister of Environment enacted 24 environmental regulations for the general purpose of carrying out or giving full effect to the functions of the Agency and to address the major environmental challenges in Nigeria. These regulations include, *inter alia*, National Environmental (Permitting and Licensing System) Regulations 2009; National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations 2009; National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations 2009; National Environmental (Wetlands, River Banks and Lake Shores) Regulations 2009; National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations 2009; National Environmental (Sanitation and Wastes Control) Regulations 2009; National Environmental (Access to Genetic Resources and Benefits Sharing) Regulations 2009; National Environmental (Ozone Layer Protection) Regulations 2009; National Environmental (Textile, Wearing Apparel, Leather and Footwear

[170] See Rabin and Schwartz. *The Pollution Crises*.Cited in Ajomo M.A and Adewale O. (eds.) (1994).*Environmental Law and Sustainable Development in Nigeria*.Nigerian Institute of Advanced Legal Studies, Lagos and the British Council, p.187.

Industry) Regulations 2009; National Environmental (Noise Standards and Control) Regulations 2009; National Environmental (Standards for Telecommunications and Broadcasting Facilities) Regulations 2011; National Environmental (Soil Erosion and Flood Control) Regulations 2011; National Environmental (Desertification Control and Drought Mitigation) Regulations 2011; National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries Sector) Regulations 2011; National Environmental (Protection of Endangered Species in International Trade) Regulations 2011; National Environmental (Domestic and Industrial Plastic, Rubber and Foam Sector) Regulations 2011; National Environmental (Coastal and Marine Areas Protection) Regulations 2011; National Environmental (Construction Sector) Regulations 2011; National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations 2011; National Environmental (Non-metallic Minerals Manufacturing Industries Sector) Regulations 2011; National Environmental (Surface and Groundwater Quality Control) Regulations 2011; and National Environmental (Electrical/Electronic Sector) Regulations 2011.

Additional five regulations were made in 2013 and are namely: National Environmental (Air Quality Control) Regulations 2013, National Environmental (Control of Charcoal Production and Export) Regulations 2013, National Environmental (Dams and Reservoirs) Regulations 2013, National Environment (Hazardous Chemicals and Pesticides) Regulations 2013, and National Environmental (Energy and Energy Efficiency) Regulations 2013.

These environmental regulations taken together constitute an attempt to confront the major environmental challenges confronting Nigeria and ensure the realization of the right to a healthy environment. These regulations cover virtually every segment of the Nigerian economy as well as sensitive and vulnerable ecosystems. They are aimed at fulfilling the environmental objective in Section 20 of the 1999 Nigerian Constitution (as amended), namely, to protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

The Regulations are significant for providing uniform environmental standards for the whole of Nigeria. This is more so as there were state laws and standards on the environment that existed prior to the enactment of the NESREA Regulations. However there was divergence in environmental standards across the states. This is a situation which could be exploited by unscrupulous industrialists. What the NESREA Regulations have done is to provide for uniform national standards which persons engaging in activities affecting the environment would have to adhere to irrespective of the state in which their operations are based.

While the enactment of Regulations pursuant to the NESREA Act is laudable and a boost to environmental rights protection, a major shortcoming of these Regulations is their failure to provide for provisions on public participation in environmental governance.[171]It is only the National Environmental (Mining and Processing of Coals, Ores, and Industrial Minerals) Regulations[172] that provide for the right of any person or group of persons to bring an action in court to prevent, stop or control the contravention of its provisions.[173]

Even the National Environmental (Permitting and Licensing System) Regulations 2009, which were madeto enable consistent application of environmental laws, regulations and standards in all sectors of the economy and geographical regions in Nigeria[174] scores low on this account. Public participation is only referred to indirectly.[175] There is no requirement imposed on an applicant or the Agency to bring an application for a permit or license to the notice of the public. This is in spite of the effect that the discharge of effluents is going to have on the life, health and well-being of persons and communities who live in proximity to the

[171] Section 7 (b) of NESREA Act provides that the Agency shall "coordinate and liaise with stakeholders, within and outside Nigeria, onmatters of environmental standards, regulations and enforcement." It is argued here that the Nigerian people are important stakeholders. Moreover according to international best practices, environmental governance involves the participation of the public.
[172]S.I. 31 of 2009.
[173]Ibid.,regulation 8(4).
[174]National Environmental (Permitting and Licensing System) Regulations 2009, Regulation 1.
[175]Regulation 13(b) provides that the terms and conditions of a permit granted by the Agency may be amended upon the Agency receiving a complaint from any person.

facility applying for a permit. The Regulations fail to provide for opportunities for members of the public to make an input before the assessment of an application. Neither is the Agency required to entertain or consider the views of the public while taking an administrative decision.

Public participation in environmental governance and access to environmental justice, which are key components of the environmental right, are lacking in the NESREA Regulations. This constitutes a major weakness of the NESREA Act and Regulations. Public participation in environmental governance and decision-making is reflected in Principle 10 of the *Rio Declaration on Environment and Development*, June 1992 which reads:

> Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information on the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.

Other weaknesses of the NESREA Act are the lack of a mandate requiring NESREA to disseminate information related to the environment to the public, or a requirement for NESREA to involve the public in the development and strengthening of environmental regulations and standards in Nigeria.

4.2.4 Environmental Impact Assessment Act[176]

Environmental Impact Assessment is the formal process used to predict how a development project or activity will affect environmental resources like land, water, air and

[176]Chapter E12 LFN 2004 (hereinafter known as the EIA Act). Enacted in 1992 as Environmental Impact Assessment Decree (No. 86) of 1992 and came into force on 10 December 1992. The EIA Act was enacted prior to the incorporation of an environmental provision in the Nigerian Constitution. However by then the African Charter, which provides for an environmental right, had been ratified by Nigeria and domesticated as part of her municipal law.

wildlife.[177] In Nigeria, the Environmental Impact Assessment Act aims to infuse environmental considerations into development project planning and execution. It prescribes the guidelines for EIA studies. It spells out the project areas and sizes of projects requiring EIA and the restrictions on public or private projects without prior consideration of the environmental impact.

The EIA Act is to facilitate the development of measures for the exchange of information, provide notice of a project and to enable discussions between all stakeholders and affected parties regarding a particular project.[178] This is appropriate, since development projects have a tendency to affect the environmental rights of host communities. An EIA thus compares the various alternatives by which a desired objective may be realized and seeks to identify the one which represents the best combination of economic and environmental costs and benefits.

Among the projects requiring mandatory Environmental Impact Assessment are large scale projects in the following areas: the agricultural and forestry sector, road and building construction industries, land reclamation project, chemical and petrochemical industries, iron and steel, drainage and irrigation, waste treatment and disposal, power generation and transmission, mining and quarries, water supply, resort and recreational development projects. Where a small scale project (not requiring full EIA) is located in an 'environmentally sensitive area,' it would then require mandatory EIA.[179]

The EIA Act contains procedural requirements that support, promote and protect the participatory rights set out in Principle 10 of the Rio Declaration and the African Charter on Human and Peoples' Rights. These 'procedural rights' are not broadly based but only in

[177] Section 63 of the EIA Act defines 'environmental assessment' to mean, 'in respect of a project, an assessment of the environmental effects of the project'. 'Environmental effect' of project means 'any change that the project may cause to the environment, whether within or outside Nigeria, and includes any effect of such change on health and socio-economic conditions'.
[178] Section 1(c.), EIA Act
[179] Schedule, ibid.

respect of particular projects related to the environment. The Act provides opportunities for the public to participate in the EIA process and to obtain information about a proposed project.

Section 7 of the Act provides that before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comments on the EIA submitted to the Agency. The section however failed to provide for the means by which the Agency shall involve members of the public and other stakeholders in the Agency's decision-making. The Agency seems to have wide discretionary powers in this regard. It shall in any manner, it considers appropriate, publish in a notice setting out the following information: the date on which the mandatory report shall be available to the public, the place at which copies of the report may be obtained, and the dateline and address for filing comments on the conclusions and recommendations of the mandatory study report.

Public participation in the decision-making process normally occurs after a mandatory study report is submitted to the Agency for the assessment of a project by the review panel established under the EIA Act.[180] The review panel has a duty to ensure that the public is given information that is to be reviewed by the board. It is to conduct hearings in a way that ensures the public can participate in such hearings. It is also to consider submitted comments from the general public and prepare a report of its findings.[181] The decision of the Agency in writing is also to be made available to interested persons or groups.

Even where no interested person or group requests for the reports, it should be the duty of the Agency to publish the decision in a manner by which the public or interested persons shall be notified. A duty should also be imposed on the Agency to provide the public with

[180]Sections 24, 26, 36 & 38, ibid.
[181]Section 36, 37 and 38. Ibid.

notice of the availability of a mandatory study report and the review panel's report. This would strengthen the procedural requirements of access to environmental information and improve public participation. The Act also provides, where necessary, that potentially affected states or local governments are notified.[182] The EIA Act requires that a document repository be established so the public can have access to documents generated during the EIA process until a follow-up EIA programme developed for the specific project is concluded.[183]

There is a need for greater public participation in the EIA process. Although the Act encourages the participation of individuals and the public by allowing them to comment on the environmental impact of a proposed project, the Agency has a lot of discretion on how and when to consult with the public. In this regard the law should be reviewed. The Act also failed to provide for appeal rights to a higher judicial body to contest a final agency determination based on a defect in form or technical irregularity.[184]

Section 40 of the EIA Act empowers the Environmental Agency to ensure that appropriate mitigation measures are implemented by developers, including calling for an injunction to be issued in respect of contravention of a prohibition to carry out a project that is likely to have adverse environmental effects.[185] The Agency is also empowered to prohibit a proponent from undertaking a project. Even after receipt of the necessary approval with its appropriate conditions, the progress of the project is monitored to ensure compliance with all conditions and mitigation measures. Environmental audit, assessing both positive and negative impacts of the project, is carried out periodically.

Environmental Impact Assessment is a process which, if properly implemented, has the potential of protecting the environment and the environmental rights of those likely to be

[182]Section 9 (2) and (3). Ibid.
[183]Section 55 Ibid.
[184]Section 57, Ibid.
[185]Section 54. Ibid.

affected by major development projects. However, the EIA Act suffers from poor drafting, overlapping and contradictory provisions[186]. The conduct of EIA in Nigeria has also been described as a formality. That is, a "paperwork exercise involving the preparation of a lengthy technical report to justify a development decision already taken"[187]. Other flaws in the EIA system in Nigeria include broad discretion of the regulatory agency on how and when to consult with the public and weak post-project follow-up procedures.[188]

4.2.5 Freedom of Information Act (FOI Act)[189]

The Freedom of Information Act (FOI Act) aims to make public records and information more freely available. It provides for public access to public records and information. It protects public records and information to the extent consistent with the public interest and the protection of personal privacy. It protects serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and it establishes procedures for the achievement of those purposes. Until the passage of the Freedom of Information (FOI) Act in 2011, access to government information was severely restricted by laws such as the Official Secret Act[190].

The Act establishes the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution.[191] An applicant under the FOI Act needs not demonstrate any specific interest in the

[186]Ajai notes that, 'The EIA Decree appears to have been drafted by laymen because of the unlawyerly style of language, vague, ambiguous and meaningless provisions…it contains. What is unpardonable is the very poor grammar used in many provisions…' See Ajai, O., (1993 – 1995). Environmental Impact Assessment and Sustainable Development: A Review of the Nigerian Legal Framework. 2 - 3 *Nigerian Current Legal Problems*, 12 – 36, p.24.

[187]Usman, A.K., (2012).*Environmental Protection Law and Practice*. Ababa Press, Ibadan, p. 70.Report of UNDP Training Programme in Environmental Law and Policy for Nigerian Lawyers, 1998, p. 71

[188]Amnesty International, (2009). Nigeria: Petroleum, Pollution and Poverty in the Niger Delta. Index: AFR 44/017/2009, June, p. 51.

[189]Freedom of Information Act, 2011.

[190]The Official Secret Act, (OSA) Cap O3*LFN* 2004. This Act has not been abolished and therefore undermines the FOI Act.

[191]Section 1(1), FOI Act.

information being applied for.[192] Anyone denied access to information may apply to court to compel disclosure of the information.[193] The Act places a mandatory duty on public institutions to record and keep information about all their activities, operations and businesses.[194]

The FOI Act can be interpreted to establish the procedural right to information on the environment, which is an important component of the environmental right. Environmental considerations form a ground for granting access to confidential trade secrets and commercial or financial information obtained from third parties, which is exempt under section 15(1) of the FOI Act. Disclosure shall be made where it would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in the disclosure clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive position of or interference with contractual or other negotiation of a third party.[195]

This provision would form a useful basis for obtaining from the Nigerian National Petroleum Corporation, NOSDRA and other regulatory bodies information obtained from oil companies relating to oil spills and the condition of oil and gas facilities etc. inasmuch as this relates to the environment and to public safety. Environmental NGOs and interested citizens could also obtain from NESREA information on the pollutants being discharged by industrial facilities and pollution control measures being implemented by these companies in order to know if such companies are complying with the law.

Access to environmental information is a prerequisite for effective and meaningful public participation in decision-making and in monitoring governmental and private sector activities that impact on the environment.[196] It is an important right that must be protected if the public are to effectively advocate for environmental protection. The public need to know of environmental

[192]Section 1 (2).Ibid
[193]Section 2 (6), ibid.
[194]Section 2 (1). Ibid
[195]Section 15 (4), ibid.
[196]Shelton D. and Kiss, A. (eds.) (2005).*Judicial Handbook on Environmental Law*, UNEP, p. 27.Ladan, M.T. (2012). *Trend in Environmental Law and Access to Justice in Nigeria*.Lambert Academic Publishing, Berlin.

threats and the origins of those threats in order to protect their environment and other human rights that would be threatened or infringed by environmental harm. Environmental harm or deterioration is difficult and sometimes impossible to reverse. Therefore sufficient environmental information, especially at the planning stage of a project is needful to enable the public make informed choices and assist project executors to take necessary preventative measures.

Despite the passage of the FOI Act, hurdles remain. There is, for example, no right of access to information held by private companies[197] and this denies a litigant the opportunity of accessing information gathered or held by private companies in pursuing his or her claim. There is also the challenge of getting public bodies to overcome the mind-set and culture of secrecy, coupled with the entrenched bureaucracy in public institutions that result in unacceptable delays. This is manifested by the frequent recourse being had to the law courts by persons requesting information to compel public institutions to comply with the provisions of the FOI Act.[198] Other challenges include the slow process of judicial review and the lack of political will to implement the Act. There is also some uncertainty as to whether or not the Act is applicable to states.[199]

More recently in a setback for freedom of information, a Federal High Court ruled that the FOI Act is binding only on the Federal Government and its agencies and not binding on state governments.[200] With due respect, the ruling is contrary to principles of freedom of expression and the press, transparency and accountability in governance; principles reflected in the Nigerian Constitution, the African Charter on Human and Peoples Rights and international instruments ratified by Nigeria.

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[197] See section 31 of the Freedom of Information Act, 2011.

[198] In 2012, after requests for information under the FOI Act on the remuneration of federal legislators in Nigeria were denied, a Federal High Court ordered the Clerk of the National Assembly to release to the Legal Defence and Assistence Project (LEDAP), details of the salaries and emoluments that were collected by the federal legislature between 2007 and 2011.

[199] Baiyewu, L. and Ayorinde, T. (2014). Lawyers disagree over Freedom of Information Act. *The Punch*, February 16.

[200] FOI Act Not Binding on States, Court Holds. *The Witness*, October 31, 2014. Retrieved on November 1, 2014 from www.witnessng.com/foi_act_binding

4.2.6 The National Policy on the Environment

Nigeria's National Policy on the Environment, adopted in 1989 after the famous Koko incident, is a wide-ranging policy document dealing with major environment issues. The policy was revised in 1999 in order to take account of developments in the field of environment following the 1992 United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro. The Revised National Policy on the Environment (NPE) states that the revision was necessitated by advances and developments in science and technology as well as the need to integrate environmental concerns into all sectors of the economy[201].

The NPE is intended to influence law and policy making at all government levels but does not establish enforceable law. The overriding goal of the NPE is to achieve sustainable development in Nigeria. The Policy requires that complementary policies, strategies, and management approaches are put in place to ensure that environmental concerns are integrated into major economic decision-making processes. It states that environmental remediation costs are built into major development projects and economic instruments are employed in the management of natural resources. It also requires that environmentally friendly technologies are applied; Environmental Impact Assessment is mandatory before embarking on any major development project; and environmental monitoring and auditing of existing major development projects are routinely carried out.[202]

The environmental policy of Nigeria is required to be built on the following sustainable development principles, namely: the precautionary principle, the pollution prevention pays principle, the polluter pays principle, the user pays principle, the principle of inter-generational equity, the principle of intra-generational equity, and the principle of participation.[203] While all

[201] Foreword of the National Policy on the Environment (Revised Edition) 1999.
[202] National Policy on the Environment (Revised Edition) 1999, page 1.
[203] Ibid.

these principles are of relevance to the realization of environmental rights, the latter three form essential components of the right to a healthy environment.[204]

Inasmuch as the NPE states that different groups of people within the country and within the present generation have the right to benefit equally from the exploitation of resources and that they have a right to a clean and healthy environment, the researcher considers the NPE to recognize the right to environment. It must also be noted that securing a quality of environment adequate for good health and well-being is a major goal of the NPE.[205] The principle of participation "which requires that decisions should as much as possible be made by communities affected or on their behalf by the authorities closest to them"[206] is a key element of procedural environmental rights.

The NPE requires that the government of Nigeria increases the public's awareness and knowledge about sustainable development principles, and encourage the public's participation in actions to restore the environment.[207] It encourages the use of procedural measures to achieve environmental goals. In addition to the public awareness and information measures other participatory strategies include ensuring public and community participation in defining environmental policy objectives and decision-making[208]; promoting environmental education and awareness through formal and informal means[209]; granting citizens access to environmental information and data. Other policies include encouraging research on multiple subjects and providing adequate training in the field of the environment at all educational levels; cooperating with the media and entertainment industry in enhancing environmental awareness; supporting educational institutions including NGOs and the private sector to

[204]The NPE states that the Principle of inter-generational equity requires that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. A number of states like South Africa include the concept of inter-generational equity in their definition of the environmental right.
[205]Para.2.0, National Policy on the Environment (Revised edition) 1999.
[206]Para 1.0, ibid.
[207]Para.6.6, ibid.
[208]Para. 6. 6, ibid.
[209] Informal here includes indigenous social structures. Para.6.6., ibid.

provide environmental training. Yet others include supporting the use of environmental information systems at the national, regional and international levels.[210] This is a clear improvement on the original policy, which did not contain such clear provisions on participation.

The NPE proposes detailed implementation strategies directed towards all sectors of the economy and problem areas of the environment.[211] It tackles issues relating to drought and desertification; flood and erosion; sanitation and waste management; toxic, hazardous and radioactive substances management; air pollution; noise pollution; and working environment.[212] Legal arrangements in the NPE include evaluating and improving existing environmental laws and ensuring that they are complied with and enforced. Others include streamlining legislations and regulations relating to the environment in a way that recognizes the cross-sectoral linkages of the environment and prescribing jurisdictional boundaries for law making in order to promote coordination and eliminate overlapping of functions among the various tiers of government.[213] Paragraph 9 provides that appropriate action shall be taken to domesticate the international obligations which Nigeria has assumed under treaties for the purpose of implementation. The NPE is currently undergoing review.[214]

[210]Paras. 4.17 and 6.6, ibid.
[211]Paras.4.1-4.21, ibid.
[212]Paras.5.1-5.3, 6.1-6.5, ibid.
[213]Paras. 8.0. ibid.
[214]Oghifo, B. (2014). Nigeria Reviews 23 Year Old National Policy on the Environment. *Thisday*, December 9.

CHAPTER FIVE

THE LEGAL AND POLICY FRAMEWORKS FOR ENVIRONMENTAL RIGHTS IN SOUTH AFRICA

5.1 Introduction

This chapter addresses the meaning and scope of the environmental provision and related provisions in the Constitution of South Africa. It also addresses the ways in which the executive, legislature and judiciary have responded to the constitutional environmental provisions. The chapter also assesses the incorporation of some identified ingredients of environmental rights in the laws and policies of South Africa. These identified elements include- the development and implementation of environmental law and policy; compliance and enforcement; public participation in environmental governance; provision of environmental information; access to justice in environmental matters; environmental partnerships between government and citizens, provision and maintenance of environmental infrastructure, and environmental education.

Legislation and policy remain the main ways of enforcing and implementing constitutional environmental provisions. Environmental provisions in national constitutions are expected to result in stronger environmental laws. However, constitutional environmental provisions are of different kinds and possess different legal implications, which may have an ultimate bearing on how far they actually go in protecting environmental rights. This chapter assesses the impact that the constitutional environmental right in South Africa has on its environmental laws and policies.

5.1.1 Background of Environmental Issues and Law in South Africa

Environmental issues in South Africa are best understood in the context of the historical past of the country rooted in its legacy of apartheid and racial injustices. The mineral wealth of the country and its rich wildlife has also played an important role in the history of the

country as well as current environmental issues. The arrival of European settlers in South Africa together with the discovery of diamonds and gold led to the blacks being gradually dispossessed of their ancestral lands through armed conquest, spurious treaties and economic pressures.

The trend of dispossession and forceful removal was legalized by the Land Act of 1913 which restricted African land ownership to just 7 per cent of the total land mass of South Africa. In 1936 the land allocation was extended to 13 per cent.[1] The confinement of over 70 per cent of the population to just 13 per cent of the land mass resulted in overcrowding and excessive pressures on the land with disastrous ecological consequences. Formerly fertile lands in the areas reserved for blacks were reduced to desert as a result of overuse.

In 1948, the Nationalist Government of South Africa instituted its policy of apartheid with the creation of "bantustans" or self-governing "homelands" for the African populations. These homelands have been described by Ramphele as "labour reserves for the white minority's farms and mines"[2].These resulted in further massive forceful removals over the next three decades, as blacks were removed from productive to unproductive land. The proclamation of native lands as wildlife parks for the exclusive enjoyment of the white population led to more forceful removals and social dislocation.[3] The urban areas were not spared in the forceful removals. The Group Areas Act[4] led to the compulsory relocation of

[1] This increase to 13 per cent was, a "compensation for the loss of parliamentary voting rights". Ramphele, M. and McDowell, C. (eds.) (1991).*Restoring the Land: Environment and Change in Post-Apartheid South Africa*.Panos Institute, London, p. 1. They also note that the land set aside for Africans consisted of fragments scattered throughout the country and was mostly barren and unproductive land. See also Landsberg, C. and MacKay, S. (2006). South Africa 1994-2004' (Chapter One). In: NasilaRembe (ed.) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* South African Human Rights Commission.

[2]Ramphele, M. and McDowell, C. (eds.) *Op cit.*Cock, J. and Koch, E. (eds.)(1991).*Going Green: People Politics and the Environment in South Africa.*Oxford University Press, Cape Town, pp. 1-2.

[3]Cock, J. and Koch, E. (eds.) (1991).*Going Green: People Politics and the Environment in South Africa*.Oxford University Press, Cape Town, pp. 1-2.

[4]Passed in 1950.

Africans, coloureds[5] and Asians. The coloureds and Asians were forcefully relocated to segregated zones within urban areas.[6] The blacks were removed from areas near their places of employment to far-of locations reserved for black occupation.

Alongside the forced removals were anti-urbanisation laws and policies directed primarily at the Africans.[7] African townships were neglected and there was hardly any provision of basic amenities: housing, sewerage, electricity, tarred roads, drainage, telecommunications and social services. Black townships were deliberately sited near the mines or downwind of industrial complexes (as a source of cheap black labour). This means that the Africans bore the environmental impacts of mining pollution and industrial pollution.

The repeal of the pass laws in 1986 led to an influx of Africans to the poor black townships. The Urban Foundation, a private sector organization established in 1978 to facilitate black urbanization projects, estimated that between 1985 and 2010, 9 million people of about 360 000 per year would move into the urban areas.[8] The resultant overcrowding of the already crowded black townships led to the mushrooming of squatter settlements.[9]

Historically, the approach to environmental issues was conservative, reflecting the interests of the privileged white minority. While white privileged South Africans associated the environment with conservation, the majority of South Africans associated it with the denial of

[5] In South Africa the term coloured people refers to people who are the offspring of mixed marriages and relationships.

[6]Ramphele estimates that about 600,000 were relocated between 1957 and 1981. Ramphele, M. and McDowell, C. (eds.) *Op cit.*

[7] For example, the Native Laws Amendment Act of 1937 was enacted to control the flow of blacks to the towns. Under this law Africans designated "temporary urban workers" were compelled to carry passes. Pass laws, limitations on housing construction and the destruction and removal of black communities were all directed at preventing black urbanization.

[8]Ramphele, M. and McDowell, C., op cit.

[9]Politely referred to as "informal settlements".

access to natural resources, forceful removals from land proclaimed as parks, and exclusion from recreational opportunities reserved for a privileged minority.[10]

Land degradation from mining activities poses a major environmental challenge. Historically, the mining industry was characterised by a lack of safety standards in many mining operations and poor regulation by the government. The planning of mine residue disposal sites was based on minimum costs, the availability of land, and the safety of underground workings with little or no regard paid to the environment.[11] The result is that the mining sector is the largest single generator and accumulator of solid wastes in South Africa.[12] Mining activities have also resulted in water pollution with acid mine drainage currently regarded as a major environmental challenge in South Africa.

Industrial pollution, similarly, was encouraged by the policies of the apartheid state. The regulation of resources to the advantage of industry and failure to regulate pollution control measures created an environment in which wide-scale industrial pollution became a normal and acceptable occurrence.[13] Although the South African Government had, by 1970, enacted several environmental laws, it failed in its attempt to enforce these laws. This was partly due to the fact that the primarily objective of these laws was the regulation of distribution and utilization of resources for the benefit of industry.[14]

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[10]Fens, L. (2006) Environmental Rights (Chapter14).In: NasilaRembe (ed.) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)*.South African Human Rights Commission.

[11] H.A. Strydom and N.D. King, (eds.) (2009)*Fuggle&Rabie's Environmental Management in South Africa*, Second Edition, Johannesburg, Juta, p. 534.

[12] The Department of Environmental Affairs and Tourism (now Department of Environment) estimated that mine tailings accounted for 72.3 percent of the total waste stream in 1999. Department of Environmental Affairs and Tourism (1999) 1999 State of Environment Report for South Africa.

[13] According to Steyn, industry took its lead from a government that paid lip service to environmental concerns, while failing to address real environmental concerns beyond "their out-dated conservation agenda". Steyn, P. (1998) *Industry, Pollution and the Apartheid State in South Africa*.Available at dspace.stir.ac.uk. (Last accessed 12/3/2016). Bethlehem, L. and Goldblatt, M. (eds.) (1997) *The Bottom Line: Industry and the Environment in South Africa.*Industrial Strategy Project, Rondebosch, UCT Press.McDonald, D. (ed.) (2002) *Environmental Justice in South Africa.*Ohio University Press, Ohio.

[14]Steyn, P.(1998) *Industry, Pollution and the Apartheid State in South Africa*, op cit.

Another reason for the difficulty in enforcing environmental control measures was the government's direct involvement in the national economy. The government, through the Electricity Supply Commission (Eskom)[15] and the South African Iron and Steel Industrial Corp. (ISCOR)[16] and the South African railway (SAR), was one of the major polluters in the country. Major polluters like Sasol Ltd.[17] also enjoyed massive government support.

Fuggle and Rabie note that:

> "Within South African environmental legislation, the near untouchable status of the state, and thus also state owned industries, in turn meant that the state was free to act as it wished where the environment was concerned. Air pollution control measures, for example, did not fully apply to the state. In terms of legislation the state was exempt from implementing measures to combat the control of smoke, and had little responsibility other than to inform the public if complaints were lodged against state-owned industries. In short, there was no mechanism in place that could ensure that the state prescribed to the standards laid down by law.[18]

Another fundamental problem of the apartheid era environmental laws was that the underlying basis of the state's power to control pollution and conserve natural resources was that the powers be used in the public interest. However, there was no legal sanction in terms of which the state could be called to account in that respect.[19]

Public objections to administrative decisions by the government were limited by the administrative laws of South Africa. An applicant seeking a review of an administrative decision involving environmental issues had no access to court unless he could establish *locus*

[15] Eskom, a state-owned corporation, was, for many years, the sole provider of electricity in South Africa. During the apartheid era it produced between 80 and 90 percent of the country's electricity from coal. Bethlehem L, and Goldblatt,M., op cit.; Steyn, P., op cit.

[16] Iscor was the state-owned iron and steel company that was set up in 1928 during South Africa's first phase of industrialization. It has been privatised and is now known as Arcelor Mittal South Africa (AMSA). See http://www.arcelormittalsa.com/Company/History.aspx (Last accessed on 10 October, 2016).

[17] Sasol was set up in 1950 to develop oil from coal technology in order to make the country less dependent on oil exports. Its predecessor name was Suid-AfrikaanseSteenkool-, Olie- en Gasmaatskappy. See http://www.sasol.com/about-sasol/company-profile/overview (Last accessed on 10 October, 2016)

[18] Fuggle, R. F. and Rabie, M.A. (1983) Air Pollution. In: Fuggle, R. F and Rabie, M.A. (eds.) *Environmental Concerns in South Africa: Technical and Legal Perspectives*, Johannesburg, 1983, pp. 296 – 298. See also Steyn, P. op cit. p. 10.

[19] Rabie, M.A and Erasmus, M.G. (1983) Environmental Law. In Fuggle, R.F and Rabie, M.A. (eds.) pp. 48 – 49.

standi (i.e. a direct personal interest in the outcome of the decision).[20] Even where there was *locus standi*, the courts were generally unwilling to get involved in such questions, and almost never ruled against a government project on the grounds that it was environmentally unsound. As a result environmental groups were generally prevented, by the requirement of *locus standi*, from challenging environmentally sensitive decisions for the sake of the public interest.

In addition to administrative law, the Common Law was utilized (in a few cases) for environmental protection. Its utility, however, was limited due to the existence of very few remedies suitable for use in an environmental context and the difficulty in using them. In a few instances, the law relating to nuisance was used in cases related to noise, smoke or water pollution.[21] Furthermore, common law remedies generally served only the interests of private litigants.[22] The exorbitant cost of litigation together with the evidentiary difficulties made legal proceedings financially crippling. This was coupled with the fact that in most, cases the victim was an individual or a community while the polluter was often a powerful multinational company who could afford to drag the case on and on until the victim(s) was bankrupted. The victim seldom had sufficient access to the scientific expertise necessary to prove that the pollution complained of was, in fact, caused by the polluter, that it harmed the victim and that it could be stopped by reasonable means.[23]

[20] For example in the case of *von Moltke v. Costa Areosa* (1975) (reported in Glazewski, J. (1991) et al. Tightening the Law. In: Ramphele, M. and McDowell, C (eds.) op cit.), a concerned citizen tried to obtain a court order to prevent bulldozers beginning development operations at Sandy Bay, near Cape Town. The activity appeared illegal as development permission had not been obtained from the authorities. But the court refused to hear the applicant's case because he had no special interest in the matter, his concern being no greater than any other citizen of Cape Town.

[21] In *De Charmoy vs. Day Star Hatchery (Pty) Ltd*. 1967 4SA 188 (D). In *Regal vs. African Superslate (Pty) Ltd*. 1963 1 SA 102(A), the Appellate Division of the Supreme Court confirmed that the rights of landowners to do what they wish on their property are not unlimited.

[22] Rabie, M. A et al. (1983).Implementation of Environmental Law. In: Fuggle, R.F and Rabie, M.A., (eds.) Op cit.pp. 120, 137.

[23] See generally, White, J. (1991). The Teeth Need Sharpening; Law and Environmental Protection. In: Cock, J, and Koch, E. (eds.) Op cit. p. 244 – 251; Glazewski, J. et al (1991) Tightening up the Law. In: Ramphele, M. and McDowell, C., (eds.) op cit., pp. 139 – 154; Feris, L. (2006) Environmental Rights. Op cit.

Some important environmental legislations enacted before 1994 were the *Water Act*[24], the *Atmospheric Pollution Prevention Act*[25], the *Environmental Conservation Act*"[26], the *Mining Rights Act*[27] and the *Hazardous Substances Act*[28]. These legislations and the regulations made pursuant to them sought to address the major environmental challenges in South Africa however they failed to adequately protect the environment and its inhabitants. The major reasons for these were ineffective environmental protection through legislative means, inadequate enforcement of environmental law, a lack of effective administration and management of environmental quality, multiplicity of enforcers leading to confusion over roles and limited *locus standi*[29]. For example, the Environment Conservation Act, which was greeted with much acclaim on its passage and described as "a major step forward",[30] turned out to be largely ineffective, because its functioning depended mainly on the Minister of Environmental Affairs exercising various powers granted to him. It also failed to address the problem of *locus standi*.

It was with this background that by 1994, South Africa had serious industry-related environmental problems with industrial initiatives based mainly on an economic ethic that excluded any considerations for the natural and human environments in which they operated.[31] Current environmental concerns include high levels of atmospheric pollution in industrial areas and a heavy dependence on coal in the power industry.[32] Others are pollution of major rivers

[24] Act 54 of 1956, repealed and replaced by the National Water Amendment Act of 1999.
[25]Act 45 of 1965.
[26]Act 73 of 1989. The National Environmental Management Act 107 of 1998 initially amended this Act and later replaced it.
[27] Act 20 of 1967; repealed and replaced by the Mineral and Energy Laws Rationalization Act 47 of 1994.
[28]Act 15 of 1973.
[29]Feris, L. (2006). Environmental Rights, op cit. Loots, C.L.J. (1994). Making Environmental Law Effective. *South African Journal on Environmental Law and Policy*, p.17; Glazewski, J. et al. (1991) op cit. p.244 – 2; Lazarus, P., Currie, I. and Short, R. (1997). The Legislative Framework: Environmental Law, Investment and Industrial Practice. In: Bethlehem, L. and Goldblatt, M. (eds.) Op cit.
[30]Glazewski, J. et al. (1991). Op cit., p. 246.
[31]Steyn, P. (2008). Industry, Pollution and the Apartheid State in South Africa., op cit., p. 15.
[32] Clive van Horen (1997). Cheap Energy - at What Cost?Externalities in South Africa's Electricity Sector' (Chapter 2). In: Bethlehem, L. and Goldblatt, M. (eds.) Op cit.

and groundwater by industrial toxins[33], hazardous waste[34]; mine dumps and acid mine drainage.

As the apartheid era drew to a close, environmental issues were some of the issues that occupied the various interest groups. Before the right to environment was constitutionally codified, the draft of the 1989 Environmental Conservation Act provided that *"every inhabitant of the Republic of South Africa is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment."* This provision, however, was not adopted in the final document.[35]

In the course of negotiations between the white government and the Liberation Movements that led to the enactment of the Interim Constitution[36], environmental concerns were addressed by different negotiating parties in their respective draft bills of rights. In November 1990 the African National Congress (ANC) Constitutional Committee issued a working document titled 'A Bill of Rights for a New South Africa,' with Article 12 dealing with environmental rights.[37]

Due to the pertinence of the human rights-based approach related to environmental concerns in South Africa, environmental rights were introduced in the 1993 Interim

[33] Several industrial pollution incidents have been reported by the South African Press. In their report on the situation of waste management and pollution control in South Africa, the Council for Scientific and Industrial Research found that 59.2 per cent of all the hazardous waste in the country was discharged into water. Steyn, P. Industry, Pollution and the Apartheid State, op cit., pp. 12-14; Coetzee, H. and Cooper, D. (1991).Wasting Water: Squandering a Precious Resource. In: Cock, J. and Koch, E. Op cit. pp. 134-136.

[34] A famous example was the Thor Chemicals case. Lukey, P. Albertyn, C. and Coetzee, H. (1991).Wasting Away: South Africa and the Global Waste Problem. In: Cock and Koch (eds.) Op cit. p. 160-173. Crompton, R. and Erwin, A. (1991) Reds and Greens: Labour and the Environment. In Cock and Koch (eds.) Op cit., p. 12-14.

[35]Glazewski, J. (1989). A New Environmental Conservation Act: An Awakening of Environmental Law? In: *De Rebus*, November, p. 873. Cock, J., and Koch, E. (1991) op cit. p. 15.

[36]Act 200 of 1993.

[37] Article 12 provides as follows:

1. The environment, including the land, the waters and the sky are the common heritage of the people of South Africa and of all humanity.
2. All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

Constitution in a context of political change and transformation.[38] A new era of transformation and a truly democratic constitutional system for South Africa began with the Interim Constitution.[39]

The Bill of Rights in section 29 of the Interim Constitution provided that: *"Every person shall have the right to an environment which is not detrimental to his or her health or well-being."* Thus, for the first time in South Africa, the environmental right was explicitly recognized as a fundamental human right available to all inhabitants. In spite of this several criticisms were levied against the wording of the environmental right in the Interim Constitution. Glazewski criticized the section for its failure to include the notion of sustainability, as that it was too anthropocentric and did not refer to the generally accepted components of environmental law, namely, resource utilization and conservation, pollution control and waste management, and planning and development law.[40]

After the historical multiracial national elections in April 1994, the new democratic Government started with policy-making to address the inequities of the past. The 1996 Constitution retained the right to environment in section 24 of the Bill of Rights but with a different phrasing that is broader and provides for a duty to protect the environment as well as sustainable development and some generally accepted components of environmental law.

[38]Glazewski J. (1993). Environmental Provisions in a new South African Bill of Rights. *Journal of African Law* at 177.

[39]Act 200 of 1993.The text of the Interim Constitution was the product of successful negotiations between the erstwhile white South African government and the liberation movement, and was part of atwo-phase transition to democracy.

[40]Glazewski, J. (1994) The Environment and the New Interim Constitution. 1 *South African Journal of Environmental Law and Policy*, p. 6.Winstanley criticised the provision for its failure to place duties on either the state or individuals to protect the environment. See Winstanley, T. (1995) Entrenching Environmental Protection in the New Constitution. 1 *South African Journal of Environmental Law and Policy*, p.93

5.2 The Legal and Policy Frameworks for Environmental Rights in South Africa

5.2.1 The Constitution of the Republic of South Africa[41]

The 1996 South African Constitution (as amended) is the supreme law of the country and any law or conduct inconsistent with it is invalid.[42] It sets out the values on which the Republic of South Africa is founded as a constitutional democracy; contains a bill of rights setting out fundamental rights and freedoms to all South Africans.[43] It sets forth the obligations of the different branches of government and affirms the status of South Africa as a federation based on a three sphere system of government, namely national, provincial and local spheres of government. It also provides for the application of customary international environmental law and international treaties ratified by South Africa.[44] Section 233 provides that every court, when interpreting domestic legislation, is to prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Constitution is significant to environmental law for four main reasons.[45] First, it elevates environmental considerations to the status of fundamental human rights by including a justiciable environmental right in the Bill of Rights. Secondly, it facilitates the bringing of legal actions to protect the environment by increasing access to information concerning the environment and allowing greater access to the courts through relaxed rules on legal standing. Thirdly, it entrenches the right to administrative action that is lawful, reasonable and

[41] Act 108 of 1996
[42] Section 2, ibid.
[43] Chapter 2 of the South African Constitution.
[44] Section 231 of the Constitution provides that South Africa is bound by the provisions of any international agreement once it has been ratified by Parliament and enacted into law by parliament; with the exception of self-executing treaties. Section 232 provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.
[45] Paterson, S. (2005). Status of Environmental Law in South Africa. In: *Teaching Environmental Law in African Universities Vol. 1*. Proceedings of the Symposium of Environmental Law Lecturers held at Merica Hotel, Nakuru, Kenya on 29th September to 2nd October 2004. UNEP, Nairobi.

procedurally fair. Finally, it prescribes the powers of the different spheres of government to make and administer laws regarding various environmental issues.

5.2.1.1 Section 24: The Environmental Right

The entrenchment of an enforceable environmental right in section 24 of the Constitution of South Africa has been widely commended and hailed as the most significant step in the development of an environmental jurisprudence in South Africa[46]. Several legal scholars from within and without South Africa have also commented on the interpretation, nature and scope of the section 24 environmental right.[47] The environmental right, and indeed all the rights contained in the Bill of Rights, was framed as a response to the injustices of the past, which also included environmental injustices.[48]

The environmental right has significantly increased the status of environmental law in South Africa. This was recognized in *The Director: Minerals Development, Gauteng Region, and another vs. Save the Vaal Environment and others*[49] where the Supreme Court of Appeal held that:

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in

[46]Du Bois, F. and Glazewski, J. (1997).The Environment and the Bill of Rights. In: *Bill of Rights Compendium,*Butterworths, Part 2B, 1-100.

[47] Bray E (1998). Towards Sustainable Development: Are We on the Right Track? *South African Journal of Environmental Law and Policy* 1-15. Feris, L.A. and Tladi, D. (2005).Environmental Rights. In: Brand, D., and Heyns, C. (eds.) *Socio-economic Rights in South Africa*, Centre for Human Rights, University of Pretoria Press. Bruch, Coker and Van Arsdale (2000). Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa, Environmental Law Institute, op cit.Glazewski, J. (2005). *Environmental Law in South Africa*2ed., Lexis Nexis Butterworth, Durban, p. 77. Du Plessis, A. (2008) Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere (Ph.D. Dissertation submitted to the North-West University, (Potchefstroom Campus), South Africa. Koetze, L.J. (2007) The South African Environment and the 1996 Constitution: Some Reflections on a Decade of Democracy and Constitutional Protection of the Environment. DreitosFundamentais&Justica N, 1-UT./DEZ.2007.Retrieved on 19/4/2014 fromwww.dfj.inf.br/Arquivos/PDF_Livre/DOUTRINA_2.pdf.Kotze L.J. (2007) The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection. RECIEL 298-311. Shelton, D. (2010) Developing Substantive Environmental Rights, Vol. 1. No. 1.*Journal of Human Rights and the Environment*, pp. 89 – 120.

[48]Preamble of the South African Constitution.

[49] 1999 (2) SA 709 (SCA) at 719C

> our country. Together with the change in ideological climate must also come a change in the legal and administrative approach to environmental concerns.

Section 24 of the 1996 South African Constitution (as amended) states:

Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
  i) prevent pollution and ecological degradation;
  ii) promote conservation; and
  iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 establishes a substantive fundamental environmental right which is justiciable as opposed to the environmental principle of state policy in the Nigerian Constitution which is non-justiciable. An applicant bringing an action under section 24 need not show that he has a genuine concern for the environment. This was succinctly stated by Sachs, J. in the case of *Fuel Retailers Association of Southern Africa vs. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*[50] as follows:

> It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rightscomes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.[51]

The right is anthropocentric in character and it excludes animals and plants. The right is negatively framed and this may have the effect of lessening the extent of the right.

Section 24 has two main aims. First, it guarantees to everyone the right to live in an environment that will not cause him or her harm and places an obligation on the State to take certain measures in order to realize the guarantee provided. Secondly, it imposes a duty on the

[50](2007) ZACC 13 (Hereinafter known as the Fuel Retailers Case). This is the first case to invoke the section 24 environmental right at the South African Constitutional Court.
[51]Op cit., para. 109.

state to abstain from measures that may cause environmental degradation or that may generally impair the guaranteed right.[52] Although the environmental right is generally viewed as a third generation right, section 24(a), which guarantees the fundamental right of everyone to an environment that is not harmful to his or her health and well-being, is framed like a first generation right. In this way the environmental right is elevated to the same status as other so-called first generation rights. This is commendable when viewed in the light of the indivisibility and interrelatedness of human rights.

The Section 24 environmental right has both vertical and horizontal application[53] binding both the state as well as natural or juristic persons. While the traditional conception of constitutional human rights is that the citizens are to be protected against unwarranted interference by the state[54], the South African Constitution goes a step further to protect citizens from the interference of their rights by other persons. Section 8(2) provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is practicable, taking into account the nature of the right and the nature of any duty imposed by the right. The South African courts have accepted that the environmental right is of such a nature and can be invoked between one citizen and another. In the case of *Minister of Health and Welfare vs. Woodcarb (Pty) Ltd. and another*,[55] the respondent's conduct of dispersing vast amount of smoke generated from its sawmill operations was held not only to have contravened certain legislations but also to constitute an infringement of the right of the respondent's neighbours to an environment which is not detrimental to their health or well-being.[56]

[52]Feris, L., and Dire, T.Op cit., p.257.

[53] See Section 8(1) of the South African Constitution which states that the Bill of Rights applies to all law , and binds the legislature, the executive , the judiciary and all organs of government. Section 8(2) provides that a provision of the Bill of Rights binds a natural or juristic person.

[54]Feris, L. and Dire, T. op cit. p. 257

[55] (1996) 3 SA 155 (N)

[56] Although the case was considered under the interim Constitution (Act 200 of 1993), it is still relevant owing to the similar wording of the environmental right retained in the final Constitution. See Paterson, S., *Teaching Environmental Law in African Universities,* Vol. 1, op. cit.

Environmental degradation is often caused by private actors such as corporations. Those who suffer most are often vulnerable groups in the society such as the poor, children, women and indigenous communities. Horizontal application of the right would enable persons whose health or well-being is affected by the environmental degradation to assert the right not only against the State, but also against persons responsible for the degradation.

Sub-section (b) of section 24 has a socio-economic character as it imposes a constitutional duty on the state to secure the right of individuals to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. If present legislation does not meet constitutional requirements, Section 24 imposes an obligation on the state to bring current legislation in line with the Constitution. 'Other measures' could include the development of environmental policy, provision of a regulatory framework for the realization of the right, provision of environmental infrastructure and environmental education, and funding of environmental programmes.

In Government of the Republic of South Africa and others vs. Grootboom and others[57] the Constitutional Court stated that what constitutes reasonable legislative and other measures had to be determined in the light of the fact that the Constitution created different spheres of government, namely the national, provincial and local. A reasonable programme had to allocate responsibilities and tasks to the different spheres of government and ensure that

[57] 2000 (11) BCLR 1169 (CC).
The Grootboom case raised the issue of enforcement of socio-economic rights. It focused in particular on the state's obligations under section 26 of the Constitution, which gives everyone the right to access to adequate housing, and section 28(1)(c) which, affords children the right to shelter.

appropriate financial and human resources are available.[58] The case also highlighted the point that both the content and the implementation of a right should be reasonable.

Section 24 explicitly recognises the principle of intergenerational equity in that the environment must be protected 'for the benefit of present and future generations'. *In BP Southern Africa (Pty) Ltd vs. MEC for Agriculture, Conservation and Land Affairs*[59] the court held that the balancing of environmental interests with justifiable social and economic development is to be conceptualised well beyond the present living generation. The Constitutional Court further stated in the case of *Fuel Retailers Association of SouthernAfrica vs. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*[60]that,

> [t]he very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both section 24 of the Constitution and the principles of environmental management contained in NEMA.[61]

Another important aspect of the right created by s 24(a) is the right to an environment that is not harmful to human health and wellbeing". Health has been defined by the World Health Organisation as a 'state of complete physical, mental and social well-being'.[62] The right to a healthy environment contained in sub-section (a) of the environmental clause extends health rights beyond section 27(1) of the Bill of Rights, which is limited to the provision of health care services. A particular environment may be damaging to people's health, yet not necessarily infringe a person's right to health care services. Therefore, for example if atmospheric pollution or the placement of disposal sites is to be subjected to constitutional

[58]Ibid. at 1171
[59](2004) 3 All SA 201 (W) 219
[60](2007) 10BCLR 1059 (CC); (2007) ZACC 13..
[61]*Ibid.,*at 75. See also para 102. NEMA means National Environmental Management Act.
[62] World Health Organisation, Preamble of Constitution, 1978.

challenge on the grounds that people's health is being damaged, the challenge would have to be brought in terms of the environmental right and not in terms of s 27.[63]

Well-being is rather broad and difficult to define being a subjective term. It is, however, useful in situations where it is difficult to prove that someone's health has been affected. In such cases infringement of well-being may be easier to substantiate.[64]Glazewski[65] regards well-being as inclusive of spiritual or psychological aspects, such as the individual's need to be able to communicate with nature. Well-being should also include economic, social and cultural aspects. For example, environmental degradation could affect the economic, social and cultural lives of indigenous people who rely on biodiversity for nutrition and medicine and whose traditional beliefs and culture are often linked to certain streams, rivers or forests.

In human rights discourse it has been accepted that conflicts may exist between rights. Section 24, which deals with environmental right, recognizes the interrelationship and tension between socio-economic development and environmental protection by providing that environmental protection measures should promote justifiable economic and social development.[66] Under the South African Constitution and in line with the concept of sustainable development, economic, social and environmental interests must be equally protected. In the case of *BP Southern Africa (Pty) Ltd vs. MEC** for Agriculture, Conservation and Land Affairs*,[67] it was held:

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[63]Glazewski, J. (2005). Environmental Law in South Africa (2nded). Lexis Nexis Butterworth, Durban, p. 77

[64]Kidd, M. (1997).*Environmental Law: A South African Guide*. Juta, p.36. It is to be noted that the term remains subjective and a lot would depend on the discretion of the court. It has also been argued that while harm to 'well-being' need not amount to mental or physical ill health, something more is required than a sense of emotional insecurity or aesthetic discomfort before the section becomes applicable. See Liebenberg, S. (1997) 'Environment' in Davis, D. *et al.* (eds.) *FundamentalRights in the Constitution — Commentary and Cases,* pp. 256-259.

[65]Glazewski, J. (1994) The Environment and the New Constitution. 1 *South African Journal of Environmental Law and Policy*, p. 3.

[66] See S. 24(b) South African Constitution.

** MEC means Member of the Executive Council to whom the Premier (of a Province) has assigned responsibility for environmental affairs. See section 1, NEMA.

[67][2004] 3 All SA 201 (W).

> The concept of 'sustainable development' is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the constitution. Pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration inter alia socio-economic concerns and principles.[68]

The obligation to promote justifiable socio-economic development was more recently noted by the Constitutional Court in the *Fuel Retailers case*[69] when it held:

> The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b) (iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.[70]

This decision further emphasises the central role of sustainable development (the balancing of economic, social and environmental considerations in the development process) in the implementation of the environmental right and to environmental regulation. The South African environmental right is therefore viewed from the prism of sustainable development.

The balancing of competing rights was further restated in *MEC: Department of Agriculture, Conservation and Environment and Another vs. HTF Developers (Pty) Limited*[71] where the Constitutional Court acknowledged that environmental management, as considered by NEMA, is a process that induces tension with other rights contained in the Bill of Rights,

[68] Ibid., per Claassen, J. at 218-9.
[69] Op cit.
[70] Op cit., per Ngcobo, J. para. 45.
[71] [2007] ZACC 25. The facts of the case are provided in Chapter 6.

most notably property rights and the right to freedom of trade and occupation. While the environmental right is a collective right, it does not supersede or eclipse other rights[72] and that where more than one right comes into play, they must be appropriately balanced by the courts, which have a vital role to play in environmental matters in pursuit of sustainable development.

The balancing of competing rights and values is not, however, without its challenges. This is illustrated by the case of *Minister of Public Works vs. Kyalami Ridge Environmental Association*.[73] Here, severe floods had rendered people homeless and as a result the government sought to establish transit camps which could cause environmental degradation. The question of a balance between the right to housing in terms of section 26 of the South African Constitution and the environmental concerns of the respondents was highlighted in this case. The compelling need of the homeless people was found to be more pressing than the need to protect the environment in terms of s 24(a) of the Constitution. The right to housing was upheld at the expense of the right to an environment that is not harmful to health or well-being.

The State is under obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.[74] This means that all authorities- at the national, provincial and local levels- must not only refrain from interfering with the enjoyment of the environmental right, but must act so as to protect, enhance and realize its enjoyment. The duty to respect requires the state to refrain from interfering with the enjoyment of rights. The duty to protect requires the state to protect existing enjoyment of rights, and the capacity of people to enhance their enjoyment of rights or newly to gain access to the enjoyment of rights against third party interference.[75] The state must, for instance, regulate industry and mining to guard against environmental degradation occasioned by the conduct of industrial and mining operations and in order to protect the health

[72]Op cit., para. 26.
[73](2001) 7 BCLR 652 (CC).
[74]Section 7(2) of the South African Constitution.
[75]Brand, D. (2005) Introduction to Socio-economic Rights in the South African Constitution. In: Brand, D. and Heyns, C. (eds.) *Socio-economic Rights in South Africa*. Centre for Human Rights, University of Pretoria Press.

and well-being of citizens who are adversely affected thereby. It also includes the provision of effective legal remedies where such environmental degradation occurs. It is the duty of the state to provide facilities necessary for the enjoyment of the right.

The duty to promote has been described as a duty to raise awareness of rights- to bring rights and the methods of accessing and enforcing them to the attention of right holders and to promote the most effective use of existing access to rights.[76] According to Du Plessis, promotion has to do with creating an environment in society conducive to respect for and the protection of human rights by means of raising awareness, education as well as compliance and enforcement, inclusive of rights-based adjudication, for example.[77] The duty to fulfil requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures so that those who do not currently enjoy access to rights can gain access and so that existing enjoyment of rights is enhanced[78].

Other rights related to the environment that are contained in the Bill of Rights in the South African Constitution include: the right to equality (section 9); the right to human dignity (section 10); the right to life (section 11); the right to property (section 25); access to housing (section 26); the right to healthcare, food, water and social security (section 27); and the right of children (section 28).

5.2.1.2 Section 32 (Right of Access to Information)

Section 32(1) of the Bill of Rights states that *everyone has the right of access to any information held by the State; and any information that is held by another person and that is required for the exercise and protection of any rights*. Subsection 2 further provides that

[76] Liebenberg, S. (2003) The Interpretation of Socio-economic Rights. In: Chakalson, M. et al. *Constitutional Law of South Africa* (2nd edition, Original Service, 12-03) Ch. 335. Cited in Brand, D. op cit. p. 10.
[77] Du Plessis, A. Op cit. p. 77.
[78] Brand, D., op. cit. p. 10.

national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The right of access to information is important to the realisation of the right to an environment that is not harmful to human health and well-being. Although this right does not refer to the environment in particular, it is nevertheless pertinent to environmental concerns. The availability of relevant environmental information and data is crucial to the proper enforcement of the environmental right. Moreover, this will empower individuals and groups to challenge perceived violations and seek remedies to prevent environmental degradation. The right enables citizens to become involved in decision-making.

The Government enacted the *Promotion of Access to Information Act*[79] (PAIA) in order to give effect to the right. The Act regulates access to information held by both public bodies and private bodies; imposes strict obligations on these bodies to provide access to their information and prescribes detailed access procedure[80]. Both public and private bodies must generally give the public access to their records unless it falls within one of the prescribed grounds of refusal.[81]

The South African courts have in a number of cases[82] reiterated the importance of the right of access to information. In the recent case of *De Lange and another vs. Eskom Holdings*

[79] Act 3 of 2000.

[80] See Sections 14-32 (relating to public bodies) and sections 51-61 (relating to private bodies).

[81] The grounds for refusing access to information held by public bodies and private bodies include the following: protecting the privacy of a third party; protecting commercial or confidential information; protecting the safety of individuals; protecting privileged information; and protecting information relating to defence, security and international relations. (See sections 33-46 and 62-70). However, there are exceptions to these grounds of refusal that are significant from an environmental perspective. First, if the information reveals evidence of an imminent and serious risk or substantial contravention of the law, then the public interest may override any ground for refusing disclosure (Sections 46 and 70). Secondly, commercial confidentiality is not a ground for refusing access to the results of environmental tests and investigations that reveal a serious environmental or public safety risk. (See sections 36(2), 42(5), 64(2) and 68(2).) See Paterson, S., op. cit. p.503.

[82] For case law on the right of access to information in the environmental context, see *Van Huyssteen NO vs. Minister of Environmental Affairs and Tourism*1996 1 SA 283 (T), *Earthlife Africa (Cape Town Branch) vs. Eskom Holdings Ltd*. [2006] 2 All SA 632 (W) and *Trustees, Biowatch Trust vs. Registrar: Genetic Resources*2005 4 SA 111. See also *President of the Republic of South Africa vs. Mail & Guardian Media (2011) 2 SA 1; Brümmer vs. Minister of Social Development and Others (2009) 6 SA 323 (CC).*

Ltd., BHP Billiton Plc. Inc. and others[83], the High Court held that environmental considerations may override the statutory grounds for refusing access to information held by public and private bodies.

Company Secretary of ArcelorMittal South Africa (AMSA) and another vs. Vaal Environmental Justice Alliance (VEJA)[84]is a recent case with important implications for access to environmental information. Between 2011 and 2012 VEJA's attorneys wrote severally to AMSA seeking a copy of its Environmental Master Plan which the corporation had developed for the rehabilitation of its Vanderbijlpark site, together with any progress reports relating to its implementation. These documents requested related to the closure and rehabilitation of ArcelorMittals's Vereeniging site where hazardous materials were once dumped. VEJA provided the basis for its request, in terms of section of 53(2)(*d*) of PAIA, stating that the requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest. VEJA further stated that it required the requested documents to "ensure that ArcelorMittal South Africa Limited carries out its operations in accordance with the law, that pollution is prevented, and that remediation of pollution is properly planned for, and correctly and timeously implemented."[85]

After series of requests by VEJA and correspondence between the parties, ArcelorMittal refused the request. VEJA subsequently instituted a court case, with legal representation from the Centre for Environmental Rights, on the premise that it is in the public

[83] (2011) (Case No: 10/10063. South Gauteng High Court, Johannesburg),an application in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000), as amended. It arose from a request for information made by the first applicant, a financial journalist, to Eskom (the South African electricity corporation) for information relating to the electricity supply contracts that Eskom has with two companies in the BHP Billiton group of companies. Eskom refused the applicants access to the information sought hence the action. The court held, *inter alia*, that disclosure of the records would reveal evidence of an imminent and serious public safety or environmental risk and that the applicants had made out a case for access tothe information sought.

[84] (2014) ZASCA 184 (26 November, 2014); [2015] 1 All SA 261 (SCA) (26 November 2014).

[85] Ibid. Page 6.

interest, and more specifically, the interest of the Vaal community, to know what impact AMSA is causing to the environment and people's health.

The South Gauteng High Court on June 3, 2013 delivered judgment in favour of VEJA and ordered AMSA to release its Environmental "Master Plan", as well as documents relating to its Vaal Disposal Site to the Vaal Environmental Justice Alliance (VEJA). In his judgment, Carstensen, J. noted that "[T]he participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of public, the dissemination of information does not usurp the role of the State but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives".[86]

Arcelor Mittal South Africa appealed. On appeal the Supreme Court of Appeal refused AMSA's appeal and unanimously upheld the High Court judgment. The Court emphasised AMSA's history of environmental impacts, pointing out that such impacts are of public interest and importance, and do not only affect persons and communities in the immediate vicinity of its facilities. It held that, as an advocate of environmental justice, Vaal Environmental Justice Alliance is entitled to the information sought and to monitor the operations of Arcelor Mittal South Africa and its effects on the environment.

The Supreme Court of Appeal emphasised the importance of corporate transparency in relation to environmental issues, stating that "Corporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced."[87]

In the judgment, their Lordships referred to Principle 10 of the Rio Declaration on Environment and Development, stating that:

[86] Ibid. see also Case No: 36646/12, South Gauteng High Court, Johannesburg. Available atwww.cer.org.za (Last accessed 17 September 2016).
[87] Ibid, p. 32, paragraph 82.

> It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all.[88]

5.2.1.3 Section 38: Locus standi

The South African Constitution affords broad standing provisions and a person seeking to enforce the environmental right need not prove a personal interest in order to have the necessary standing to approach the court. Section 38 provides that *"anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights"*.

The persons who may approach a court are: anyone acting in his own interest; anyone acting on behalf of another person who cannot act in his own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

This is in contrast to the 1999 Nigerian Constitution which lacks broad standing provisions. The *Fundamental Rights (Enforcement Procedure) Rules 2009* (FREP Rules) has now liberalised *locus standi* in the enforcement of human rights in Nigeria. Its provisions on the issue are similar in wording to section 38 of the South African Constitution.[89]

5.2.1.4 Section 33: The Right to Just Administrative Action

Section 33(1) of the South African Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.[90] National legislation must be enacted to give effect to the right, and must provide for

[88] Ibid, p. 29, paragraph 71.
[89] For a more detailed discussion of the FREP Rules, see Chapter 4.2.2.
[90] Section 33(2) Constitution of the Republic of South Africa

the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.[91]

The implication of this provision in the context of the environmental right is that all environmental decisions taken by all tiers and arms of government as well as all environmental procedures should be lawful, reasonable and procedurally fair. Also, an administrative action that affects the environmental right can be challenged in the court by way of judicial review.Environmental law encompasses various administrative procedures insofar as government is involved in regulating activities of people that may have an effect on the environment. Glazewski has even described environmental law as "…administrative laws in action, as environmental conflicts frequently turn on the exercise of administrative decision-making powers."[92]

The Promotion of Administrative Justice Act[93] (PAJA) was enacted in line with section 33 of the Constitution and replaces the Common Law administrative law principles that hitherto formed the basis of Administrative law. PAJA prescribes detailed provisions regarding what constitutes procedurally fair administrative action,[94] the grounds for judicial review,[95] and the remedies available to courts if the action is held to be unlawful, unreasonable and/or procedurally unfair.[96] Just administrative action encompasses the notion of public participation in environmental decision making.

The notion of public participation in the environmental decision-making process as well as the need to recognise and respect environmental considerations in the administrative process was stressed by the Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region, and Sasol Mining (Pty) Ltd vs. Save the Vaal Environment and*

[91] Section 33(3)(a), ibid.
[92] Glazewski, J. (2005).*Environmental Law in South Africa*, op cit. at 86
[93] Act No. 2 of 2000.
[94] Section 4, ibid.
[95] Section 6 and 7, ibid.
[96] Section 8, ibid.

Others.[97]Sasol Ltd., a petroleum and mining company planned to expand its coal mining activities in an area bordering the Vaal River, one of the largest rivers in South Africa, which provides the Greater Gauteng Area (Johannesburg and environs) with water for domestic, industrial and agricultural purposes. The Director of Mineral Development (Department of Minerals and Energy) issued a licence to Sasol to commence mining without having given Save the Vaal[98] an opportunity to raise objections.

The appeal raised, *inter alia*, questions whether interested and affected parties wishing to oppose an application for a mining licence by a mining company in terms of the Minerals Act 50 of 1991 are entitled to raise environmental objections to halt the application and also whether they are entitled to be heard by the competent authority designated to grant or refuse such a licence. In the present case, the Director, taking the view that consideration of such objections would be premature at that stage, refused the respondents a hearing. He was successfully taken on review at the High Court of South Africa, Witwatersrand Local Division. The Director and Sasol Ltd. appealed to have the decision reversed.

The primary substantive right or interest on which the respondents relied was the constitutional right to the environment in Section 24. They contended that their environmental right would be prejudiced by an adverse decision by the Director.[99] The Supreme Court of Appeal based the bulk of its decision on an interpretation of the *audialterampartem*rule,[100] which rests squarely within the realm of administrative law and not necessarily environmental

[97]1999 (2) SA 709 SCA. The case was heard by the Supreme Court of Appeal and was one of the first instances where the judiciary referred to Section 24.

[98] Save the Vaal is an unincorporated association comprised of concerned people who own property and live along the Vaal River. Its object, according to its written constitution, is to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations. See *Director: Mineral Development, Gauteng Region, and SASOL Mining (Pty) Ltd vs. Save the Vaal Environment and Others (supra),* para. 4.

[99] Some of the environmental concerns raised by the respondents included, the destruction of the Rietspruit wetland, the threat to flora and fauna, pollution, loss of water quality and decreased value of properties. See para. 6.

[100] The *audialterampartem*rule is part and parcel of administrative law and more specifically the rules of natural justice. It entails that everyone has the right to be heard in administrative matters, which may affect their rights and interests.

law. The court found that the *audialterampartem*rule in fact applies to the dispute and decision in question since,

> [t]he application of the rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs…Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[101]

5.2.2 National Environmental Management Act (NEMA)[102]

NEMA was enacted to give effect to the provisions of section 24 of the South African Constitution which requires the state to have the environment protected through reasonable legislative measures. The Act seeks to establish an integrated management framework for all sectors of the environment in South Africa.[103] The importance of NEMA to the realization of the environmental right is captured in the Preamble which recognizes the right of everyone to an environment that is not harmful to his or her health or well-being and to have the environment protected, for the benefit of present and future generations. The Preamble further states that the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities.

NEMA sets out the fundamental principles that apply to environmental decision making by all organs of the state and which are to guide the interpretation, administration and implementation of the Act and any other law concerned with the protection or management of

[101]Op cit., para. 20

[102] Act No. 107 of 1998 (As last amended by National Environmental Laws Amendment Act 14 of 2009)

[103] See the Long title which provides that the Act aims to provide for co-operative environmental governance byestablishing principles, procedures and institutions to that effect, and to provide for certain aspects of the administration and enforcement of other environmental management laws.

the environment.[104] Some of the principles are that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.[105] Development must be socially, environmentally and economically sustainable.[106]

Other principles of particular relevance to the environmental right include the anticipation and prevention of negative impacts on the environment and on people's environmental rights, or their minimization and remediation where they cannot be prevented.[107] The pursuit of environmental justice is placed so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person.[108] The Act protects the right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers.[109] The participation of all interested and affected parties in environmental governance must be promoted[110] and access to information must be provided in accordance with the law[111].

NEMA imposes a duty of care on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.[112] This duty has retrospective effect. Thus it applies to a significant pollution or degradation that- occurred

[104] Section 2(1)(a-e), NEMA
[105] Section 2(2), ibid.
[106] Section 2(3), ibid. Sustainable development is recognized as an important concept in South African environmental law and is defined as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations' (NEMA, section 1).
[107] Section 2(4) (a) (viii), ibid.
[108] Section 2(4) (c), ibid.
[109] Section 2(4) (j), ibid.
[110] Section 2(4) (f), ibid.
[111] Section 2(4) (k), ibid.
[112] Section 28(1), ibid.

before the commencement of the Act; that arises or is likely to arise at a different time from the actual activity that caused the contamination; or that arises through an act or activity of a person that results in a change to pre-existing contamination.[113] This is significant in view of the fact that the environmental pollution or degradation resulting from certain activities may not be immediately apparent and may take time to manifest.

Section 29 provides comprehensive protection for workers refusing to do environmentally hazardous work. The Act also provides protection to any person who discloses environmental information from civil or criminal liability, dismissal, discipline, prejudice or harassment on account of such disclosure, if the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of an environmental risk and the disclosure was made in accordance with section 31(5).[114]

NEMA contains provisions for the designation of a person as an environmental management inspector (EMI) for the enforcement of the Act and any specific environmental management Act.[115] It also sets out the functions and powers of Environmental Management Inspectors.[116] These include the power to - seize items,[117] stop, enter and search vehicles, vessels and aircraft,[118] conduct routine inspections,[119] and to issue compliance notices.[120]

Section 32 liberalises the *locus standi* rule in environmental litigation by providing that- any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or

[113]Section 28(1A) (a-c), ibid.
[114]Section 31(4). Section 31(5) prescribes the persons to whom such disclosure should be made and/or the circumstances in which it is made.
[115]See 31B, 31BA, 31C, 31D, NEMA.
[116] See sections 31B, 31BA, 31C, 31D, 31G and 31H. Ibid.
[117]31I, ibid.
[118]31J, ibid.
[119]31K, ibid.
[120]31L, ibid.

of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources:

(a) in that person's or group of person's own interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment.[121]

This provision builds on the constitutional provision on *locus standi* which applies only to instances where a right in terms of the Bill of Rights has allegedly been infringed. While section 38 of the Constitution liberalizing *locus standi* would apply in a matter that involves the section 24 environmental right, the more restrictive common law position would still apply to matters falling outside the Bill of Rights.[122] Mindful of the foregoing and the need for broadened *locus standi*in environmental matters generally, the NEMA subsequently amended the common law position by granting the same array of persons and institutions (including those acting in the interest of the environment) standing to approach the courts for appropriate relief with respect to any breach or threatened breach of environmental laws.[123] In addition to liberalizing the *locus standi* rule where the interests of persons or groups are sought to be protected (already covered in the Constitution) section 32 of NEMA has the effect of including instances where it is the interest of the environment that is sought to be protected.

[121] Section 32(1) NEMA.

[122]Feris, L.A.(2009). Environmental Rights and Locus Standi. In:A.R. Paterson and L.J. Kotzé(eds.)*Environmental Compliance and Enforcement in South Africa: Legal Perspectives*. JUTA.

[123]Kotze, L.J. and Du Plessis, A. (2010). Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa. *Journal of Court Innovation*, Vol. 3:1, pp. 157- 176.

NEMA provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.[124] This statutory provision is an exception to the general rule in litigation that costs follow the event in that the successful party is usually awarded costs.[125] This provision was given judicial recognition in*Trustees for the Time Being of the Biowatch Trust vs. Registrar, Genetic Resources and Others (Biowatch Trust III)*[126]. The rationale behind this provision, according to the Constitutional Court in the instant case, is that the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest.[127]

NEMA allows any person acting in the public interest or in the interest of protecting the environment to institute and conduct criminal proceedings in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.[128]

The power of private prosecution of environmental offences is statutorily protected; such that when a private prosecution is instituted in accordance with the provisions of NEMA, the Attorney-General is barred from prosecuting except with the leave of the court

[124]Section 32(2), NEMA.
[125] It is to be noted that the Constitutional Court and the other courts of South Africa generally do not make costs orders in matters in which a party seeks to establish an important constitutional principle. See *Affordable Medicines Trust and Others vs. Minister of Health and Another*[2005] ZACC 3; 2005 (6)BCLR 529 (CC); 2006 (3) SA 247 (CC), where the Constitutional Court of South Africa held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. This general rule was reaffirmed by the Constitutional Court in the *Biowatch Trust III*.
[126][2009] ZACC 14, para. 19.
[127]Op cit., para. 19.
[128] Section 33(1) NEMA.

concerned.[129] NEMA contains provisions applicable in certain criminal proceedings[130] and provides for employer, employee and director liability in respect of specified environmental offences[131]. It also gives the Minister of Environmental Affairs and Tourism broad discretion to make regulations.[132]

NEMA provides for the enforcement of international environmental agreements. Where the Republic is a party to an international environmental instrument the Minister, after compliance with the constitutional provisions,[133] may publish the provisions of the international environmental instrument in the *Gazette* and any amendment or addition to such instrument.[134] The Minister may introduce legislation in Parliament or make such regulations as may be necessary for giving effect to an international environmental instrument to which the Republic is a party.[135] NEMA also imposes annual reporting requirements on the Department of Environment regarding the domestic implementation of these international and regional environmental instruments.[136]

5.2.2.1 Integrated and Cooperative Environmental Management under NEMA

South Africa operates an integrated system of environmental management involving cooperation between national, provincial, and municipal environmental departments/bodies in environmental assessment procedures and requirements and makes determinations to prevent the duplication of efforts.[137] The National Environmental Management Act (NEMA) provides for the establishment of institutions to facilitate horizontal cooperation between different

[129]Section 33(5), ibid. This is in marked contrast to sections 174 and 211 of the Nigerian Constitution which give the Attorneys General of the Federation and the States the unfettered power to institute, take over, continue, and discontinue any criminal prosecution.
[130] See section 34, ibid.
[131] Section 34 (5)-(9), NEMA.
[132]Section 44, ibid.
[133]Section 231 (2) and (3), Constitution of South Africa, op cit.
[134] Section 25(2), NEMA
[135]Section 25 (3), ibid.
[136]Section 26, ibid.
[137] See Chapter 5 of NEMA on Integrated Environmental Management

government departments and vertical coordination between national, provincial and local government environmental authorities. These include the National Advisory Forum[138] and the Committee for Environmental Coordination[139].

NEMA also promotes integrated environmental management by requiring the provinces and various government departments (exercising functions that may affect the environment or exercising functions involving environmental management) to prepare environmental implementation plans and/or environmental management plans every four years.[140] The purpose of these plans is to coordinate and harmonise the environmental policies, functions and activities of these departments so as to minimise duplication and promote consistency.[141] This system of integration and cooperation between environmental agencies at federal, provincial and municipal levels is worth emulating.

5.2.3 Sectoral Environmental Management Acts

Several environmental laws have been enacted pursuant to NEMA. These include- National Environmental Management: Protected Areas Act,[142] National Environmental Management: Biodiversity Act,[143] National Environmental Management: Air Quality Act,[144] National Environmental Management: Integrated Coastal Management Act,[145] and National Environmental Management: Waste Act.[146] These legislations cover major sectors of the economy including pollution, waste management, conservation and natural resources, and land

[138] NEMA, section 3. This institution comprises mainly of stakeholders and advises the Minister of Water and Environmental Affairs on various rules.
[139] NEMA, section 4. The object of this institution, whose membership consists of the heads of national and provincial government departments involved with environmental management, is to promote the integration and coordination of environmental functions by relevant organs of state.
[140] NEMA, section 11.
[141] Ibid, section 12.
[142] Act 57 of 2003 (as amended by National Environment Laws Amendment Act 14 of 2009 and National Environmental Management: Protected Areas Amendment Act 15 of 2009).
[143] Act 10 of 2004 (as amended by National Environment Laws Amendment Act 14 of 2009)
[144] Act 39 of 2004 (as amended by the Environment Laws Amendment Act 14 of 2009.)
[145] Act 24 of 2008
[146] Act 59 of 2008

use. They are all aimed at giving effect to the environmental right. A brief overview of these laws follows with particular emphasis on the provisions most relevant to environmental rights.

5.2.3.1 National Environmental Management: Protected Areas Act (NEMPAA)[147]

The Protected Areas Act provides for the protection and conservation of ecologically viable areas representative of the country's biological diversity, its natural landscapes and seascapes. Section 3 of the Act affirms the principle of trusteeship by providing that in fulfilling the rights contained in section 24 of the Constitution, the State through the organs of state implementing legislation applicable to protected areas "*must act as the trustee of protected areas in the Republic*." The state shall implement the Act in partnership with the people to achieve the progressive realisation of those rights. The Act is binding on all state organs[148] and must be interpreted and applied in accordance with the national environmental management principles. In this regard it should be read with the applicable provisions of NEMA.[149]

The system of protected areas in South Africa consists of: special nature reserves, national parks, nature reserves (including wilderness areas) and protected environments; world heritage sites; marine protected areas; specially protected forest areas, forest nature reserves and forest wilderness areas and mountain catchment areas. The Act provides for the establishment of a Register of Protected Areas[150] and the management of these areas,[151] as well as the observance of the principles of co-operative governance.[152]

[147]Op cit.
[148] Section 4(2) NEMPAA
[149]Section 5(1) Ibid.
[150] Section 10, NEMPAA
[151] See Chapter 4, ibid.
[152]Sections 2(a), 11, 31, 32. Ibid. Cooperative governance is a thread running through the Act and involves extensive consultation at national, provincial and local levels of environmental governance.

Consultation and public participation must be observed before the issuance of notices[153] by the Minister[154] or the Member of the Executive Council (MEC) for Environmental Affairs (MEC).[155] Furthermore, The Minister or MEC must give due consideration to all representations or objections received or presented before publishing the relevant notice.[156] This is important since a major objective of the Act remains the promotion of sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas and the promotion of participation of local communities in the management of protected areas, where appropriate.

5.2.3.2 National Environmental Management: Biodiversity Act (NEMBA)

The Biodiversity Act provides for the management and protection of the country's biodiversity and the use of indigenous biological resources in a sustainable manner, as well as providing for co-operative governance in biodiversity management and conservation. It establishes the South African Biodiversity Institute as the regulatory body on biodiversity.[157] The Act gives effect to international agreements affecting biodiversity which South Africa has ratified.[158] It also provides for offences and penalties.[159]

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[153] These notices relate to the declaration of particular areas as special nature reserves, or as nature reserves, or as protected areas, or as national parks; the designation of national parks as wilderness areas; the designation of nature reserves as wilderness areas; and the withdrawal of the declaration or exclusion of part of the relevant protected area. See sections 18(1), 19, 20(1), 22(1), 23(1), 24(1), 26(1), 28(1) and 29 of NEMPAA.

[154] Where the protected area is covered by national legislation.Section 31 provides –

Subject to section 34, before issuing a notice under section 18(1), 19, 20(1), 22(1), 23(1), 24(1), 26(1), 28(1) or 29, the Minister may follow such consultative process as may be appropriate in the circumstances, but must:

(a) consult all national organs of state affected by the proposed notice;

(b) in accordance with the principles of co-operative government as set outin chapter 3 of the Constitution, consult:

(i) the MEC of the province concerned; and

(ii) the municipality in which the area concerned is situated;

(c) in the prescribed manner, consult any lawful occupier with a right inland in any part of the area affected; and

(d) follow a process of public participation in accordance with section 33.

See also sections 32 - 34 NEMPAA.

[155] Where the protected area is covered by provincial legislation.

[156] Section 33(4 Ibid.)

[157] Chapter 2, NEMBA

[158] Section 5.Ibid. This would include the Convention on Biodiversity which was ratified by South Africa on ….

[159] Section 101-102. Ibid.

Public participation is important in the implementation of the Biodiversity Act. Before adopting or approving a national biodiversity framework, a bioregional plan or a biodiversity management plan, or any amendment to such a plan, the Minister must follow a consultative process in accordance with sections 99 and 100.[160] The Member of the Executive Council (MEC) for Environmental Affairs in a province must similarly follow a consultative process in accordance with sections 99 and 100 before adopting a bioregional plan, or any amendment to such a plan.[161] Consultation is also mandatory before publication of a notice relating to the listing of ecosystems and/or species that are threatened or in need of protection or before the repeal of such a notice.[162]

Section 100 of the Act spells out the process for public participation. The Minister must give notice of the proposed exercise of the power (requiring consultation under the Act) in the *Gazette;* and in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.[163] The notice must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the *Gazette,* written representations on, or objections to, the proposed exercise of the power. The notice must contain sufficient information to enable members of the public to submit meaningful representations or objections.[164] The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.[165] Due consideration must be given to all representations or objections received or presented before the Minister exercises his power.[166]

[160]Section 47, ibid.
[161] Ibid.
[162]Section 63 Ibid.
[163] Section 100(1) Ibid
[164] Section 100(2) Ibid
[165] Section 100(3) Ibid
[166] Section 100(4) Ibid

5.2.3.3 National Environmental Management: Air Quality Act (NEMAQA)

The Air Quality Act aims to bring the regulation of air quality in line with the environmental right.[167] The Act further provides for national norms and standards regulating air quality monitoring, management and control by all spheres of government. It provides for specific air quality measures and for offences and penalties[168]. The Act in its Preamble acknowledges that the quality of ambient air in many areas of the Republic is not conducive to a healthy environment for the people living in those areas let alone promoting their social and economic advancement. It notes that the burden of health impacts associated with polluted ambient air falls most heavily on the poor and that air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter. It further affirms that everyone has the constitutional right to an environment that is not harmful to their health or well-being; and the constitutional right to have the environment protected.

The Act obligates the Minister to establish a national framework for achieving the object of the Act, which must include: mechanisms, systems and procedures to attain compliance with ambient air quality standards. To establish mechanisms, systems and procedures to give effect to related international law obligations; national norms and standards governing - the control of emissions, air quality monitoring, air quality management planning, and air quality information management and other incidental matters.[169] The national framework is binding on all organs of state in all spheres of government.[170]

The minister must identify substances or mixtures of substances in ambient air which present a threat to health, well-being or the environment, or which he reasonably believes present such a threat. He must establish national standards for ambient air quality, including

[167] Section 60 of NEMAQA repealed the Atmospheric Pollution Prevention Act of 1965 which did not afford sufficient protection to the environment.
[168] Section 51 and 52.NEMAQA.
[169] Section 7(1), NEMAQA.
[170] Section 7(3), ibid.

the permissible amount or concentration of each such substance or mixture of substances in ambient air. The Minister may also establish national standards for emissions from point, non-point or mobile sources.[171] The MEC of a province and the municipality (local government) may similarly identify such polluting substances and establish provincial or local standards for ambient air quality or emissions from point, non-point or mobile sources in the province or municipality.[172] If national standards have been established for any particular substance or mixture of substances, the MEC and/or a municipality may not alter any such national standards except by establishing stricter standards.[173] Both the MEC and the municipality must follow a consultative process before the MEC publishes an air quality notice or before the municipality passes an air quality bylaw.[174] The Act imposes obligations on the Minister, the MEC of each Province and each municipality to appoint air quality officers for the national government, the provinces and the municipality respectively.[175] Each national department or province or municipality also bears responsibility for preparing an air quality management plan.[176]

The Minister or MEC may, by notice in the *Gazette*, declare an area as a priority area if the Minister or MEC reasonably believes that ambient air quality standards are being, or may be, exceeded in the area, or any other situation exists which is causing, or may cause, a significant negative impact on air quality in the area; and the area requires specific air quality management action to rectify the situation.[177] Before publishing the notice designating an area as a priority area, the Minister or the relevant MEC(s) must follow a consultative process in

[171]Section 9, ibid.
[172]Sections 10(1), 11(1), ibid.
[173]Sections 10(2) and 11(2), ibid.
[174] Section 10(4)(a), 11(4). For the MEC the consultative process must be in accordance with sections 56 and 57 of the Act. For the municipality the consultative process must be in terms of chapter 4 of the Municipal Systems Act.
[175]Section 14, NEMAQA.
[176]Section 15, ibid.
[177]Section 18, ibid.

accordance with sections 56 and 57.[178] Where an area is so declared the relevant air quality officer must prepare a priority area air quality management plan for the area; and must submit the plan to the Minister (or MEC) for approval, within six months of the declaration of the area, or such longer period as the Minister (or MEC) may specify.[179] To ensure cooperative environmental governance and avoid conflict between the different spheres of government, the air quality officer responsible for preparing a priority area air quality management plan for the area must first of all consult with the air quality officers of the other spheres of government.[180] Before approving a priority area air quality management plan, the Minister or the relevant MEC(s) must follow a consultative process in accordance with sections 56 and 57.[181] The Minister or MEC may prescribe regulations necessary for implementing and enforcing approved priority area air quality management plans.[182]

The Act further imposes an obligation on the Minister to publish a list of activities which result in atmospheric emissions and which have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage.[183] The notice must establish minimum emission standards in respect of a substance or mixture of substances resulting from a listed activity and identified in the notice, including: the permissible amount, volume, emission rate or concentration of that substance or mixture of substances that may be emitted; and the manner for measuring the emissions.[184] A consultation process is also mandatory before the publication of the notice. No person may carry out a listed activity without an atmospheric emission licence or a provisional atmospheric emission licence.[185]

[178]Section 18(4), ibid.
[179]Section 19(1-3), ibid.
[180] Ibid.
[181]Section 19(4), ibid.
[182]Section 20, ibid.
[183]Section 21, ibid.
[184] Section 21(3)(a), ibid.
[185]Section 22, ibid.

The Act contains similar provisions in respect to controlled emitters[186] and controlled fuels.[187] Before declaring a substance or mixture of substances as a controlled fuel or an activity or appliance as a controlled emitter, the Minister or MEC must: follow a consultative process, apply the precautionary principle, take into account South Africa's obligations in terms of any applicable international agreement and consider any sound scientific information; and any risk assessments.[188] The notices must establish emission standards for the controlled emitter and standards for the manufacture, sale, and use of controlled fuels.[189] A notice may also prohibit the manufacture, sale or use of the controlled fuel.[190] The Minister or MEC may also prescribe measures for the control of dust, noise and offensive odours.[191]

Chapter 5 of NEMAQA contains detailed provisions for the licensing of listed activities. Here, local authorities have a key role to play in relation to air quality management. Metropolitan and municipal authorities are charged with implementation of the atmospheric emission licensing system.[192] This function may be delegated to a provincial organ of state that will then be regarded as the licensing authority in that municipality.[193] The MEC may also intervene, on the grounds that a municipality cannot or does not fulfil its obligation as licensing authority, and designate a provincial organ as the licensing authority.[194]

Public participation is a major requirement applicable to the application process. Thus an applicant must take appropriate steps to bring the application to the attention of relevant

[186] A controlled emitter is any appliance or activity which results in atmospheric emissions which through ambient concentrations, bioaccumulation, deposition or in any other way, present a threat to health or the environment or which the Minister or MEC reasonably believes presents such a threat; and which the Minister or MEC declare as a controlled emitter.Section 23, NEMAQA.

[187] A controlled fuel is a substanceor mixture of substances which, when used as a fuel in a combustion process,result in atmospheric emissions which through ambient concentrations, bioaccumulation, deposition or in any other way, present a threat to health or the environment or which the Minister or MEC reasonably believes present such a threat, and which is so declared by the Minister or MEC as a controlled fuel. Sec. 26, NEMAQA.

[188] Section 23(2) and 26(2) NEMAQA.

[189] Section 24 and 27, ibid.

[190] Section 27(d), NEMAQA.

[191] Section 32-35, ibid.

[192] Section 36(1), ibid.

[193] Section 36(2), ibid.

[194] Section 36(3), ibid.

organs of state, interested persons and the public. Such steps include the publication of a notice in at least two newspapers circulating in the area in which the listed activity applied for is to be carried out. It must describe the nature and purpose of the licence applied for; give particulars of the listed activity, including the place where it is to be carried out; state a reasonable period within which written representations on or objections to the application may be submitted and the address or place where representations or objections must be submitted; and contain such other particulars as the licensing authority may require.[195] One of the factors to be taken into account by the licensing authority when considering an application for an atmospheric emission licence is any submissions from organs of state, interested persons and the public.[196]

After a licensing authority has reached a decision in respect of licence application, it must within 30 days, notify the applicant of the decision, and give written reasons if the application was unsuccessful. He shall notify any persons who have objected to the application; and, if requested by the objector, give written reasons for its decision or make public its reasons.[197] This is to ensure transparency in the decision-making process and guard against arbitrary exercise of power.

The Minister and MEC also have general powers to make regulations in accordance with the Act.[198] Before publishing any regulation made in terms of this Act, or any amendment to the regulations, the Minister or MEC must follow a consultative process in accordance with sections 56 and 57.[199] The consultative process, which is an important element of public participation and cooperative governance[200], is mandatory whenever the Minister and MEC are to exercise certain powers. According to section 56, the Minister must consult all Cabinet members whose areas of responsibility will be affected by the exercise of the power (for

[195]Section 38(3), ibid.
[196] Section 39(h), ibid.
[197]Section 40(4), NEMAQA.
[198]Section 53 and 54, ibid.
[199] Section 55 (3)(a), ibid. The consultative process need not be carried out if the regulations are amended in a non-substantive way.
[200] The principles of co-operative governance are set out in chapter 3 of the South African Constitution.

example, the Minister of Mining and the Minister of Trade and Industry). The Minister must consult the MEC responsible for air quality in each province that will be affected by the exercise of the power; and allow public participation in the process. Where the power is to be exercised by the MEC, he must consult all members of the Executive Council whose areas of responsibility will be affected by the exercise of the power; and consult the Minister and all other national organs of state that will be affected by the exercise of the power. He must also allow public participation in the process.

To ensure public participation, the Minister or MEC must give notice of the proposed exercise of the relevant power in the *Gazette*; and in at least one newspaper distributed nationally or, if the exercise of the power will affect only a specific area, in at least one newspaper distributed in that area. The notice must, in addition, invite members of the public to submit to the Minister or MEC, within 30 days of publication of the notice in the *Gazette*, written representations on or objections to the proposed exercise of the power; and must contain sufficient information to enable members of the public to submit meaningful representations or objections. The Minister or MEC may allow any interested person or community to present oral representations or objections to the Minister or MEC, or a person designated by the Minister or MEC.[201] The Minister or MEC must give due consideration to all representations or objections received or presented before exercising the power concerned.[202]

5.2.3.4. National Environmental Management: Integrated Coastal Management Act (NEMICMA)

NEMICMA establishes a system of integrated coastal and estuarine management in South Africa, including norms, standards and policies, in order to promote the conservation of the coastal environment and to ensure that development and the use of natural resources within

[201]Section 57, ibid.
[202]Section 57(4), ibid.

the coastal zone is socially and economically justifiable and ecologically sustainable. It defines rights and duties in relation to coastal areas and determines the responsibilities of organs of state in relation to coastal areas. It furthermore prohibits incineration at sea, controls dumping at sea, pollution in the coastal zone, inappropriate development of the coastal environment and other adverse effects on the coastal environment. Finally the Act gives effect to South Africa's international obligations in relation to coastal matters.

In fulfilling the section 24 environmental right objectives, the State, through its functionaries and institutions implementing the Act, must act as the trustee of the coastal zone; and must, in implementing the Act, take reasonable measures to achieve the progressive realisation of those rights in the interests of every person.[203] In this capacity, the State must ensure that coastal public property[204] is used, managed, protected, conserved and enhanced in the interests of the whole community; and take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.[205]

The Act provides for a national coastal management programme,[206] provincial coastal management programmes,[207] and municipal coastal management programmes.[208] In the exercise of their powers to make coastal management programmes, the Minister or MECs or municipal authorities must, before adopting their respective programmes, give an opportunity to the public to submit written representations on or objections to the programme.[209] The Minister, MEC or municipality must, within 60 days of the adoption of a coastal management programme or of any substantial amendment to it, inform the public of the adoption of the

[203]Section 3, NEMICMA.
[204] Section 7 NEMICMA for the composition of coastal public property.
[205]Section 12, ibid.
[206]Section 44 and 45, ibid.
[207]Section 46 and 47, ibid.
[208]Sections 48, 49 and 50. Ibid.
[209]Section 44(2), 46(2) and 48(2).Ibid.

programme. The copies of, or extracts from the programme must be available for public inspection at specified places. They must also publicise a summary of the programme.[210]

The Act makes consultation and public participation mandatory in the decision-making process.[211] It also provides that the Minister must make available and accessible to the public sufficient information concerning the protection and management of the coastal zone, to enable the public to make an informed decision of the extent to which the state is fulfilling its duties in terms of the Act.[212] This duty to inform is commendable as environmental information constitutes an essential tool for public participation. The rider that the duty is to be fulfilled progressively and within the available resources of the Department however detracts from the utility of section 93, since the relevant department could cite lack of funds to avoid its duty.

5.2.3.5 National Environmental Management: Waste Act (NEMWA)

The Act regulates waste management in order to protect health and the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development. The Act aims, among others, to protect health, well-being and the environment by providing reasonable measures for minimising the consumption of natural resources; avoiding and minimising the generation of waste; reducing, re-using, recycling and recovering waste; treating and safely disposing of waste as a last resort. It is aimed at achieving integrated waste management reporting and planning.[213] The Act also aims at ensuring that people are aware of the impact of waste on their health, well-being and the environment.[214]

[210]Section 44(3), 46(3) and 48(3).Ibid.
[211]Section 53, ibid.
[212]Section 93, ibid.
[213] Section 2, NEMWA
[214] Ibid.

The Act, which binds all organs of state, is to be interpreted and applied in line with the NEMA principles.[215] The obligations imposed on the Minister by the Act include the establishment of a national waste management strategy for achieving the objects of the Act,[216] the setting of national norms and standards relating to - the classification of waste, the planning for and provision of waste management services, and the storage, treatment and disposal of waste.[217] The Minister has broad discretionary powers under the Act.[218] In exercising these powers, the Minister must follow a consultative process in accordance with sections 72 and 73[219].

The Act obligates the MEC to ensure the implementation of the national waste management strategy and national norms and standards. He may also, within his jurisdiction, set provincial norms and standards that are not in conflict with national norms and standards.[220] In exercising these powers he must also follow a consultative process.[221]

The municipality bears major responsibility for the provision of waste management services, which include waste removal, waste storage and waste disposal services. It must do these in a manner that does not conflict with the powers of the Minister or the MEC.[222] Each municipality must exercise its executive authority and perform its duty in relation to waste services by adhering to all national and provincial norms and standards. It must integrate its waste management plans with its integrated development plans. It must ensure access for all to such services and provide such services at an affordable price.[223] The municipality may also

[215] See section 2 NEMA
[216] Section 6, NEMWA
[217] Section 7(1), ibid.
[218] For example, discretion to set national norms and standards for the minimisation, re-use, recycling and recovery of waste; extended producer responsibility; the regionalisation of waste management services; and the remediation of contaminated land and soil quality.Section 7(2), ibid.
[219] Section 6(6), 7(6), 14(6).Ibid.
[220] Section 8(1 & 2), ibid.
[221] Section 8(5), ibid.
[222] Section 9(1), ibid.
[223] In line with its tariff policy in chapter 8 of the Municipal Systems Act

pass by-laws in respect of waste management services, after following a consultative process.[224]

The Act imposes profound duties on certain persons.[225] A holder of waste must take all reasonable measures to avoid the generation of waste and where such generation cannot be avoided, to minimise the toxicity and amounts of waste that are generated. He must reduce, re-use, recycle and recover waste and where waste must be disposed of, ensure that the waste is treated and disposed of, in an environmentally sound manner. He must manage the waste in such a manner that it does not endanger health or the environment or cause a nuisance through noise, odour or visual impacts. He must prevent any employee or any person under his or her supervision from contravening the Act and prevent the waste from being used for an unauthorised purpose.[226] Furthermore, any person who sells a product that may be used by the public and that is likely to result in the generation of hazardous waste must take reasonable steps to inform the public of the impact of that waste on health and the environment.[227]

Any person who stores waste must take steps to ensure that the containers, in which any waste is stored, are intact and not corroded or rendered unfit for the safe storage of waste. Adequate measures must be taken to prevent accidental spillage or leaking or blowing away of the waste. He must ensure that nuisances such as odour, visual impacts and breeding of vectors do not arise and pollution of the environment and harm to health are prevented.[228] The Act further provides for waste collection services;[229] duties of persons transporting waste;[230] treatment, processing and disposal of waste.[231]

[224] As provided for in chapter 4 of the Municipal Systems Act. Section 9(5)
[225]Section 16(1), NEMWA.
[226] Ibid.
[227]Section 16(2), ibid.
[228]Section 21, ibid.
[229]Section 23, ibid.
[230]Section 25, ibid.
[231] Section 26-27, ibid.

The Minister (or the MEC) may require a person, or a category of persons, or an industry, that generates waste to prepare and submit an industry waste management plan to the Minister (or MEC) for approval.[232] Organs of state may also be required to prepare an industry waste management plan.[233] One way in which NEMWA provides for access to environmental information and public participation is by making it mandatory for a person or organ of state required to prepare an industry waste management plan to bring the contents of a proposed industry waste management plan to the attention of relevant organs of state, interested persons and the public and to follow a consultation process.[234]

NEMWA provides for the licensing and control of waste management activities. This includes, inter alia, the requirement that the applicant must take appropriate steps to bring the application to the attention of relevant organs of state, interested persons and the public.[235] These steps must include the publication of a notice in at least two newspapers circulating in the area in which the waste management activity applied for is to be carried out. The notice must describe the nature and purpose of the waste management licence applied for. It must give particulars of the waste management activity, including the place where it is or is to be carried out. It must state where further information on the waste management activity can be obtained and a reasonable period within which written representations on, or objections to, the application may be submitted. It must contain such other particulars as the licensing authority may require.[236] When considering an application for a waste management licence, the licensing authority must take into account, among others, any submissions received from organs of state, interested persons and the public.[237] Persons who have objected to the application are entitled

[232]Section 28, ibid.
[233]Section 29, ibid.
[234]Section 31(1-2), ibid.
[235]Section 47(2), ibid.
[236]Section 47(3), ibid.
[237] Section 48(h), ibid.

to be notified (by the applicant) of the decision of the licensing authority and the reasons for the decision.[238]

. The Act establishes a national waste information system.[239] Information contained in the national waste information system or a provincial waste information system, must be made available by the Minister or MEC, subject to the Promotion of Access to Information Act, 2000.[240] The Act confers the Minister and MEC with power to make regulations in respect of the Act.[241] It provides for the remediation of contaminated land,[242] the consultation process and public participation[243], and compliance and enforcement measures.[244]

5.2.4 Policies on the Environment

South Africa does not have a single environmental policy document but rather a series of policy documents on different aspects of the environment. The current policies are as follows: White Paper on Sustainable Coastal Development, 2000; White Paper on Environmental Management, 1998; White Paper on Integrated Pollution and Waste Management, 2000; White Paper on Conservation and Sustainable Use of Biodiversity, 1997; White Paper on Integrated Pollution and Waste Management, 2000; and White Paper on National Climate Change Response, 2011.[245]

[238] Section 49(4)(c), ibid.
[239] Section 60, ibid.
[240] Section 64, ibid.
[241] Section 69-71, ibid.
[242] Sections 35-41, ibid.
[243] Section 72 and 73, ibid.
[244] Chapter 7 NEMWA
[245] Department of Environmental Affairs, Annual Report 2012/13, page 15. Retrieved from https:/www.environment.gov.za/ on 02/01/2014.

CHAPTER SIX

INSTITUTIONAL AND NON-INSTITUTIONAL MECHANISMS FOR THE PROMOTION AND PROTECTION OF ENVIRONMENTAL RIGHTS IN NIGERIA AND SOUTH AFRICA

6.1 Introduction

This chapter examines the role that several institutional and non-institutional bodies have played, are playing, and can play in the promotion and protection of the right to a healthy environment. While legislation and policy are important means of implementing constitutional environmental provisions, they cannot be effective in the absence of proper and vigorous implementation and enforcement. Likewise, promotional activities are important as environmental rights campaign cannot be achieved solely through the development of protective laws or establishment of mechanisms to implement those laws.

Promotion has been defined in the Oxford Dictionary as "activity that supports or encourages a cause, venture or aim."[1] The Merriam Webster Dictionary defines it as "the act of furthering the growth or development of something."[2] According to the Black's Law Dictionary, promotion means: "to contribute to growth, enlargement or prosperity of; to forward; to further; to encourage; to advance."[3] Promotion involves raising awareness of rights - to bring rights and the methods of accessing and enforcing them to the attention of right holders and to promote the most effective use of existing access to rights.[4] The promotion of human rights can thus be described as activities that support and encourage the recognition, growth, development and enjoyment of human rights.

[1]Available at www.oxforddictionaries.com/definition/english/promotion. Last accessed 13 June 2016.
[2]Available at www.merriam-webster.com/dictionary/promotion.Last accessed 13 June 2016.
[3] Black, H.C. (1968). Black's Law Dictionary (4th Ed.). St. Paul, Minn. West Pub.Co. p., 1379.
[4]Liebenberg, S. (2003).The Interpretation of Socio-economic Rights. In: Chakalson, M. et al, *Constitutional Law of South Africa* (2nd edition).Original Service, 12-03) ch. 335. Cited in Brand, D. and Heyns, C. (2005).*Socio-economic Rights in South Africa*. Pretoria University Law Press, 2005, p. 10.

From a perusal of domestic and international instruments dealing with the promotion and protection of human rights,[5] promotional activities include public enlightenment and education, including training, conferences, seminars, workshops, rallies, use of the mass media. It also includes interactive sessions with relevant stakeholders; publications aimed at disseminating information on human rights issues; collaboration with nongovernmental organisations (NGOs) and community based organisations (CBOs) to raise awareness on human rights issues. It includes attendance and participation at public hearings on issues involving human rights. It also includes research and publication of research works.

"To protect" has been defined as "to keep safe from harm or injury."[6] The prime responsibility to promote and protect human rights lies with the state. According to Brand,[7] the duty to protect requires the state to protect existing enjoyment of rights, and the capacity of people to enhance their enjoyment of rights or newly to gain access to the enjoyment of rights against third party interference. Thus the obligation of a state to protect human rights requires states to protect individuals and groups against human rights abuses and to prevent others from violating these rights.

Protection of the right to a healthy environment includes but is not limited to the development of protective laws, the establishment of mechanisms to implement and enforce the laws and plans and programmes geared at environmental protection. It also includes effective complaint treatment mechanisms to handle complaints of environmental rights violations. It includes the provision of professionally qualified legal and/or technical assistance. The state must, for instance, regulate industry and mining to guard against

[5]For example, the National Human Rights Commissions' *National Action Plan for the Promotion and Protection of Human Rights; Principles relating to the Status of National Institutions (The Paris Principles),* adopted by General Assembly resolution 48/134 of 20 December 1993; andthe *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by General Assembly resolution 53/144 of 9 December 1998.

[6]Available at www.oxforddictionaries.com/definition/english/protection. Last accessed 13 June 2016.

[7]Brand, D. (2005).Introduction to Socio-economic Rights in the South African Constitution. In: Brand, D. and Heyns, C. (eds.).*Socio-economic Rights in South Africa*, Centre for Human Rights.University of Pretoria Press.

environmental degradation occasioned by the conduct of industrial and mining operations and in order to protect the health and well-being of citizens who are adversely affected thereby. It also includes the provision of effective legal remedies where such environmental degradation occurs.

While the primary responsibility of promoting and protecting human rights lies with the state, the right and responsibility of individuals, groups and organs of society to promote and protect human rights is also internationally recognised.[8] This means that the efforts of the state in protecting human rights should necessarily be complemented by the efforts of citizens and groups.

Although the chapter is concerned primarily with the domestic level, developments at the regional and global levels have an impact on what is happening at the domestic level. For example, following the decision of the African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights vs. Nigeria (SERAC communication)*[9] and follow-up activities of the African Commission, the Federal Government of Nigeria commissioned a study on oil pollution in Ogoniland by the United Nations Environment Programme (UNEP). It is for this reason that the researcher includes the contributions of relevant regional and international bodies in this chapter.

6.2 International and Regional Bodies

6.2.1 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (The Commission), established in 1987, is a quasi-judicial body and the treaty-monitoring body of the African

[8] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by General Assembly resolution 53/144 of 9 December 1998.

[9] Communication No 155/96 (2001).See 3.2.2.

Charter on Human and Peoples' Rights (the African Charter). The Commission is comprised of eleven members elected by the African Union Assembly of Heads of State and Government (AU Assembly) and it has its Secretariat in Banjul, the Gambia.[10]The Commission meets twice a year in two week sessions at which civil society organisations can participate and make statements. At the conclusion of a session the Commission adopts an Activity Report which is submitted to the next African Union (AU) Summit.[11]

The Commission has three major functions, namely: the promotion of human and peoples' rights, the protection of human and peoples' rights, and the interpretation of the provisions of the African Charter. The Commission shall also carry out any other task assigned to it by the AU Assembly.[12] Inasmuch as the rights guaranteed by the African Charter include the right to a satisfactory environment, the Commission has an important role to play in the promotion and protection of the environmental right.

The Commission's promotional functions include: the conduct of research in the field of human rights, organization of seminars, symposia and conferences and dissemination of information. They also include the encouragement of national and local human rights institutions, the formulation of principles to solve legal problems relating to human rights and cooperation with African and international human rights institutions.[13] This implies that the Commission is to cooperate and collaborate with bodies like Office of the High Commissioner of Human Rights, National Human Rights Commissions, and NGOs that are in the forefront of the promotion of environmental rights. It is in this context that the Commission confers

[10]Articles 30, 31 and 33, African Charter on Human and Peoples' Rights.
[11]Killander, M. (2010).African Human Rights Law in Theory and Practice. In: Joseph, S. and McBeth, A. (eds.).*Research Handbook on International Human Rights Law*.Edward Elgar, Cheltenham, UK, pp. 388-413.
[12] Article 45, African Charter,.
[13]Article 45(1), ibid.

observer status on human rights NGOs, thereby allowing their representatives to participate in the public sessions of the Commission.[14]

The protective function of the Commission is not as clearly defined as the promotional function. Article 45(2) provides that the Commission shall "ensure the protection of human and peoples' rights under conditions laid down by the present Charter". The manner in which the Commission is to fulfil its protective function may therefore be deduced by reference to other provisions of the African Charter as well as the practice and procedure of the Commission. The Commission protects human rights mainly by examining state reports, by considering communications alleging human rights violations, and by carrying out fact-finding missions on the territory of State parties to investigate allegations of massive and serious human right violation. Each state party is required to submit every two years a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the African Charter.[15]

The Commission's role of considering communications (or complaints) provides the Commission with a door of opportunity to fulfil its mandate of interpreting the provisions of the African Charter.[16] It also serves an important protective function since it places no restriction on who may file a communication. This creates room for individuals, groups, or NGOs, whether or not they are the direct victims of the alleged violation, to file a communication. However a communication can only be brought against a State entity which is a party to the Charter.[17]

[14]Rule 75, Revised Rules of Procedure of the African Commission on Human and Peoples' Rights.
[15]Article 62, African Charter.Killander, M., op cit., p. 406; MakauwaMutua, (1999). The African Human Rights Court: A Two-Legged Stool? *Human Rights Quarterly* 21: 350.
[16]Article 45(3), African Charter.Ouguergouz, F. (2003).*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights.*MartinusNijhoff, The Hague, pp. 563-564; Killander, M. op cit., pp. 388-413.
[17]Articles 47, 49 and 55(2), African Charter.

For communications to be considered by the Commission they must: indicate the authors, even if they request anonymity. They must be compatible with the OAU (now AU) Charter and the African Charter. A communication should not be written in disparaging or insulting language directed against the state or the African Union. It must not be based exclusively on media reports. Communications are sent after exhausting local remedies, if any, unless such remedies are unduly prolonged and are to be submitted within a reasonable time after local remedies are exhausted.[18] A Communication is to be brought to the knowledge of the State concerned in order to give the state the opportunity to defend itself. Where there is a violation, the Commission will make recommendations to the State and the AU Assembly on what the State should do including remedies to be provided.[19]

The right to environment in Article 24 of the African Charter has been considered by the Commission in only one communication.[20]*The Socio-Economic Rights Action Centre (SERAC) and Another vs. Nigeria (The SERAC Communication)*[21] alleged that the Nigerian Government, through its involvement in oil production in the Niger Delta, contributed both directly and indirectly to gross violations of the rights of the Ogoni people. The communication alleged violations of the right to a satisfactory environment, the right to health,[22] as well as some other rights guaranteed in the African Charter.[23] In its decision, the Commission found the Nigerian Government in violation of various human rights guaranteed under the African Charter including the right to a general satisfactory environment and the right to health.[24] The Commission appealed to the government of Nigeria to ensure protection

[18]Article 56, ibid.
[19]African Commission on Human and Peoples Rights (ACHPR) OAU-*OUA Information Sheet No 1: Establishment* (ACHPRSecretariat) 4. Available at http://www.achpr.org/english/information_sheets/ACHPR. Last accessed 23 August 2016.
[20] The paucity of environmental rights decisions of the Commission in its over 26 years of existence stems partly from the fact that the cases decided by the Commission depends on the admissible communications filed before it.
[21](2001) AHRLR 60 (ACHPR 2001).Communication 155/96.See 3.2.2.
[22]Article 16, African Charter.
[23]The SERAC Communication, paras. 1-10.
[24]Ibid, paras. 50-69

of the environment, health and livelihood of the people of Ogoniland by, inter alia, ensuring adequate compensation to victims of the human rights violations including undertaking a comprehensive clean-up of the lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil developments and to ensure that the safe operation of any further oil developments is guaranteed through effective and independent oversight bodies for the petroleum industry; and providing information on health and environmental risks and meaningful access to the regulatory and decision making bodies to communities likely to be affected by oil operations.

The Commission promoted and protected the right to environment in Africa by affirming the existence and justiciability of the right, giving clarity to the nature and content of the environmental right in the African Charter, and spelling out the obligations of state parties in respect of the right.[25] The Commission sought to balance the environmental right with the right of a state to exploit its natural resources for socio-economic development by stressing that the state in exploiting such resources ought to take care and be mindful of the common good and sacred rights of individuals and communities.[26] The Commission further reaffirmed the indivisibility of human rights by stating that collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa and it indicated its willingness to apply every one of these rights since "there is no right in the African Charter that cannot be made effective".[27]

The Commission has contributed to the development of the environmental rights jurisprudence and this is reflected in the citations of the decision by human rights bodies[28] and

[25] These include taking "reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources". Para 52.
[26] SERAC Communication, paras.54 and 69.
[27] Ibid, para 68.
[28] For example, in the case of *Maya Indigenous Community of Toledo District vs. Belize*, Case 12.053, Report No. 40/04, Inter-American Court of Human Rights, OEA/Ser.L/V/II.122 Doc.5 rev at 727 (2004), the Inter-American Court of Human Rights cited the SERAC case.

in scholarly works. The importance of the Commission is further underscored by the redress it provides in cases involving socio-economic rights in countries which only recognize socio-economic rights in their national constitutions as non-justiciable directives of state policy. Anyone who has had their case thrown out by national courts on this ground could bring a complaint to the African Commission alleging a violation of the Charter

The Commission, notwithstanding its achievements, is limited in its effectiveness and its decisions are only recommendatory and not binding. There is poor enforcement of the decisions of the Commission against state parties and victims of human rights violations hardly receive redress in real terms.[29] The work of the Commission, for this reason, has been described as basically promotional[30]. Lack of follow-up by the Commission and the AU political organs have contributed to the gap between recommendations of the Commission and actual implementation. A study on the implementation of the recommendations of the Commission found that the only "significant link" between the Commission's work and increased compliance was effective follow-up.[31]

To address this, the Commission has passed a *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties*.[32] According to the resolution the Commission will include a report oncompliance with its recommendations in its Activity Reports submitted to the AU Assembly. States are further requested to indicate the measures they have taken to comply with the recommendations within 90 days of notification of the decision of the Commission. In spite of

[29] The limited powers of the Commission and its inability to enforce its decisions against state parties have attracted much criticism. See MakauwaMutua, op cit., pp. 353-354 (noting that the African Charter lacks a credible enforcement mechanism and describing the work of the Commission as basically promotional); Nwobike, C., (2005). The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic andSocial Rights (CESR) v Nigeria.*African Journal of Legal Studies,* 1: 129.

[30]MakauwaMutua, op cit., pp. 353-354

[31]Viljoen, F. andLouw, L. (2007).State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights.*American Journal of International Law*,101(1): 14–16; cited in Killander, M., (2010) op cit., p. 409.

[32]AU Doc ACHPR/Res.97(XXXX)06 (29 November 2006).

these steps, the enforcement of the Commissions decisions is likely to remain problematic and dependent on the consent of the state involved. From this, the environmental right provision under the South African Constitution is more concrete than under the African Charter.

6.2.2 The African Court of Human and Peoples' Rights

The African Court on Human and Peoples' Rights (AfCHPR) was created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Right (the African Court Protocol)[33] in recognition of the shortcomings of the Commission and the need to establish a court to complement and reinforce the functions of the Commission.[34] The AfCHPR is mandated to complement the protective mandate of the Commission[35] (an acknowledgement of the fact that the Commission has underperformed in actual protection of human rights on the African continent). The court, which is based in Arusha, Tanzania, has jurisdiction to determine cases and disputes submitted to it on the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the state concerned.[36] The court is also empowered to provide advisory opinion on any legal matter relating to the African Charter or any other relevant human rights instruments.[37] The advisory opinion may be requested by a member state of the African Union, the African Union itself or any of its organs, or any African organisation recognized by the Commission.[38]

The import of this is that cases involving environmental rights (as guaranteed in the African Charter) can be adjudicated by the AfCHPR, thereby conferring the court with the

[33] Adopted in June 1998 and entered into force on January 25, 2004 with the ratification by fifteen member states of the African Court Protocol. See OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (9 June 1998) ('African Court Protocol').
[34] See the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Right (the African Court Protocol).
[35] Article 2, The African Court Protocol.
[36] Article 3(1), ibid.
[37] Article 4(1), ibid.
[38] Ibid. The organizations recognized by the Commission could include Non-Governmental Organisations (NGOs).

potential to protect environmental rights. This potential is strengthened by the fact that the court shall apply as sources of law any relevant human right instrument ratified by the state concerned, in addition to the African Charter. This could include the International Convention on Economic, Social and Cultural Rights and the Aarhus Convention. In ruling on the admissibility of cases, the court is to take into account the provisions of Article 56 of the African Charter (governing admissibility of communications before the Commission).[39]

The court comprises of 11 judges, nationals of member states of the AU, elected in their individual capacity by the AU Assembly from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.[40] The judgments of the court, which are binding on the parties involved, are final and not subject to appeal; although the court may review its decision in the light of new evidence under certain conditions.[41] Where the court finds that there has been violation of a human or peoples' right (including the right to environment), it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.[42] As part of measures to ensure that its judgments are complied with, the AfCHPR shall submit to each regular session of the AU Assembly a report on its work during the previous year. The report is to specify particularly the cases in which a state has not complied with the court's judgment.[43] This practice of naming and shaming non-compliant states could play a vital role in stimulating compliance.

While the court has a potentially important role to play in the protection of environmental rights and other human rights, its capacity is severely limited by the provision of the Protocol which limits the right of access of individuals and NGOs to the court. While the

[39] African Court Protocol, article 6.
[40] Article 11(1), ibid.
[41] Article 28(2), ibid. These conditions are set out in the Rules of Procedure of the Court.
[42] Article 27(1), ibid.
[43] Article 31, ibid.

Commission, state parties and African Intergovernmental Organisations enjoy unfettered access to the AfCHPR,[44] individuals and NGOs with observer status before the African Commission are prevented from bringing a case unless the state against whom the case is brought has, either at the time it ratified the Protocol or thereafter, made a declaration accepting the competence of the court to hear such cases.[45] In addition, the Court has discretion to grant or deny individuals or NGOs access to the court.[46]

This provision is contrary to the right of fair hearing and severely undermines the ability of the AfCHPR to fulfil its protective mandate. It is individuals and groups who are mostly affected by environmental degradation and the State, in most cases, is complicit. For this reason most suits involving the violation of environmental rights are brought by individuals or NGOs against states. It is individuals and groups who are the major beneficiaries of human rights and limiting their access to court in this way amounts to denying them redress under the African system.

In view of the changing perception of international law, i.e. from law that regulates the relationship between independent states to one that also regulates the relationship between states and individuals, it is important the Protocol be reviewed to accept complaints from individuals as the International Criminal Court (ICC) does.

At the time of writing, only six states – Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda - have made the declaration.[47] The failure of Nigeria and South Africa to make the declaration accepting the competence of the AfCHPR to hear individual and NGO cases means

[44]Article 5(1), ibid.

[45]Articles 5(3) and 34(6), ibid. This provision was applied in the case of *Yogogombaye vs. Republic of Senegal*(2009) AHRLR 315 (ACtHPR 2009*)*, the first case to be decided by the AfCHPR. The applicant in that case filed an action seeking the court to compel Senegal to extradite Mr Hussein Habre, the former President of Chad to his country to answer to charges of crimes against humanity between 1982 and 1990. Senegal filed a preliminary objection to the case on the grounds of lack of jurisdiction of the court on the basis that Senegal had not made a declaration under article 34(6) of the Protocol allowing individuals to institute cases against it before the court. The court upheld Senegal's preliminary objection.

[46]Article 5(3), ibid.

[47] Retrieved on 12 February, 2014 from http://www.african-court.org and www.au.int/en/organs/cj...

that the court, at present, is constrained from exercising its protective function in respect of individuals and communities in these states whose environmental rights are being violated. The AfCHPR will be replaced by an African Court of Justice and Human Rights when the Protocol on the Statute of the African Court of Justice and Human Rights[48] enters into force.[49]

6.2.3 Economic Community of West African States Court of Justice (ECOWAS Court of Justice)

The ECOWAS Court of Justice is the judicial organ of ECOWAS[50] and is charged with resolving disputes related to the Community's treaty, protocols and conventions. The Court was created pursuant to the *Revised Treaty of the ECOWAS* of 1993 and has its headquarters in Abuja, Nigeria. In addition to providing advisory opinions on the meaning of Community law, the Court has jurisdiction to examine cases involving: an alleged failure by a Member State to comply with Community law; a dispute relating to the interpretation and application of Community acts; dispute between Community institutions and their officials; Community liability; human rights violations; and the legality of Community laws and policies.[51]

Initially individuals could not access the court, but in 2004 the ECOWAS Court of Justice Protocol was amended to allow individual ECOWAS citizens direct access to the Court. The Court is composed of seven judges appointed by the authority of Heads of State and Government from a list of up to two persons nominated by each member state. The Court applies the African Charter on Human and Peoples' Rights in its decisions on human rights matters. The requirement to exhaust local remedies (as is the case with the African Commission) does not apply in the ECOWAS Court. The principal requirements are that the

[48] Adopted on 1 July, 2008.

[49] The Protocol requires 15 ratifications to enter into force, however, as at February 2014 only five countries had ratified the Protocol. Retrieved on 23 February, 2014 from www.africancourtcoalition.org>HOME>

[50] ECOWAS comprises fifteen West African countries: Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

[51] *Revised Treaty of the ECOWAS* of 1993;Protocol A/SP.1/12/01 on Democracy and Good Governance. Supplementary Protocol A/SP.1/01/05 provide for the Court's jurisdiction.

application should not be anonymous and the matter should not be pending before another international court.[52]

The ECOWAS Court has contributed to the protection of the right to a healthy environment in its recent judgment in the case filed by Socio-Economic Rights and Accountability Project (SERAP), a coalition of ten Nigerian civil society groups against the Nigerian government and six oil companies[53] over alleged violations of human rights associated with oil pollution in the Niger Delta. In the case, *SERAP vs. Nigeria*,[54] the complaint alleged "Violations of the right to an adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment, and to economic and social development – as a consequence of: the impact of oil related pollution and environmental damage on agriculture and fisheries."[55]

While the Court declined jurisdiction over the oil companies (on the ground that the six oil companies were not parties to the ECOWAS Treaty) the case proceeded against the government. On 17 December 2012, in its judgment, the Court unanimously found the Nigerian government responsible for the abuses by the oil companies and made clear that the government must hold the companies to account. The Court also found that Nigeria violated Article 24 of the African Charter (on the right to a general satisfactory environment) by failing to protect the Niger-Delta and its people from the operations of the oil companies that have for many years devastated the region.

The Court ruled that government's failure to enact effective laws and establish effective institutions to regulate the activities of the companies coupled with its failure to bring

[52] *Hadijatou Mani Koroua vs. Niger*.Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.
[53] The six multinationals sued are Chevron Oil Nig. Plc., Shell Petroleum Development Company (SPDC), Elf Petroleum Nigeria Ltd., Exxon Mobil Corporation, Agip Nig. Plc. and Total Nig. Plc.
[54] ECW/CCJ/APP/08/09.Retrieved on July 14, 2016 from http://www.reports-and-materials.org/Complaint-to-ECOWAS-Court-re-Nigeria-oil-pollution-25-Jul-2009.doc.www.courtecowas.org/.../SERAP_V_FEDERALREPUBLIC_OF_NIGERIA.pdf
[55] Ibid.

perpetrators to book amounts to a breach of Nigeria's international human rights obligations and commitments. The court emphasised that "the quality of life of people is determined by the quality of the environment. But the government has failed in its duty to maintain a general satisfactory environment conducive to the development of the Niger-Delta region."

The Court made several orders - firstly, that the government must take effective measures within the shortest time to address the issues of oil pollution and devastation in the Niger Delta. Secondly, that the government must take immediate steps to bring perpetrators of the violations in Niger Delta to account.Thirdly, that the government must take effective measures to prevent further occurrence of the violations of the rights.[56]

6.2.4 United Nations Environment Programme (UNEP)

UNEP was established in June 1972 as a result of the United Nations Convention on the Human Environment (UNCHE) as the agency of the UN responsible for coordinating the UN's environmental activities. It has its Secretariat in Nairobi and has six regional offices and various country offices and is headed by an Executive Director. Its mission is to "provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations." UNEP, in furtherance of its goal, works with UN entities, international organisations, national governments, NGOs, civil society and the private sector through a series of initiatives[57].

[56] Ibid.

[57] These include the Environmental Action Learning (EAL) programme (addressing the needs of youth and children in primary and secondary schools as well as first and middle level colleges and supporting the development of courses on environmental management for students at the university level); UNEP Finance Initiative (UNEP FI*)*, in which close to 300 banks and insurers from over 50 countries have signed up(a means of engaging financial institutions on environment and climate matters, in which signatories commit to integrate sustainable development considerations into all aspects of their operations and services); the UNEP Business & Industry Global Dialogue; and Major Groups and Stakeholders Branch (to work with civil society and align to the principles and approach of Agenda 21 regarding public participation). Retrieved on 3 March, 2014 from www.unepfi.org/about, www.unep.org/.../business/dialogue/.../UNEP_2011_BIGD_Final_Report.

The work of UNEP includes: assessing global, regional and national environmental conditions and trends; developing international and national environmental instruments; strengthening institutions for the wise management of the environment; facilitating the transfer of knowledge and technology for sustainable development; encouraging new partnerships and mind-sets within civil society and the private sector.[58] UNEP similarly hosts the Secretariats relating to several international environmental conventions.[59]

UNEP has been actively engaged in the promotion of environmental rights in several ways. It provides advisory services and technical assistance to developing countries and countries with economies in transition upon request to develop and/or strengthen environmental policy, legislation and institutional regimes.[60] It engages in capacity building in the form of national, or regional or global training and sensitization programmes for stakeholders of environmental law to strengthen the institutional framework for enhancing development, implementation of national as well as international environmental law.[61] These involve government officials, judges, magistrates, legal practitioners, parliaments, prosecutors, judicial training institutes, legal NGOs, and the academia.[62]

The promotion of environmental rights has also been achieved through the publication of guidelines, reports, atlases and newsletters. The Global Environmental Outlook (GEO) assessment, for instance, is a comprehensive report on environment, development and human

[58]Available at http://www.unep.org/environmentalgovernance/UNEPsWork/tabid/347/language/en-. (Last accessed 12 July 2016).

[59] These include the Secretariats for: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Convention on Biological Diversity, the Implementation of the Montreal Protocol on the Ozone Layer, the Stockholm Convention on Persistent Organic Pollutants, the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Retrieved on 3 March, 2016 from http://www.unep.org/Documents.Multilingual/default.asp?DocumentID=43&ArticleID=234&l=en

[60]Available at www.unep.org/environmentalgovernance/UNEPsWork/tabid/347/language/en. (Last accessed 3 March 2016).

[61] UNEP has organized training workshops and seminars for stakeholders in Nigeria and South Africa as well as a conference for University teachers in African universities. See *Teaching Environmental Law in African Universities Vol. 1*. (Proceedings of the Symposium of Environmental Law Lecturers held at Merica Hotel, Nakuru, Kenya on 29th September to 2nd October 2004).UNEP Nairobi, 2005.Available at http://www.unep.org/training/publications/... (Last accessed 3 March 2016).

[62]Available at http://www.unep.org/environmentalgovernance/UNEPsWork/tabid/347/language/en-US/... (Last accessed 5 March 2016).

well-being and it provides information and analysis for policy makers and the public. The 2012 UNEP publication of *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* provides a boost to procedural environmental rights.

More recently, United Nations Environment Programme (UNEP) and the Office of the High Commissioner for Human Rights (OHCHR) organized joint High-level Expert Meetings on Human Rights and the Environment. These meetings brought togetherrepresentatives of international governmental organisations, policy makers, and experts in human rights law and environmental law from around the world. They provided a forum to review recent developments concerning the relationship between human rights and environment, including the recent resolutions of the Human Rights Council on human rights and climate change, and to discuss ways and means to promote integrated strategies and policies for the protection of human rights and the environment.[63] They have also deepened the understanding of the direct and indirect links between the protection of the environment and the enjoyment of human rights, as well as on obligations and responsibilities of States and other actors under human rights treaties and multilateral environmental agreements. These Meetings resulted in UNEP and OHCHR issuing a comprehensive joint report in preparation for the 2012 United Nations Conference on Sustainable Development (Rio+20).

The collaboration between UNEP and the OHCHR also culminated in the Report of the United Nations High Commissioner for Human Rights on human rightsand the environment[64] presented to the Human Rights Council for adoption during its 19th Session. The Report develops a thorough analysis of the mutual impact between human rights and the environment

[63]Report of the UNEP – OHCHR joint experts meeting on Human Rights and the Environment (2002). Available athttp://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/.... (Last accessed 3 December 2015). See Report of the High-level Expert Meeting on 'The New Future of Human Rights and Environment: Moving the Global Agenda Forward' (30 November to 1 December 2009, Nairobi). http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx(Last accessed 3 December 2016).

[64] See A/HRC/19/34(Analytical Study on the Relationship between Human Rights and the Environment).

and highlights the tensions and cross-fertilization that occurred over the last three decades between international environmental and human rights laws. The analysis covers national constitutions, international jurisprudence and the work of United Nations human rights treaty bodies. Among the final recommendations of the Report was the establishment of a Special Procedure on Environment and Human Rights by the Human Rights Council. The Human Rights Council adopted the report on March 20, 2012 and passed a resolution establishing an Independent Expert on Human Rights and the Environment as an institutional vehicle to advance the linkages between Human Rights and the Environment.[65] The Independent Expert has a three-year term to study human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and to identify, promote and exchange views on best practices in that regard. This represents a major step in the promotion and protection of environmental rights.

In 2009 the UNEP, at the invitation of the Nigerian government and relevant stakeholders, carried out the first ever comprehensive environmental assessment study on oil pollution in Ogoniland. The invitation was based on UNEP's international reputation for assembling expert teams, coordinating demanding assessments and bringing scientific and empirical evidence to policymakers. UNEP held initial consultations with a wide range of stakeholders and the UN Country Team in Nigeria in order to consider the scope and feasibility of the assessment. In order to ensure the independence of the study and provide the logistics necessary, a framework for cooperation was negotiated in which all parties were involved and a recognized team of national and international experts then recruited for the two year assessment.

Over a 14-month period, the UNEP team examined more than 200 locations, surveyed 122 kilometres of pipeline rights of way, reviewed more than 5,000 medical records and

[65]Resolution 19/10. (A/HRC/RES/19/10). Mr John Knox has been appointed the Independent and has begun work on his mandate.

engaged over 23,000 people at local community meetings. Detailed soil contamination investigations were conducted at 69 sites. Altogether more than 4,000 samples were analyzed, including water taken from 142 groundwater monitoring wells drilled specifically for the study and soil extracted from 780 boreholes.[66]

The UNEP Report, presented to the President of Nigeria on 4 August 2011, found that, without exception, all the water bodies in Ogoni were polluted by the activities of oil companies. It stated that some of what the people took as potable water had carcinogens, such as benzene, up to 900 times above World Health Organisation standards. The report also revealed that in some places in Ogoniland, the soil is polluted with hydrocarbons to a depth of five (5) metres and in many cases the contamination had penetrated to the groundwater. In one place, EjamaEbubu, the study found heavy contamination from a spill that took place more than forty years ago "despite repeated clean up attempts".[67]

The report provided, for the first time, systematic and scientific evidence available in the public arena on the nature, extent and impacts of oil contamination in Ogoniland. It also provided the government, stakeholders and the international community with invaluable, baseline information on the scale of the challenge and priorities for action in terms of clean-up and remediation. According to the report, countering and cleaning up the pollution and catalysing a sustainable recovery of Ogoniland could take 25 to 30 years and will require the deployment of modern technology to clean up contaminated land and water, improved environmental monitoring and regulation, and collaborative action between the Nigerian government, the Ogoni people and the oil industry. The report suggests the creation of an Environmental Restoration Fund for Ogoniland, to be set up with an initial capital injection of

[66]United Nations Environment Programme, (2011).*Environmental Assessment of Ogoniland*.UNEP, Nairobi, Kenya.
[67] Ibid.

one billion US dollars contributed by the oil industry and the government, to cover the first five years of the clean-up project.[68]

The Report has put the spotlight on the environmental rights of the oil producing communities of Nigeria and, if implemented, would have a positive impact on the protection of their rights. It has also served as a rallying cry to civil society organizations involved in the promotion and protection of environmental rights and helped reinforce the evidence in on-going environmental litigations against oil producing companies in Nigeria.[69]

UNEP, through its work on the regulation of the use of cyanide in gold mining, an area of importance to the South African economy, has contributed to the protection of the environmental rights of workers in the mining industry and communities sited close to gold mines.[70] The mining industry has huge environmental impacts and an instance is the widespread use of cyanide, a toxic chemical, in the extraction of the precious metal from the ore. The solution containing cyanide is then discarded in large ponds or tailings dams. Public calls for prohibitions on the use of cyanide were unsuccessful since it is the only chemical capable of economically recovering gold from ore. In the year2000, an accident at a gold mine in Romania involving the release of large amounts of cyanide into the Tiza River, a tributary to the Danube River and resulting in a massive loss of fish, focused the world's attention on the risks of cyanide use in the gold-mining industry.

UNEP and the International Council on Metals and the Environment (the predecessor of the International Council on Metals and Mining), in the wake of this, convened a multi-

[68] Ibid.

[69] In August, the same month the UNEP Report was released, Shell accepted full responsibility for two massive oil spills that occurred in 2008 and that devastated Bodo in Ogoniland, where 69 000 people live. Before August, Shell had claimed that less than 40 000 barrels had been split although experts put the figure at about 500 000 barrels. Shell accepts liability for two oil spills in Nigeria. *The Guardian* August 3, 2011. Retrieved on February 21, 2016 from http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria.

[70]South Africa is a major producer of gold with gold accounting for about a third of its exports and the mining industry generally contributing about twenty per cent of the GDP. Retrieved May 3, 2016 from www.southafrica.info/.../mining.htm, www.projectsiq.co.za/mining-in-south-africa

stakeholder steering committee involving the gold mining industry, governments, non-governmental organizations, the workforce, cyanide producers and financial institutions. This initiative resulted in the drafting of the International Cyanide Management Code for the Manufacture, Transport and Use of Cyanide in the Production of Gold (the Code).[71]

6.3 Mechanisms for the Promotion and Protection of Environmental Rights in Nigeria

6.3.1 The National Human Rights Commission (Nigeria)

The National Human Rights Commission of Nigeria was established as an independent body by the Nigerian Human Rights Commission (NHRC) Act of 1995 as amended.[72] This was in line with the resolution of the United Nations General Assembly which enjoins all member states to establish national human rights institutions for the promotion and protection of human rights. The mandate of the Commission, which was expanded by virtue of the 2010 Amendment Act, extends *inter alia* to: dealing with all matters relating to the promotion and protection of human rights guaranteed under the Nigerian Constitution, UN Charter, the Universal Declaration of Human Rights, and all international and regional human rights instruments to which Nigeria is a party. The mandate includes monitoring and investigating all alleged cases of human rights violations in Nigeria and making appropriate recommendations to the Federal Government for the prosecution and such other appropriate actions.

Its mandate includes: assisting victims of human rights violations and seeking appropriate redress and remedies on their behalf; organising local and international seminars, workshops and conferences on human rights issues for public enlightenment; undertaking research and educational programmes and such other programmes for the promoting and protection of human rights. It includes receiving and investigating complaints concerning violations of human rights and making appropriate determination; referring any matter of human rights violation requiring prosecution to the Attorney-General of the Federation or a

[71]International Cyanide Management Code for the Gold Mining Industry.Retrieved on February 26, 2016 from http://www.cyanidecode.org/about-cyanide-code.
[72]Amended by the National Human Rights Commission (Amendment) Act, 2010.

State as the case may be. It may, with the leave of the court, intervene in any proceeding involving human rights violations.[73]

The Commission has powers to conduct investigations and enquiries and institute any civil action on any matter it deems fit in relation to the exercise of its functions. It has powers to determine the damages or compensation payable in relation to any violation of human rights where it deems this necessary in the circumstances of the case. It can also do other things as are necessary, conducive, incidental, or expedient to the discharge of its functions.[74]

The Commission has power to summon and interrogate any person, body or authority to appear before it for the purpose of public enquiry aimed at the resolution of a complaint of human rights violation. It shall issue warrant to compel the attendance of a person who refuses or neglects to attend such public enquiry and compel any person, body, or authority to furnish information in his or her custody relating to any matter under its investigation.[75] The Commission has express powers to enforce its decisions, thus decisions of the Commission's Governing Council can be registered as decisions of the High Court.[76]

The rights to be promoted and protected by the Commission include the environmental right provided for in the African Charter. Environment and the Niger - Delta is one of the fifteen (15) main thematic areas of focus identified by the NHRC Council.[77] The expanded mandate and powers of the Commission has made it a viable forum for obtaining redress by victims of environmental rights abuses perpetrated by corporations, especially the poor and vulnerable.[78] The Commission is an inexpensive forum and is now empowered not only to make in appropriate circumstances determination regarding damages payable for corporate human rights abuses, but also, to institute legal action against corporations for such abuses. In

[73]Section 5, NHRC (Amendment) Act.
[74]Section 6 (1), ibid.
[75]Section 6 (2), ibid.
[76]Available at www.nigeriarights.gov.ng. (Last accessed 13 August 2016).
[77] Ibid.
[78]International Commission of Jurists (2012).*Access to Justice: Human Rights Abuses Involving Corporations-Federal Republic of Nigeria.* International Commission of Jurists, Geneva, p. 43.

addition, the complaint procedure has been liberalised, as the Commission allows the following classes of person to bring a complaint before it. Any person acting on his or her own behalf; any person acting on behalf of another who cannot act in his or her own name; any person acting as a member of or in the interest of a group or a class of persons; and an association acting in the interest of its members.[79]

The NHRC has, to date, not utilised its considerable powers in protecting the right to environment. Instead it has limited its role to that of promotion. This is connected to the failure of the Nigerian Constitution to provide for a direct environmental right. Some promotional activities of the Commission on the right to a healthy environment include press statements, meetings with oil-pollution impacted communities and provision of legal advice. The NHRC recently acknowledged the link between the environment and the right to life and said that the non-implementation of the UNEP report on the degradation of the Ogoni environment infringes on the Ogoni peoples' right of existence. The NHRC Chairman, Prof. ChidiOdinkalu, at a town hall meeting on the UNEP Report stated that the damage caused by the devastation of the environment due to oil activities is tantamount to sentencing the people to death and urged the Ogoni to approach the NHRC as part of measures to obtaining redress.[80]

The major challenge hampering the effectiveness of the NHRC as a viable non-judicial institution is underfunding by the State.[81] Inadequate funding affects its ability to procure adequate manpower and equipment necessary for the effective discharge of its mandates. The effect of this is that the NHRC is restricted to maintaining offices at the Federal Capital

[79] Ibid.

[80] Iruoma, B. (2012). Soyinka, Odinkalu Task FG on Implementation of UNEP Report. *Scan News,* July 1.

[81] The paucity of funds, according to the Chairman of the Commission, has reached the level where workers lack basic tools to work, such as operational vehicles and writing materials. Partnership for Justice (2012).Odinkalu Raises Alarm over Poor Funding of NHRC, retrieved on February 22, 2016 from www.pjnigeria.org/odinkalu_raises_alarm_over_poor_funding_of_NHRC.Ajoni, K.F. (2007). My Experience in Driving the Mandate of the National Human Rights Commission of Nigeria and the Challenges of NHRI's In The African Sub Region. Paper presented at the Conference for Commonwealth National Human Rights Institutions, Marlborough House, London, 26-28 February 2007, at pp. 7-8. See also International Commission of Jurists (2012).*Access to Justice: Human Rights Abuses Involving Corporations- Federal Republic of Nigeria,* International Commission of Jurists, Geneva, p. 43.

Territory (FCT) and state capitals with virtually no presence at the local government level where it is especially needed. At present, the NHRC maintains only six (6) zonal offices in the six geo-political zones of the country.[82] The virtual absence of the NHRC at the local government level in turn adversely affects its accessibility for victims of abuses, especially those residents in the rural areas.[83]

Another challenge is the ignorance or low awareness of the citizens of their rights, as well as the existence and activities of the NHRC.[84] In a situation where majority of citizens are not aware of their rights, it would be hard to find victims of environmental rights abuses bringing complaints to the NHRC. The NHRC, in a bid to address this challenge, has recently begun holding Village Square meetings across the country to discuss its mandate and other issues of relevance.[85] Another challenge facing the NHRC is that of securing the good-will of the office of the Attorney-General to co-operate with the Commission in the prosecution of corporations involved in human rights abuses.

6.3.2 The Federal Ministry of Environment

The Federal Ministry of Environment was created in 1999 as the Ministry of Environment and Housing to ensure effective coordination of all environmental matters. In 2008 it was established as an independent and separate ministry. The mandate of the Federal Ministry of Environment includes: the preparation of a National Policy on the Environment; the preparation of Environmental Impact Assessment Procedure for all development projects and cooperation with government bodies at all levels on matters and facilities relating to the protection of the environment and conservation of natural resources. It includes advising the federal government on environmental matters; promoting cooperation in environmental matters with similar bodies in other countries and with international environmental bodies; prescribing

[82] The zonal offices are in Kano, Maiduguri, Jos, Lagos, Enugu and Port Harcourt. Available at www.nigeriarights.gov.ng/the-commission.(Last accessed 22 February 2016).
[83]Okafor, O.C. and Agbakwa, S.C. (2002).On Legalism, Popular Agency and "Voices ofSuffering": The Nigerian National Human Rights Commission in Context.*Human Rights Quarterly*, 24 (3): 662 at 714.
[84]Ajoni, K.F., op cit.
[85]Available atwww.nigeriarights.gov.ng/the-commission.(Last accessed 22 February 2016).

environmental standards and regulations; and monitoring and enforcing environmental protection measures.[86]

Some initiatives under implementation by the Federal Ministry of Environment include:

- Control of deforestation and forestry development through the establishment of shelterbelts and woodlots and provision of seedlings and boreholes to several frontline arid zone states under the Government Millennium Development Goals initiative.
- Control of desertification through the Great Green Wall Nigeria Programme aimed at halting the southward movement of the Sahara desert and restoring the integrity and productivity of the environment.
- Pollution and Waste Management programme through the pilot projects in several cities on: integrated waste management facilities consisting of material recovery facility centre, composting plant, incinerator, plastic recycling plant, and landfill being executed using the Public-Private Partnership framework.
- Physical erosion and flood control projects under execution in several parts of the country with part funding from the Ecological Funds Office.
- Coastal and marine environmental protection and biodiversity conservation through the Guinea Current Large Marine Ecosystem (GCLME) project funded by the Global Environment Facility (GEF). The project is aimed at reducing land and sea based pollution, restoration of biodiversity and recovery of the depleted fisheries resources.
- Establishment of a Special Climate Change Unit to coordinate all climate change implementation activities in the country including the Clean Development Mechanism projects under the Kyoto Protocol.[87]

[86]Available at www.nigeria.gov.ng/2012-10-29-11-06.(Last accessed 22 February 2016).
[87]Ukwe, C. (2009). Democracy has Helped Sustainable Environmental Management in Nigeria.*The Guardian*, 2 June. Available at

- Establishment (in conjunction with the Federal Ministry of Health) of the national health waste management programme.[88]
- Establishment of Flood Early Warning Systems (FEWS) including three hundred and seven (307) Web-based FEWS nationwide; fifteen (15) Community-based Flood FEWS in some flood prone states; and the installation of four (4) stand-alone automated FEWS facilities along some rivers.[89]

More recently the Federal Ministry of Environment carried out a clean-up and environmental remediation of lead contaminated sites in several villages in Zamfara state.[90] The response to the lead poisoning crisis involved three ministries, namely: the Ministry of Health (to treat the victims of lead poisoning), the Ministry of Mines and Steel Development (to support a safer mining programme) and the Ministry of Environment (to carry out environmental remediation). This illustrates the various approaches needed in the wake of an environmental crisis and the importance of collaborative efforts between government bodies and other stakeholders.[91] The delay in the release of funds needed for the remediation of Bagega, the last village to be cleaned up, illustrates the challenges of lack of funding in the execution of environmental projects and suggests that a lot still needs to be done in terms of timely implementation of programmes and cutting out excessive bureaucracy.

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http://www.ngrguardiannews.com/policy_politics/article04//indexn3_html?pdate=020609&ptitle='Democracy %20has%20helped%20sustainable%20environmental%20management %20in%20Nigeria'&cpdate=020609. (Last accessed 22 February 2016).

[88] Environment Ministry Led with Relevant Policies, says Mailafia. *The Nigerian Telegraph*, 11 September 2013.

[89] National Orientation Agency (2013).A Summary of the Achievements of the Ministry of Environment.Available at www.noanaija.blogspot.com/.../a-summary-of-achievements-of-ministry_14.html.(Last accessed 22 February 2016).

[90] Nnodim, O. (2013). Federal Government Completes Environmental Remediation in Zamfara.*The Punch*, 29 July. Karunakara, U. (2012). Lead Poisoning and Remediation in Zamfara.*The Punch*, 25 December.

[91] The collaborative efforts, apart from the aforementioned ministries, also involved Medecins Sans Frontieres (Doctors without Borders), an international charity and Terra Graphics International Foundation, an internationally recognized expert in environmental remediation. See Karunakara, U. (2012). Lead Poisoning and Remediation in Zamfara.*The Punch*, 25 December.

The Federal Ministry of Environment faces major challenges of lack of capacity;[92] lack of accurate and adequate information and data needed for environmental planning and enforcement.[93] Among other challenges are: corruption;[94] and looting of allocated funds.[95]

6.3.3 National Environmental Standards and Regulations Enforcement Agency (NESREA or 'the Agency')

The federal government, on July 20, 2007 and in line with the section 20 environmental directive principle in the 1999 Nigerian Constitution (as amended), established NESREA as the major federal body responsible for environmental protection in Nigeria. NESREA, which is headquartered in the Federal Capital Territory, Abuja and with 17 State offices and six zonal offices in each geopolitical zone of the country,[96] is charged with the responsibility of enforcing all environmental laws, guidelines, policies, standards and regulations in Nigeria.[97] It also has the responsibility to enforce compliance with provisions of international agreements, protocols, conventions and treaties on the environment.[98]

A necessary element for the protection of environmental rights in a country is the development and implementation of environmental law and policy. The NESREA Act empowers the Agency to make guidelines, regulations and standards for the protection of the environment.[99] NESREA in its seven years of existence has performed commendably in this

[92] See FG Tasks Environmental Health Officers on Diligence, *Thisday*, 2 October 2012 (where the then Minister of Environment acknowledges this challenge).
[93] FG Wants Accurate Data, Information to Tackle Environmental Challenges- Minister, *Osun Defender*, 26 November 2012; Itodo, N. (2013). Nigeria to Improve Environmental Statistics.*Voice of Nigeria*, 3 August 2013. Retrieved on 15 February, 2016 from www.voiceofnigeria.org/Nigeria/.
[94]Abutu, A. (2014).Accountability a Serious Challenge in the Environmental Sector.*Daily Trust*, 1 January.
[95] ICPC recovers N1bn looted from Ministry of Environment, Federal Pay Office. *Premium Times*. September 16, 2015. Retrieved on 26 May 2016 from http://www.premiumtimesng.com/news/headlines/190170-icpc-recovers-n1bn-looted-from-ministry-of-environment-federal-pay-office.html.
[96]Structure of NESREA.Available atwww.nesrea.gov.ng.(Last accessed 15 February 2016).
[97] Section 7 (a), NESREA Act,
[98]Section 7 (c), ibid.
[99] Sections 20, 23, 25 and 8(k) of the NESREA Act, for example, empower the Agency to make regulations in the areas of air quality and atmosphere protection, water quality standards, and environmental sanitation.

area having collaborated with the Federal Ministry of Environment to make over 24 environmental regulations with more regulations in the pipeline.[100]

As part of its mandate NESREA is involved in environmental education and awareness.[101] Environmental awareness is a necessary ingredient for the realization of environmental rights since people cannot enforce rights they are ignorant of. Ignorance by the vast majority as to the rights they possess is a fact that a major barrier to the fulfilment and enjoyment of human rights in Africa generally. NESREA, as part of its environmental education and awareness, should educate the public on the existence of an environmental right as part of the corpus of human rights in Nigerian law. With the linking of the environmental right to other human rights and to the protection of the environment, citizens would no longer view environmental concepts as abstract and alien but as issues relevant to their existence and well-being. The result would be an attitudinal and a behavioural change in the way the environment is treated as well as a rise in environmental activism.

In carrying out its functions, the Agency is to coordinate and liaise with stakeholders within and out Nigeria, on matters of environmental standards, regulations and enforcement.[102] These include the organized private sector, environmental groups at both national and international levels, and government ministries, departments and agencies. For example in proposing a new regulation, the Agency would of necessity have to consider the potential impact of such legislation on businesses; welcome submissions from other stake-holders on the proposed regulation, and take the views and concerns of the affected stakeholders into

[100]Laws and Regulations. Available at http://www.nesrea.gov.ng/regulations/.... (Last accessed 2 May 2016).
[101] As part of creating awareness on topical environmental issues, NESREA produces the 'NESREA WATCH' - a weekly environmental education and awareness programme on Radio in 16 States and the FCT. The weekly radio programme is produced in English, Pidgin English, Igbo, Hausa and Yoruba and aired in the language most appropriate to each of the States, so as to get the message to the community and grass root levels.
[102] Section 7 (b), NESREA Act.

consideration. This is necessary since NESREA cannot deal with all the issues itself but in cooperation and coordination with other stakeholders.[103]

In line with this, the Agency organizes an Annual National Stakeholders' Forum which is a channel for special interest groups to participate in environmental issues. The Forum, which is geared towards increasing public participation in environmental governance, is open to all major stakeholders and sector players at national, state, local government and grass root levels.

The collaboration between the NESREA, the Consumer Protection Council (CPC), the Standard Organisation of Nigeria (SON) and the largest association of electronics traders in Nigeria offers an example of how the Agency can integrate its environmental objectives with the objectives of other institutions to create synergy and achieve stated objectives. The collaboration arose from the concern over cases of sub-standard quality, counterfeiting and the dumping of near-end-of-life and end-of-life electrical and electronic appliances in Alaba International Market in Lagos.[104]

As part of its efforts to educate the marketers, NESREA organized a sensitization workshop on the negative environmental impact and the associated health problems of e-waste.[105] In an effort to address these problems, the three Government Agencies: NESREA, CPC and SON on Thursday 30th July, 2009 signed a Memorandum of Understanding (MOU) with Alaba International Market Amalgamated Traders Association (AIMATA) to check these vices.[106] Under the MOU, all the parties are to work together to discourage the sale of fake and sub-standard electrical and electronic products and to dispose unserviceable electrical and

[103] Partners for Water and Sanitation and the Environment Agency for England and Wales (2008) Report by PfWS/EA on NESREA Institutional Appraisal and Strategic Planning Support, p. 7. Available at www.wedc.lboro.ac.uk/.../NIG04d_NESREA_workshop_report_Apr10_annex. (Last accessed 5 February 2015).
[104] "NESREA, CPC, SON Partner Alaba Traders on Sub-standard Goods" Retrieved on 10 February, 2015 from www.nesrea.gov.ng.
[105] Ibid.
[106] Ibid.

electronic products in an environmentally sustainable way. Collaboration with other government agencies also helps the Agency avoid the pitfalls that befell the defunct Federal Environmental Protection Agency (FEPA).[107] Such initiatives also promote voluntary compliance and build partnerships between regulators and regulated.

The collaborative efforts by the Agency have reduced the frequency of inter-agency conflicts but have not totally eliminated them. The recent conflicts between the Agency and the Nigerian Communications Commission (NCC) on the erection of base transceiver stations[108] (which necessitated the intervention of the Federal Government) and recent conflicts between the Agency and the Abuja Environmental Protection Board[109] suggests that there is a dire need for a more integrated system of environmental governance as well as an effective institutional coordination of environmental management activities in the country. This is necessary in order to address the issue of over-lapping roles of enforcement agencies which leads to duplication and creates hardship for the regulated.[110] NESREA needs to develop a clear strategy on how it will work with other Ministries, Departments and Agencies at federal, state and local government levels because successful fulfilment of its environmental protection mandate can only be achieved and effected through partnership with different organizations whose activities influence environmental enforcement.

Other achievements of NESREA include the establishment (together with other West African countries) of the toxic waste dump watch. This is a mechanism to monitor the

[107] Adegoroye, A. (1994) The Challenges of Environmental Enforcement in Africa: The Nigerian Experience, Third International Conference on Environmental Enforcement. Retrieved on 21 February, 2015 from http://www.inece.org/3rdvol1/pdf/adegoro.pdf.

[108] The point of disagreement was over the ideal setback for the erection of telecoms masts. While NCC was of the opinion that it be five metres from the closest building, NESREA insisted on 10 metres. The conflict degenerated to the extent that NESREA was sealing off masts which didn't meet its 10 metre set back requirement, while NCC was unsealing them. See Atili, A. (2012). The Battle over Telecom Masts, *The Nation*, June 7.

[109] Anonymous (2012). NESREA Shuts Down Construction Firm's Headquarters in Abuja, *The Punch*, June 27.

[110] See Alli, F. (2011) Manufacturers Fault NESREA, LASEPA Double Inspection, *The Vanguard*, May 12.

movement and influx of hazardous chemicals and wastes at the coast[111] and it has resulted in the successful detection and turning back of five ships carrying toxic electronic waste with the intention of berthing and dumping their cargo in Nigeria.[112] Other achievements are the successful prosecutions of Chinese nationals and a Malian for trafficking in ivory[113] and organization of a workshop for judges and law enforcement officers on the enforcement of environmental laws, regulations, and conventions. The workshop was done in collaboration with the National Judicial Institute, the United Kingdom Environmental Agency, the United States Environmental Protection Agency, and the Partners for Water and Sanitation.[114]

The prosecution of offenders constitutes a major challenge to the Agency and necessitates the employment of an adequate number of legal practitioners who possess requisite knowledge of the environment and environmental law. The creation by the NESREA (Establishment) Act of a Legal Services department to be headed by a director is commendable and ought to stimulate prosecution of environmental offenders by the Agency. However, the requirement of the consent of the Attorney General of the Federation before the institution of criminal prosecutions by the NESREA[115] further weakens the powers of the Agency to conduct prosecutions as it could result in delaying prosecutions as well as open up the Agency to political interference.

NESREA possesses broad enforcement powers for the purpose of enforcing the NESREA Act and Regulations. Thus an officer of the Agency may enter and search with a court warrant any premises which he reasonably believes carries out activities or stores goods which contravene environmental standards or legislations for the purpose of conducting

[111]Benebo, N. (2011). Using Enforcement Cooperation to Promote Environmental Governance: The Case of the National Environmental Standards and Regulations Enforcement Agency of Nigeria, A Paper Presented at the Ninth International Conference on Environmental Compliance and Enforcement. Retrieved on 10 February, 2015 from inece.org/conference/9/proceedings/60_Benebo.pdf.
[112] Anonymous (2011) NESREA Set to Certify Telecoms Companies, *Daily Trust*, May 26.
[113]Anonymous (2013) Court Jails Chinese, Malian for Trafficking in Ivory, *Thisday*, July 11.
[114]Partners for Water and Sanitation and the Environment Agency for England and Wales, op cit.
[115] NESREA Act, Section 32(3).

inspection, searching and taking samples for analysis.[116] The power to enter and search premises excludes oil and gas facilities.

To constitute a lawful search, the search has to be carried out with a search warrant issued by the federal or state high court. This is in contrast to section 26 of the repealed FEPA Act and section 10 of the Harmful Wastes (Special Criminal Provisions) Act where environmental protection agencies were empowered to search, detain and confiscate items recovered from environmental polluters without a search warrant. The new requirement of a search warrant by the court is in recognition of the right to privacy guaranteed under the Nigerian Constitution[117] and involves the recognition of the citizens' right to be secured in their persons, houses, and effects against unreasonable and unlawful searches and seizures. Thus, the right of the NESREA and other environmental protection bodies to search and seize environmental substances considered harmful is not absolute. It must be based on a reasonable belief that the premises are used for activities or storage of goods which contravene environmental standards or legislation. The right to privacy can be constrained by legislation that is reasonably justifiable in a democratic society in the interest of the public. The requirement of a search warrant also brings the NESREA Act in conformity with the Criminal Procedure Code and the Criminal Procedure Act where a search warrant is required for a search to be lawful.[118]

Officers of NESREA have additional powers to examine articles, take samples of articles, open and examine containers or packages, and examine and make copies of documents found in the course of the search, which he reasonable believes may contain any information relevant to the enforcement of the Act or the regulations. They may also seize and detain

[116] Section 30 (1)(a), NESREA Act.
[117] Section 37, Constitution of the Federal Republic of Nigeria 1999 (as amended).
[118] Section 74 of the Criminal Procedure Code and Section 107 of the Criminal Procedure Act.

articles by means or in relation to which the provision of the Act or regulation has been contravened and issue a written receipt for the thing seized.[119]

Officers of the Agency may obtain a court order to suspend activities, seal and close down premises.[120] Thus, the enforcement powers conferred upon the NESREA are far reaching, extending to the closure of the premises used in contravention of the law. The requirement of a court order would guard against arbitrary exercise of its powers by the Agency.

NESREA's mandate is a weighty and broad one which if properly executed would undoubtedly contribute immensely to the promotion and protection of environmental rights in Nigeria. The Agency, however, faces constraints in the execution of its mandate. These include: lack of baseline information and data; inadequate human and institutional capacity; inadequate public awareness and education on environmental standards and regulations; poor information exchange and feedback mechanisms between the Agency and the regulated communities; and inadequate budgetary provision.[121] For instance as part of its air monitoring program the Agency has only two Mobile Air Quality Monitoring Stations; one each in the Federal Capital Territory (FCT) and Port Harcourt, Rivers State. These equipment, which are required to monitor and evaluate any environmental hot spot that requires urgent attention, ought also to be installed in all major industrial centres like Kano, Ogun and Lagos; cement producing areas like Obajana, Ashaka, Ewekoro and in areas experiencing gas flaring. The poor funding of NESREA is further illustrated by the fact that NESREA has to look to the state governments for furnished office accommodation and some logistics like vehicles, computers and internet connectivity for its state and zonal offices.[122]

[119] Section 30(1)(b, c, d, e, f), NESREA Act.
[120] Section 30 (1)(g), ibid.
[121] NESREA Information File.Available at www.nesrea.gov.ng. (Last accessed 23 August 2015)
[122] Ibid.

Access to environmental enforcement data is another area where the NESREA is lacking. Online research conducted on the NESREA website revealed that the website is very inefficient and yields sparse information on the programmes of the Agency and environmental law documents. While it lists the major environmental laws and regulations in Nigeria, it is not possible to access any of these laws through the website. Reports of the Agency are unavailable online and can only be obtained by a visit to the Headquarters in Abuja with the request passing through several bureaucratic channels. These reports do not contain the income and expenditure of the Agency.

Enforcement agencies in Nigeria generally lack the mechanism for monitoring and evaluating the impacts of industrial pollution with a view to controlling them. The separation of environmental policy and laws from the development programs and policies of the state are a major problem in the implementation strategy or techniques of NESREA. Other problems such as inadequate penalties for violation, the non-involvement of citizens in the formulation and execution of the laws, and the lack of political will are all obstacles to the proper execution of environmental laws.

6.3.4 State Environmental Protection Agencies

Nigeria's status as a federation is reflected in the existence of environmental enforcement bodies at both federal and state levels. In addition to the national enforcement body, NESREA, all the states of the federation have autonomous State Environmental Protection Agencies (SEPAS). These bodies were established pursuant to section 25 of the FEPA Act which mandates states to establish their own environmental protection agencies for the purpose of maintaining good environmental quality in the areas of relevant pollutants under their control.

The SEPAS at inception were given responsibility over the following:

1. The monitoring and enforcement of environmental quality standards and regulations as may be designated by the Federal Environmental Agency.
2. The regular assessment of environmental conditions and trends in rural areas and identification of programs and actions needed to reduce or avoid further environmental degradation and pollution.
3. The application of the national environmental assessment guidelines and procedures for all development policies and projects likely to have adverse environmental impacts within the state.
4. The development of a state environmental management plan with priorities for action to reverse environmental degradation, protect human health and the environment and accelerate progress towards environmental improvement and sustainable development.
5. The development of contingency plans and capabilities to respond quickly and effectively to environmental emergencies such as natural disasters or major industrial accidents.
6. The collection, analysis and distribution of data of relevance to environmental impact assessments, policy analysis and environmental monitoring within the state and local governments and the preparation of periodic reports on the environment in the state or communities for submission to the National Council on the Environment.[123]

The Government mandated the state environmental protection agencies to implement the National Policy on the Environment andenforce environmental standards and regulations within their area of jurisdiction. SEPAs are responsible also for the enforcement of state environmental protection laws and are to identify and prioritise environmental problems in their respective and formulate projects necessary to mitigate the identified problems. The FEPA and SEPAS formerly worked together to monitor and control industrial pollution. The

[123]National Implementation of Agenda 21, Information provided by the Government of Nigeria to the UN Commission on Sustainable Development 7-25 April, 1997, New York.

SEPAS were statutorily directly responsible for industrial pollution monitoring and control in their respective states, while FEPA provided institutional support and a regulatory framework for pollution control. The support provided by FEPA included the development of standards and guidelines for pollution control in Nigeria; and training programs for state environmental regulators and officers in charge of environmental issues.

The SEPAs have an important role to play in the promotion and protection of environmental rights since they are closer to the people and based on the growing decentralization of regulatory powers from central to state and local government levels.[124] For environmental governance to be closer to local communities there is a need for decentralization of environmental governance. Devolution of powers in environmental governance is a major way to achieve broad based public participation at the grassroots level and reduce risks about the quality of the environment. The key role of the SEPAs in protecting environmental rights in Nigeria is further buttressed by the fact that most environmental infrastructure and services are provided through the state governments.

SEPAs are normally conferred with broad powers to enforce environmental laws and standards. These include the power to demand from organisations to produce permits, licence, certificate or any other document required under the law; examine any appliance or device used in relation to environmental protection; give instructions and orders to owners and/or occupiers of premises; enter, search and inspect premises; perform tests and take samples of substances found in any premises searched.[125] They may also arrest offenders for contravention of the provisions of the relevant laws. SEPAs may also be empowered by their enabling law to establish mobile courts for speedy prosecution of environmental offenders. In Abuja, for instance, the Abuja Environmental Protection Board (AEPB) runs mobile courts set up to give

[124] This is further illustrated by the preferred attention and funding accorded grassroots projects by the European Union and the UNDP. See Partners for Water and Sanitation (2008) op cit.
[125] Lagos State Environmental Protection Agency Law Cap L23, Laws of Lagos State of Nigeria, 2003

on the spot fines to environmental offenders. It has been estimated that AEPB prosecutes over 50 offences each day through the mobile courts.[126]

At present every state in Nigeria has enacted an environmental protection law and created an environmental agency to enforce its environmental laws and/or laws on waste management. In Kano State (located in the North-west of Nigeria), for example, the Kano State Environmental Planning and Protection Agency (KASEPPA) is the government agency responsible for issues concerning the environment in the state. Its functions include planning urban centres, control of development in urban centres, provision of amenities, conveniences and infrastructures and other functions necessary for healthy and orderly urban growth. KASEPPA is responsible for ensuring that public land is not illegally allocated to individuals, and it destroys illegally constructed buildings. The agency supports entrepreneurs who wish to construct and operate public toilets. KASEPPA allocates the site on which the toilets are to be built, provides building plans and supervises construction. The agency also provides and reinforces hygiene guidelines.[127] The agency has fixed standards for building designs and site selection. The objective is to safeguard ground water from pollution and ensure a healthy environment. The agency assists in ensuring that urban waste from these toilets and other sources is put to good use by farmers, particularly in the vicinity of Kano city. In fulfilment of its mandate, the agency solicits the assistance of traditional rulers in the state for assistance in achieving its goal. This approach is one that acknowledges the role that traditional and religious institutions and knowledge-based systems can play in achieving environmental outcomes and is particularly helpful in northern Nigeria where majority of citizens are religious and revere traditional rulers. However, KASEPPA seems to play a minimal role in

[126]Partners for Water and Sanitation (2008) op cit..
[127]Medupin, C. and Lasisi, A. (2012).*Course Module for Environmental Protection Agencies: Case Studies*. National Open University of Nigeria, Lagos. Retrieved on March 31, 2015 from http://www.nou.edu.ng/NOUN_OCL/pdf/edited_pdf3/ESM%20405%20EPA.pdf

industrial pollution control and focuses more on demolition of illegal structures and sanitation, from which it generates revenue through its mobile/ sanitation courts.

Similarly, the Lagos State Environmental Protection Agency (LASEPA) was established by Edict No. 9 of 1996[128] and has the mandate to monitor and control disposal of solids, gaseous and liquid wastes; monitor and control all forms of environmental degradation from agricultural, industrial and government operations; carry out tests on insecticides, herbicides and other agricultural chemicals; set, monitor and enforce standards and guidelines on vehicular emission; survey and monitor surface, underground and potable water, air, land and soil environments.[129] LASEPA is also empowered to make regulations and standards on pollution control of water, air, noise and land; effluent treatment; erosion control; nature conservation; and waste management.[130]

The status of Lagos State as the industrial and commercial nerve centre of Nigeria and hosting up to 50 per cent of the nation's industries has also made it one of the most polluted states in Nigeria.[131] LASEPA is naturally expected to play a major role in the promotion and protection of environmental rights. This it does by its enforcement measures especially as it relates to compliance monitoring of industrial facilities. LASEPA is headed by a General Manager and has eight departments. These include Pollution Control, Enforcement, Ecology and Conservation, Research and Development, Sanitation, Laboratory, and Finance and Administration) and Accounts, Audit, Legal, and Engineering Units.[132]

When an industry violates environmental laws or standards, the first step of LASEPA is to serve it with an abatement of nuisance notice stating the sections of the law that were contravened; with a timeframe given within which the anomaly must be corrected and

[128] Lagos State Environmental Protection Agency Law Cap L23, Laws of Lagos State of Nigeria, 2003
[129] Ibid, section 7.
[130] Ibid.
[131] Nigeria Common Country Assessment, March 2001. Retrieved on 15 January, 2016 from http://www.ng.undp.org/documents/CCA_2001.pdf
[132] Source: Oral Interview with Mr.Olukoya, Director of Research and Development, LASEPA on May 24, 2012.

specified actions carried out. Facilities whose effluent discharges exceed the LASEPA Guidelines (which are stricter than the Federal Guidelines and Standards) are required to install an appropriate effluent treatment plant to bring their waste in conformity with the LASEPA Guidelines. The timeframe given varies depending on how dangerous or hazardous the activity is. Where a facility fails to abide with the instructions, a pre-sanction notice is issued. Where non-compliance persists, the facility is sanctioned and this is usually in the form of sealing up of the facility.[133]

The enforcement unit of LASEPA works in conjunction with the State Task Force on the Environment which provides armed personnel. LASEPA also carries out regular public awareness campaigns on environmental protection and educates the publicon businesses opportunities in waste management, such as the waste to wealth programme.[134]In addition to encouraging public participation in the EIA process, LASEPA provides opportunities for the public to report incidents of pollution in their vicinity and it has provided a link on its website where such reports can be lodged for appropriate investigation and action.

Notwithstanding their achievements, SEPAs also face a myriad of challenges. These include lack of baseline information and data; inadequate human and institutional capacity; inadequate public awareness and education on environmental standards and regulations and poor information exchange and feedback mechanisms between the Agency and the regulated communities. Other challenges are inadequate funding; lack of operational facilities; high cost of environmental monitoring equipment (which are mostly imported); and conflicts and overlap with the federal environmental agencies.[135] In many cases environmental laws are

[133] Source: Oral Interview with Mr.Olukoya, Director of Research and Development, LASEPA on May 24, 2012.

[134] Ibid. for other achievements of LASEPA in the area of enforcement, seeLASEPA website. Available at http://www.lasepa.gov.ng/;http://moelagos.gov.ng/agencies/lagos-state-environmental-protection-agency-lasepa/. (Last accessed 21 August 2016)

[135] See Environmental Protection Laws and Sustainable Development in the Niger Delta. Retrieved on 25 October, 2015 from http://www.africanajournal.org/PDF/vol4no1/vol4no1_2_Ibaba%20S.%20Ibaba.pdf.Ebeku, K. (2005). *Oil and the Niger Delta People in International Law, Resource Rights, Environmental and Equity Issues.*Oil Gas and Energy Law Intelligence.

largely unenforced or oftentimes enforced only with a revenue collection motive without the required interest in protecting the environment.

6.3.5 The Nigerian Judiciary

Under the Nigerian constitution, the courts exercise judicial powers and play an important role in the enforcement of human rights.[136] The courts provide access to justice and effective legal remedies, which are crucial elements in the protection of environmental rights. Inasmuch as it is settled law that the directive principles can be made justiciable by implementing legislation, the courts can be called upon to give effect to the environmental laws enacted pursuant to the environmental principle in the Nigerian Constitution. The courts may also be called upon to enforce other fundamental rights provided for in Chapter Four of the Nigerian Constitution that are being threatened by environmental degradation. The environmental right in the African Charter and provisions contained in environmental laws may also give rise to litigation.

There is a paucity of case law on the environmental right in Nigeria due largely to the non-inclusion of an environmental right in Chapter IV of the Nigerian Constitution. The Nigerian courts have in a single case, *Jonah Gbemre vs. Shell Petroleum Development Company and two others*,[137] interpreted the fundamental rights to life and dignity to include environmental protection. The applicants, members and residents of Iwherekan community in Delta state[138], applied to the court for the enforcement of their fundamental rights to life and dignity of the person as provided for in the Nigerian Constitution and the African Charter on Human and Peoples' Rights[139]. The applicants contended that these rights together with their rights to health and environment were being violated by the gas flaring activities of the first

[136]Constitution of the Federal Republic of Nigeria 1999 (as amended).Sections 6 and 46.
[137](2005) AHRLR 151 (NgHC 2005).(Hereinafter known as the Jonah Gbemre Case).
[138] Delta state is a major oil producing state in the Niger Delta region of Nigeria.
[139] Ratified and subsequently domesticated as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Vol. 1, Laws of the Federation of Nigeria, 2004.

and second respondents in the applicants' community. The applicants cited the following *inter alia* as harmful effects of gas flaring: it poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main greenhouse gas; the flares contain a cocktail of toxins that affect their health, lives and livelihood; it exposes them to an increased risk of premature death, respiratory illness, asthma and cancer; it contributes to climate change (by its emission of carbon dioxide and methane) and pollutes their food and water; it causes painful breathing, chronic bronchitis, decreased lung function and death; it reduces crop production and adversely impacts on their food security; its emissions of sulphur dioxides and nitrogen oxides combine with atmospheric moisture to cause acid rain thereby resulting in the corrosion of their corrugated house roofs.

The court, after considering the evidence from both sides, granted the following reliefs:

1. A declaration that the constitutionally guaranteed rights to life and dignity of human person provided in sections 33(1) and 34(1) of the *Constitution of the Federal Republic of Nigeria, 1999* and reinforced by Articles 4, 16 and 24 of the *African Charter on Human and Peoples Rights (Ratification and Enforcement) Act*,[140] inevitably includes the right to clean, poison-free, pollution-free and healthy environment.

2. A declaration that the actions of the first and second respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of the applicant's fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the *Constitution of the Federal Republic of Nigeria, 1999* and reinforced by Articles 4, 16 and 24 of the *African Charter on Human and Peoples Rights (Ratification and Enforcement) Act*.

3. A declaration that the failure of the first and second respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their

[140]Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004.

gas flaring activities is a violation of section 2(2) of the *Environmental Impact Assessment Act*[141], and contributed to the violation of the applicant's fundamental rights to life and dignity of human person.

4. A declaration that the provisions of section 3(2) (a) (b) of the Associated Gas Re-Injection Act[142], and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[143] under which continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the *Constitution of the Federal Republic of Nigeria, 1999* and Articles 4, 16 and 24 of the *African Charter on Human and Peoples Rights (Ratification and Enforcement) Act*, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

5. An order restraining the first and second respondents by themselves, their servants or workers or otherwise from further flaring of gas in the applicant's community.

The case is a landmark case that highlights the link between the environment and other fundamental human rights like the right to life, similar to the practice of the Indian courts[144] of deriving environmental protection from constitutional guaranteed rights. Bold and innovative judges who can interpret the law progressively are a boon most especially in jurisdictions that fail to provide for justiciable environmental rights and where for many the right to environment is a grave matter that has implications for the enjoyment of other rights, including the very right to life. The decision reinforces the relationship between the environment and human rights and the horizontal application of the right especially where the state is unable or unwilling to protect the right.

Although the environmental right provided for in Article 24 of the African Charter was cited in the *Jonah Gbemre case*, it did not form the major plank of the legal authorities forming

[141]Cap. E12, Vol. 6, Laws of the Federation of Nigeria, 2004.
[142]Cap. A25, Vol. 1, Laws of the Federation of Nigeria, 2004
[143]S.1.43 of 1984
[144] See Chapter 3 for details

the basis of the case but was instead a subsidiary provision to the constitutionally recognized rights to life and human dignity. This is in contrast to countries like South Africa and Kenya that provide for a fundamental environmental right in their Bill of Rights and with numerous decided cases based on the environmental right.[145]

There are other instances in which the courts, through the exercise of their powers, indirectly protect the environmental right. These include the interpretation and application of Common Law tort principles of nuisance, strict liability, trespass and negligence. For example, in *Lagos City Council vs. Olutimehin,*[146] the appellant's night soil disposal site was held to constitute a nuisance and interfered unduly with the adjacent church property of the plaintiffs. However, to require the Lagos City Council to effect a complete removal of the nuisance within six months was held to be both unreasonable and oppressive. In the opinion of the Supreme Court, it would be neither oppressive nor unreasonable to require the Council to fully remedy the nuisance within 18 months.

In *Tebite vs. Nigeria Marina and Trading Co. Ltd*[147] the plaintiff successfully sued the defendants for injunction because the 'black, noxious, dirty and filthy matter' coming from the defendants machines near his premises constituted a nuisance to him. However, the attitude of the courts in Nigeria reveals an unwillingness to grant an injunction where it would affect crude oil which is the main source of the country's revenue. In *AllarIrou vs. Shell BP Development Company (Nigeria) Limited*[148] the court denying the injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the defendants operations stated that "… to grant the injunction would amount to asking the defendant to stop operating in the area .. and cause the stoppage of a trade… which is the main source of the country's revenue."

[145]Section 24, Constitution of the Republic of South Africa (as amended).Article 42 of the 2010 Kenyan Constitution.Chapter 6.4.4.
[146](1969) 1 All NLR 403.
[147](1971) WLR 432.
[148] Suit No. W/89/71, Warri High Court, 26/11/73.

With due respect, what the court failed to realize in the instant case is that the plaintiff was not asking for an injunction to restrain the defendants from carrying out mining operations, but that in carrying out their operations, the defendants should not pollute his property. In the same vein, the licence granted to the defendants was not a license to pollute but to mine oil. It is believed that the attitude of the court in present times and in the light of the increased public awareness on environmental materials is likely to be different.

There are also instances of the court exercising judicial review of constitutionality of administrative decisions and legislations in which the judiciary is called upon to play a vital role in the development of environmental law. The courts may also make orders compelling a party to comply with the provisions of environmental laws or empowering the environmental agency to seal up premises that are being used for activities detrimental to the environment. The fact that the judiciary plays a critical role in the implementation, development and enforcement of environmental laws translates to its important role in the protection of environmental rights. This is further highlighted by the fact that case laws - the decisions made by judges in the superior courts - form growing sources of environmental laws.

The role of the judiciary in the protection of environmental rights has been highlighted by the Johannesburg Principles adopted at the Global Judges Symposium. On that occasion members of the judiciary from around the world affirmed, inter alia, that:

> … an independent judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law.[149]

Examining the role that the Nigerian courts have played in the protection of environmental rights necessitates an examination of several issues relating to the exercise of

[149]United Nations Environment Programme – Division of Policy Development and Law, *Global Judges Symposium on Sustainable Development and the Role of Law* - The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002, retrieved on 21/05/2014 from http://www.unep.org/dpdl/symposium/Principles.htm.

powers by the courts in cases relating to environmental protection and enforcement of human rights. These issues, which have implications for the realization of environmental rights, include: access to court and legal representation; jurisdictional issues; *locus standi*; evidence and access to information; obstacles during and after court proceedings and unnecessary delay.

6.3.5.1 Access to Court and Legal Representation

In Nigeria, access to courts and legal representation for victims of human rights abuses largely depends on the ability of the victims in procuring the requisite financial resources to file court process as well as to afford legal services. Hence, access to courts and legal representation is partly driven by socio-economic factors.[150] Two major socio-economic factors hindering access to justice for environmental rights violations in Nigeria are poverty and ignorance. Studies have shown that at low levels of income, people in poor countries are more likely to be preoccupied with sustenance and achieving their basic needs than to bother with environmental quality.[151] Poverty, which is widespread in Nigeria[152], has an adverse effect on access to courts and legal representation by negatively affecting the ability of victims to retain lawyers and use legal institutions, as well as offsetting the opportunity cost generated by being away from income-generating activities in the course of the litigation. Furthermore many environmental law cases are technical and involve expert evidence, with the attendant

[150]International Commission of Jurists (2012).*Access to Justice: Human Rights Abuses Involving Corporations-Federal Republic of Nigeria*. International Commission of Jurists, Geneva.Anderson, M. (1999). Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC.Paper for Discussion at WDR Meeting, 16-17 August, pp. 9 & 18. Retrieved on 23 July, 2015 from http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Projectpapers/anderson.pdf

[151]Hunter, D., Salzman, J. and Zaelke, D. (eds.) (2002).*International Environmental Law and Policy*, 2ed, pp.1128-1129.Amechi, E. P. (2009). Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment*Law, Environment and Development Journal*, 5(2): 107. Retrieved on April 23, 2015 from http://www.leadjournal.org/content/09107.pdf .

[152]According to the National Bureau of Statistics, 69 per cent of Nigerians (or 112.519 million Nigerians) live in relative poverty conditions while 60.9 per cent (or 99, 284, 512 Nigerians) live in absolute poverty. (Absolute poverty is defined in terms of the minimal requirements necessary to afford minimal standards of food, clothing, healthcare and shelter). Anonymous (2014) *Nigeria Poverty Profile Report 2010*, National Bureau of Statistics, Abuja. Retrieved on July 10, 2015 from http://www.proshareng.com/news/16302.

cost of hiring experts. This is especially the case where the violation involves a large corporation with enormous resources at its disposal.

The impediment that poverty constitutes is better understood in the context that it is litigants and their lawyers who determine which disputes will reach the courts, when and how often courts will be petitioned, and how intensively litigation will be pursued.[153] Poverty hinders environmental litigants from pursuing cases to a logical conclusion as they easily get discouraged by the financial burden of litigation especially where they are up against a large and wealthy corporation. In some cases the environmental litigants are bought over by the polluting company.

Ignorance of most victims of environmental rights violations constitutes a further impediment to accessing justice. Most Nigerians are unaware of how a degraded environment affects their fundamental human rights. Many are ignorant of the existence and workings of the relevant institutions that may be accessed for legal redress.

Jurisdiction: In the judicial enforcement of environmental laws and Common Law principles relating to the environment, the issue of jurisdiction is of utmost importance. Jurisdiction, in this context, refers to the legal competency of a court to hear and determine judicial proceedings. Jurisdictional competency must be present over subject persons, whether they are legal or natural persons, and over the subject matter of the dispute.[154] Jurisdiction is fundamental to any legal proceeding as the lack of it will render such proceeding void. As held by the Supreme Court of Nigeria in the case of *Menakaya vs. Menakaya*[155] the competence of a court or of the proceedings is a fundamental issue which cannot be waived.

In Nigeria, rules of jurisdiction are determined first by the Constitution, which allocates power to specific courts,[156] and by the National Assembly. It is of utmost importance that a

[153]Anderson, M.,op cit., note 23, pp. 10-18.
[154]Madukolu vs. Nkemdilim (1962) 1 All NLR 587.
[155](2001) 8 MJSC 50
[156] For example, see ss. 232-233 (Supreme Court's original and appellate jurisdiction); 239-240 (Court of

plaintiff filing an environmental suit ensures that he files it in the proper court as such a mistake could be fatal to his case. It is also vital to be conversant with changing trends in the law so as to take prompt action in line with new requirements of the law.

The jurisdictional dichotomy between the State High Court and the Federal High Court has in several cases constituted a barrier to accessing environmental justice. By virtue of section 251 of the 1999 Constitution, the Federal High Court enjoys exclusive jurisdiction over a wide range of matters and the unlimited jurisdiction enjoyed by the State High Court under section 232 of the 1979 Constitution was removed. The Federal High Court has exclusive jurisdiction to determine matters arising from oil spillage or pollution.[157]

In the case of *Shell Petroleum Development Company (Nig.) Ltd vs. Abel Isaiah*[158] a tree fell on the appellant's pipeline carrying crude oil from the production head to the flow station. The tree dented the pipeline and the appellant employed a contractor to repair the pipeline. In the course of the repairs and in the attempt to replace the dented portion of the pipeline, noxious crude oil freely flowed into the respondents' dry land, swamps and streams called Miniabia, causing pollution and damage. The respondents maintained that the appellants had not constructed an oil trap to contain the spillage and no other precautions had been taken by the appellants. The spillage adversely affected the respondents in the use of their land, swamps and streams. The respondents sued the appellants at the High Court of Rivers State, Isiokpo, claiming compensation for loss of marine and domestic life, damages for negligence and damages sustained under the Rule in Rylands vs. Fletcher. The appellants denied liability and pleadings were filed and exchanged. At the conclusion of the hearing the Court awarded 22 million Naira to the respondents in damages. Dissatisfied, with the decision of the High Court, the appellant appealed to the Court of Appeal and raised the issue of jurisdiction. The

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Appeal's original and appellate jurisdiction); 251 (Federal High Court's jurisdiction) and 272 (jurisdiction of the State High Court).

[157]This is by virtue of section 251(1)(n) of the 1999 constitution which vests jurisdiction on the Federal High Court, to the exclusion of any other court, in civil causes and matters arising from mines and minerals (including oil fields, oil mining, geological surveys and natural gas).

[158](2001) 11 NWLR (pt. 723) 168.

Court of Appeal dismissed the appeal and the appellant further appealed to the Supreme Court and again raised the issue of jurisdiction. In determining the appeal, the Supreme Court considered Section 7(1) of the Federal High Court (Amendment Act), 1991; Section 30 (1) (o) of the Constitution (Suspension and Modification) Decree No. 107 of 1993; and Section 251 (1) (n) of the 1999 Constitution and held that:

> Oil spillage from an oil pipeline is a thing associated with, related to, arising from or ancillary to mines and mineral, including oil fields, oil mining, geological surveys and natural gas as provided in Section 7 (1) and (2) of Decree No. 60 of 1991. Therefore by the provisions of Section 7 (1) (p) of that Decree which came into operation on 26th August, 1993 by virtue of Section1 (a) of Decree No. 16 of 1992, the (State) High Court lacks the jurisdiction to hear and determine any suit arising therefrom.[159]

This was affirmed in the cases of *SPDC vs. H.B. Fishermen*[160] and*SPDC vs. Maxon*[161] where the Court of Appeal stated that in an action to recover damages for pollution caused by oil spillage, the appropriate court with jurisdiction is the Federal High Court and not the High Court of the State.

The exclusive original jurisdiction conferred on the Federal High Court could create problems of congestion of the court due to the fact that not many divisions of the Federal High Court exist. This in turn could lead to delay in the dispensation of justice. Justice delayed is justice denied. It is not certain whether the Federal High Court will be able to cope with the volume of litigations arising from petroleum operations as the court is already over-burdened with other cases in which it also has exclusive jurisdiction. The additional reposition of environmental pollution cases on it has stretched it to a breaking point, resulting in congestion and delay in trials. Consequently, environmental law enforcers are not likely to be enthusiastic to take environmental pollution cases to the court and face the drudgery involved in such trials.

The exclusive jurisdiction of the Federal High Court in many cases involving environmental protection hinders access to justice for rural dwelling victims of environmental

[159]Op cit. at 173.
[160](2002) 4 NWLR (pt. 758)) 505.
[161](2001) 9 NWLR (pt. 719) 541.

harm who reside far from the only division of the court in a state. Until recently many of the states in Nigeria did not have a division of the Federal High Court and litigants who wished to institute actions at the court had to travel long distances to another state. Although the Federal High Court has succeeded in establishing 36 divisions across the country, only 24 divisions of the Federal High Court have a building.[162] This is in contrast to the State High Court that has several divisions within the state and is more proximate to the people.

Vesting the Federal High Court with exclusive original jurisdiction in so many matters that previously fell within the former unlimited jurisdiction of the State High Courts typifies the over-centralization of governance in Nigeria (which became entrenched during military rule) and runs contrary to true federalism. The Constitution (Suspension and Modification) Decree No. 107 of 1993, that first vested exclusive original jurisdiction in the Federal High Court, was promulgated in part as a response of the former military powers to the judgment of the High Court of Lagos state declaring that the Interim National Government headed by Chief Ernest Shonekan was illegal. The expansion of the exclusive jurisdiction of the Federal High Court was later imported into the 1999 Constitution as section 251, giving constitutional backing to the exclusive original jurisdiction of the Federal High Court.

Locus Standi: The application of the doctrine of *locus standi*has barred many litigants from access to justice in enforcing human rights. The issue of *locus standi* is related to the fact that the environmental laws in Nigeria have conferred the government agencies alone with *locus standi*. No one else has power to enforce the environmental laws and standards. The doctrine of *locus standi* works to exclude some people from obtaining the assistance of the courts in declaring and enforcing the law in circumstances where others could obtain that assistance. The concept, which finds support in sections 6(6) (b) and 46 (1) of the 1999 Nigerian Constitution (as amended), is predicated on the assumption that no court is obliged to

[162]Available at www.fhc-ng.com/about.html (Last accessed 22 April 2016).

provide a remedy for a claim in which the applicant has a remote, hypothetical interest or no interest.[163]

In *Douglas vs. SPDC and Four Others*[164] the plaintiff instituted an action at the Federal High Court, challenging the failure of the respondents to comply with the Environmental Impact Assessment Act before commissioning the Nigeria Liquefied Natural Gas Project. The Federal High Court dismissed his application holding that the plaintiff had no *locusstandi* and he showed no *prima facie* evidence that his personal right was affected by the defendant's failure to comply with the environmental law. On appeal to the Court of Appeal the matter was remitted for retrial on a technical ground that it was erroneous to conclude that the appellant had no standing without looking at the statement of claim or in the absence of any evidence. It is worth noting that even on appeal the Court acknowledged the application of the *locus standi* rule only that it was of the opinion that the statement of claim needs to be examined and/or evidence taken before it can be concluded that a plaintiff lacks *locus standi*.

In *Centre for Oil Pollution Watch vs. NNPC*,[165] the appellant, an NGO involved in environmental activities, sued the respondent at the Federal High Court, Lagos for reinstatement, restoration and remediation of the environment in Acha community in Isukwuato LGA of Abia state, particularly some streams which had been contaminated by an oil spill. The appellant also asked for provision of potable water as a substitute to the contaminated streams which were the only sources of water supply to the community. The respondent, in its defence, filed a motion challenging the *locus standi* of the appellant to file the action as the appellant was not directly affected by the spillage notwithstanding the mention of some of her members as indigenes of the affected community. The trial court, in its judgment delivered on 31st October 2006, dismissed the suit as lacking in merit and as

[163]*Nyame vs. FRN* (2010) 7 NWLR (Pt. 1193) 344 SC; *Centre for Oil Pollution Watch vs. NNPC*(2013) 15 NWLR (Pt.1378) at 556.
[164](1999) 2 NWLR (Pt. 591) at 466.
[165](2013) 15 NWLR (Pt.1378) at 556.

constituting an abuse of court process as the respondent had no *locus standi* to institute the proceedings.

On appeal, the Court of Appeal unanimously dismissed the appeal and held that for a person to have *locus standi*, he must be able to show that his civil rights and obligations have been or are in danger of being infringed. The court further held:

> A plaintiff is said to have a *locus standi* when he shows sufficient interest in a suit. A plaintiff will have *locus standi*only if he has a special right or, alternatively, if he can show that he has sufficient or special interest in the performance of the duty sought to be enforced or where the interest is adversely affected. Where a plaintiff institutes an action claiming a relief or reliefs, which on the face of the cause of action is or are readily enforceable by another person, then such a plaintiff cannot succeed because he lacks the requisite *locus standi* to stand on. In the instant case, apart from its averment that some of its members are indigenes of and/or live at Acha community and use the water from Ineh and Aku stream/ rivers, there was nothing in the appellant's pleadings to show that the appellant or any of its unspecified members suffered as a result of the alleged oil spill.

Making reference to several decisions of foreign courts cited by the appellants, Augie, JCA held, *obiter*, that there is a remarkable divergence in the jurisprudence of *locus standi* in jurisdictions like England, India and Australia and the Nigerian approach to same, which has not evolved up to the stage where litigants like the appellant can ventilate the sort of grievance contained in its statement of claim.

The above position, coming after the enactment of the 2009 Fundamental Rights (Enforcement Procedure) Rules (FREP Rules) is a step backward in the development of the law on *locus standi* in Nigeria and runs counter to the spirit and letter of the FREP Rules. The recognition of public interest litigation in the FREP Rules was recognition of the obstacle that the strict adherence to the traditional notion of *locus standi* constituted to human rights enforcement in Nigeria and an attempt to move away from that position to the liberal position gaining ground globally.

The negative impact of the rigid application of the doctrine of *locus standi* on the dispensation of justice has been recognised by legal scholars, including judges.[166] In the case of *Senator Abraham Adesanya vs. President of the FederalRepublic of Nigeria*[167], Fatai–Williams CJN spoke on the need for the judiciary to widen the scope of *locus standi*, thus:

> ... to deny any member of such a society which is aware or believes or is led to believe that there has been an infraction of any of the provisions of our constitution, or that any law passed by any of our legislative houses… is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the process.

These reformist views culminated in the abolition of the requirement of *locus standi* in the enforcement of human rights by virtue of the 2009 Fundamental Rights Enforcement Procedure Rules which permit the relaxation of the strict *locus standi*rule and permit public interest litigation for the protection of human rights.[168] Thus no human rights case may be dismissed or struck out for want of *locus standi*.

The promotion of public interest litigation by the 2009 FREP Rules ought to positively impact on environmental litigation. Public interest litigation is an effective medium for promoting access to environmental justice. Most environmental matters take on a public character. Moreover it should be the interest of every citizen to see that the law is complied with. It is also indispensible in a state like Nigeria where many of the citizens lack formal education and are, in most cases, unaware of their rights. Majority of people are classified as poor and lack resources to engage the services of lawyers. A further argument for public interest litigation as a tool in realizing environmental protection in Nigeria is the general culture of apathy in Nigeria. The repressive years of military rule and disregard for human rights conditioned Nigerians to endure intolerable situations and instead of rising to challenge

[166]Fatai Williams CJN (as he then was) in the case of *Senator Abraham Adesanya vs. President of the Federal Republic of Nigeria*(1981) All NLR 1. See also the dictum of Pats-Acholonu, JCA (as he then was) in *SPDC vs. Nwawka*(2001) 10 NWLR (pt. 64)at p.70 and 71

[167](1981) All NLR 1.

[168]Preamble Rule 3(e) (i-v) of the 2009 FREP Rules.

injustices, the average Nigerian prefers to *"leave matters in the hands of God."*[169] The general disinclination to challenge the powers (political, economic, social, or cultural) leaves a vacuum in environmental litigation and this vacuum could be filled by environmental or human rights activists willing to litigate in the public interest.

The liberalized rules on *locusstandi* extend only to cases involving the enforcement of human rights. Thus, except a litigant can show that environmental damage or non-compliance with environmental laws has resulted or is likely to result in a violation of one or more of his human rights, he would still be constrained by the rule. This is one possible reason for the dismissal of the suit in *Centre for Oil Pollution Watch vs. NNPC*.[170] This is especially so since Nigerian environmental statutes and regulations do not provide for a general right of access to court to challenge violations of environmental law.

There is a clear need for the legislature to amend sections 6(6) (b) and 46 (1) of the 1999 Nigerian Constitution to strengthen public interest litigation. Environmental legislations such as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,[171] Regulations made pursuant to the NESREA Act and state environmental protection laws should be amended to provide for public interest groups. This would complement the enforcement efforts of government agencies and go a long way in enabling access to justice in environmental matters.

Evidence and Standard of Proof: Environmental issues are often scientific and require a particular standard or burden of proof, depending on the circumstances of the case and whether it is a civil proceeding or criminal prosecution. Section 135 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The onus is on the plaintiff to prove his or her case on the preponderance of evidence. The scientific

[169] Source: Fieldwork Research, 2012-2014.
[170] Op cit.
[171] No. 25 July 30, 2007.

basis of environmental proof sometimes requires expert evidence for a claim to be properly established in a claim of highly technical and professional nature, which the court would not ordinarily appreciate. In such a case the plaintiff needs to go the extra mile to establish his claim through expert evidence.

Victims of environmental degradation in Nigeria who litigate for compensation for environmental harm and remediation are constantly confronted with difficulties relating to evidence gathering and the attendant high costs. This is especially so when scientific evidence is involved, thus requiring expert evidence. The victims are usually in a disadvantaged position in relation to the perpetrators of environmental harm, which often times are large corporations.Corporations have access to scientific experts, laboratory tests and lawyers that are unattainable for most claimants (even those with the support of legal aid or non-governmental organizations)[172]. The evidence of the plaintiff can be rebutted by the defendant company which may hire the services of experts in the particular field in question in order to rebut the evidence given to support the plaintiff's case.

The issue of expert evidence arose in the case of *Seismograph Services Ltd vs. Akpruoyo*.[173] The respondent alleged damages to his building in the course of the appellant's seismic operation. The respondent failed to call any expert evidence in support of the causal link between the damages and the appellant's seismic operation as alleged. The appellant called a seismologist who gave unchallenged evidence that the appellant's operations did not cause the damages allegedly suffered by the respondent. In reversing the decision of the lower court that the appellant was liable to the respondent for damages, the Supreme Court held that the learned trial judge ought to have accepted and acted upon the unchallenged expert evidence. The Court further declared that:

> The evidence of the 4th defence witness is that of an expert. He knows the soil and therefore his opinion is relevant and deserved consideration. We think that, since

[172]International Commission of Jurists (2012) op cit. note 11, p. 53.
[173](1974) 6 SC 119 at 136.

> such expert opinion has not been challenged, it could have been considered as the only evidence on the issue of liability so far as the seismic operations are concerned.[174]

Again, in *Seismograph Services (Nigeria) Ltd vs.KwarbeOgbeni*,[175] The plaintiff's failure to prove his claims by expert evidence caused the decisions of the trial court in his favour to be overturned on appeal. In *Seismograph Service Ltd vs. Onokpasa*,[176] the Supreme Court accepted the expert evidence of the defendant/appellant while rejecting that of the plaintiff/respondent and consequently allowed the appeal.

Even where the case is being prosecuted by an environmental agency the result is not likely to be different as the agencies often lack monitoring equipment to detect environmental pollution, well equipped laboratories, and experts to enable them test samples, gather data, and other evidence required to obtain a successful conviction. The lack of these serves as a major disincentive to environmental prosecutors.[177]

Instances where the court would require expert evidence are in ascertaining liability for damage alleged to have arisen from seismic operations,[178] claims involving determination of substances, cases alleging a causal link between environmental pollution and illness or death; and in determining the extent of damage suffered.[179]

The difficulty faced by victims of environmental degradation or NGOs litigating on their behalf is further compounded by the lack of access, in many cases, to environmental information held by private corporations. Until the passage of the *Freedom of Information*

[174]Ibid., per Sowemimo, JSC at p. 136.
[175](1976) All NLR
[176](1972) NSCC 231
[177] Despite the powers of the environmental agencies to prosecute environmental offenders they rarely do so, prompting Justice Niki Tobi to state that: "Not much is happening in the area of judicial enforcement of environmental laws in Nigeria. And this is both in the area of criminal prosecution and civil litigation… not much is undertaken by way of prosecution of offenders who are in proliferation." See Niki Tobi (2001). Judicial Enforcement of Environmental Laws in Nigeria. In:Ladan M.T. (ed.)*Law, Human Rights and the Administration of Justice in Nigeria*. ABU Press, Zaria, at pp. 262-287. Oral Interview with Mr.Olukoya, Director of Research and Development, LASEPA on May 24, 2012.
[178] Seismograph Services vs. Ogbeni, op cit., Seismograph Services vs. Onokpasa op. cit.
[179]Farrar vs. SPDC (1995) 3 NWLR (pt. 382) 142.

(FOI) Act[180] in 2011, access to government information was severely restricted by laws such as the *Official Secret Act*[181]. Even with the eventual passage of the FOI Act, hurdles remain. There is, for example, no right of access to information held by private companies[182] and this denies a litigant the opportunity of accessing information gathered or held by private companies in pursuing his or her claim. This is in contrast to section 32 (1) of the Constitution of South Africa which provides a right of access to information held by private persons and that is required for the exercise and protection of any rights. There is also the challenge of getting public bodies to overcome the mind-set and culture of secrecy, and the entrenched bureaucracy in public institutions that result in unacceptable delays.

Delay in Justice Delivery: A major hindrance to effective implementation of rules for the realization of environmental rights and objectives is the delay associated with justice delivery in Nigeria. It is a common maxim that *'justice delayed is justice denied'*. Prevention of pollution and other forms of environmental degradation involve the need to take prompt, quick and expeditious action to arrest causes of environmental degradation. Where there is a failure to take prompt action, the damage is likely to continue and even increase. In such a case, the only option left to the courts would be the provisions of remedies which may not have the effect of properly addressing or correcting the harm caused.

It is a common thing for environmental litigation in Nigeria to drag on for over a decade making it more expensive and frustrating. Such delay has the effect of discouraging officers of environmental agencies and victims of environmental rights violations from seeking redress in the courts in view of the inordinately lengthy time they are likely to spend.[183] One of the strategies of corporate polluters avoiding liability is delaying court hearings so as to

[180] (hereinafter known as the FOI Act). It took the FOI Act about 12 years to be passed into law, a manifestation of theculture of secrecy and the closed nature of governance in Nigeria.

[181]The Official Secret Act, Cap O3*LFN* 2004. The Act makes it an offence for civil servants to give out government information and for anyone to receive or reproduce such information. Further restrictions are contained in the Evidence Act, the Statistics Act and the Criminal Code and there is the need to amend these laws to bring them in accordance with the FOI Act.

[182]Section 31 of the Freedom of Information Act, 2011.

[183] Source: Fieldwork Questionnaire, 2014.

frustrate litigants. Oil companies have the advantage of continuing operations undisturbed whilst the case suffers undue delay, and they can ultimately dodge the payment of compensation by winning the case on technical grounds or because of the inferiority of the victim's counsel or inability of the victims to reach the standard of proof required to succeed.[184]

The case of *SPDC vs. Anaro,*[185] which involved four Ijaw communities, is a vivid example of the delay in justice delivery. While the action was instituted in 1983 at the High Court of the old Bendel State, final judgment by the Supreme Court in the case was delivered in 2015, thirty two years after the institution of the action. The High Court in that case awarded the affected communities N30, 298,681 in damages for oil spillage. Judgment was delivered on 27th May, 1997, after 14 years of legal proceedings. Six of the eight representatives of the communities had died before the conclusion of the case at the high court.[186] The defendant was dissatisfied and appealed against the judgment to the Court of Appeal, Benin City in CA/8/255/97. The Court of Appeal delivered its judgment on 22nd May, 2000 (three years later) dismissing the appeal. The appellant was still not satisfied and appealed to the Supreme Court. The Supreme Court, in its judgment delivered on 5th June 2015, (fifteen years after the decision of the Court of Appeal) upheld the decision of the trial court. The researcher therefore agrees with the learned Niki Tobi JSC (as he then was) in his lamentation that "the justice delivery system in this court as it relates to delay is scandalous. It is most wicked and cruel."[187]

Lack of Training of Judges in Environmental Law: Continuing legal education of judges in the field of environmental law remains a major challenge in enabling the judiciary to fulfil its role as a protector of the environment. Environmental law is a relatively new public law course and majority of judges were not exposed to environmental courses prior to their

[184] See Ebeku K. (2002). Compensation for Damages Arising from Oil Operations: SPDC v Ambah Revisited.*Nigerian Law and Practice Journal*,Volume 6, p, 1.
[185](2015) LPELR-24750(SC); (2001) FWLR (Pt.50) 1815 (CA).
[186]Annual Report of the Civil Liberties Organization (CLO) Lagos 1997 at 205–206; See also Anonymous (1997).Shell Appeals Against N30 million award to Ijaw Communities. *The Guardian,* July 8, p. 5.
[187]Aiguoreghain v State (2004) 3 NWLR (Pt. 860) 367.

appointments to the bench. Many judges are also uncomfortable with environmental issues requiring scientific proof. Furthermore there is a lack of judicial precedents in the area of environmental protection and environmental rights.[188] Undue reliance on technicalities by judges constitutes another hindrance to accessing justice in environmental matters.[189]

Majority of judges are used to the principles of nuisances, negligence and trespass (which are of limited utility in protecting the environment). They are unfamiliar with modern principles such as sustainable development, the preventive principle, the precautionary principle, and inter-generational equity. This is often reflected in the value they place on the environment and conversely on the legal remedies they provide. Pollution cases however, pose special problems with regard to establishing causation, identifying the polluter and proving damage for several reasons. The distance separating the source from the place of damage may be hundreds of miles; the noxious effects of a pollutant may not be experienced until several months or years after the act; and the type of damage may become manifest only if the pollution continues over time. Therefore training in the concepts of environmental pollution and natural resources degradation is still widely needed.

Remedies provided by the court in cases of environmental degradation play a key role in the protection of environmental rights. These remedies may be in the form of injunctions, damages. The quantum of damages awarded by the courts to victims of environmental harm usually reflects the value placed by the court on the environment and environmental resources and could act as a deterrent to environmental pollution. Where the court takes a strict, no–nonsense stance in cases where the environment is harmed or threatened, corporate bodies would be motivated to install environmental friendly technologies and adopt necessary precautions in their operations. This would only occur when the cost benefits of continuing in

[188]Uwais, M. L., (former Chief Justice of Nigeria) in his paper presented at the Global Judges Symposium on Sustainable Development and the Role of Lawheld in Johannesburg, South Africa, 18-20 August, 2002.Uwais, M.L., (2002) Recent Developments in Nigeria: Strengthening Legal and Institutional Framework for promoting Environmental Management, 18-20 August.

[189] Source: Fieldwork Questionnaire, 2014.

pollution is removed. These necessitate the adoption of a novel and innovative approach to environmental protection including the use of inter-disciplinary methodology.[190]

The low value hitherto placed by Nigerian courts on the environment can be illustrated by the low quantum of damages in several environmental litigations[191] and the omission of many courts that award compensation for environmental harm to make specific orders made for restoration of the affected area to its immediate condition prior to the damage, as far as practicable. For example, in *Shell PetroleumDevelopment Company Nigeria Ltd (SPDC) vs. Chief Tiebo VII,*[192]the plaintiffs recovered damages at the High Court for injury caused to the environment by oil spillage from the defendants' oil installations. Similarly, in *Nigerian NationalPetroleum Corporation (NNPC) vs. Chief Stephen Sele*,[193] the plaintiffs were awarded damages for injury they suffered due to oil spillage from the defendant's facilities. In these cases the plaintiffs' losses were made good. However, in none was any order made for the clean-up of the spillage or the defendant required to restore the damaged or affected area of the environment. In *Shell Petroleum Development Company vs. Councillor Farrah and others*,[194] however, the court ordered rehabilitation of the affected land in addition to the award of damages.

In recognition of the need to adequately educate the judiciary, NESREA and the United Nations Environmental Programme (UNEP) have held workshops and/or symposia for judicial officers. UNEP has also developed a training manual for judicial officers.[195] There is the need for such training to be regular and sustained and to involve access to electronic environmental

[190] The application of inter-disciplinary methodology in an environmental rights case is exemplified by the Costa Rican case of *Justicia Para la Naturaleza (JPN) vs. Geest Caribbean Ltd*. where the court for the first time sought to apply natural resource damage assessment techniques to gauge the loss of biodiversity and ecosystem values. In doing so, the court considered cases from other jurisdictions interpreting the right to a healthy environment, as well as economic valuation methodologies; the court also appointed an interdisciplinary working group of experts to make recommendations on the issue of valuation. See E-LAW UPDATE 2 (Spring 1999) E-LAW IMPACT: VALUING BIODIVERSITY IN COSTA RICA (1999), cited in Bruch, Coker and Van Arsdale (2000).*Constitutional Environmental Law: Giving Forceto Fundamental Principles in Africa*. Environmental Law Institute, p. 22.

[191]Ebeku, K., op cit., note 53, p.1.

[192](2005) 9 MJSC 158

[193](2004) All FWLR (pt.223) 1859 CA

[194]Farrar v SPDC (1995) 3 NWLR (pt. 382) 142

[195] Retrieved on 4 March, 2014 from http://www.unep.org/training/publications/..

rights trends and case law from different jurisdictions. Nigeria undoubtedly needs bold and proactive judges who would apply fundamental rights provisions on the right to life, the right to human dignity, among others, to the right to a healthy environment.

5.3.5.2 Enforcement of Judgments

Another challenge relating to access to environmental justice relates to the enforcement of court judgments especially in cases involving government bodies. Enforcement of judgments is the final stage in the judicial process after the legal right, claim or interest has been determined by way of judgment in favour of the successful party. It is therefore the person who has obtained the final order in his or her favour who has the interest in enforcing the judgment.[196] The court generally does not have the power and the machinery to act on its own to enforce or police its judgment. Therefore, the party who will benefit must invoke the process. In Nigeria, every process of enforcement of judgment involves fresh, independent and separate proceedings to effectuate the judgment.[197] Enforcement of judgments in Nigeria is governed by the Sheriff and Civil Process Act,[198] and Judgment Enforcement Rules made pursuant to the Act and Sheriff and Civil Process Laws of the States.

Compliance with court orders has improved since the return of Nigeria to civilian rule.The enforcement of court decisions involving environmental protection may involve the State, as in instances of issuance of licences or permits, conduct of EIA, or where an environmental legislation envisages enforcement by the government alone and a victim's remedy accordingly lies against the State. There are also instances in which the corporation involved in the violation of environmental rights or other related rights is wholly or partly owned by government. The ability of the court to enforce its judgments against the state becomes crucial. There are however instances of federal and state governments or their agencies picking and choosing which court orders to comply with and which ones to

[196] International Commission of Jurists (2012), op cit., p.56.
[197] Ibid, p. 57
[198] Cap 407 LFN 2004

disobey.[199] This practice is contrary to the rule of law and hinders the enforcement of environmental laws.

Outright disobedience of court orders by companies is rare, as Nigerian courts have often invoked their coercive power to ensure that the party in whose favour the judgment was given enjoys the benefits of the decision.[200] In practice however, companies against which orders or judgments have been rendered are known for using appeals and other indirect tactics to delay or frustrate successful victims of corporate human rights abuses from obtaining relief.[201] One such tactic is to appeal the judgment and apply to the court for an order of a stay of execution which will put the execution of the judgment on hold pending the determination of the appeal filed.

These tactics of delay and frustration were used by the defendants in the *SPDC vs. Anaro case*[202] and in *Jonah Gbemre vs. SPDC.*[203] In the latter case the judge applied the environmental right as a component of the right to life. In April 2006, after the filing of contempt of court proceedings against Shell for its disobedience of the court order, the company was granted a "conditional stay of execution", releasing it from the duty to comply with a court order in November 2005 to stop flaring, on three conditions.[204]

The first condition was that Shell was "allowed a period of one year . . . to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of this Honourable Court". The second condition was that "a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in

[199] For example, the case involving the Lagos State Government and the Federal Government where the Federal Government under the then President, OlusegunObasanjo withheld the statutory allocations of Lagos State. See *Attorney General of Lagos State vs. Attorney General of the Federation* (2004) SC70/2004. Retrieved on 14 May, 2014 from http://www.nigeria-law.org/Attorney-General%20of%20Lagos%20State%20V%20Attorney-General%20of%20the%20Federation.htm

[200] International Commission of Jurists (2012) op cit., p.57.

[201] International Commission of Jurists (2012), op cit., p.58.

[202] Op. cit.

[203] Suit No: FHC/CS/B/153/2005. (Hereinafter known as the *Jonah Gbemre case*).

[204] Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again. Retrieved on July 15, 2014 from http://www.climatelaw.org/media/2007May2/ .

all their on-shore flow stations by 30th April 2007" must be submitted to the court personally by Mr. Basil Omiyi, the Managing Director of Shell Nigeria, Mr FunshoKupolokun, the Group Managing Director of the Nigerian National Petroleum Corporation (NNPC), Mr Edmund Daukoru, the Minister of State for Petroleum Resources, and Chief Mrs Sena Anthony, the Company Secretary of NNPC.[205]

However, when Mr Gbemre's legal representative attended the court on 30th April 2007, he discovered that not only had no such detailed scheme been submitted, but that Justice Nwokorie had been removed from the case by having been transferred to another court division in faraway Katsina, the court file was not available, and no representatives of the company or government turned up. Several years from the decision, two of the conditions have not been met.[206] All these, according to Peter Roderick, a co-Director of the Climate Justice Programme, which has also supported the case; "suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law."[207]

The perception of Nigerian courts as unresponsive to environmental violations is illustrated by the growing trend by communities affected by corporate environmental rights abuses to sue the multinational oil companies in their parent countries rather than in Nigerian courts, although the damage occurred in Nigeria.[208] These cases are viewed as a test for holding multinationals responsible for offences committed by their foreign subsidiaries. To date, Shell has been sued in the Netherlands and the United Kingdom by Nigerian communities affected by oil pollution from the company's oil facilities.

[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Sekularac, I. and Deutsch, A. (2013). Dutch Court Says Shell Responsible for Nigeria Spills.*Reuters*, 30 January. Retrieved on August 29, 2016 from www.reuters.com/article/10/30. See also, Anonymous (2011). Shell Accepts Liability for Two Oil Spills in Nigeria,*The Guardian*, August 3. Retrieved on 23 April 2016 from http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria.

In a judgment delivered on 30th January 2013 in the case of *Akpan and VerenigingMilieudefensie vs. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*,[209] the District Court of The Hague found Shell Petroleum Development Company of Nigeria Ltd (SPDC), the Nigerian subsidiary of Royal Dutch Shell Plc., liable for the environmental damage caused by a series of oil spills that occurred between 2006 and 2007. In this landmark judgment, the Dutch Court upheld its jurisdiction not only over the Dutch parent company, but also over the claims arising from the conduct of SPDC in Nigeria.[210]

In a very recent development, Shell Petroleum Development Company of Nigeria Limited (SPDC) in January 2015 agreed to a 55 million pounds out of court settlement with members of the Bodo community in Ogoniland in respect of two operational oil spills in 2008 and 2009; with 35 million pounds to be split between those impacted by the oil spill and 20 million pounds to go to the community. Shell is also to undertake a clean-up of the areas affected by the oil spill.

The out-of-court settlement follows a lawsuit filed against Shell in a London High Court on 23rd March 2012 in which residents of the Bodo community had demanded restitution for loss of livelihood caused by two oil spills in which a broken pipeline spilled tens of thousands of barrels of oil into the creeks and forests contaminating the environment. The plaintiffs claimed that the relevant pipelines caused spills because they were over 50 years old and were poorly maintained, and that Shell reacted too slowly after being alerted to the spills.

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[209] *Friday Alfred Akpan and VerenigingMilieudefensie vs. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580. English translation available at http://www.menschenrechte.uzh.ch/entscheide/Friday_Alfred.pdf(Last accessed10 July 2015).

[210] Ibid.As part of its ruling the court noted that for quite some time there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign subsidiaries, in which the foreign subsidiary involved was also summoned together with the parent company on several occasionsand that therefore it was entirely foreseeable for SPDC that it might have been summoned before a court in the Netherlands to answer for the oil spill in question. SeeAlongi, F. (2013). The Shell Nigeria Case and the Environmental Liability of Parent Companies for the Conduct of their Foreign Subsidiaries.*Environmental Law Survey 2013*. Alma Mater Studiorium, University of Bologna, pp. 36-45.

A preliminary hearing took place from 29th April to 9th May 2014 to consider Shell's duty to take reasonable steps to prevent spillage from their pipelines- whether from malfunction or from oil theft. The judge ruled on 20th June 2014 that Shell could be held responsible for spills from their pipelines if the company fails to take reasonable measures to protect them from malfunction or from oil theft[211].

Although the case has been settled out of court prior to trial, which was expected to commence in mid- 2015, it is important for a number of reasons. Firstly, the ruling stating that an oil company has potential liability if it fails to take reasonable steps to protect its pipelines.[212] Secondly, the case helped bring to light certain information in the possession of Shell (but which the plaintiffs had been unable to access). Court documents showing for the first time that Shell knew for years that its pipelines were in very poor condition and likely to leak, included an internal memo by Shell based on a 2002 study that states that: "the remaining life of most of the [Shell] Oil Trunklines is more or less non-existent or short, while some sections contain major risk hazards". Thirdly, in the course of the judicial process, Shell admitted that its figures for the oil spill were wrong[213] (thereby casting doubt on Shell's assessment of hundreds of other Nigerian oil spills).

The assertion of jurisdiction by British and Dutch courts over damages that occurred in Nigeria but involving subsidiaries of British and Dutch multinationals is part of a recent international trend for multinationals to be held accountable in their home jurisdictions for damage that was caused by, or is related to the operations of one of their foreign subsidiaries.

[211]London High Court Rules that Shell Nigeria Could be Legally Liable for Bunkering, 20 June 2014. Retrieved on 15 August, 2015 at www.leighday.co.uk/News/2014/June20.

[212] At paragraph 92(g) the Court held:

> Short of a policing or military or paramilitary defence of the pipelines, it is my judgment that the protection requirement within section 11(5)(b) [of the Nigerian Oil Pipelines Act] involves a general shielding and caring obligation… [O]ther examples may also fall within the maintenance requirement such as renewing protective coatings on the pipeline or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.

[213] Shell had consistently maintained that only 4,000 barrels of oil were split as a result of the burst pipeline despite evidence to the contrary including an independent assessment by the specialist US firm, Accufacts Inc. that put the amount of oil split at over 100 000 barrels. See Smith, A. (2014). Shell Underestimated Nigeria Oil Spills by Over 2,400%, Leaked Documents Reveal. *Newsweek*, 13 November.

The District court in Netherlands assumed jurisdiction not only over Shell PLC (the parent company) with Headquarters in the Hague but also over Shell Nigeria, since both claims related to oil spills in Nigeria and were closely related.[214]

In English courts to establish prima facie jurisdiction over the subsidiary, the court would have to be satisfied that it is a convenient forum; that the subsidiary was a 'necessary and proper party to the claim against the United Kingdom (UK) parent defender. Also, as between the claimant and the UK parent, there was a real issue that is reasonable for the court to try.[215] In the case between Shell and the Bodo community (instituted in the UK), Shell submitted to the court's jurisdiction.

Once jurisdiction is assumed by the British and Dutch courts, in principle the claims are assessed under the laws of the country where the subsidiary is operational (the country where the damage took place). This is broadly the same approach taken in other EU jurisdictions (except for Denmark) by virtue of the Rome II Regulation.[216]

6.3.6 Non-Governmental Organizations (NGOs) and Civil Society

Non-governmental organizations are playing an increasing role in the promotion and protection of environmental rights in Nigeria. The National Policy on Environment and Nigeria's Agenda 21 both highlight the importance of NGOs in the fulfilment of environmental policy and law.[217] The growing importance of NGOs in environmental protection is further evidenced by: the increasing role of NGOs in climate change negotiations as well as in the development of national climate change mitigation programmes;[218] the formation of linkages

[214]Under Dutch private international law rules closely connected claims between a European Union (EU) and a non-EU defendant can be brought before the same court The Shell Nigeria Cases: an Important Precedent for Transnational Liability Claims, 7 February 2013. Available at www.allenovery.com/publications/en (Last accessed 1 August 2016).
[215] Ibid.
[216] The Rome II Regulation (EC) No. 864/2007 is an EU Regulation applicable to all EU member states except Denmark and regarding the conflict of laws on the law applicable to non-contractual obligations.
[217]National Policy on the Environment, 1999 (Revised Edition) p.38.
[218] For example, the work of Nigerian Environmental Study Team (NEST) as it relates to local action on climate change. See www.nestinteractive.org, www.nigeriaclimatechange.org, www.naspanigeria.org.

between the UNEP and NGOs;[219] the close links between the World Bank, Africa Development Bank (ABD), Asia Development Bank on the one hand and on the other, the International Union for the Conservation of Nature (IUCN).[220] Others include the prominence given to NGOs in the events prior to during and following the United Nations Conference on Environment and Development; and the Africa 2000 project in most countries in the West African sub–region. The project, sponsored by the UNDP, is established to link groups based in the rural communities with the activities and programmes of African NGOs working on environmental issues.[221]

NGOs and Civil Society are usually granted observer status by international or regional human rights monitoring bodies.[222] This forms a useful platform for NGOs to bring environmental rights violations to the notice of the relevant monitoring bodies. The growing role of NGOs in environmental protection is borne out of the need for an alternative means that can complement the role of the government in environmental protection. It is also borne out of the general incapacity of individuals and communities suffering environmental rights violations to obtain redress due to ignorance, apathy, and lack of resources.

The activities of environmental NGOs are directed primarily at the prevention of environmental degradation, nature conservation, climate change mitigation and adaptation, environmental lobbying and generally, proper management of the environment. Their role in the promotion and protection of environmental rights include the funding and organisation of research, conferences and seminars on the environment; education of their members and the citizens at large on the issues involved in environment and development; cooperation with the

[219] Available at www.unep.org/civil-society/MajorGroups/Non-GovernmentalOrganisations/tabid/78622/ (Last accessed).

[220] Onibokun, A. G and Faniran, A. (1994).The Role of NGOs in Achieving Sustainable Development.In Ajomo, M.A and Adewale, O. (eds.) *Environmental Law and Sustainable Development in Nigeria,* op cit., p.125.

[221] Adewale, O. (1995). The Role of Non-Governmental Organisations in ImplementingEnvironmental Treaties in the ECOWAS.*Nigerian Current Law Review*, NIALS, Lagos p.193.

[222] For example, the African Commission on Human and Peoples' Rights grants observer status to NGOs and civil society and their representatives are allowed to participate and make statements at the public sessions of the Commission. See Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 75.

public sector in the formulation and implementation of sound environmental policies and programmes and engaging in environmental litigation.

The area of litigation on behalf of the environment is an area where NGOs are playing an increasingly important role. Bearing in mind the high cost of litigation as a major obstacle to the citizen suits, the NGOs who have a larger pool of resources, greater funding, and, in most cases, access to specialized scientific knowledge are better equipped and placed to institute and maintain public interest litigation. In this way they, to some extent, act as the voice of the environment.

The role played by NGOs and Community Based Organisations (CBOs) in the UK, India and Pakistan in this area, has contributed in no small measure to the growth and development of environmental law in those jurisdictions.[223] In Nigeria, however, until the judges move away from the rigid adherence to the traditional position of *locus standi*, decisions like *Centre for Oil Pollution Watch vs. NNPC*[224] are likely to have a chilling effect on NGOs instituting public interest litigation for the protection of human rights including the right to a healthy environment. Nevertheless, the involvement of NGOs in environmental protection and human rights has also contributed to environmental rights protection in Nigeria.

Social and Economic Rights Action Committee (SERAC): The *SERAC Communication*,[225] for example, was the fruit of collaboration between communities affected by oil pollution and two NGOs- Social and Economic Rights Action Committee (SERAC) of Nigeria and Committee for Economic and Social Rights (CESR) of New York. In that case activist lawyers worked within the history and groundwork provided by communities and environmental groups in the Niger-Delta and expanded the understanding of international law

[223] Boyd, D.R. (2010).The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment (Unpublished PhD Dissertation, Resource Management and Environmental Studies, University of British Columbia, Vancouver), pp. 266-270.
[224] Op cit.
[225] Communication No 155/96 (2001).See 3.2.2.

as it relates to the environment. The case impacted international human rights law by the finding of the African Commission that environmental rights are justiciable.

SERAC has also pursued a series of strategies to ensure implementation of the recommendations of the African Commission. These include: promoting public awareness of the recommendations of the African Commission in the SERAC Communication;[226] holding meetings with the Federal Ministry of Environment and the Niger-Delta Development Commission; campaigning for the drafting of new legislations to regulate oil exploration in Nigeria; and hosting sensitization workshops on environmental protection for legislators.[227]

Environmental Rights Action (ERA): This is another NGO in the forefront of the environmental rights campaign. ERA was founded in 1993 during the period of military dictatorship as a project of the Civil Liberties Organisation (CLO) and specifically to coordinate the activities of CLO in the South-south zone.[228] At that time, the Michelin Okomu Rubber Plantation in Edo State was threatening not just farmers and their livelihoods, but also wildlife and in particular the White-throated Guenon, a rare species of white throated monkey which was unique to that area.[229] The ERA also became involved in the environmental degradation and human rights violations that oil exploration was causing in the Niger Delta as well as desertification.[230]

ERA, which later became an independent NGO and the Nigerian branch of the international NGO Friends of the Earth, has the following key principles:

[226] Specifically, these included dissemination of copies of the decision with a cover note explaining the importance of the communication to various stakeholders, including the President of Nigeria, relevant government departments, the judiciary, media houses and multinational oil companies. See van der Linde, M. and Louw, L. (2003).Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication, 3 AHRLJ, pp. 167-187.
[227] See van der Linde, M. and Louw, L.,op cit., p. 184.
[228] Ayo Obe (2013). Environmental Justice Struggles and the Right to Life in Nigeria. A Paper Presented at the 20th Anniversary of Environmental Rights Action (ERA), 19th March, Abuja.
[229] Ibid.
[230] Ibid.

- That every African has a right to a safe and satisfactory environment favourable to his/her development as captured in Article 24 of the African Charter of Peoples and Human Rights;
- That human rights are also well defended when ecosystems are respected;
- That the promotion of environmentally responsible governmental, commercial, community and individual practices is best attained through the empowerment of local people;
- That local people have the right and knowledge to control local resources; and
- Pro-environment policy changes are best worked for though non-violent resistance.[231]

Activities of ERA centred on environmental rights promotion and protection include: environmental advocacy, the organization of media trainings on environmental reporting across the Nigerian federation,[232] engaging communities affected by environmental rights violations and assisting them in seeking redress,[233] environmental litigation; and creating environmental awareness.

ERA carries out extensive field research in the oil producing areas of Nigeria and through its field reports exposes environmental rights violations committed by international oil companies operating in the Niger-Delta. These have served to draw international and home government attention to the environmental and social impacts of the companies' operations and served to rebut the company sustainability reports where the companies' are whitewashed. It also serves as a challenge to companies to adopt environmentally sound corporate practices. ERA has been at the forefront of leading advocacy by community activists to organs of the

[231]NnimmoBassey (2013). Welcome Address at the Event held to mark the 20th Anniversary of Environmental Rights Action, March 19, Abuja.

[232] These are targeted at enhancing the capacity of journalists to bridge the existing knowledge gap of the participants and the larger Nigerian public on issues such as gas flaring, desertification, deforestation, climate change, environmental and their link with conflicts. See Jakpor, P. (ed.) (2012). *The Environment as Seen by the Nigerian Media*. Environmental Rights Action, p.6.

[233] More recently the ERA assisted farmers affected by oil pollution in the Niger-Delta in litigation instituted in The Netherlands against Royal Dutch Shell. See ERA is also assisting fishermen affected by the Shell Bonga oil spill in their petition before the National Assembly. See Ameh, J (2014). Oil Spill: Bonga Fishermen Seek Compensation from Shell. *Punch*, April 1.

National Assembly involved in deliberations on the proposed *Petroleum Industry Bill (PIB).*[234] Representatives of ERA are also part of the on-going review of the National Policy on the Environment.[235]

Nigeria Environmental Study/Action Team (NEST): This is another NGO with the overall goal of acting in concert with an active nationwide membership to sensitize and empower Nigerians on issues of the environment and sustainable development, through the dissemination of factual information, training on skills acquisition and promotion of sustainable livelihoods.[236] Founded in 1987 and headquartered at Ibadan, NEST has carried out extensive research on Nigeria's vulnerability and adaptation to climate change including the Climate Change Adaptation in Africa (CCAA)/International Development Research Centre (IDRC) Project; Building Nigeria's Response to Climate Change (BNRCC) Project; and the Canada-Nigeria Climate Change Capacity Development Project (CN-CCCDP)[237]. Other activities of NEST include: training and capacity development[238]; community outreach; serving in key implementation, planning and monitoring committees of the Desertification Convention; institution building in the NGO sector; and organization of public hearings on topical environmental issues.

The Centre for Environmental Resources and Sustainable Ecosystems (CERASE): This NGO, with the partnership of the World Bank initiated the bio-remediation and restoration of the ecology of the Niger Delta region. A pilot project started by the group at Ogbogu, a community in one of the largest oil producing areas of Ogba/Egbema/Ndoni Local Council of

[234]ERA (2010). We Must Choose What we Eat, *Annual Report*, Environmental Rights Action/Friends of the Earth, Nigeria

[235]Oghifo, B. (2014). Nigeria Reviews 23 Year Old National Policy on the Environment. *Thisday*, December 9.

[236] Available at www.nestinteractive.org, www.nigeriaclimatechange.org,and www.naspanigeria.org. (Last accessed 15 May 2015).

[237] The two years project undertook activities to strengthen the capacities of Federal Institutions, raise awareness in targeted segments of the public, improve the information base on greenhouse gas emissions and mitigation options, and undertake an analysis of the country's vulnerability to climate change.

[238] NEST developed the *Environmental Awareness Training Manual (EATM),* and applied it in the training of staff of the secondary school system in states covering different geopolitical zones of Nigeria. NEST also hosts annual workshops in various agro-ecological zones of the country.

Rivers State, uses plants and micro-organisms to clean up oil spills from the environment, particularly those affecting farmlands and fishing areas.[239] The project is a restoration of the ecology and community that has long been neglected by the government involving the mobilization and participation of the affected community not only by way of their approval but also by creating jobs for them and therefore offers an example of the participatory approach to promoting and protecting environmental rights.

The Nigerian Conservation Foundation: This NGO, which is headquartered in Lagos, was founded in 1980 by ShafiEdu and has worked since then on a number of resource management and conservation projects across Nigeria. It works to preserve the natural resources and biodiversity of Nigeria. The Foundation is involved in conservation efforts on a number of fronts; it engages in lobbying work both at the national and state levels; and it also has a number of educational initiatives both to raise awareness of environmental issues in Nigeria and to encourage sustainable practices. It works with higher education, primary and secondary schools, and with the general public through local initiatives in target areas. Its scientific staffs are engaged in research and management plans in reserves, parks, and wildlife habitats across the country. It also advises industry on sustainable development and environmental impacts for their projects in Nigeria. The foundation also promotes environmental tourism with the goal of expanding awareness of Nigeria's natural resources and also creating economic incentives for continued and expanded preservation.[240] In 1992, the Foundation was recognized by the UNEP, which added it to its Global 500 Roll of Honour, a group of individuals and organizations making important contributions to the environment.[241]

[239]Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta ANNEX Ig. Nembe (Ogbolomabiri): Biophysical Report. A *Report by the independent IUCN - Niger Delta Panel (IUCN-NDP)* to the Shell Petroleum Development Company Ltd of Nigeria (SPDC). Retrieved on May 3, 2015 from https://cmsdata.iucn.org/downloads/annex_1g_nembe_biophysical_report_final.pdf.

[240]http://www.ncfnigeria.org/projects.php; http://www.ncfnigeria.org/proposed_projects.php retrieved on 3 June 2015.

[241] Ibid.

Socio-Economic Rights and Accountability Project vs. Nigeria,[242] a case filed at the ECOWAS Court by Socio-Economic Rights and Accountability Project (SERAP), a coalition of Nigerian NGOs, against the Nigerian Government and six oil companies over alleged violations of human rights associated with oil pollution in the Niger Delta, is another example of efforts by NGOs to make the Federal Government accountable for their actions or inactions that devastate the environment. NGOs also played a major role in creating public awareness of the lead poisoning incident in Zamfara state and engaged in advocacy to galvanise the Federal and State government to action.[243] They also monitored the release and use of funds by the relevant ministries in order to ensure accountability.

A growing trend with implications for environmental rights is the increasing cooperation and networking of environmental NGOs across borders. These networks exchange legal, scientific and technical information, ideas, precedents, and strategies across national boundaries in support of grassroots, public interest environmental law.[244] International NGOs like Human Rights Watch and Amnesty International have also contributed to the promotion of environmental rights in Nigeria by publicizing and drawing international attention to environmental rights violations in Nigeria.[245] The publication of reports of these international human rights NGOs has the effect of putting the spotlight on governments who are perceived as not complying with their obligations under international law and multinational corporations responsible for human rights violations in their areas of operation.

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[242]ECW/CCJ/APP/08/09. Available at www.courtecowas.org/.../SERAP_V_FEDERALREPUBLIC_OF_NIGERIA.pdf(Last accessed July 14, 2016)

[243]Karunakara, U. (2012) op cit. note 67.Abutu, A. (2014) op cit., note 67.

[244] As exemplified by the SERAC/CESR collaboration. Another example is the Environmental Law Alliance Worldwide (E-LAW), a network that facilitates the development and practice of public interest environmental law throughout the world. E-LAW has worked with environmental NGOs in Nigeria and South Africa in the promotion and protection of environmental rights. See Fuelling the Devastation: Oil Drilling in Nigeria, E-LAW Advocate, Summer 2004 Issue, retrieved on April 28, 2014 from www.elaw.erg/book/export/html/1217; Exercising South Africa's New Constitution to Reduce Pollution, retrieved on April 28, 2014 from www.elaw.org/node/871.

[245]Human Rights Watch (1999). The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities. Human Rights Watch, New York. Amnesty International (2013). Bad Information: Oil Spill Investigation in the Niger Delta. Report of Amnesty International and the Centre for Environment, Human Rights and Development.

The strength of NGOs, particularly those operating at the field level, is their ability to form close linkages to local communities, and to engender community ownership and participation in development efforts. NGOs often can respond quickly to new circumstances and can experiment with innovative approaches. NGOs can identify emerging issues, and through their consultative and participatory approaches can identify and express beneficiary views that otherwise might not be heard. On the other hand, the voluntary nature of NGOs often raises questions regarding the legitimacy, accountability, and credibility of NGOs and their claims as to mandate and constituencies represented.

Generally, environmental NGOs in Nigeria are small and constrained by limited technical capacities and relatively small resource bases.[246] Rather than having several environmental NGOs merge to create larger and more powerful groups with the synergy, the contrary is the case in Nigeria with several environmental NGOs having witnessed splits. For example, at its inception ERA was an arm of the Civil Liberties Organisation before it 'broke off'. Few years later, Douglas Oronto, a founding member of ERA, left to form his own environmental NGO, Community Defence Law Foundation (CDLF). There is a lack of powerful, large and financially empowered NGOs with the resources to effectively pursue public interest litigations. Many Nigerian NGOs depend on funding from foreign donors or government agencies. This is an unhealthy factor that could compromise their independence.[247]

Generally, Nigerian NGOs are characterized by limited managerial and organizational capacities with many being a "one-man or two-man show" and based solely in the urban areas. Lack of accountability and corruption has severely limited the effectiveness of many Nigerian

[246] The small size of Nigerian ENGOs is exemplified by Environmental Rights Action, which is described as a foremost environmental NGO in Nigeria yet has only 18 staff, working in 4 offices. See Nigeria: Focus on Environmental Rights Action: an Interview with Israel Aloja (Technical Operations Officer of ERA) retrieved on 4/2/2015 from www.foei.nigeriafocusonenviroonmentalrightsaction

[247] ERA, for example, is largely funded by foreign organisations like OxfamNovib Netherlands, Friends of the Earth International, Tobacco-Free Kids Action Fund, American Cancer Society, Cancer Research UK, National Endowment for Democracy, Cordaid, Third World Network (TWN), International Development Research Centre (IDRC), World Rainforest Movement (WRM), Kairos, Miliudefesse Friends of the Earth Netherlands, Friends of the Earth Norway/NORAD, and Global Greengrants Fund (GGF). See ERA (2010). We Must Choose what we Eat.*Annual Report*, Environmental Rights Action/Friends of the Earth, Nigeria.

NGOs with many of their operations lacking in transparency. Some have existed for the purpose of attracting political patronage or for attracting and funnelling foreign funds to private ends. Such corrupt NGOs are usually managed as family businesses with two or three members of staff and without a credible board of trustees who can direct its activities. These have led to a loss of credibility of many NGOs in the eyes of foreign donors.

The dependence of many environmental NGOs on donor funds, apart from creating a dependency syndrome, has also affected the operations of such groups as they are compelled to focus on the areas of interest to their donors. In Nigeria, for example, although waste, desertification, erosion, and pollution from industries are major environmental challenges, environmental NGOs scarcely focus on them; preferring to focus on the lucrative and internationally popular areas of climate change and oil pollution.

6.3.7 Community Based Organisations

Community-based organizations are essential in organizing people, taking collective action, fighting for their rights, and representing the interests of their members in dialogue with NGOs and government. Citizens play an essential role in ensuring that environmental laws are implemented and complied with. This they do through citizen monitoring and complaints, an invaluable means of helping government detect violations of environmental laws. The role of citizens in the protection of environmental rights is hinged on the fact that the general public is most directly affected by the consequences of pollution and ecosystem destruction. They are closest to the problems, and they have the most at stake. Citizen actions in the Philippines, India, and other countries, have resulted in widespread changes in governmental control and enforcement.[248]

[248] See for example, the case of Concerned Residents of Manila Bay in which the court ordered the Department of Environment and Natural Resources, being the lead agency, to develop "a consolidated, coordinated and concerted scheme of action" to clean up and rehabilitate Manila Bay. See *Concerned Residents of Manila Bay et al vs. Metropolitan Manila Development Authority, Department of Environment and Natural Resources and others*(2008) G.R. Nos. 171947-48 Supreme Court. Retrieved on August 3, 2015 from http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm.

In Nigeria the agitations by the Ogoni and other oil-producing communities affected by environmental degradation have attracted international attention to the environmental rights and human rights condition in the Niger Delta. More recently Shell accepted full responsibility for two massive oil spills that occurred in 2008 and that devastated Bodo in Ogoniland following class action suit of local communities in a British court.[249] Prior to the action Shell had claimed that less than 40, 000 gallons had been split. No attempt was made to clean up the oil which collected on the creek sides, washed in and out on the tides and seeped deep into the water table and farmland neither did the Nigerian regulatory bodies take any step to ensure clean up and remediation. This case illustrates the importance of communities in ensuring protection of their environmental rights in the face of an unwilling government.

In addition to proceeding against oil companies involved in the violation of environmental rights, communities in the Niger Delta need to take proactive steps against the vandalising of pipelines, oil bunkering, and illegal refineries as these all constitute threats to the environment. This can be done by organising neighbourhood and community watches in collaboration with NOSDRA and the NNPC.

The role of communities in promoting environmental rights is not felt much in Nigeria for several reasons. These include widespread poverty; low level of environmental education and awareness; lack of reliable environmental data; absence of citizen suits in environmental legislations. Other reasons are over-centralization of environmental governance with the attendant distance between regulators and local communities; and difficulties in accessing environmental information. Thus, the role of communities in environmental rights protection in Nigeria is largely limited to reporting cases of non-compliance of environmental laws to the regulatory authorities and common law based environmental litigation (in oil producing communities).

[249]('Shell accepts liability for two oil spills in Nigeria' The Guardian 03/08/2011. Retrieved on April 24, 2015 from http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria.

The impediment that poverty constitutes is illustrated by the environmental litigation instituted against Lafarge Plc., a cement producing multinational, by two communities in Ewekoro in Ogun state. Ewekoro area of Ogun state experiences high levels of air pollution due to the activities of the cement industry. Upon the institution of the lawsuit, the company called the communities to a settlement meeting whereby they promised to meet some needs of the communities. The company provided the communities with an electrical transformer, graded their road and provided them with a town hall, upon which the litigation was discontinued. Meanwhile, the high levels of pollution in the area and its health impacts upon the inhabitants persist.[250]

The government at all levels needs to live up to its responsibility of providing infrastructure for Nigerians and not shift the responsibility of doing so to corporate organisations (in the name of corporate social responsibility) or to the citizens themselves. An example is the lack of potable water facilities in many Nigerian towns and the widespread practice of property owners having to dig boreholes to provide their own water. These multiple boreholes weaken the soil structure. Environmental agencies at federal and state levels must live up to their mandate and ensure that the existing laws and regulations are properly enforced by industries. Also, communities affected by pollution and environmental degradation need to partner with reputable NGOs to press for environmental justice.

[250]Source: Fieldwork Research, May 14-26, 2012. According to respondents this happened about four years ago. The account given by the respondents of the facilities provided corresponds with the infrastructural support provided to those communities as provided in the Annual Report. See *Annual Report*, Lafarge Cement WAPCO Nigeria Plc. 2010, p.33.

6.4 Mechanisms for the Promotion and Protection of Environmental Rights in South Africa

6.4.1 The South African Human Rights Commission

The South African Human Rights Commission (The SAHRC) is a constitutional body governed by Section 184 of the South African Constitution and the Human Rights Commission Act.[251] It is mandated to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights (including socio-economic rights) in the Republic.[252] The SAHRC has the powers necessary to perform its functions, including the power to investigate and report on the observance of human rights; take steps and secure appropriate redress where human rights have been violated; carry out research; and educate people on human rights. Each year, the SAHRC must require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.[253] In addition to presenting the Parliament with its reports and recommendations The SAHRC monitors parliament and government to ensure that their reports and recommendations are implemented.

The SAHRC has, on several occasions, conducted investigations into environmental human rights abuses. The very first involved alleged environmental rights abuses by EnviroServ, South Africa's largest hazardous waste disposal company, against the Aloes community. EnviroServ had been operating a medical waste incinerator adjacent to the community and had been granted permission by government to operate one of the two most hazardous commercial landfill sites in the country.[254] The SAHRC is also carrying out

[251] No. 54 of 1994.
[252] Section 184 of the Constitution of the Republic of South Africa.
[253] Section 184(3).
[254] McDonald, D. (ed.) (2002). *Environmental Rights in South Africa*. Ohio University Press, Athens and UCT Press, Cape Town.

investigations on how acid mine drainage is affecting the human rights of South African communities.[255]

In 2010, following the receipt of two complaints on access to sanitation[256], the SAHRC took a decision to link these complaints to a broader investigation on the right to water and sanitation in South Africa. The SAHRC held nine public hearings on the right to water and sanitation in 2012 in each of South Africa's respective provinces plus a national conference held in March 2013. The SAHRC engaged with various government departments on the findings and recommendations that emanated from the provincial hearings. These culminated in the release of a report on the state of water and sanitation in South Africa titled:*Water is Life. Sanitation is Dignity: Accountability to People who are Poor*[257].

Some key findings of the SAHRC are that those areas which lack water and sanitation mirror apartheid spatial geography. Former homelands, townships and informal settlements are the areas in which communities and schools, which are black and poor, predominantly do not enjoy these rights and many others. The lack of access to sanitation has an impact on other rights including rights to dignity, education, health, safety and the environment. The SAHRC cited cases where raw sewage was pouring into the streets. This has severe health implications for the affected communities. In all nine provincial hearings, people complained of the poor condition of waste and water treatment plants.[258]

The SAHRC in its report noted that access to safe drinking water and sanitation is fundamental to the enjoyment of other rights such as the rights to education, health, safety and an environment that is not harmful to human health or wellbeing. The Report made wide-ranging recommendations with implications for funding for water and sanitation programmes

[255]Interview with Rachel Adatia, Earthlife volunteer on 16/8/2012.
[256] The complaints were about municipalities that built pit or bucket toilets without enclosures in their local communities.
[257]Available at www.sahrc.org.za. (Last accessed 4 May 2016).
[258]Govender, P. (ed.) (2014). *Water is Life. Sanitation is Dignity: Accountability to People who are Poor: Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014*. South African Human Rights Commission, op cit., p.14.

at national, provincial and local government level; transparency of budgets and accessibility of budgets to the general public to allow for community monitoring; participation of affected communities in project planning; human rights focus in the implementation of service delivery policies; and the cross-subsidisation of poorer districts by well-resourced municipalities.[259]

Among the recommendations were that the National Treasury should liaise with community-based civil society organisations (CSOs) on proposals on the provision of water and sanitation to potentially provide CSOs with funding to implement appropriate projects, with monitoring from the relevant government departments and other CSOs. All mines operating without water use licences should be instructed to suspend operations immediately and the Department of Water Affairs must put in place a system whereby mines are responsible for cleaning up water sources that they have polluted within a specific time. The relevant departments must seek compensation and action from courts in the event that a mining company fails to comply.[260]

The environmental right in South Africa is commonly understood to include sanitation and access to safe water.[261] This is especially so among poor and underprivileged communities who continue to suffer from the legacies of apartheid. According to McDonald, "The lack of basic services like sewerage and sanitation for millions of urban South Africans is arguably the most pressing environmental justice problem in the country today".[262] Recently, in September 2016, the SAHRC conducted a national investigative hearing on the underlying socio-economic challenges in mining-affected communities in South Africa.[263]

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[259] Ibid, pp. 16-20.
[260] Ibid, pp. 18-19.
[261] So seriously is the problem of sanitation viewed that President Jacob Zuma, in his 2014 State of the Nation Address, stated that: "Government has begun an intensive programme to eliminate the bucket system as part of restoring the dignity of our people." See The Presidency, State of the Nation Address by His Excellency Jacob G Zuma, President of the Republic of South Africa on the occasion of the Joint Sitting of Parliament, Cape Town, 13 February 2016 athttp://www.thepresidency.gov.za/pebble.asp?relid=16912. Protests and demonstrations by poor black communities for their rights to water and sanitation are common. In February2014 a 6-year-old school boy, Michael Komape, from Chebeng Village in Limpopo fell into a pit toilet at his school and died.
[262] McDonald, D. (ed.) (2002). *Environmental Justice in South Africa*. Op cit., p. 10.
[263] Human Rights Commission Holds Investigative Hearing on Mining-Affected Communities. *Mail and Guardian*, 13 September 2016.

The work of the Commission has yielded some results as evidenced by the recent emphasis given to the issue of sanitation by the President of South Africa in his State of the Nation Address;[264] the Department of Human Settlements has implemented an intensive Bucket Eradication Programme (BEP) which will replace the bucket toilet system with water borne sanitation systems. Also, the Department of Basic Education has drawn up a sector plan with timelines for the provision of water and sanitation facilities at schools and plan that by the end of the 2014/2015 year, all schools should have access to potable water and adequate sanitation.[265] The Commission has published and disseminated a pamphlet on the right to sanitation in 12 languages.[266]

Challenges of the Commission include inaction by Parliament and the executive on the reports of the Commission.[267]

6.4.2 Ministry of Environmental Affairs

The Minister of Environmental Affairs (the Minister) is the member of the Cabinet having oversight over the Department of Environmental Affairs.[268] The Minister also has oversight over the South African National Biodiversity Institute; the iSimangaliso Wetland Park Authority; the South African Weather Service; and South African National Parks (SAN Parks).[269]

The Minister has an important role to play in the promotion and protection of environmental rights through her oversight functions and the power to make delegated

[264]Govender, P. (ed.) (2014) *Water is Life. Sanitation is Dignity: Accountability to People who are Poor*. Op cit.
[265] Ibid.
[266]Available on its website at www.sahrc.org.za. (Last accessed 19 September 2016)
[267] In its report on water and sanitation, the Commission noted that "parliament has been regularly alerted to the problems that people experience in realising and enjoying their rights, yet it has not used its powers to ensure government's responsiveness and accountability to the recommendations of various Commission reports".Govender, P. (ed.) (2014). Water is Life. Sanitation is Dignity: Accountability to People who are Poor, pp. 8, 12. The Commission has therefore decided to embark on a process where it directly engages with government departments to discuss their plans on implementing the Commission's recommendations and challenges in this regard.
[268] The post, created in 2009, has partially replaced the posts of Minister of Environmental Affairs and Tourism and Minister of Water Affairs and Forestry
[269]Department of Environmental Affairs, Annual Report 2012/2013.

legislation in the form of regulations.[270] The Minister has exercised his/her power to make environmental regulations to promulgate numerous regulations and standards governing diverse areas of the environment. These include: the Regulations Relating to Qualification Criteria, Training and Identification of, and Forms to be used by, Environmental Management Inspectors 2006; Hazardous Chemical Substance Regulations; Major Hazardous Installation Regulations; Plastic Bag Regulations; Regulations for the prohibition of the use, manufacturing, import and export of asbestos and asbestos containing materials, 2008; Noise Control Regulations; the Environmental Impact Assessment (EIA) Regulations; National list of ecosystems that are threatened and in need of protection, 2012; Biodiversity Management Plan for the black rhinoceros, 2013; Highveld Priority Area Air Quality Management Plan, 2012[271]; National ambient air quality standard for particulate matter with aerodynamic diameter less than 2.5 micron metres (PM 2.5), 2012;[272] National Waste Information Regulations, 2012; Waste management Information Regulations, 2012; Waste Tyre Regulations, 2008; Environmental Management Framework Regulations, 2010; Regulations for the Establishment of a Designated National Authority for the Clean Development Mechanisms, 2005; Regulations controlling the use of vehicles in the coastal zone, 2001; Threatened or Protected Species (TOPS) Regulations, 2007; Regulations for the Proper Administration of Nature Reserves, 2012; CITES Regulations, 2010; and Regulations for Bio Prospecting, Access and Benefit-sharing, 2008.

6.4.3 Department of Environmental Affairs

The Department of Environmental Affairs is the national department responsible for administering environmental affairs. It is mandated to ensure the protection of the environment and conservation of natural resources, balanced with sustainable development and the

[270] Section 44 of NEMA. Other environmental legislations like the Environment Conservation Act (Act No. 73 of 1989), NEMWA, NEMPAA, NEMAQA, NEMBA also give the Minister the power to make regulations.

[271] to ensure that Ambient Air Quality in the Highveld Priority Area complies with all national ambient air quality standards.

[272] To provide protection of human health and environment from adverse levels of pollution by establishing safe levels (standard) of PM 2.5.

equitable distribution of the benefits derived from natural resources[273] in line with its constitutional mandate, as contained in section 24 of the Constitution. The Department of Environmental Affairs fulfils its mandate through formulating, coordinating and monitoring the implementation of national environmental policies, programmes and legislation. In terms of Environmental Quality Protection, the department's role is to protect and improve the quality and safety of the environment to give effect to the right of all South Africans to an environment that is not harmful to health and well-being. The department seeks to promote compliance with environmental legislation and to decisively act against transgressors.

In line with the National Environmental Management Amendment Act, 2003, which provides for a compliance and enforcement directorate (known as environmental management inspectors (EMIs)); the Department of Environmental Affairs (DEA), provincial environmental departments and other provincial and municipal organs of the state employ Environmental Management Inspectorates (popularly known as Green Scorpions), a network of environmental enforcement officials from various national, provincial and municipal government departments created by National Environmental Management Act (NEMA).In terms of NEMA's Section 31B and C the Minister of Water and Environmental Affairs and MECs[274] are empowered to designate EMIs (and they have the discretion to decide which officials to designate). The Minister and MECs can delegate this power to designate EMIs (for example to an environmental department or agency)[275] with wide powers to enforce NEMA as well as other environmental legislations.

[273]Retrieved on 12/04/2015 and 15/11/2015 from https:/www.environment.gov.za/. The Department formerly existed as the Department of Environmental Affairs and Tourism; however in 2009 President Jacob Zuma announced the establishment of the Ministry of Water and Environmental Affairs. The department was created from the former Department of Environmental Affairs and Tourism as well as the Department of Water Affairs and Forestry.The Minister and Deputy Minister of Water and Environmental Affairs oversee the work of two separate departments, namely the Department of Environmental Affairs and the Department of Water Affairs.

[274]*MEC* means the Member of the Executive Council to whom the Premier has assigned responsibility for environmental affairs(See Section 1(1) of NEMA.). The MEC is the counterpart of the Minister at the provincial level.

[275] This has already happened in SANParks (to the SANParks Chief Executive) and in Western Cape (to the Head of the Department of Environmental Affairs and Development Planning).

EMIs possess broad powers to monitor and ensure compliance with environmental legislations for which they have been designated.[276] They have the powers to investigate: question witnesses, inspect and remove articles, copy or make extracts from, any document, book or record or any written or electronic information, require the production or delivery of any document, book or record or any written or electronic information; take photographs and audio-visual recordings, take samples and remove waste.[277] They also have power to enter premises and inspect and search them to ascertain whether legislation is being followed and seize evidence of criminal activity.[278] They have power to stop, enter and search containers, vessels, vehicles, aircraft and pack animals; seize evidence and contraband; establish road blocks and make arrests.[279]

These powers are to be exercised with regard to any act or omission in respect of which there is a reasonable suspicion that it might constitute an offence in terms of a law for which that inspector has been designated in terms of that section; a breach of such law; or a breach of a term or condition of a permit, authorisation or other instrument issued in terms of such law; or that the object targeted contains or conveys or has been used to convey a thing which may serve as evidence of such offence or breach.[280] An EMI must, whenever exercising any powers or performing any duties under NEMA or a SEMA, on demand by a member of the public, produce his or her EMI ID Card and his or her Letter of Designation.[281]

EMIs have powers to carry out routine inspections,[282] issue compliance notices[283] and admission of guilt fines.[284] In addition to routine inspections, reactive inspections are

[276] The designated legislation may be NEMA or a specific environmental management Act (SEMA) such as the the*NationalEnvironmental Management: Air Quality Act* (NEMAQA) or a provincial environmental legislation. EMIs may also be mandated to enforce specific provisions of NEMA or a SEMA.Sec. 31B, 31C and 31D (1) of NEMA.
[277] NEMA. Section 31H
[278]Section 31I.Ibid.
[279]Section 31J.Ibid.
[280] Sections 31H(1)(a) and 31J(1)(a).Ibid.
[281]Section 31F, ibid.
[282]Section 31K, ibid.

conducted based on complaints received from the public. In 2010/2011 for example, reactive inspections were conducted on 87% of all environmental related complaints, resulting in notices and directives issued to non-compliant institutions. In addition, sixty two (62) environmental authorisations and waste licenses were inspected whilst 15 criminal investigations into non-compliance with environmental legislation were carried out. [285]

Environmental management inspectors are to be regarded as peace officers and may exercise all the powers assigned to a peace officer, or to a police officer who is not a commissioned officer, as contemplated in the Criminal Procedure Act.[286] Unlike the Nigerian enforcement agencies, the EMIs are not empowered to prosecute cases in court. All cases continue to be handed over to the National Prosecuting Authority (NPA) for prosecution.[287] The EMIs therefore work closely with prosecutors country wide to ensure the successful prosecution of offenders. The South African Police Service also plays a crucial role in enforcing environmental legislation and EMIs work closely with the SAPS in the investigation of environmental crimes. In terms of the National Environment Management Act, all police officers have the powers of an EMI.[288]

The compliance notice is an important administrative enforcement instrument whose overall aim is to bring non-compliant actors into compliance with environmental legislation or with the conditions of permits, authorisations or other regulatory instruments. A compliance notice is issued if there are reasonable grounds for believing that a person has not complied with a provision of the law for which that inspector has been designated; or with a term or condition of a permit, authorisation or other instrument issued in terms of such law. The compliance notice must set out details of the conduct constituting non-compliance; any steps

[283] Section 31L, ibid.
[284] Retrieved on 12/01/2014 from https:/www.environment.gov.za/projectsprogrammes/emi/about
[285] Department of Environmental Affairs, Annual Report 2010/2011, p. 9.
[286] Act 51 of 1977. See NEMA Act, section 31H (5).
[287] Retrieved on 12/01/2014 from https:/www.environment.gov.za/projectsprogrammes/emi/about.
[288] Ibid.

the person must take and the period within which those steps must be taken; anything which the person may not do, and the period during which the person may not do it; and the procedure to be followed in lodging an objection to the compliance notice with the Minister or MEC, as the case may be.[289] EMIs may only issue compliance notices with respect to that legislation or provisions of the legislation that they are explicitly authorised to enforce.[290]

Failure to comply with a compliance notice constitutes an offence.[291] In case of such failure the EMI must report the non-compliance to the Minister or MEC and the Minister or MEC may revoke or vary the relevant permit, authorisation, or other instrument which is the subject of the compliance notice; take whatever steps necessary and recover the costs of doing so from the person who failed to comply[292] and report the matter to the National Prosecuting Authority. A permit holder who fails to comply with the conditions of a waste management permit, for instance, may not only lose the permit, but may also face criminal charges. The use of the word 'may' provides the Minister or MEC with discretionary powers in reporting the matter to the National Prosecuting Authority. This has the effect of watering down the effect of the criminal sanction and could limit the effectiveness of compliance notices in the hands of EMIs.

Another impediment in the effectiveness of compliance notices is that although they can be issued against organs of state that act in breach of environmental laws; they cannot give rise to criminal prosecution in the event that the offence persists. Section 48 of NEMA states that the Act is binding on the State except in so far as criminal liability is concerned. This means that it is not possible to criminally prosecute organs of state (including agencies and parastatals) for contravention of the NEMA or Specific Environmental Management Acts

[289] Section 31L,NEMA.
[290] Sections 31(D) and 31(G).Ibid.
[291] Section 31N (1).Ibid.
[292] Ibid. Section 32N (2)

(SEMAs). This provision has prevented the National Prosecuting Authority from instituting criminal actions against major state-owned polluters like Eskom.

The Department of Environmental Affairs has a focused training programme which includes the training of environmental management inspectors as well as training of prosecutors (and awareness raising for magistrates) in relation to dealing with environmental cases, including those that involve pollution. The Department liaises with the National Prosecuting Authority and the Asset Forfeiture Unit in relation to more effective investigation and prosecution of environmental offences.[293]

The DEA appears to have performed commendably in the training of EMIs and justice officers. In 2012/2013 for example, the Department trained 244 justice officials (67 magistrates and 177 prosecutors) in environmental crimes; bringing to 844 the number of justice officers trained.[294] 240 officials received Environmental Management Inspectorate (EMI) training, and a further 94 EMIs received specialised training in various aspects of environmental management. 138 officers were trained in environmental management bringing the total number of officers trained in environmental management (in that year and previous years) to 562.[295] In 2011/2012 financial year, 252 EMIs received specialized training while 37 local authority officials were trained as EMIs.[296]

Environmental matters are often technical or scientific in nature, requiring EMIs to have knowledge in these fields. In this regard the Department has reached an agreement with six tertiary institutions (Universities of Technology) to develop and roll-out an EMI Bridging

[293] National Council of the Provinces Question No. 138; Minister of Water and Environmental Affairs reply to Ms. BV Mncube (ANC-Gauteng), 03 May 2013.
[294] Department of Environmental Affairs, Annual Report 2012/13, p. 24.
[295] Ibid, p.45.
[296] Department of Environmental Affairs, Annual Report 2011/12, p.22.

Training Programme.[297] While the Department appears to have trained a large number of EMIs, the great majority of these work in South African National Parks and in the other provincial park services. Thus, the number of EMIs engaged in monitoring compliance and enforcement of the NEMA and specific environmental management Acts nationally is actually low.[298]

A ranking system is used in the appointment of EMIs where they are ranked from one to five on the basis of levels of seniority and expertise.[299] Grade 1 EMIs are the highest ranked and are mandated to exercise all the powers given to EMIs under the Act. They are likely to be senior administrators in DEAT and provincial environmental government departments. At the lowest level are Grade 5 EMIs who only have routine inspection and administrative powers. The powers of grade 2, 3 and 4 vary according to rank, but include powers of inspection, investigation and enforcement.[300] In practice it will be the Grade 2 to 5 EMIs that will be actively involved in effecting monitoring, compliance and enforcement. The discretionary power to issue compliance notices, however, rests with Grade 1 EMIs.[301] This has the effect that Grade 2 to 5 EMIs will only be able to make a recommendation to a Grade 1 EMI to issue a compliance notice. Thus, for example, if a Grade 2 EMI in the course of an investigation determines that a person has contravened the relevant environmental law, the EMI will have to report the transgression to a Grade 1 EMI who then may exercise the discretion to issue a compliance notice.

[297] National Environmental Compliance and Enforcement Report 2012/2013, pp. 85-87. National Assembly Question No. 1006, Internal Question Paper No.10 NW1187E, 26 April 2012, Minister of Water and Environmental Affairs reply to Mr G R Morgan (DA).

[298] National Assembly Question No. 1006, Internal Question Paper No.10 NW1187E, 26 April 2012, Minister of Water and Environmental Affairs reply to Mr G. R. Morgan (DA). By 2012/2013, the number of EMIs on the national register had risen to 1705 with 1055 (62%) of them Grade 5 EMI/field rangers employed at national and provincial parks authorities. See *National Environmental Compliance & Enforcement Report 2012/13*.

[299] Annexure A of the Regulations read with reg. 3.

[300] Sections 31H, 31J and 31K of NEMA read with Annexure A of the Regulations

[301] Annexure A of the Regulations

The ranking system may raise some challenges in compliance and enforcement. It creates a hierarchical system of enforcement where enforcement officials may have to cut through bureaucratic red tape in order to use an environmental enforcement tool. Senior administrators may in many instances be too far removed from the practicalities of day-to-day enforcement and as a result may not act with the necessary insight or speed to ensure that compliance notices are in fact issued when required.[302] Extending the power to issue compliance notices to other EMIs, at the least to Grade 2 and 3 EMIs who also have investigative powers (in the case of Grade 3 EMIs) and enforcement powers (in the case of Grade 2 EMIs), may serve the cause of environmental enforcement more effectively.[303]

Air pollution is a major environmental challenge in South Africa and the country is the largest greenhouse gases emitter in Africa, due largely to its coal-fired power plants. In its bid to implement the Air Quality Act, the Department developed a National Ambient Air Quality Indicator to determine the national quality of air with more focus on priority areas. During 2010/11 the process of developing the Highveld Priority Area Air Quality Management Plan (AQMP) was finalised and approved for public comments.

In an effort to expand the National Ambient Air Quality Monitoring Network and also to support air quality monitoring activities within areas declared as Air Quality Priority Areas, air quality monitoring stations have been established across the country and they report to the South African Air Quality Information System (SAAQIS).[304] In 2012/2013 the number of ambient air quality monitoring stations reporting to SAAQIS increased from 60 to 72 stations reporting data on SAAQIS.[305] This invariably means that South Africa is far ahead of Nigeria

[302]Feris, L.A. (2006). Compliance Notices: A New Tool in Environmental Enforcement. *Potchefstroom Electronic Law Journal*, 9 (3): 10.
[303]Ibid. p. 10.
[304] SAAQIS is a web-based interactive system with two main objectives; firstly to meet the legal purpose of reporting air quality related information to the public and, secondly, to be an information system that assists all spheres of government in strengthening policy-making related to air quality issues.
[305]Department of Environmental Affairs, Annual Report, 2012/13.

in terms of air monitoring with the whole of Nigeria not having up to five air monitoring stations.[306]

In addition to the work of Environmental Management Inspectors, other projects and programmes run by the Department include the following:

- Working for Water (WfW) considers the development of people as an essential element of environmental conservation. Short-term contract jobs created through the clearing activities are undertaken, with the emphasis on recruiting women, youth and disabled. It creates an enabling environment for skills training and invests in the development of communities wherever it works.
- Working for Land is an essential programme of the Natural Resource Management Programmes (NRMP). Its key objective is to ensure that degraded ecosystems are restored to their formal or original state wherein they are able to maintain or support the natural species of that system.
- Working for Wetlands Programme is implemented by the South African National Biodiversity Institute (SANBI) on behalf of the departments of Environmental Affairs (DEA); Agriculture, Forestry and Fisheries (DAFF) and Water Affairs (DWA). It is aimed at rehabilitating wetlands, for example forms part of the government's Expanded Public Works Programme, which seeks to draw unemployed people into the productive sector of the economy.
- Environment Sector Conflict and Dispute Resolution, in line with Chapter 4 of NEMA which authorises the use of alternative dispute resolution mechanisms so as to ensure fair decision making and effective conflict management. Thus creates a framework for integrated environmental planning and management and ensures co-ordination within government and with outside stakeholders.

[306] 5.2.1 and 5.2.2.

- The Green Fund, established through an initial allocation of R800 million by the National Treasury to support green initiatives to assist South Africa's transition to a low carbon, resource efficient and climate resilient development path delivering high impact economic, environmental and social benefits. The Fund provides start-up or top-up funding for innovative and high-impact green programmes that support the transitioning process to a greener economy which supports poverty reduction and job creation.
- People and Parks Programme is aimed at addressing issues at the interface between conservation and communities in particular the realization of tangible benefits by communities who were previously displaced to pave way for the establishment of protected areas. In contrast to the apartheid era conservationist practices that excluded black communities, the programme promotes inclusive and people-focused eco-tourism management that ensure that South Africans participate and get involved in biodiversity initiatives, and that operations of the SAN Parks have a synergistic existence with neighbouring communities for their educational and socio-economic benefit.
- South African Waste Information Centre (SAWIC)provides the public, business, industry and government with access to information on the management of waste in South Africa. The Centre also provides users with access to the South African Waste Information System (SAWIS).[307]

A unique feature of the protection of environmental rights in South Africa is that it is people-centred as illustrated by the 'Working For' programmes which annually employ a considerable number of disadvantaged South Africans on projects aimed at rehabilitating degraded environments. In this way economic objectives and environmental objectives intersect. Unemployment among the youth is a major problem in Nigeria and environmental

[307] See generally https//www.environment.gov.za/projectsprogrammes (retrieved on 12/02/2014); Department of Environmental Affairs Annual Reports of 2010/2011, 2011/2012 and 2012/2013; Department of Environmental Affairs, Strategic Plan: 01 April 2013 - 31 March 2018.

programs could be designed to provide job opportunities for youth. Also, the Environment Sector of the Expanded Public Works Programme (EPWP) makes interventions aimed at protecting the integrity of the environment while also creating needed job opportunities for many people.[308]

Environmental awareness and education remains a critical component of realizing the environmental right and is a prerequisite for developing and maintaining sufficient human resource capacity for the environment sector. In this regard, the Department has a school based environmental education programme as well as community based environmental awareness programme.[309] In the spirit of promoting public participation in environmental governance, the Department has an environmental crimes and incidence hotline for environmental queries and complaints.[310]

In terms of the prosecution of environmental crimes, the department through the National Prosecuting Authority has secured both civil and criminal convictions involving large fines and terms of imprisonment.[311] Enforcement actions against large corporate polluters in the refineries, iron and steel, cement and power generation sectors, however, appear to take a different path with greater reliance on administrative enforcement processes and a reluctance to institute criminal actions for significant non-compliance.[312] This suggests that companies that are of strategic importance to the economy receive preferential treatment in the enforcement of

[308]In the 2011/2012 financial year for example, the implementation of environmental programmes under EPWP resulted in the creation of 65 182 new work opportunities, against a planned annual target of 48 084.[308] In 2012/13, 99 548 work opportunities were created. Department of Environmental Affairs, Annual Report 2012/2013, pp. 16 and 17.

[309] Ibid.

[310]The effectiveness of the hotline can be measured by the number of complaints actually received via it and follow-up actions taken. The hotline, which does not include complaints reported directly to provinces and local authorities or other EMI Institutions reported 570 complaints in 2010/11 and 467 in 2012/13. See NECER Report 2012/ 2013, p. 81.

[311]The criminal cases involve mining within a wetland (The State vs. Goldview Mining (Pty) Ltd.); the application of the Prevention of Organised Crime Act to environmental crimes (The State vs. York Timbers (Pty) Ltd.), as well as sentences handed down for illegal activities related to rhino (The State vs. ChumlongLemtongthai and Five Others). See *National Environmental Compliance and Enforcement Report* 2012/2013, p. 30.

[312] See *National Environmental Compliance and Enforcement Report* 2012/2013, pp. 36-66

environmental laws. Another reason for the low rate of prosecution of large polluters like Sasol and BHP Billiton is that they are very rich industries with resources to employ big lawyers resulting in time-consuming and labour-intensive court battles. This can have a discouraging effect on prosecutors who already have a heavy work load to contend with, considering South Africa's high crime rate.

In terms of environmental data, South Africa has performed commendably when compared to Nigeria with the publication of the 2007 South African Environment Outlook Report and an updated edition of the report in 2013.[313] In addition to the Annual Report and Statement of Accounts published by the Department of Environmental Affairs, the Environmental Management Inspectorate publishes an annual National Environmental Compliance and Enforcement Report (NECER)[314]. These documents are all freely accessible online; a contrast to the difficulty in accessing official reports of NESREA, the counterpart agency in Nigeria.[315] Reportage of the work and achievements of environmental compliance and enforcement bodies, including civil and criminal cases involving these agencies, helps build upon existing environmental statistics and provides a more comprehensive understanding of environmental compliance and enforcement efforts.

In order to respond to key threats to the environment in a coordinated manner, the national, provincial and local environmental departments plan and implement joint compliance and enforcement operations. This is a practice worth emulating by federal and state

[313] Retrieved on May 15, 2015 from www.environment.gov.za/sites/default/files/docs/envirosustainability_indicators_systems_state.pdf.

[314] NECER, a joint publication that aims to provide an overview of environmental compliance and enforcement activities undertaken by the various environmental authorities, is an example of cooperative and integrated environmental management between the national environmental department and the environmental departments at the provincial level.

[315] Online research conducted on the NESREA website revealed that the website is very inefficient and yields sparse information on the programmes of the Agency and environmental law documents. While it lists the major environmental laws in Nigeria, it is impossible to access any of these laws through the website. Also missing from the list of environmental laws are all the regulations made since 2009. Reports of the Agency are unavailable online and can only be obtained by a visit to the Headquarters in Abuja with the request passing through several bureaucratic channels. These reports do not contain the income and expenditure of the Agency.

enforcement agencies in Nigerian in order to avoid overlapping responsibilities, duplication and role conflicts.

The challenges of the Department include financial constraints; a rise in non-compliance[316]; appropriate funding to create a pool of required competencies; capacity constraints relating to a scarcity of specialists in the environmental field, retention of people with critical and scarce skills, and skills gaps.[317] Another challenge is the legal constraints in enforcing environmental legislations against State organs that engage in environmentally destructive activity.[318]

6.4.4 The South African Judiciary

The South African Constitution creates an independent judiciary whose orders or decisions are binding on all persons to whom and organs of state to which it applies.[319] Under the Constitution, the courts exercise judicial powers and play an important role in the enforcement of human rights, including the right to environment.[320] The constitutional duty imposed on the courts to uphold the Constitution and the law has made the courts vital in protecting the right to environment in South Africa The manner or extent to which South Africa achieves environmental protection depends to a large extent on how the environmental right is interpreted, applied and enforced and how the right guides administrative decision-making. The courts, in interpreting and applying the right, create a body of environmental rights jurisprudence that could guide the duties of all authorities and others to respect, protect, promote and fulfil the environmental right in section 24 of the Constitution. The South African

[316] The total number of non-compliances detected during inspections (at both national and provincial levels) increased from 1116 in 2011/12 to 2482 in 2012/13, representing an increase of 122%. See *National Environmental Compliance and Enforcement Report 2012/2013,* p.2.

[317] The vacancy rate is high for senior management levels (levels 13-16) and stands at 22.7%. See generally, DEA Annual Reports of 2010/2011, 2011/2012 and 2012/2013.

[318] As exemplified by several instances in which Eskom failed to comply significantly with conditions of authorisations, among other offences. Criminal enforcement was initiated but the NPA decided not to prosecute Eskom due to section 48 of NEMA). See NECER Report 2012/2013, pp. 44-45.

[319] Constitution of the Republic of South Africa, Part 8.

[320] Section 165, ibid.

courts' interpretation of section 24 could also guide foreign courts in the interpretation and analysis of the environmental provisions in their own domestic constitutions.

South Africa's hierarchy of courts include: the Constitutional Court; the Supreme Court of Appeal; High Courts; Magistrates' Courts; and any other court established or recognized in terms of an act of Parliament.[321] The Constitutional Court is the highest court in all constitutional matters.[322] The Supreme Court of Appeal is the highest court in all appeal matters, with the exception of constitutional matters.[323] High Courts can generally decide any constitutional matter except a matter that only the Constitutional Court may decide; and any other matter not assigned to another court by an act of Parliament.[324] Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but cannot enquire into or rule on the constitutionality of any legislation or any conduct of the President.[325]

The inclusion of an environmental right in the Bill of Rights means that individuals or groups may assert this right up to the highest court created by the Constitution and significantly enhances the number, nature and scope of legal remedies available to enforce it. However, based on the principle of subsidiarity applied by the South African courts, a litigant cannot rely directly on the constitutional right in his suit where enabling legislation has been enacted. This is based on the Constitutional Court's view that *"[w]here legislation is enacted to give effect to a constitutional right; a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation as falling short of the constitutional standard."*[326] This provision encourages litigants and courts to make use of environmental laws in litigating environmental cases. In addition, since most of South Africa's existing environmental laws stem from the section 24 environmental right, the role of the

[321]Section 166, ibid.
[322]Section 167(3),ibid.
[323]Section 168(3),ibid.
[324]Section 169, ibid.
[325]Section 170,ibid.
[326]*South African National Defence Union vs. Minister of Defense,* (2007) (5) S.A. 400, para.51, 52 (C.C.).

courts in the protection of environmental rights can be determined not only from rights-based jurisprudence per se, but also from cases that involve laws that have developed subsequent to the inception of the constitutional environmental right.[327]

The enactment of the Constitution and the NEMA has revolutionized locus standi and access to court by permitting a broad range of persons to institute environmental rights actions in court.[328] It has also promoted public interest litigation in environmental rights issues and provides a fertile ground for South Africa to develop robust environmental rights jurisprudence. The South African courts have elaborated on and given effect to the environmental right in a number of cases. For the purpose of discussing how the courts have promoted the environmental right, this discussion will be restricted to judgments that interpreted or applied section 24.

Survey of Environmental Cases

(a) Fuel Retailers Association of Southern Africa and Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others (the Fuel Retailers Case)[329] concerns the nature and scope of the obligations of environmental authorities when they make decisions that may affect the environment. It also addresses the interaction between socio-economic development and the protection of the environment.

The case involved an application for a filling station in White River, Mpumalanga. Inama Trust applied to the Mpumalanga environmental authorities for authorisation to construct a filling station in White River, Mpumalanga. Fuel Retailers Association of Southern Africa, an organisation which represents the interests of fuel retailers and the applicant in the

[327]Kotze, L.J. and Du Plessis, A. (2010).Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa, *Journal of Court Innovation*, pp. 157- 176.
[328] See 5.3.1 and 5.3.2 where these are discussed in detail.
[329][2007] ZACC 13.Available at www.saflii.org. (Last accessed 17 February 2016).

Constitutional Court, objected to the construction of the filling station on various grounds, including that the construction of the filling station will have an adverse impact on the environment. The applicant insisted that the environmental authorities should consider whether the proposed filling station would be socially, environmentally and economically sustainable as required by the laws governing the protection of the environment. Despite this objection, the environmental authorities granted authorisation to the Inama Trust to construct the filling station. An internal appeal by Fuel Retailers Association was unsuccessful.

The applicant thereafter approached the Pretoria High Court seeking an order setting aside the granting of the authority to construct the filling station. It alleged that the environmental authorities did not consider whether the proposed development would be socially, environmentally and economically sustainable. It further alleged that the evaluation that had been conducted by the Town Planning Authorities some seven years earlier, when an application for rezoning for the purposes of establishing the filling station was considered, does not satisfy the requirement of the environmental legislation. The environmental authorities and Inama Trust opposed the application alleging that the socio-economic aspects (such as need, desirability, and sustainability) of the construction of a filling station had been duly considered by the local authority when it considered the rezoning of the property for the purposes of constructing the filling station in question. The Pretoria High Court dismissed the application. The appeal of Fuel Retailers Association to the Supreme Court of Appeal was equally unsuccessful.

In its judgment the Constitutional Court examined the tensions between environmental protection and socio-economic development and held that the Constitution recognises the interrelationship between the protection of the environment and socio-economic development. According to Ngcobo, J.,

> What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.[330]

The Court stated that section 24 of the Constitution contemplates the integration of environmental protection and socio-economic development and envisages that the two will be balanced through the ideal of sustainable development. Thus sustainable development provides a framework for reconciling socio-economic development and environmental protection and thus acts as a mediating principle in reconciling environmental and developmental considerations. This, according to the Court, is apparent from section 24(b) (iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

The Court dealt extensively with the nature of the concept of sustainable development in international law, drawing *inter alia* upon the Report of World Commission on Environment and Development (the Brundtland Report), the Rio Declaration, and the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[331]. The Constitutional Court stated that the concept of sustainable development in South African law must be construed and understood in the light of these developments in the international law of environment and sustainable development[332] and concluded that the concept has a significant role to play in the resolution of environmentally related disputes in South African law.

[330] Op cit., para. 44
[331] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*37 I.L.M. 162 (1998) 200
[332] Op cit., para. 56.

> It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.[333]

The Court went on to reiterate the important role of the courts in balancing the resultant tensions and in ensuring sustainable development. It noted that the obligation to ensure that the essence of sustainability be reflected in the governance processes of environmental authorities is primarily that of the judiciary and this was affirmed at the Global Judges Symposium during the World Summit on Sustainable Development in Johannesburg.

> The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.[334]

The Court further analysed the application of the concept of sustainable development in the domestic law and stated that NEMA, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development. That the NEMA Principles[335], the general objectives of integrated environmental management, and the sections dealing with the implementation of the general objectives of integrated environmental management all make it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility.

[333] Op cit., para. 57.
[334] Op cit., para. 102
[335] The NEMA principles, contained in section 2 of NEMA, "apply ... to the actions of all organs of state that may significantly affect the environment". They provide not only the general framework within which environmental management and implementation decisions must be formulated, but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment. Fuel Retailers Case.Op cit. para. 67.

The Court therefore held that the obligation of the environmental authorities to consider socio-economic factors includes the obligation to consider the impact of the proliferation of filling stations and of proposed filling station on existing ones. This obligation is wider than the requirement to assess need and desirability under the Ordinance. It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.

The Court reasoned that unsustainable developments are in themselves detrimental to the environment if a development such as a filling station may have a substantial impact on the environment. The proliferation of filling stations poses a potential threat to the environment, which arises from the limited end-use of filling stations upon their closure. However, the objective of considering the impact of a proposed development on existing ones is not to stamp out competition; rather it is to ensure the economic, social and environmental sustainability of all developments. The filling station infrastructure that lies in the ground may have an adverse impact on the environment. The Court went on to hold that, having failed to apply their minds to the impact of the proposed filling station on socio-economic conditions, the authorities misconstrued the nature of their obligations and as a consequence failed to comply with a compulsory and material condition prescribed by the law for granting authorisation to establish a filling station.

The Court accordingly granted the application for leave to appeal and upheld the appeal. It set aside the decision of the environmental authorities granting authorisation to construct the proposed filling station and ordered the environmental authorities to reconsider the application by Inama Trust in the light of the judgment.

The Fuel Retailers Case is significant for expanding on the relationship between environmental protection and socio-economic development. In this regard "sustainable development and sustainable use and exploitation of natural resources are at the core of the

protection of the environment."[336] The environmental right in section 24 is therefore to be understood and situated within the context of sustainable development.

The judgment of the Court raises issues relating to the stringency and diligence required of environmental authorities in the conduct of their statutory duties. Criticizing the approach adopted by the environmental authority and the Department of Water Affairs, the Court noted that they did not consider the cumulative effect of the proliferation of filling stations on the aquifer.

> …two matters … in relation to the duty of environmental authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the environmental authorities. The environmental authorities and Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.[337]

(b)Maccsand (Pty) Ltd. vs. City of Cape Town and Others (Maccsand case)[338] in which the Constitutional Court discussed environmental rights in the context of mining. The Minister for Mineral Resources had, in accordance with his powers under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), authorized mining operations in several areas including several undeveloped areas of Cape Town. However, Maccsand could not mine the Cape Town locations because the nationally approved areas were not zoned for mining or prospecting under municipal law. Cape Town relied on the provincial Land Use Planning Ordinance (LUPO)[339]to prohibit Maccsand's mining operations on city-owned public open space within the municipality. The city opposed the mining because the area was near schools and homes.

[336]Op cit., para. 45.
[337]Op cit. para. 98.
[338][2012] ZACC 7; 2012 (4) SA 181 (CC) (S. Afr.)
[339]Land Use Planning Ordinance 15 of 1985 (Western Cape).

In the High Court[340], the City of Cape Town and the MEC for Local Government Affairs and Development Planning, Western Cape, were successful in obtaining an interdict prohibiting Maccsand from continuing with mining activities until it had obtained authorisations under both the Land Use Planning Ordinance and the National Environmental Management Act. Maccsand appealed against this decision to the Supreme Court of Appeal.[341] The SCA upheld the finding of the high court regarding the need for LUPO authorization but set aside the interdict insofar as it related to the NEMA on a technical issue. Maccsand subsequently appealed against the SCA's decision to uphold the interdict as regards the need for LUPO authorization.

On appeal to the Constitutional Court, the court granted leave, noting that the interplay of mining and environmental issues clearly raises constitutional issues.[342]Maccsand claimed that the local land use law could not limit their rights to mine because "in the event of a conflict between [national and provincial] laws, the MPRDA prevailed because it regulated a functional area vested in the national sphere of government".[343] Cape Town insisted that their zoning laws created an independent and valid restriction on the use of regulated municipal land.

In its judgment the Constitutional Court disagreed with the argument that the application of LUPO to land in respect of which mining rights have been granted would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government.[344] The court pointed out that the LUPO and the MPRDA served different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governed mining, LUPO regulated the use of land.

[340]*City of Cape Town vs. Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WCC).
[341]*Maccsand (Pty) Ltd & Minister of Mineral Resources vs. City of Cape Town & others* (Chamber of Mines as amicus curiae) [2011] ZASCA 141
[342]*The Maccsand case*[2012] ZACC 7, para 37
[343]Op cit., para. 27.
[344]Op cit., para. 41.

While acknowledging that an overlap between these two laws could occur, the court held that such overlap did not constitute an impermissible intrusion by one sphere into the area of another 'because spheres of government do not operate in sealed compartments'[345]. In this context, the court advised, the Constitution obliges these spheres of government 'to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another'[346]. The Court further noted that it was open to Maccsand to request the Provincial Government to intervene and have the rezoning effected.[347] There was nothing in the MPRDA suggesting that LUPO would cease to apply to land upon the granting of a mining right or permit.[348] The court therefore dismissed the appeal against the SCA's decision that upheld the need for LUPO authorization in respect of land to which a mining right has been granted.

The judgment, which has been hailed by environmental rights activists asmarking the beginning of the end of decades of special treatment for the mining industry[349], is important for several reasons. First, it provides clarity on the relationship between the MPRDA and the Land Use Planning Ordinance, and by extension other legislation on land planning. Secondly, its effect is to allow for limitations on mining rights in South Africa. The mining industry was a protected one during the apartheid era despite the environmental degradation occasioned by its activities, a fact acknowledged in *Save the Vaal*[350].

The *Maccsand Case* upholds restrictions on mining activity through the instrumentality of planning legislations like the LUPO, in addition to regulations provided under the MPRDA, a development that could have a positive effect on environmental rights protection. Thirdly, the

[345]Op cit., para. 43
[346]Op cit., para 47
[347]Op cit., para 49
[348]Op cit., para. 44
[349]Mabuza, E. (2012). Court Ends 'Special Treatment' for Mining, *Mail and Guardian***,** August 08.
[350]*Director: Mineral Development, Gauteng Region, and SASOL Mining (Pty) Ltd vs. Save the Vaal Environment and Others* 1999 (2) SA 709 SCA, para. 20.

judgment upholds the powers of municipal authorities or local governments and empowers them to evaluate environmental harms in the context of appropriate land use determinations[351].

(c)Director: Mineral Development, Gauteng Region, and SASOL Mining (Pty) Ltd vs. Save the Vaal Environment and Others.[352]Sasol Ltd., a petroleum and mining company planned to expand its coal mining activities in an area bordering the Vaal River, one of the largest rivers in South Africa, which provides the Greater Gauteng Area (Johannesburg and environs) with water for domestic, industrial and agricultural purposes. The Director of Mineral Development (Department of Minerals and Energy) issued a licence to SASOL to commence mining without having given Save the Vaal[353] an opportunity to raise objections.

The appeal raised, *inter alia*, questions whether interested and affected parties wishing to oppose an application for a mining licence by a mining company in terms of the Minerals Act 50 of 1991 are entitled to raise environmental objections to halt the application and also whether they are entitled to be heard by the competent authority designated to grant or refuse such a licence. In the present case, the Director, taking the view that consideration of such objections would be premature at that stage, refused the respondents a hearing. He was successfully taken on review at the High Court of South Africa, Witwatersrand Local Division. The Director and SASOL appealed to have the decision reversed.

The primary substantive right or interest on which the respondents relied was the constitutional right to the environment in Section 24. They contended that their environmental

[351] Christiansen, E. (2013). Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights. *Stanford Environmental Law Journal*, 32: 215.

[352]1999 (2) SA 709 SCA. The case was heardby the Supreme Court of Appeal and was one of the first instances where the judiciary referred to Section 24.

[353] Save the Vaal is an unincorporated association comprised of concerned people who own property and live along the Vaal River. Its object,according to its written constitution, is to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations. See *Director: Mineral Development, Gauteng Region, and SASOL Mining (Pty) Ltd v Save the Vaal Environment and Others. Op cit.,* para. 4.

right would be prejudiced by an adverse decision by the Director.[354] The Supreme Court of Appeal based the bulk of its decision on an interpretation of the *audialterampartem*rule,[355] which rests squarely within the realm of administrative law and not necessarily environmental law. The court found that the *audialterampartem*rule in fact applies to the dispute and decision in question since

> [t]he application of the rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs…*Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns*.[356]

A discussion of the role of the judiciary in protecting environmental rights reveals several points of departure between Nigeria and South Africa. First, the enactment of the South African Constitution and the NEMA has revolutionized locus standi and access to justice in environmental matters by permitting a broad range of persons to institute environmental rights actions in the courts.[357] Any person may sue in respect of any breach or threatened breach of any provision of NEMA or other environmental laws. The motive or identity of the person is irrelevant.[358] This has opened the doors to interested or affected persons whose interests were previously considered too remote. Secondly, the jurisdictional dichotomy between the Federal

[354] Some of the environmental concerns raised by the respondents included, the destruction of the Rietspruit wetland, the threat to flora and fauna, pollution, loss of water quality and decreased value of properties. See para 6.

[355]The *audialterampartem*rule is part and parcel of administrative law and more specifically the rules of natural justice. It entails thateveryone has the right to be heard in administrative matters, whichmay affect their rights and interests.

[356]Op cit., para. 20

[357] Section 38 Constitution of South Africa, section 32 NEMA. See also 5.3.2.

[358] See the *Fuel Retailers Case* where Ngcobo , J stated that -

> *. . . The duty of a court of law when the decision of an environmental authority is brought on review is to evaluate the soundness or otherwise of the objections raised. In doing so, the court must apply the applicable legal principles. If upon a proper application of the legal principles, the objections are valid, the court has no option but to uphold the objections. That is the duty that is imposed on a court by the Constitution, which is to uphold the Constitution and the law which they "… must apply impartially and without fear, favour or prejudice."* ***Neither the identity of the litigant who raises the objection nor the motive is relevant****.* (para. 101)(emphasis supplied)

High Court and the State High Court- a factor that has frustrated environmental litigation in Nigeria – is not present in South Africa.

With the provision of a constitutional environmental right in South Africa, the South African courts play a more prominent role than the Nigerian courts in environmental decision making. The courts are used more widely than before to either force the governments at various levels to carry out their environmental protection functions; to prevent anticipated or on-going breaches by non-compliant actors and to claim damages as a result of violations of environmental laws. In Nigeria there is no direct constitutional provision that proclaims environmental rights and the African Charter Act which provides for a right to environment has its shortcomings. These factors have affected judicial protection of the right. The major Nigerian court decision on environmental rights remains a High Court decision in the *Jonah Gbemre case*.[359]In that case, the court could not place total reliance on the environmental right but recognised environmental right as a corollary to the rights to life and human dignity. To date, neither the Court of Appeal nor the Supreme Court has issued any judgment on environmental rights in spite of the numerous instances of environmental degradation in Nigeria. The reverse is the case in South Africa where the Constitutional Court, Supreme Court of Appeal, and High Courts have all issued important environmental decisions influenced by the constitution.

Environmental rights protection in both countries faces the challenge of high cost of litigation more so when those most affected by environmental rights violations are the poor and vulnerable. NEMA has responded to this by providing that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.[360] This statutory provision has also been given judicial recognition in*Trustees for the*

[359]Op cit.
[360] Section 32(2)

Time Being of the Biowatch Trust vs. Registrar, Genetic Resources and Others.[361] The rationale behind this provision, according to the Constitutional Court in the instant case, is that the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest.[362] This is also traceable to the fact that environmental rights is constitutionally recognized and the Constitutional Court and the other courts of South Africa generally do not make costs orders in matters in which a party seeks to establish an important constitutional principle.[363]

6.4.5 Non-Governmental Organisations (NGOs) and Civil Society

In addition to the considerable number of Non-governmental Organizations in South Africa whose object clauses border on environment, there exist other NGOs or Civil Society groups who are in the vanguard of promoting and protecting the rights recognized in the South African Bill of Rights. A right that is constitutionally recognized is more likely to attract support from the general NGO community than a right that is not constitutionally recognized; and this is the case in South Africa. South Africa's environmental law and policy and the Reports of environmental regulatory bodies all highlight the importance of NGOs in the fulfilment of environmental policy and law. The liberalization of the *locus standi* rule and the provision for public interest litigation in South Africa's environmental law all provide NGOs with an effective tool for the promotion and protection of environmental rights, as reflected by a survey of environmental rights cases.[364]

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[361][2009] ZACC 14, para. 19.

[362]Ibid.,para. 19.

[363]See *Affordable Medicines Trust and Others vs. Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) where the Constitutional Court of South Africa held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. See also *Trustees for the Time Being of the Biowatch Trust vs. Registrar, Genetic Resources and Others*(supra)

[364] See for example, *Wildlife Society of Southern Africa and Others vs. Minister of Environmental Affairs and Tourism* 1996 (3) SA (TKS);*Earthlife Africa (Cape Town) vs. Director General of Environmental Affairs and Tourism and Eskom Holding*, unreported case no, 7653/03 25 January 2005; *South Durban Community Environmental Alliance vs. Head of Department: Department of Agriculture and Environmental Affairs* 2003 (6) SA 631 (D).

The Legal Resources Centre (LRC)

The Legal Resources Centre (LRC) is an example of human rights organisations who, empowered by the constitutional status given to environmental rights, are involved in environmental rights protection. LRC, established in 1979, is regarded as the largest public interest, human rights law clinic in South Africa and is notable for its contributions to the anti-apartheid struggle as well as the provision of free legal services to the poor. According to the LRC, the objective of its Environment Work is to "equip South Africa's civil society to participate effectively in environmental governance in order to protect the environmental rights enshrined in the Constitution"[365]. Its environmental work focuses on addressing the impact of development activities that are likely to affect the health, livelihood and well-being of marginalized and poor people and communities.

The LRC provides legal representation and technical support for environmental organisations as well as vulnerable and marginalized communities. It works in the areas of air quality and water quality; industrial pollution and mining related environmental problems. It is also involved in the EIA process; medical waste management; and the right to information on genetically modified organisms.[366] Mechanisms adopted by the LRC are litigation, representation of clients during administrative procedures, networking, education in the law and law reform.

Although the LRC was established in 1979, its environmental work began in earnest after the drafting of the 1996 Constitution that provides for environmental rights. It has achieved the following results: a reduction in sulphur dioxide emissions in all four refineries in South Africa and negotiation of an emission reduction plan with some; rehabilitation of abandoned mines affecting the health and well-being of nearby communities; closure of illegal

[365] Available at www.lrc.org.za/about_us (Last accessed 23 May 2016)
[366] Ibid.

mining operations and judicial review of mine permits granted with lenient measures for environmental protection. Others include negotiation of environmental management plans with large industrial developments; prevention of authorization of medical waste incinerators without sufficient air pollution control devices and representation of civil society in law reform processes. The LRC has been involved in negotiating a reduction in lead and sulphur levels in fuel and in successful litigation overturning authorization granted for development of a nuclear power plant where interested and affected parties were not given opportunity to be heard on the final EIA.[367]

The size, clout, geographic spread and financial resources commanded by the LRC portends well for its environmental work. The organization which numbers Constitutional Court judges and other notable human rights activists among its alumni[368]; employs over 65 lawyers specializing in public interest litigation and operates from four offices, namely in, Johannesburg, Cape Town, Durban and Grahamstown. It has no equal in Nigeria. The broad range of competing human rights issues covered by the LRC however means that constraints are of necessity placed on the resources and staff it can devote to Environmental Work.

Environmental NGOs in South Africa are many and diverse. There are those whose focus is primarily conservationist issues (also called "green issues") while some others focus on industrial pollution and waste ("brown issues"). Degradation caused by mining and acid mine drainage forms the focus of some other groups while some groups have corporate accountability and responsibility as their primary objective. It is indisputable that freedom of association thrives more in constitutional democracies and this is the case of South Africa that has experienced a boom in environmental NGOs with the end of apartheid. With the exception of conservationist ENGOs like the Wildlife Society of South Africa (1926) and Endangered

[367] Ibid.

[368] Including Arthur Chakalson, former Chief Justice and Constitutional Court Judge; SandileNgcobo, Chief Justice and Constitutional Court Judge; Johann Kriegler, former Constitutional Court Judge; and George Bizos, notable human rights activist.

Wildlife Trust (1973), most of the active environmental NGOs were established post-apartheid or in the dying days of the apartheid era.

Earthlife Africa (Earthlife): This NGOwas founded in 1988 by a group of university students to mobilise civil society around environmental issues in relation to people. It is a nationwide alliance of volunteer activists, grouped into autonomous local branches but linked through the Earthlife Statement of Belief and common campaign activities. Earthlife is largely volunteer- driven. However in recent years, some branches have acquired funding to staff and facilitate specific campaigns, an example being the Sustainable Energy and Climate Change Project[369]. Earthlife produces and distributes a newsletter, and has monthly meetings at which its different campaign/action groups report. The current campaign groups are biodiversity and toxics group, nuclear energy, zero waste, animal action and climate change report, renewable energy, acid mine drainage, and fracking. There are office bearers, elected at an Annual General Meeting.[370]

Mechanisms adopted by Earthlife in achieving its objectives include protests, rallies and marches; press releases; research and reports on large corporate polluters; engagement with Government in the law making process[371] and engagement with agencies responsible for the enforcement of environmental law. In this way Earthlife operates mainly as a pressure group. Earthlife has also instituted several litigations to protect the environmental right.[372]

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[369] The project, done in partnership with WWF Denmark, aims to link renewable energy and energy efficiency to advocacy around climate change, to influence relevant development policies. The importance of the project is better understood in the context of the increasing energy needs of South Africa, coupled with South Africa's coal-fired power plants which make South Africa the largest emitter of greenhouse gases on the African continent and one of the largest in the world.

[370]Retrieved on May 23, 2014 from www.earthlife.org.za. See also Cock, J. (2004) Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa, Centre for Civil Society and the School of Development Studies, University of KwaZulu-Natal, pp. 13-14.

[371]Earthlife was active in the Consultative National Environmental Policy Process (CONNEP) that led to the Drafting of the NEMA

[372]Earthlife Africa (Cape Town) v. Director-General, Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C); [2006] 2 All SA 44 (C); Earthlife Africa (Cape Town) v. Eskom Holdings Ltd.

Earthlife has played an important role in the environmental justice movement in SA with its involvement in some notable environmental struggles. One such moment was the exposure of pollution by Thor Chemicals, a corporation which imported toxic waste into South Africa, by Earthlife and the Environmental Justice Networking Forum (EJNF). They worked closely with the LRC, the Chemical Workers Industrial Union, affected workers and local communities.[373] The case is important for demonstrating how alliances can be forged between environmentalists and organized labour. According to Barnett, it was the crucial turning point in the re-framing and 'browning' of environmentalism in South Africa.[374]

In 1998 Earthlife organized a picket at Durban harbour against a nuclear waste ship. Earthlife and other organisations like Groundwork, EJNF, the LRC and the Sasolburg Environmental Committee have collaborated to prevent the construction of a hazardous waste incinerator in Sasolburg which would have been the largest in Southern Africa.

GroundWork: GroundWork, the South African member of Friends of the Earth International, was founded in 1999 and has collaborated with and assisted communities suffering violations of their environmental rights. Its work, which is centred in South Africa, is increasingly being extended to other countries in the Southern Africa region. GroundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.[375] Its main campaign areas are climate justice and energy, air quality, waste and environmental health.[376]

GroundWork is known for the crucial support it provides to several communities and a number of community based organizations in different parts of South Africa, especially those

[373]Cock, J. (2004). Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Centre for Civil Society and the School of Development Studies, University of KwaZulu-Natal, p. 15.
[374] Barnett, C. 2003. Media Transformation and New practices of Citizenship: the Exampleof Environmental Activism in Post-apartheid Durban.*Transformation 51,* pp. 1 – 24. Cited in Cock, J. (2004) Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Op cit., p. 15
[375]GroundWork, Vol. 14 No. 2 –June 2012,p.2.http://www.groundwork.org.za/About_us/background.asp
[376] Ibid.

located in pollution hotspots. Examples of CBOs that GroundWork helped establish are the South Durban Community Environmental Alliance (SDCEA) and the Vaal Environmental Justice Alliance (VEJA).[377] These coalitions of CBOs work closely with Groundwork and yet retain their unique identity. In this way GroundWork ensures that"the larger processes are informed by local knowledge and interests"[378].

GroundWork trains community groups and thereby enhances their capacity to contribute to the making of environmental policy.[379] For example they facilitated submissions from the Boipatong Environmental Committee on the proposed Air Quality Bill arguing that the Bill failed to adequately protect communities exposed to hazardous air borne chemicals.[380] More recently GroundWork has engaged with communities in Lephalale, Limpopo Province to monitor and challenge the World Bank's loan to Eskom for the development of Medupi, a large coal fired power plant expected to result in adverse environmental and social impacts.[381]

GroundWork, through its trainings has provided communities affected by industrial pollution with an important tool for monitoring the pollution they are exposed to daily. Through a simple method using a bucket, communities can monitor industrial pollution. Air samples taken by community volunteers are then sent to various laboratories for analysis. The air monitoring project thus provides scientific evidence to back up the people's daily experience of pollution. The communities are thereby empowered to challenge corporate polluters as well as environment enforcement agencies. The Bucket System of monitoring air pollution has been used successfully in South Durban and in the Vaal Triangle and has assisted

[377] See 5.4.6 for more on the SDCEA and VEJA.
[378]Cock, J. (2004).Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Op cit. p. 11.
[379]Khanyile, S. (2012). Air Quality: Community Workshops, *GroundWork*, Vol. 14 No. 2 –June, p. 10.
[380]Cock, J. (2004). Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Op cit. p. 12.
[381]Khanyile, S. (2012).Op cit. p. 10.

NGOs and CBOs in making submissions to parliamentary bodies on proposed environmental legislations.[382]

GroundWork's pioneering research has been influential at the policy level. In 2003 their report on community-based air pollution monitoring was presented which draws together the findings of the bucket brigade air samples and community air sampling programmes in three identified pollution hotspots, namely South Durban, Cape Town and Sasolburg. For the first time community research was captured in a document that would be updated annually to monitor industrial pollution. The report is used by communities to lobby government to force industry to adopt better technologies and practices.

GroundWork also facilitates the legal services of the LRC and the Centre for Environmental Rights to communities. The alliances between environmental Non-Governmental Organisations (ENGOs), community based organisations (CBOs) and public interest law clinics offer examples of the synergy that results when activists working towards a common goal come together.

Bench Marks Foundation: This NGO aims to ensure that the operations of big corporations do not undermine community life or destroy the environment. The Foundation, which was set up by a broad-based coalition of churches and has its headquarters in Johannesburg, is mandated to monitor the practices of corporations to ensure they respect human rights, operate in a way that protects the environment and do not externalize costs. It has to see that profit making is not done at the expense of other interest groups and that those most negatively impacted are heard, protected and accommodated.[383] The Bench Marks

[382]Interview with members of VEJA at Vanderbiljpark on 20/8/2012. See also, Cock, J. (2004). Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Op cit. p. 12; www.sdceango.co.za
[383]Benchmarks Foundation (2013) *Policy Gap 8, Steel at Any Cost: A Community Voice Perspective on the Impacts of ArcelorMittal´s Operations in Vanderbijlpark, South Africa*, the Bench Marks Foundation, Johannesburg, p. iii. Benchmarks Foundation (2012) *Policy Gap 6, A Review of Platinum Mining in the Bojanala District of the North West Province: A Participatory Action Research Approach*, the Bench Marks Foundation, Johannesburg, p. ii.

Foundation, in addition to other concerns about the activities of corporations, is concerned about the destruction of the environment that results from industrial activities and mining.

The Bench Marks Foundation conducts research that is used to monitor multinational corporations. It works with local communities and networks to support them in their engagements with corporations and governments. It promotes public awareness through the mass media, social media and websites and works to promote ideas on what constitutes good investment and corporate practice. It encourages the church and other religious leaders to be more active in promoting responsible corporate behaviour. In this regard the Foundation works closely with research bodies, NGOS, religious and community organisations across the Southern Africa Community Development region.[384]

The Bench Marks Foundation uses a measurement instrument called the *Bench Marks, Principles for Global Corporate Responsibility - Bench Marks for Measuring Business Performance* - a comprehensive set of social, economic, and environmental criteria and business performance indicators drawn from a body of internationally recognized human rights, labour and environmental standards and principles. This forms the basis for conducting its research and for monitoring multinational corporations.[385]

The Foundation has released several research reports on the activities of large manufacturing corporations and mining companies.[386] These have served to draw public attention as well as government attention to the environmental and social impacts of the companies and served to rebut the companies' sustainability reports where the companies' are whitewashed. It also serves as a challenge to companies to adopt environmentally sound corporate practices.

[384]Ibid.
[385]Ibid. See also www.bench-marks.org.za
[386] Ibid.

Centre for Environmental Rights: This NGO was established in 2009 as a merger of eight civil society organisations (CSOs) in South Africa's environmental and environmental justice sector. It provides legal and related support to environmental CSOs and communities.[387] A major reason for the merger establishing CER was that, although South Africa guarantees environmental rights in its Constitution and has strong environmental legislation that provides for public participation in environmental policy and decision-making, South African civil society's ability to hold government and industry to account through their participation in environmental decisions and advocacy, reporting of non-compliance and, through legal challenges was being hampered by increasingly complex environmental legislation and procedures, coupled with limited access to funding and legal advice.

The Centre provides support and legal representation to civil society organisations and communities who wish to protect their environmental rights and engages in legal research, advocacy and litigation to achieve change.[388] It meets on a regular basis with communities whose environmental rights are violated and provides them with free legal aid.[389] The Centre also acts as a repository of environmental legal information in South Africa through its rich virtual library.[390] The Centre has in this and other ways assisted several communities in protecting their right to environment.

The alliance between environmental NGOs and Community Based Organisations is exemplified by the free legal representation afforded the Vaal Environmental Justice Alliance

[387] Available at www.cer.org.za/About (Last accessed 15 September 2016).
[388] Ibid.
[389] Interview with Ms. Dina Townsend, Staff Attorney of CER on 21/8/2012. The researcher on 21/8/2012 has been an observant at one such community forum between the Davidsonville Community, Johannesburg, staff of CER and volunteers from Earthlife Africa.
[390] Key resources on environmental rights in the library include environmental legislations (including draft legislation, international instruments, national and provincial legislation); court judgments on environmental law and rights, articles; budget speeches; key correspondence on environment –related issues; Parliamentary Questions and Answers on environment; Plea and Sentence Agreements; Policy Documents and White Papers; Research Reports; Departmental Annual Reports; Enforcement Reports; Strategic Plans and Strategies of Enforcement Departments; Training Materials and other resources.

(VEJA) in their case against ArcelorMittal South Africa.[391] The judgement of the Supreme Court of Appeal in that case is considered a victory for environmental justice and governance in South Africa. It confirms the right of fence-line communities to have access to environmental documents of corporate polluters, so that they can be in a stronger position to protect their constitutional rights to a safe and healthy environment.[392] With access to such documents, communities whose health and other rights have been affected by industrial pollution can better understand the extent of the impact of an offending corporation and how they can begin to hold it more accountable.

Other NGOs like the Group for Environmental Monitoring and the Environmental Justice Networking Forum (EJNF) have all played important roles in promoting and protecting environmental rights. EJNF, for example, played a major role in the Consultative National Environmental Policy Process (CONNEP) and followed it thorough to the enactment of the National Environmental Management Act. EJNF is also focused on grassroots campaigning. Through its 1998 "Speak Out on Poverty Campaign" the EJNF contributed significantly to the reframing of the environmental discourse to include issues of environmental injustice thereby portraying the environment in a new light and signalling a shift from the dominant conservationist ethic that had hitherto characterized environmental efforts in South Africa.[393]

In a bid to promote transparency, accountability, sharing of information and dialogue, several ENGOs regularly engage with industry through various forums. For example, the Eskom NGO Forum is aimed at facilitating meetings and workshops with environmental NGOs to share information on Eskom's strategy to reduce particulate emissions and water

[391] For details of the case, see 5.2.1.2. Also, *Company Secretary of ArcelorMittal South Africa (AMSA) and another vs. Vaal Environmental Justice Alliance*(2014) ZASCA 184 (26 November, 2014);
[392]Available at www.cer.org.za. (Last accessed 15 Sptember)
[393] McDonald, D. (ed.) (2002). Op cit., p. 205. Cock, J., (2004).Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa, op cit. pp. 8-11.

management. The NGOs also use the platform to present their views on these and other environmental issues.

The end of apartheid and the inclusion of environmental rights in the South African Constitution has undoubtedly strengthened and revolutionized environmental activism in South Africa. Whereas the environmental lobby used to be almost entirely white middle class and concerned mostly with wildlife conservation, environmental groups are now diverse in their racial and economic base. Benchmarks Foundation, EJNF and GroundWork, for example, are directed mostly by Blacks or coloureds. The environment is now seen as a social and economic issue and the environmental rights struggle increasingly involves rural and grassroots organisations who are increasingly involved in environmental research, environmental monitoring and environmental campaigns.

Some important characteristics of South African environmental NGOs are the involvement of religious bodies in those issues that affect the enjoyment of environmental rights. This can be traced to the role that South African churches have traditionally played in the anti-apartheid struggle and the role it continues to play in socio-economic struggles. The activist role played by churches through organisations like the Benchmarks Foundation and the Southern African Faith Communities' Environment Institute (SAFCEI)[394] highlights the potential role that religious leaders (drawn from all faiths) can play in environmental education[395].

[394] SAFCEI, established in 2006 as a Public Benefit and Non-Profit Organisation, is the fruit of a multi-faith environmental conference which called for the establishment of a faith-based environmental initiative. Its membership is drawn from various faiths including Christian, Muslim, Jewish, Hindu, Buddhist and Baha'i and its current projects include: advocacy for efficient and renewable energy; engagement with government, civil society and faith leadership about mitigation and adaptation to climate change; renewable energy, energy efficient and wise water-use pilot projects by faith communities; protecting biodiversity; and promoting environmental action by local faith communities. Available at http://safcei.org/about/ (Last accessed 2/9/2016).

[395] For example, as part of the campaign against the World bank loan to Eskom for the construction of Medupi, a large coal fired power plant, the Diakonia Council of Churches' 2010 Good Friday Service and March was dedicated to Eskom and the World Bank under the theme, 'Creation: Crucified by Greed'. See Peek (2010) The WB, Eskom and the Inspection Panel,*GroundWork* Vol. 12 No. 2, June, pp. 7-8.

Nigeria is a country whose citizens are deeply religious (although not necessarily God fearing) and where religious and traditional leaders wield immense influence. In view of the fact that every religion and culture in Nigeria has something positive to say about the environment and the protection of the environment, the role of traditional and religious leaders in influencing public reorientation on environmental protection should be explored. NESREA, SEPAs and environmental NGOs can work with traditional rulers and religious leaders in creating public awareness of environmental issues. At present, such partnerships are lacking. The Nigerian National Agency for Food and Drug Administration and Control (NAFDAC) has built on the influence of religious and cultural leaders in its anti-counterfeit drugs campaign.

The South African environmental struggle is not limited to South African Government alone. Several NGOs transcend their borders to extend assistance in the form of training, provision of assistance, expertise and legal advice to NGOs and pollution-impacted communities in other countries within the Southern Africa Development Community (SADC).[396] In this way they are outward-looking rather than solely inward-looking. Books written on environmental rights issues in South Africa commonly include chapters on environment-related issues in other countries in SADC.[397]

6.4.6 Community Based Organisations

There has been, from the early nineteen nineties, an increasing incidence of communities in South Africa mobilizing around the environment objectives. Koch reported that a newspaper's regular review of the state of the country's ecology at the end of 1989

[396]GroundWork, the Environmental Justice Networking Forum (EJNF), Benchmarks Foundation and the Centre for Environmental Rights, among others have been instrumental in the establishment of environmental NGOs and CBOs in other countries in the Southern Africa. See *GroundWork*, Vol. 14. No. 2 –June 2012. Fritz, J.M. (1999). Searching for Environmental Justice: National Stories, Global Possibilities.*Social Justice*, Vol. 26, No. 3 (77), pp. 174-189.

[397]See Cock, J. and Koch, E. (eds.) *Going Green: People, Politics and the Environment in South Africa*.Op cit. pp. 210-222.Ramphele, M. and McDowell, C. (eds.) (1991).*Restoring the Land: Environment and Change in Post-Apartheid South Africa*.Panos Institute, London. McDonald, D. (ed.) (2002) op cit.

yielded only one example of community-based organization around the environment.[398]There is today, an abundance of community based organisations and alliances involved in environmental struggles. Whether it be mining degradation, industrial pollution, nuclear power stations, toxic waste or sanitation; these community based organisations are all united by the struggle for the realization of their environmental rights.

The South Durban Community exemplifies the role that communities can play to protect their environmental rights. The South Durban area is inhabited by mostly low-income and working-class people who were forcibly relocated to the area by the apartheid regime to create a cheap labour pool for the emerging industrial economy. It is also a home to over 300 industrial facilities including two oil refineries (one of which is Africa's largest), waste water treatment works, numerous toxic waste landfill sites, a paper manufacturing plant and a multitude of chemical process industries.[399] Research has shown that children in local schools in the area have three times the rate of respiratory diseases as children living outside of the area. The area carries the infamous label of "cancer valley" — a reference to the area's high rates of cancer.[400]

In 1995 the struggle of the community for a healthier environment received an important boost when the then President Nelson Mandela, during a visit to the Engen Oil Refinery, was met at the gates by demonstrating community members calling for a reduction in the pollution produced by Engen. President Mandela granted the community an audience and called an inter-stakeholder meeting which included Engen, the various organisations representing communities living adjacent to the refinery, and various cabinet ministers including the Minister of Environmental Affairs and Tourism, the Minister of Health and the

[398] Koch, E. (1991). Rainbow Alliances: Community Struggles Around Ecological Problems. In: Cock, J. and Koch, E. (eds.). *Going Green: People, Politics and the Environment in South Africa*, op cit., p. 21.
[399] Available at www.sdcea.co.za/about; www.goldmanprize.org/.../desmond-dsa. www.sdcea.co.za/index.php%3Foption%(Last accessed 3 November 2015).
[400] Ibid.

Minister of Minerals and Energy.[401] The meeting served to highlight the pollution debate as a holistic environmental and socio-economic problem rather than a mere industrial problem.[402] It led to the establishment of the South Durban Steering Committee for Environmental Management (SDSCEM).

The realization of the importance of communities first uniting with each other before engaging industry and government led to the formation of the SDCEA in 1996, which brought together the several diverse and previously racially divided residential groups.[403] Shortly after the meeting with President Mandela the local community was granted a long-awaited hearing with the National Minister of Water Affairs regarding the closure of the Umlazi dump site—a toxic landfill operating without a permit. The minister promised to investigate the illegal toxic dump site, but it took further protests, this time by school students suffering adversely because of the site, for the illegal dump to finally be closed in 1997.[404]

The South Durban Community Environmental Alliance (SDCEA) has grown to become one of the most active community environmental groups in the country, made up of 16 affiliate organizations. It holds regular workshops to create awareness in the community around the health issues that confront them and publishes an environmental newsletter. It also organizes protests and marches to highlight the toxic environment in the area and violations of the community's right to an environment that is not harmful.[405]

Its significant achievements include an agreement by the Engen refinery to reduce its sulphur dioxide pollution by 65 per cent. It has developed a smell chart to help residents identify which toxic chemicals they are being exposed to and trained them in "bucket

[401]Peek, S. (2002). Doublespeak in Durban: Mondi, Waste Management, and the Struggles of the South Durban Community Environmental Alliance. In: McDonald, D. (ed.). Op cit., p. 207.
[402]Ibid, p. 207.
[403] Peek, S. (2002) op cit. pp. 202-218. Retrieved on 7/11/2015 from www.goldmanprize.org/.../desmond-dsa; www.goldmanprize.org/.../bobby-peek
[404] Retrieved on 7/11/2015 fromwww.goldmanprize.org/.../bobby-peek
[405] Retrieved on 7/11/2015 fromwww.sdcea.co.za/community-empowerment

brigade"[406] techniques to scientifically monitor air quality in their communities without sophisticated equipment. The results of the "bucket brigade" have been used in challenging government and polluting industries and have contributed to the enactment of air quality standards and the declaration of the South Durban Basin as a priority area in terms of the Air Quality Act. The SDCEA have also succeeded in mobilizing community opposition to a toxic waste dump resulting in the closure of the waste dump in 2011. Several of its leaders have won notable prizes including the Goldman Prize, which is the world's largest prize for grassroots environmental activism.[407]

The achievements of the SDCEA have been traced to the "united stance of a broad spectrum of communities, vigorous public campaigning, strong political lobbying, and assistance from NGOs such as the Legal Resources Centre, Environmental Justice Networking Forum and links to organisations abroad"[408]. It is also apparent that programmes like the bucket brigade campaign serve as a community empowerment tool since residents can monitor pollution and generate their own scientific data on the levels of pollution they are being exposed to.

Vaal Environmental Justice Alliance (VEJA) comprises a number of community based environmental organisations that have merged to form a stronger body. The Vaal area is a major industrial area and one of the pollution hotspots of South Arica. Residents of Zamdela, a black township situated downwind of the large industrial complexes of Sasol, suffered the effects of pollution for decades without knowing the extent of the harm they were exposed to because of apartheid- era laws that prohibited the release of information on certain industry

[406] The "bucket brigade" is a system that takes air quality samples with easy to use inexpensive bucket testing devices.

[407] Peek, S. (2002). Op cit. p. 201-215; South Africa's 'Cancer Alley' Residents Face New Threat From Port, www.theguardian.com>News>Global development>Environmental Sustainability.Desmond D'Sa- 2014 Goldman Environmental Prize Winner. Retrieved on 7/11/2014 fromwww.sdcea.co.za/index.php%3Foption%... And www.goldmanprize.org/.../desmond-dsa

[408] Peek, S. (2002) op cit., p. 208.

operations. Most people in the community have been reported to suffer from health problems including asthma, bronchitis, tuberculosis and eye irritations.[409]

Members of the community sought the assistance of GroundWork who assisted them to form the Sasolburg Air Quality Monitoring Committee. In 2000, they were introduced to the bucket brigade where, through a simple method using a bucket, they can monitor industrial pollution.[410] Air samples taken by community volunteers were then sent to various laboratories for analysis. Samples taken by the community in 2001near industrial facilities run by Sasol and several other companies revealed the presence of 16 potentially dangerous chemicals.[411] Some of them include benzene, toluene and styrene, which are linked to cancer. The level of benzene in the samples exceeded the World Health Organisation standards by 8 times. Members of the Sasolburg Environmental Committee publicized the results in the media, gave copies to Sasol and distributed them to the rest of the community and to the local government council.[412] The test results constitute technical and scientific data to substantiate the claims of violations of the environmental right and have empowered the community in their engagement with the enforcement body and the companies.

A major success of the bucket brigade was the influential role it played in ensuring that provision was made for ambient air emission standards in the Air Quality Act of 2004. When the Air Quality Bill went to Parliament in February 2004, there was no mandatory provision for air emission standards. Community groups and NGOs made submissions demanding for such standards to be included and this was reflected in the Act.[413] Coupled with the ambient air emission standards, is the South African Air Quality Information System. As a result of the Air Quality Act, which constituted a marked improvement over the old Atmospheric Pollution

[409]Interview with Ms. Caroline Ntaopane, resident of Zamdela, air quality campaigner and member of VEJA on 20/8/2012.
[410] Ibid.
[411] Ibid.
[412]Ibid.See Knight, D., (2001). Black Community Takes Control of its Air. Inter Press Service, March 30. Retrieved on 8/3/2013 from www.ips.net/2001/03/environment.
[413] Ibid.

Prevention Law (APPA), the Vaal Triangle was declared a priority area by the Minister of Environmental Affairs and Tourism. The Vaal Triangle Air-shed Priority Area (VTAPA) was the first priority area in South Africa and was so declared due to the concern of elevated pollutant concerns, specifically particulates within the area.[414] This was recognition that the air in the area is not conducive to human health or well-being.

The intention of the declaration is to enable government, in consultation with industry and the public, to come up with an air quality management plan; to initiate best practice air quality management; to reduce emissions and to improve air quality and reduce environmental risks. In order to ensure participation at all levels, two administrative structures were formed to drive the development of the air quality plan: VTAPA Air Quality Officers from local and district municipalities and the Multi-Stakeholders Reference Group, consisting of NGOs, CBOs and business.[415] The two groups meet every month to guide and monitor developments. Six monitoring stations were installed and are currently functioning. They monitor various pollutants continuously. The monitoring stations are also a fruit of lobbying by the communities and enable government to adequately monitor the industries and verify their claims.[416]

Women constitute a powerful driving force in community environmental groups and activities in South Africa and this can be ascribed partly to the socio-economic history of South Africa where the men were often away in the mines or living in industrial workers hostels.[417] Many of the activists in grassroots environmental justice initiatives are young people and women. According to Cock, the female activist role often stems from traditional women's socialization to be the administrators of household consumption. In this capacity, they are the

[414] Vaal Evironmental Justice Community LEAD Newspaper, Vol.1, November 2011, pp. 3-4.
[415] Ibid.
[416] Ibid.
[417] Interviews with VEJA, Israel, Earthlife Volunteer Fieldworker, residents of Riverlea, Dobsonvillebetween 17-22 August, 2012.

shock absorbers of environmental degradation.[418] Interviews conducted by the researcher reveal that the role of women as caregivers and those responsible for nursing sick children (who in many cases are suffering the effects of environmental pollution) also plays a role in galvanizing them to action.[419]

One way in which Community Based Organisations overcome challenges of lack of specialist knowledge and information, lack of legal resources and lack of finances is by engaging with NGOs as a means of empowerment. In many cases environmental violations are brought to the attention of NGOs by community based organisations or residents of affected communities. Many NGOs in turn reach out to communities affected by environmental degradation. The Centre for Environmental Rights, for instance, runs an Environmental Rights Clinic on the first Friday of every month, providing free environmental legal advice to communities, community organisations and non-government organisations that are not in a position to afford private legal advice. Several NGOs run regular training programmes and workshops among communities. Such networks and engagements have contributed to successes recorded by CBOs like the SDCEA and VEJA.

Developing community capacity to monitor mining and industrial operations in their areas is crucial to the active participation of CBOs in promoting and protecting environmental rights. The Benchmarks Foundation, for example, has over the years equipped monitors drawn from different communities with several skills. These include writing, information gathering (interviewing, taking photographs, and the use of mapping tools, etc.), research and analysis, community mobilisation, internet communications (including the use of social media and blogging). Of importance also is participation of communities in researches undertaken by NGOs. This, according to a key informant, is important in gaining the trust of communities as environmental justice struggles take a long time and,

[418]Cock, J. (2004). Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa. Op cit. p.19.

[419]Interviews conducted with VEJA, Israel, Earthlife Volunteer Fieldworker, residents of Riverlea, Dobsonvillebetween 17-22 August, 2012.

> People can get distrustful because they see people coming in to do research and nothing seems to be happening. It is not enough giving people information but there is need to equip them with skills so they can monitor things themselves…[W]hen community people are involved in monitoring in the long term, they can keep their own records and have hard evidence to confront the companies and government.[420]

This view is supported by Earthlife Africa Johannesburg's Mining Waste Action Group (MWAG) which sees community mobilisation as an essential element in strengthening civil society and empowering marginalised communities to influence development that protects their health and environments.[421]

The people of the Niger-Delta, communities affected by industrial pollution and communities affected by environmental degradation from mining have many lessons to learn from South African NGOs and CBOs in the struggle for environmental justice.Lessons include the need for NGOs to engage communities affected by pollution and environmental degradation and to develop community capacity to monitor industrial operations in their localities. NGOs and CBOs also need to popularise and invoke the environmental right in the African Charter and link it to the right to life in the Nigerian Constitution.

[420] Interview with Rachel Adatia, Earthlife Volunteer on 16/8/2012.

[421]Earthlife Africa (2012) Acid Mine Drainage and Mine Waste in Johannesburg, South Africa,Earthlife Africa Johannesburg's Mining Waste Action Group (MWAG), Earthlife Africa, Johannesburg.

CHAPTER SEVEN

PROMOTION AND PROTECTION OF THE RIGHT TO A HEALTHY ENVIRONMENT: CONSTRAINING FACTORS IN NIGERIA

7.1 Introduction

The environment is vital to human existence as it provides all life support systems as well as the materials for fulfilling all developmental aspirations. This fact is reiterated in Agenda 21 of the 1992 United Nations Conference on Environment and Development which states that *"environmental protection must be an integral part of the development process for it to be sustainable since the environment is the life-supporting system for human existence and survival."*

Major environmental issues facing Nigeria that affect the realisation of a decent or healthy environment include: gully and coastal erosion; flooding (which may be coastal flooding, river flooding or urban flooding). Others include municipal solid waste, air pollution, water pollution, drought and desertification, industrial pollution and waste, deforestation with its attendant loss of fauna and flora and climate change.

As part of her response to these challenges, Nigeria has enacted a multitude of environmental laws and regulations that can be used to promote and protect the right to a healthy environment. Environmental bodies charged with the protection of the environment have also been created at the federal, states and local government levels. In addition the courts have on several occasions applied legislations and the common law principles of Tort to environmental litigation. This has resulted in a limited degree of environmental protection.

While several authors have written on the challenges of environmental protection in Nigeria, there is a paucity of empirical evidence on the socio-economic and other factors affecting the enforcement and implementation of existing environmental laws and policies.

The gap between environmental laws and policies and their practical implementation is further reflected in recent reports on the attainment of the Millennium Development Goals. While the data shows appreciable progress towards achieving some of the MDGs, the data referring to Goal 7 – Ensuring Environmental Sustainability[1]- reveals that it is unlikely that targets will be met while the supportive policy environment is described as "weak".[2]

Arising from the above, the main objectives of this chapter are: to determine the extent to which Nigerians are aware of the environmental issues in their localities as well as the laws and policies on environmental protection and to determine the factors affecting the enforcement of environmental laws.

7.2 Methodology

7.2.1 Population and Sample Size of the Study

The target groups for this study are legal practitioners, highly literate persons and staff of federal and state environmental enforcement agencies. The target population is drawn from all the states of Nigeria and is infinite. Nigeria comprises of thirty six states and a Federal Capital Territory, Abuja. Since the population for the study is unknown, random sampling was used to select a state from each geo-political zone in order to ensure geographical spread. Altogether, 1500 questionnaires were administered by the researcher with the aid of research assistants. 250 questionnaires were allocated to each of the six geo-political zones.

7.2.2 Method of Data Collection

The instrument used for collection of primary data for this chapter was the questionnaire. This instrument was used in order to ensure reliability and confidentiality from

[1] Ensuring environmental sustainability, the MDG 7 target, is to reduce by half the proportion of people without access to clean drinking water and basic sanitation, and to achieve a significant improvement in the lives of at least 100 million slum dwellers

[2] Nigerian Millennium Development Goals 2013 Report.P. 55. Retrieved on 03 October 2016 at http://www.ng.undp.org/content/dam/nigeria/docs/MDGs/UNDP_NG_MDGsReport2013.pdf

the respondents. The questions used are mostly close-ended, which makes for easier coding, tabulation and subsequent analysis. A few open-ended questions were employed in order to generate qualitative data and enable respondents supply more detailed information. The justification for employing the questionnaire is the lower costs compared to interviews and the ability to reach a wider reach geographically. A major limitation of the questionnaire is that it excludes persons who lack literacy skills in English language. This group comprises a significant segment of the Nigerian population.[3]

The questionnaires were personally administered by research assistants. Although more expensive and time consuming than other modes (such as e-mail and postal), this method has a higher response rate than other modes and is more suitable for a developing country like Nigeria with a relatively low rate of internet penetration and a poor use of the postal system.

7.2.3 Pre-Testing of Questionnaires

The questionnaires were pre-tested among a smaller subset of target respondents in Lagos State to ensure it accurately captures the intended information.

7.2.4 Administration of Questionnaires

The questionnaires were in two formats. The first was directed at highly literate persons and officers of federal and state environmental enforcement agencies while the second format was directed at legal practitioners. A total of 1, 500 questionnaires were administered in six states representing the six geo-political zones in Nigeria. The states are Gombe (NE), Rivers (SS), Plateau (NC), Lagos (SW), Abia (SE) and Kaduna (NW).[4] 250 questionnaires were

[3] According to the Nigerian Bureau of Statistics, 60.82 percent of Nigerian adults are literate in any language. National Bureau of Statistics (NBS) (2013c).*Millennium Development Goals Survey 2012*. Abuja: NBS. However, the percentage of Nigerians literate in English language is lower. According to UNICEF, approximately 49.9 per cent of Nigerian adults lack literacy in English language. UNICEF Statistics.Available at http://www.unicef.org/infobycountry/nigeria_statistics.html (Last accessed 03 October 2016).

[4] NE= North East, NC= North Central, NW= North West, SS= South South, SW= South East and SE= South East.

allocated to each of the geo-political zones, out of which 200 were administered to highly literate persons and enforcement officers and 50 to legal practitioners.

Of the 1 200 questionnaires administered to highly literate persons and officials of environmental enforcement agencies/departments, 997 questionnaires representing 83 per cent were returned while 203 questionnaires representing 17 per cent were not returned. Of those returned, 959 questionnaires representing 80 per cent of the questionnaires administered were valid. The high return rate is attributed to the fact that the questionnaires were personally administered.

Of the 300 questionnaires administered to legal practitioners, 179 representing 60 per cent were returned while 121 representing 40 per cent were not returned. The low response rate is largely attributed to the commencement of a nationwide strike lasting several months by staff of the judiciary and subsequent to the administration of the questionnaires. This made it practically impossible to retrieve the questionnaires administered to judicial officers. An average of two weeks was given to legal practitioners.

7.2.5 Method of Data Analysis

The data was analysed by means of descriptive analysis. Descriptive tools of statistics employed include the use of frequency tables and percentages.

7.3 Data Analysis (Results and Discussion)

A total of 1, 500 questionnaires were administered in Gombe, Rivers, Plateau, Lagos, Abia and Kaduna. 250 questionnaires were allocated to each of the geo-political zones, out of which 200 were administered to highly literate persons and enforcement officers and 50 to legal practitioners.

Table 7.1 Rate of Return of Questionnaire

Sample size	Highly literate persons and staff of environmental agencies (%)	Legal Practitioners (%)	Total
Total questionnaires administered	1200 (100%)	300 (100%)	1500 (100%)
Total questionnaires returned	997 (83%)	179 (60%)	1176 (78.4%)
Total questionnaires not returned	203 (17%)	121 (40%)	324 (24.6%)
Total valid questionnaires	959 (80%)	179 (60%)	1138 (76%)
Total invalid questionnaires	38 (3%)	---	38 (2.5%)

Source: Researcher's Field Survey, 2014

Table 7.2: Training of Legal Practitioners in Environmental Law

Training in Environmental Law		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	Yes	54	30.2	30.7	30.7
	No	122	68.2	69.3	100.0
	Total	176	98.3	100.0	
Missing System		3	1.7		
Total		179	100.0		

Source: Researcher's Field Survey, 2014

Table 7.2 above shows the responses as to whether or not the legal practitioners who responded have undergone training in environmental law. 30.7 percent have undergone training or course(s) in environmental law while 69.3 percent have not attended or undergone any training or course in environmental law. This reveals that majority of legal practitioners in Nigeria do not have any training in environmental law and they are therefore not likely to be versed in modern environmental law concepts.

Table 7.3: Greatest Environmental Problem in Locality (by States)

STATE	**Air Pollution**	**Water Pollution**	**Waste**	**Flooding**	**Soil erosion**	**Desertification**	**Deforestation**
GOMBE	**2.6**	**8.2**	**41.8**	**15.8**	**7.6**	**14.3**	**9.7**
ABIA	**15.6**	**10.8**	**42.6**	**15.3**	**14.8**	**0**	**0.6**
LAGOS	**16.1**	**24.0**	**27.1**	**29.7**	**3.1**	**0**	**0**
PLATEAU	**15.6**	**16.6**	**50.8**	**7.0**	**6.5**	**0.5**	**3.0**
KADUNA	**13.6**	**8.9**	**53.4**	**6.3**	**4.7**	**8.9**	**4.2**
RIVERS	**29.6**	**15.1**	**33.0**	**16.4**	**3.3**	**0**	**2.6**
TOTAL	**15.0**	**13.9**	**41.8**	**15.0**	**6.7**	**4.2**	**3.4**

Source: Researcher's Field Survey, 2014

Table 7.3 is intended to ascertain respondents' knowledge of environmental problems in their localities based on valid responses. This was grouped into states since environmental challenges vary between climatic regions.

The total figures reveal that waste is regarded as the most pressing environmental challenge in Nigeria, followed by air pollution and flooding in second place. Water pollution comes third. This is not surprising as municipal waste disposal is a major problem in Nigeria and the most apparent to an observer. Heaps of wastes are likely to confront a visitor to most Nigerian cities. This led Prof. Akin Mabogunje to describe Nigeria cities as some of the dirtiest, the most unsanitary, and the least aesthetically pleasing in the world.[5] Improper disposal of waste by many Nigerians, including the dumping of refuse in canals, water channels and drains, is also linked to flooding experienced in many Nigerian cities. Deforestation has the lowest percentage and this reveals that despite on-going deforestation (especially in the south and Middle Belt of Nigeria)[6] most Nigerians do not regard deforestation as a serious environmental challenge. There is the need to educate Nigerians on the effect of deforestation on the environment and the need to move away from burning of wood for fuel to alternative sources of energy.

[5]Mabogunje, A. L. (1996). The Camel Without a Rider: A Tale of Development Policy in Nigeria Over the Years. Paper presented at the Sustainable Human Development Paradigm: Role of the Civil Society in Nigeria. Workshop organised by the United Nations Development Programme, p. 29. Cited in *Nigeria Common Country Assessment*, March 2001.Retrieved on 18/8/2011 from http://www.ng.undp.org/documents/CCA_2001.pdf.

[6]For example, between 2000 and 2010 the area of forest shrank by a third, from 14.4 per cent to 9.9 per cent of the land area. UNDP (2015) *MDGs Survey Report 2015.*Retrieved on 12 July 2015 from http://www.ng.undp.org/content/nigeria/en/home/library/mdg/NigeriaMDGsSurveyReport2015.html.

Table 7.4: Respondent's Knowledge of Environmental Legislations

Sub-Category	Able to mention environmental law	Frequency	Per cent	Cumulative Percent
HIGHLY LITERATE PERSONS	Yes	111	12.6	12.6
	No	771	87.4	100.0
	Total	882	100.0	
STAFF OF ENVIRONMENTAL AGENCIES	Yes	57	74.0	74.0
	No	20	26.0	100.0
	Total	77	100.0	
LEGAL PRACTITIONERS	Yes	90	50.3	50.3
	No	89	47.7	100.0
	Total	179	100.0	
TOTAL	Yes	258	22.7	22.7
	No	880	77.3	100.0
	Total	1138	100.0	

Source: Researcher's Field Survey, 2014

Table 7.4 seeks to know the respondents' level of awareness of existing laws and policies on the environment in Nigeria. This was determined by whether or not a respondent could mention one or more laws or policies on the environment known to him. Unlike the case where respondents merely answer "yes" or "no", this is a more reliable and stringent method of ascertaining whether respondents really possess the knowledge they claim. Of the highly literate public comprising 882 respondents, 111 respondents representing 12.6 percent were able to mention one or more environmental laws or policies while 771 respondents representing 87.4 percent were unable to mention any environmental law or policy. Legal practitioners demonstrated a higher level of knowledge: of 179 legal practitioners, 90 respondents representing 50.3 percent were able to mention one or more environmental laws or policies while 89 respondents representing 47.7 percent were unable to mention any environmental law or policy. The staff of environmental agencies demonstrated the highest level of awareness: out of 77 staff of environmental agencies, 57 respondents representing 74 percent were able to mention one or more environmental laws or policies while 20 respondents

representing 26 percent were unable to mention any environmental law or policy. This reveals that in Nigeria there is a low level of awareness of laws and policies on the environment.

Table 7.5: Does the Nigerian Constitution Provide for the Right to a Satisfactory or Healthy Environment?

Sub-Category	Response	Frequency	Per cent	Valid Percent	Cumulative Per cent
STAFF OF ENVIRONMENTAL AGENCIES	Valid Yes	51	66.2	68	68
	No	10	13.0	13.3	81.3
	Don't know	14	18.2	18.7	100.0
	Total	75	97.4	100.0	
	Missing System	2	2.6		
	Total	77	100.0		
LEGAL PRACTITIONERS	Valid Yes	72	40.2	40.9	40.9
	No	76	42.5	43.2	84.1
	Don't know	28	15.6	15.9	100.0
	Total	176	98.3	100.0	
	Missing System	3	1.7		
	Total	179	100.0		

Source: Researcher's Field Survey, 2014

Table 7.5 shows the respondents' response to the question "Does the Nigerian Constitution Provide for the Right to a Satisfactory or Healthy Environment?" Of the staff of environmental agencies, 68 percent said yes, 13.3 percent said no, 18.7 percent did not know whether or not the Nigerian Constitution provides for the right to environment. 2 respondents failed to answer the question. Of the legal practitioners, 40.9 percent said yes, 43.2 percent said no, 15.9 percent answered don't know. 3 respondents did not answer the question.

The percentage of respondents who answer yes to the question on whether the Nigerian Constitution provides for the right to a healthy environment reveals that many respondents are aware that the Nigerian Constitution provides for environmental protection. However the large percentage of respondents who say that the Constitution does not provide for the right to a healthy environment also reveals the weaknesses inherent in the directive principle on

environment which is non-justiciable (except by implementing legislation) and on a lesser footing than the fundamental rights in Chapter 4 of the 1999 Nigerian Constitution (as amended). It is for this reason that a slight majority of the legal practitioners said that the Constitution does not provide for the right to a healthy environment. Table 7.7 provides an insight into the bases for the responses.

Table 7.6: Does Nigerian Law Provide for the Right to a Satisfactory or Healthy Environment?

Sub-Category	Response	Frequency	Per cent	Valid Percent	Cumulative Per cent
STAFF OF ENVIRONMENTAL AGENCIES	Valid Yes	49	63.6	67.0	67.0
	No	9	11.7	12.0	79.0
	Don't know	15	19.5	21.0	100.0
	Total	73	94.8	100.0	
	Missing System	4	5.2		
	Total	77	100.0		
LEGAL PRACTITIONERS	Valid Yes	77	43.0	43.8	43.8
	No	52	29.0	29.5	73.3
	Don't know	47	26.3	26.7	100.0
	Total	176	98.3	100.0	
	Missing System	3	1.7		
	Total	179	100.0		

Source: Researcher's Field Survey, 2014

Table 7.6 shows the respondents' response to the question: Does Nigerian Law Provide for the Right to a Satisfactory or Healthy Environment? Of the staff of environmental agencies, 67 percent answered "yes", 12 percent said "no". 15 respondents representing 21 percent answered "don't know". 5.2 percent failed to answer the question. Of the legal practitioners, 43.8 percent answered "yes", 29.5 percent said "no" and 26.7 percent answered "don't know". 1.7 percent did not answer the question. This reveals that staff of environmental agencies has the most favourable perception of environmental rights protection by legislation in Nigeria.

Table 7.7: Laws or Legal Provisions Identified as Providing for Environmental Rights in Nigeria

Law (or Legal Provision)	Frequency	Percent	Cumulative Per cent
Section 20 CFRN (Directive Principle on Environment)	27	14.0	14.0
Right to Life and other rights in Chapter 4 CFRN	18	9.3	23.3
Constitution (no specific provision mentioned)	17	8.8	32.1
African Charter on Human and Peoples' Rights	5	2.6	34.7
NESREA (Establishment) Act and Regulations	54	28.0	62.7
Environmental Impact Assessment Act	9	4.7	67.4
State Environmental Protection Laws	28	14.5	81.9
Harmful Waste (Special Criminal Provisions) Act	8	4.1	86
Associated Gas Reinjection Act	3	1.6	87.6
Oil in Navigable Waters Act	3	1.6	89.2
Endangered Species Act	2	1.0	90.2
Environmental Sanitation Law	7	3.6	93.8
National Oil Spill Detection and Response Agency Act	1	0.5	94.3
Forestry Act	2	1.0	95.3
Land Use Act	3	1.6	96.9
Law of Torts	3	1.6	98.5
Public Health Law	1	0.5	99.0
Child Rights Act	1	0.5	99.5
Penal Code Law	1	0.5	100.0
TOTAL	193	100.0	

Source: Researcher's Field Survey, 2014

Table 7.7 follows from table 7.6 above. It shows the responses of legal practitioners and staff of environmental agencies on the laws that protect the right to environment in Nigeria. Out of 193 responses, 14 percent mentioned section 20 of the 1999 Nigerian Constitution (the Directive Principle on Environment). 9.3 percent mentioned the right to life in section 33, of Chapter 4 of the 1999 Nigerian Constitution. 8.8 percent simply mentioned the Constitution but failed to mention any particular provision of the Constitution. 2.6 percent mentioned the African Charter on Human and Peoples' Rights. 28 percent mentioned the NESREA Act and its Regulations. 4.7 percent mentioned the Environmental Impact

Assessment Act. 14.5 percent mentioned the environmental protection laws of various states. 4.1 percent mentioned the Harmful Waste (Special Criminal Provisions) Act. Each of the following laws was mentioned by 3 respondents each representing 1.6 percent: Associated Gas Reinjection Act, Oil in Navigable Waters Act, Land Use Act and the Law of Torts. 3.6 percent mentioned the Environmental Sanitation Laws. 2 respondents representing 1 percent mentioned the Endangered Species Act. 2 respondents representing 1 percent mentioned the Forestry Act.

This reveals that most of those who answered this question chose the Nigerian Constitution (62 respondents representing 32.1 percent), the NESREA Act and Regulations (54 respondents representing 28 percent) and State Environmental Protection Laws (28 respondents representing 14.5 percent) as the laws that protect environmental rights in Nigeria. The choice of the African Charter by only 2.6 percent of those who answered this question shows that many Nigerians are ignorant of section 24 of the African Charter that provides for the right to a general satisfactory environment.

Table 7.8: What are the Three (3) Greatest Obstacles to Using Legal Processes for Environmental Protection?

Obstacle (Multiple responses)	General Public (n=680)	Legal Practitioners (n=167)	Enforcement Officials (n=57)	Total (n=904)
No citizen suit	126 (18.5%)	22 (13.2%)	3 (5.3%)	151 (16.7%)
Restrictive locus standi	97 (14.3%)	71 (42.5%)	10 (17.5%)	178 (19.7%)
Ignorance	406 (59.7%)	136 (81.4%)	44 (77.2%)	586 (64.8%)
Passivity	95 (14.0%)	23 (13.8%)	12 (21.1%)	130 (14.4%)
Delay in Judicial System	304 (44.7%)	84 (50.3%)	32 (56.1%)	420 (46.5%)
High cost of Litigation	258 (37.9%)	81 (48.5%)	25 (43.9%)	364 (40.3%)
Complicated legal mechanisms	120 (17.6%)	15 (9.0%)	9 (15.8%)	144 (15.9%)
Ltd funds of citizens/ NGOs	120 (17.6%)	22 (13.2%)	6 (10.5%)	148 (16.4%)
Lack of legal assistance	181 (26.6%)	9 (5.4%)	10 (17.5%)	200 (22.1%)
Limited legal assistance	124 (18.2%)	13 (7.8%)	4 (7.0%)	141 (15.6%)
n= number of valid responses				

Source: Researcher's Field Survey, 2014

Table 7.8 above shows the response on what respondents consider to be the three greatest obstacles to using legal processes for environmental protection. Of 680 highly literate members of the general public who responded to this question, 18.5 percent identified the absence of citizen suits, 14.3 percent identified the restrictive rule of *locus standi*, 59.7 percent identified ignorance as one of the three greatest obstacles to using legal processes for environmental protection. 14 percent identified passivity of citizens, 44.7 percent identified delay in the judicial system, while 37.9 percent identified high cost of litigation. 17.6 percent said the legal mechanisms were complicated, 17.6 percent cited limited funds of citizens and NGOs, 26.6 percent identified lack of legal assistance while 18.2 percent identified limited legal assistance.

The factors identified by highly literate members of the general public as constituting the greatest obstacles to using legal processes to protect the environment are: ignorance of the legal framework by the general public; followed by delay in the judicial system; high cost of litigation and the lack of legal assistance.

Of 167 legal practitioners who responded to this question, 13.2 percent identified the absence of citizen suits, 42.5 percent identified the restrictive rule of *locus standi* and 81.4 percent identified ignorance as one of the three greatest obstacles to using legal processes for environmental protection. 13.8 percent identified passivity of citizens, 50.3 percent identified delay in the judicial system and 48.5 percent identified high cost of litigation. 9 percent said the legal mechanisms were complicated, 13.2 percent cited limited funds of citizens and NGOs. 5.4 percent identified lack of legal assistance while 7.8 percent identified limited legal assistance.

The factors identified by legal practitioners as constituting the greatest obstacles to using legal processes to protect the environment are: ignorance of the legal framework by the

general public; followed by delay in the judicial system; high cost of litigation and the restrictive rule of *locus standi*.

Of 57 staff of environmental enforcement bodies who responded to this question, 5.3 percent identified the absence of citizen suits. 7.5 percent identified the restrictive rule of *locus standi*, and 77.2 percent identified ignorance as one of the three greatest obstacles to using legal processes for environmental protection. 21.1 percent identified passivity of citizens, 56.1 percent identified delay in the judicial system. 43.9 percent identified high cost of litigation, 15.8 percent said the legal mechanisms were complicated. 10.5 percent cited limited funds of citizens and NGOs, 17.5 percent identified lack of legal assistance while 7 percent identified limited legal assistance.

The factors identified by staff of environmental enforcement bodies as constituting the greatest obstacles to using legal processes to protect the environment are: ignorance of the legal framework by the general public; followed by delay in the judicial system; high cost of litigation and passivity of citizens.

It is clear from the above that ignorance, delay in the judicial system and high cost of litigation were identified by all three categories as the three greatest obstacles to using legal processes to protect the environment. There is however some divergence following these three obstacles: while members of the general public placed lack of legal assistance in fourth place, legal practitioners put restrictive *locus standi* in fourth place and staff of environmental bodies put passivity of citizens in fourth place.

Table 7.9: Rating of Environmental Agencies for Effectiveness

Agency	Very effective	Effective	Weak	Ineffective	Undecided	Total
NESREA	83 (8.6%)	288 (29.7%)	389 (40.1%)	129 (13.3%)	80 (8.3%)	100%
NOSDRA	4(2.9%)	32 (23.0%)	67 (48.2%)	24 (17.3%)	12 (8.6%)	100%
SEPAs	71 (7.3%)	331 (33.9%)	387 (39.7%)	147 (15.0%)	40 (4.1%)	100%
Local Governments	57 (5.8%)	170 (17.4%)	371 (38.0%)	309 (31.6%)	70 (7.2%)	100%

Source: Researcher's Field Survey, 2014

Table 7.9 seeks to determine citizens' perceptions of several environmental agencies. The agencies rated include National Environmental Standards and Regulations Enforcement Agency (NESREA), the national agency charged with the protection of the environment (with the exception of matters relating to oil and gas), National Oil Spills Detection and Response Agency (NOSDRA), State Environmental Protection Agencies and Local Government Authorities. Employees of environmental agencies were not included among the respondents in order to remove the likelihood of bias. In rating NOSDRA, we relied on the perceptions of Rivers state residents. Their views are likely to be more accurate than the views of Nigerians in non- oil producing states. Rivers state is one of the top three oil producing states in Nigeria and hosts a large number of oil and gas installations.

Generally, citizens of Nigeria rated the environmental bodies poorly. While 38.3 percent of respondents rated NESREA as being very effective or effective, 53.4 percent rated the Agency as weak or ineffective. 25.9 percent of the respondents rated NOSDRA as very effective or effective and 65.5 percent rated them as weak or ineffective. 42.2 percent of respondents rated their State Environmental Protection as being very effective or effective and 54.7 percent rated their SEPAs as weak or ineffective.

Environmental protection is not the sole mandate of the LGA. However, under the environmental sanitation regulations, the LGAs have an important role to play in controlling

pollution.[7] Of all the bodies rated by respondents, the LGAs were rated the lowest with approximately 70 percent of respondents describing them as weak or ineffective in protecting the environment. Although the LGA is the tier of government that is closest to the people and crucial for grassroots development, Local Government administration in Nigeria is hampered by many challenges including: lack of functional autonomy; lack of financial and human capacity; and corruption.[8]

Table 7.10: What is the greatest factor impeding the enforcement of environmental laws in Nigeria?

Sub-category	Greatest impediment	Frequency	Per cent	Valid Percent	Cumulative Per cent
Highly Literate Persons	Valid Ignorance	264	29.9	32.5	32.5
	Environmental rights status	55	6.2	6.8	39.3
	Restrictive *locus standi*	20	2.3	2.5	41.8
	Corruption	337	38.2	41.5	83.3
	Lack of capacity	114	12.9	14.0	97.3
	High cost	9	1.0	1.1	98.4
	Judges' attitude	6	0.7	0.7	99.1
	No citizen suits	7	0.8	0.9	100.0
	Total	812	92.1	100.0	
	Missing System	70	7.9		
	Total	882	100.0		
Staff of Environmental Agencies	Valid Ignorance	30	39.0	42.9	42.9
	Environmental rights status	4	5.2	5.7	48.6
	Restrictive *locus standi*	1	1.3	1.4	50.0
	Corruption	21	27.3	30.0	80.0
	Lack of capacity	12	15.6	17.1	97.1
	High cost	1	1.3	1.4	98.5
	Judges' attitude	1	1.3	1.4	99.9
	No citizen suits	0	0	0	
	Total	70	90.9	100.0	
	Missing System	7	9.1		
	Total	77	100.0		

[7]Regulations 64 and 65, National Environmental (Sanitation and Wastes Control) Regulations 2009
[8]Oviasuyi, P.O., et al. (2010). Constraints of Local Government Administration in Nigeria.Volume 24 (2), *Journal of Social Sciences*.Available at www.krepublishers.com/.../JOviasuyi-P-O-Tt.pdf (Last accessed 13 May 2016).

Legal Practitioners	Valid	Ignorance	71	39.7	40.8	40.8
		Environmental rights status	19	10.6	10.9	51.7
		Restrictive *locus standi*	6	3.3	3.4	55.1
		Corruption	49	27.4	28.2	83.3
		Lack of capacity	15	8.4	8.6	91.9
		High cost	8	4.5	4.6	96.5
		Judges' attitude	1	0.5	0.6	97.1
		No citizen suits	5	2.8	2.9	100.0
		Total	174	97.2	100.0	
	Missing System		5	2.8		
	Total		179	100.0		
Total	Valid	Ignorance	365	32.1	34.6	34.6
		Environmental rights status	78	6.9	7.4	42.0
		Restrictive *locus standi*	27	2.4	2.5	44.5
		Corruption	407	35.8	38.5	83.0
		Lack of capacity	141	12.4	13.4	96.4
		High cost	18	1.6	1.7	98.1
		Judges' attitude	8	0.7	0.8	98.9
		No citizen suits	12	1.1	1.1	100.0
		Total	1056	92.8	100.0	
	Missing System		82	7.2		
	Total		1138	100.0		

Source: Researcher's Field Survey, 2014

Table 7.10 shows respondents' responses when asked to identify the greatest factor impeding the enforcement of environmental laws. Of the highly literate members of the public surveyed, 32.5 percent identified ignorance while 6.8 percent identified the status of environmental right. 2.5 percent identified restrictive rules of locus standi, 41.5 percent identified corruption and 14 percent regarded lack of capacity of environmental agencies as the greatest factor. 1.1 percent chose the high cost of litigation, 6 respondents representing 0.7 percent identified the attitude of judges, while 7 respondents representing 0.9 percent chose the absence of citizen suits as the greatest factor impeding the enforcement of environmental laws.

This reveals that corruption was identified by the general public as the greatest factor impeding enforcement of environmental laws, followed by ignorance and lack of capacity.

Of the staff of environmental agencies surveyed, 42.9 percent identified ignorance while 5.7 percent identified the status of environmental right. 1.4 percent of respondents identified restrictive rules of *locus standi*, 30 percent identified corruption and 17.1 percent regarded lack of capacity of environmental agencies as the greatest factor. 1.4 percent chose the high cost of litigation, 1.4 percent identified the attitude of judges as the greatest factor impeding the enforcement of environmental laws. No respondent in this category chose the absence of citizen suits. Thus the staff of environmental agencies identified ignorance of citizens as the greatest factor impeding enforcement of environmental laws, followed by corruption and lack of capacity.

Of the legal practitioners who responded, 40.8 percent identified ignorance while 10.9 percent identified the status of environmental right. 3.4 percent identified restrictive rules of locus standi, 28.2 percent identified corruption and 8.6 percent regarded lack of capacity of environmental agencies as the greatest factor. 4.6 percent chose the high cost of litigation, 0.8 percent identified the attitude of judges, while 2.9 percent chose the absence of citizen suits as the greatest factor impeding the enforcement of environmental laws. Legal practitioners identified ignorance as the greatest factor impeding enforcement of environmental laws, followed by corruption and the status of environmental rights. From this we conclude that many lawyers are of the opinion that the non-justiciability of the right to a healthy environment has contributed to the poor enforcement of environmental protection laws.

Ignorance was identified by both legal practitioners and staff of environmental agencies as the greatest factor impeding the enforcement of environmental laws. Corruption was identified by members of the public as the greatest factor impeding the enforcement of environmental laws. Corruption is a menace to every aspect of Nigeria's development and diversion of funds meant for the provision of environmental facilities is a contributory factor to toe poor state of enforcement. It has also been reported that market women have had to bribe

some state waste collectors before waste could be removed from market place.[9] Also truck pushers and scavengers have been known to bribe officials before they can be allowed to dispose their waste at designated points, this has led to the growth of illegal dumpsites.[10]

Table 7.11: How would you rate the general level of awareness of people in terms of environmental law in Nigeria?

Respondents	Level of awareness		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Highly Literate Persons	Valid	Very High	31	3.5	3.8	3.8
		High	130	14.7	15.8	19.6
		Low	450	51.0	54.6	74.2
		Very Low	213	24.1	25.8	100.0
		Total	824	93.4	100.0	
	Missing		58	6.6		
	Total		882	100.0		
Staff of Environmental Agencies	Valid	Very High	0	0	0	0
		High	9	11.7	12.0	12.0
		Low	45	58.4	60.0	72.0
		Very Low	21	27.3	28.0	100.0
		Total	75	97.4	100.0	
	Missing		2	2.6		
	Total		77	100.0		
Legal Practitioners	Valid	Very High	0	0	0	0
		High	8	4.5	4.7	4.7
		Low	90	50.3	52.6	57.3
		Very Low	73	40.8	42.7	100.0
		Total	171	95.5	100.0	
	Missing		8	4.5		
	Total		179	100.0		
Total	Valid	Very High	31	2.7	2.9	2.9
		High	147	12.9	13.7	16.6
		Low	585	51.4	54.7	71.3
		Very Low	307	27.0	28.7	100.0
		Total	1070	94.0	100.0	
	Missing		68	6.0		
	Total		1138	100.0		

Source: Researcher's Field Survey, 2014

[9] Source: Fieldwork Research, 2014.
[10] Ibid.

As the above frequency distribution shows, 2.9 percent of the total respondents rate the level of awareness as very high, 13.7 percent rate it as high, while 54.7 percent rate it as low and 28.7 percent of the respondents rate it as very low. Majority of the sample respondents ascribe a low rating to the general awareness of members of their communities in terms of environmental law. Staff of environmental agencies and legal practitioners surveyed gave the awareness level of Nigerians a very low rating.

Table 7.12: How would you rate the general level of participation of people in your community in implementation of environmental law in Nigeria?

Sub-category	Level of participation		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Highly Literate Persons	Valid	Very High	23	2.6	2.8	2.8
		High	144	16.3	17.7	20.5
		Low	450	51.0	55.4	75.9
		Very Low	196	22.2	24.1	100.0
		Total	813	92.2	100.0	
	Missing		69	7.8		
	Total		882	100.0		
Staff of Environmental Agencies	Valid	Very High	0	0	0	0
		High	7	9.1	9.3	9.3
		Low	51	66.2	68.0	77.3
		Very Low	17	22.1	22.7	100.0
		Total	75	97.4	100.0	
	Missing		2	2.6		
	Total		77	100.0		
Legal Practitioners	Valid	Very High	0	0	0	0
		High	8	4.5	4.7	4.7
		Low	107	59.8	62.2	66.9
		Very Low	57	31.8	33.1	100.0
		Total	172	96.1	100.0	
	Missing		7	3.9		
	Total		179	100.0		
Total	Valid	Very High	23	2.0	2.2	2.2
		High	159	14.0	15.0	17.2
		Low	608	53.4	57.3	74.5
		Very Low	270	23.7	25.5	100.0
		Total	1060	93.1	100.0	
	Missing		78	6.9		
	Total		1138	100.0		

Source: Researcher's Field Survey, 2014

The frequency distribution in Table 7.12 shows that 2.2 percent of the total respondents rate the level of participation as very high, 15 percent rate it as high, while 57.3 percent rate it as low and 25.5 percent of the respondents rate it as very low. From these data, majority of the respondents rate the participation of their community in the enforcement or implementation of environmental laws as low.

Table 7.13: Have you been participating in the implementation or enforcement of environmental law in your state or locality?

Sub-category	Level of participation		Frequency	Per cent	Valid Percent	Cumulative Per cent
Highly Literate Persons	Valid	Yes	142	16.1	17.4	17.4
		No	676	76.6	82.6	100.0
		Total	818	92.7	100.0	
	Missing		64	7.3		
	Total		882	100.0		
Staff of Environmental Agencies	Valid	Yes	59	76.6	80.8	80.8
		No	14	18.2	19.2	100.0
		Total	73	94.8	100.0	
	Missing		4	5.2		
	Total		77	100.0		
Legal Practitioners	Valid	Yes	31	17.3	18.2	18.2
		No	139	77.7	81.8	100.0
		Total	170	95.0	100.0	
	Missing		9	5.0		
	Total		179	100.0		
Total	Valid	Yes	232	20.4	21.9	21.9
		No	829	72.8	78.1	100.0
		Total	1061	93.2	100.0	
	Missing		77	6.8		
	Total		1138	100.0		

Source: Researcher's Field Survey, 2014

From table 7.13 above, of the highly literate members of the general public in the states sampled, 142 respondents representing 17.4 percent say yes while 676 respondents representing 82.6 percent say no. Of the legal practitioners surveyed, 31 respondents representing 18.2 percent say yes while 139 respondents representing 81.8 percent say no.

Employees of the environmental enforcement bodies have the highest level of participation in the implementation and enforcement of environmental law: 59 respondents representing 80.8 percent say yes while 14 respondents representing 19.2 percent say no. Of all the respondents, 21.9 percent participate in the implementation and enforcement of environmental law in their locality while 78.1 percent do not. This shows that the general level of participation of Nigerians in the implementation and enforcement of environmental law is low.

Mode of Participation in Implementation/ Enforcement of Environmental Laws

Of the 232 respondents who answered yes to questions on involvement in the implementation and/ or enforcement of environmental laws, 185 (79.7%) went on to give details of their involvement as well as the challenges they faced. Diverse forms of involvement cited included the following:

- Environmental sanitation - This was the most common form of involvement in implementation of environmental law. Most respondents are aware of the day set aside by states for environmental sanitation exercise which also involves the restriction of movement on that day. Respondents however cited apathy, low level of compliance, lack of cooperation by members of the community and the lack/ inadequacy of waste disposal facilities as major challenges.
- Community based efforts – these are directed at environmental challenges like erosion and disposal of waste that are adversely affecting communities. Major challenges cited include: financial constraints, being perceived as busy bodies by some in their communities, poor awareness of relevant environmental regulations and poverty of members.
- Afforestation/ Reforestation programmes – those involved in this were mostly officials of environmental agencies and members of environmental nongovernmental organisations (NGOs). Illegal deforestation by firewood dealers and stealing of seedlings by some members of the host communities were among the challenges reported.

- Membership of environmental NGOs involved in alternative energy, afforestation etc.
- Prosecution of environmental offences and/ environmental litigation – the former is conducted by lawyers in the relevant environmental agency while the latter is usually conducted by lawyers in private practice. Some challenges cited include: ignorance of defaulters; financial constraints that hamper victims of pollution from pursuing their cases; undue delay in the dispensation of justice and the use of technicalities by judges.
- Lodging of formal complaints to relevant environmental agencies.
- Environmental awareness campaigns/ Community training
- Drafting of environmental regulations and waste management plans – those involved here, apart from environmental agency officials, are basically a few NGOs. Public participation is described as very low.
- Waste collection and disposal
- Performance of official functions as officials of environmental agencies – functions cited include: scientific monitoring of environmental media; compliance monitoring; environmental education and awareness; reforestation programmes; drafting of environmental regulations and prosecution of environmental offences. Challenges faced by these agencies include: ignorance of environmental regulations by members of the public; lack of political will; impersonation; low level of voluntary compliance; security challenges in some of their areas of operation; and opposition from defaulters protecting their livelihoods e.g. illegal miners, and owners of illegal roadside structures.

The forms of involvement cited by respondents reveals that, for most Nigerians, the general notion of environmental protection is environmental sanitation linked in most cases to the monthly sanitation exercise. Apart from respondents who belong to environmental NGOs, there is not much involvement of the public in other environmental protective activities such as

tree planting; monitoring emissions of industrial facilities and reporting violations; and involvement in Environmental Impact Assessments.

This trend is also reflected in the environmental statistics of the Lagos state government, which incidentally has the most comprehensive environmental statistics in Nigeria.[11] Its statistics on environment refer mostly to volumes of waste generated and handled by the relevant government agencies and contractors; environmental health services; monitoring, enforcement and compliance; and environmental offenders arrested and prosecuted. There are no publicly available statistics on air monitoring or effluents discharge by industrial facilities.[12] Of the 232 respondents who answered yes to involvement in enforcement/ implementation of the law,[13] 134 (57.8%) mentioned various challenges.

Table 7.14:Challenges faced in enforcement and implementation of environmental laws by enforcement officials, highly literate Nigerians and legal practitioners

Challenges faced in enforcement and implementation of environmental laws (Multiple responses)	All Categories (n= 134)
Ignorance of environmental laws/ Poor awareness/Illiteracy	42 (31.3%)
Apathy/ Low level of cooperation/ non-compliance/ seen as busy body	61 (45.5%)
Lack of waste disposal facilities	15 (11.2%)
Poverty/ Defaulters protecting livelihoods	13 (9.7%)
Low capacity/ Lack of funds and logistics	12 (9.0%)
Poor public participation in formulation of regulations	12 (9.0%)
Lack of political will/ Political interference	10 (7.5%)
Undue delay in environmental litigation/ Use of technicalities by judges	5 (3.7%)
Official corruption	5 (3.7%)
Inconsistency in implementation/ Lack of continuity	6 (4.5%)
Security challenges	4 (3.0%)
Impersonation	3 (2.2%)
n= number of valid responses	

Source: Researcher's Field Survey, 2014

[11] Source: Online analysis of websites of state governments and state owned environmental agencies.
[12] The 2013 statistics, for example, reveal that all the arrests and prosecutions by the environmental bodies were in respect of environmental sanitation exercise, touting, street trading, sewage, environmental nuisance and drainage.Lagos Bureau of Statistics 2013.
[13] Details of their involvement are provided in the discussion following Table 7.13.

In discussing the challenges faced in formulation, enforcement and implementation of environmental laws, responses were open ended and later coded into the categories provided above. 31.3 percent of the respondents mentioned ignorance of the law, poor awareness and illiteracy as the main problem encountered, while 45.5 percent cited non-compliance by citizens, apathy and low level of cooperation between residents. 11.2 percent mentioned the lack of waste disposal facilities, while 9.7 percent faced challenges associated with poverty and opposition from defaulters who were protecting their livelihoods. 9 percent mentioned low capacity and lack of funds and logistics; 9 percent encountered poor public participation in the formulation of environmental regulations; and 7.5 percent faced the lack of political will and political interference. 3.7 percent mentioned undue delay in environmental litigation and the use of technicalities by judges; 3.7 faced official corruption; 4.5 mentioned inconsistency in implementation and lack of continuity. 3 percent mentioned security challenges and conflicts in their areas of operation and 2.2 percent cited impersonation of enforcement officials.

Table 7.15: Are Nigerians keen on enforcing their human rights?

Sub-category	Are Nigerians keen on enforcing human rights?	Frequency	Per cent	Valid Percent	Cumulative Per cent
Staff of Environmental Agencies	Valid Yes	24	31.2	32.9	32.9
	No	49	63.6	67.1	100.0
	Total	73	94.8	100.0	
	Missing	4	5.2		
	Total	77	100.0		
Legal Practitioners	Valid Yes	48	26.8	27.9	27.9
	No	124	69.3	72.1	100.0
	Total	172	96.1	100.0	
	Missing	7	3.9		
	Total	179	100.0		

Source: Researcher's Field Survey, 2014

From the table above, 32.9 percent of the staff of environmental agencies surveyed, say Nigerians are keen on enforcing their human rights while 67.1 percent disagree. 27.9 percent of the legal practitioners surveyed say yes while 72.1 percent say no. The data from this table

shows that majority of Nigerians are not keen on enforcing their human rights that have been, are being, or are likely to be infringed.

Table 7.16: Reasons why many Nigerians are not keen on enforcing their human rights (multiple responses)

Reasons for not enforcing human rights	Enforcement Officials) (n=42)	Legal Practitioners (n=110)	Total (n=152)
Ignorance/ Low awareness	26 (61.9%)	76 (69.1%)	102 (67.1%)
High cost	9 (21.4%)	46 (41.8%)	55 (36.2%)
Poverty/ Lack of funds	7 (16.7%)	34 (30.9%)	41 (30.0%)
Delay in judicial system	6 (14.2%)	31 (28.2%)	37 (24.3%)
No confidence in judicial system	8 (19.0%)	17 (15.5%)	25 (16.4%)
Complicated legal process	1 (2.3%)	2 (1.8%)	3 (2.0%)
Religious and cultural reasons	2 (4.8%)	11 (10.0%)	13 (8.6%)
Corruption	7 (16.7%)	10 (9.1%)	17 (11.2%)
Passivity/ Apathy	4 (9.5%)	7 (6.4%)	11 (7.2%)
Fear/ Intimidation	5(11.9%)	6 (5.5%)	11 (7.2%)
Culture of impunity	3 (7.1%)	6 (5.5%)	9 (6.0%)
Illiteracy/ Low education	5 (11.9%)	5 (4.5%)	10 (6.6%)
Lack of/ Limited legal assistance	2 (4.8%)	3 (2.7%)	5 (3.3%)
n= number of valid responses			

Source: Researcher's Field Survey, 2014

Table 7.16 above sheds light on reasons why many Nigerians are not keen on enforcing their human rights. This is taken from the responses of legal practitioners and environmental enforcement officials, 67.1 percent mentioned ignorance followed by the high cost of litigation with 36.2 percent. Poverty or lack of funds came third with 30 percent. Next was delay in the judicial system with 24.3 percent. Lack of confidence in the judiciary was next with 16.4 percent, corruption with 11.2 percent and religious and cultural reasons with 8.6 percent. Fear or intimidation with 7.2 percent and passivity or apathy with 7.2 percent was next. Illiteracy or low education had 6.6 percent while culture of impunity was 6 percent. Lack of/ or limited legal assistance was 3.3 percent and complicated legal process was 2 percent.

The majority of respondents cite ignorance, high cost of litigation, poverty/lack of funds, delay in the judicial system (described by some respondents as "come today, come tomorrow") and lack of confidence in the judicial system as top reasons why Nigerians are not keen on using laid down procedures for the enforcement of their human rights. Some respondents have observed that many Nigerians prefer to use 'unofficial' or 'unorthodox' means to enforce their rights.

It is important to properly understand and address these factors responsible for the low level of human rights enforcement in Nigeria. This largely boils down to the poor observance of the Rule of Law in Nigeria.

Table 7.17: Opinions of legal practitioners on whether the right to a healthy environment should be made justiciable in the Nigerian Constitution?

Should the right to a healthy environment be made justiciable in the Constitution?		Frequency	Per cent	Valid Per cent	Cumulative per cent
Valid	Yes	162	90.5	98.2	98.2
	No	3	1.7	1.8	100.0
	Total	165	92.2	100.0	
Missing System		14	7.8		
Total		179	100.0		

Source: Researcher's Field Survey, 2014

Table 7.17 presents the opinions of legal practitioners on whether the right to a healthy environment should be made justiciable in the Nigerian Constitution 162 respondents representing 98.2 percent say yes while 3 respondents representing 1.8 percent say no. 14 respondents failed to answer this question. From these responses we conclude that majority of legal practitioners feel the right to a healthy environment should be made justiciable in the Nigerian Constitution.

Out of the 162 respondents who feel the right to a healthy environment should be made justiciable in the Nigerian Constitution, 145 gave reasons for their answer while 17

respondents failed to give any reason. The reasons provided were grouped into categories and are presented below:

Table 7.18: Reasons for supporting a justiciable right to environment in the Nigerian Constitution (n=162)

Reasons for supporting justiciability of right to healthy environment (multiple responses)	Frequency (n= 162)	Per cent
Better enforcement, increased compliance and aid environmental litigation	59	36.4
Environmental right is linked to the right to life and other fundamental rights and it is fundamental to human existence and welfare	53	32.7
It would check impunity by government and corporations and improve accountability	15	9.3
It would create greater awareness of the right	8	4.9
Necessary to check increase in environmental degradation	8	4.9
To strengthen and make the right meaningful	7	4.3
To protect the interest of future generations	1	0.6
No reason provided	17	10.5

Source: Researcher's Field Survey, 2014

36.4 percent of legal practitioners who support the justiciability of the right to environment believe it will result in better enforcement, increased compliance and will aid environmental litigation. 32.7 percent say environmental right is linked to the right to life and other fundamental rights and it is fundamental to human existence and welfare. According to 9.3 percent making the right justiciable would check impunity by governments and corporations and improve accountability. 4.9 percent say it would create greater awareness of the right. 4.9 percent believe making the right justiciable is necessary to check an increase in environmental degradation. 4.3 percent say it would strengthen and make the right meaningful. Only one respondent representing 0.6 percent mentioned the protection of the interest of future generations. 17 respondents representing 10.5 percent failed to give any answer.

Table 7.19: Reasons for opposing justiciability of the right to environment(n=3)

Reasons for opposing justiciability of right to healthy environment	Frequency (n= 3)
It would suffer from the generally poor enforcement of human rights	1
It is best covered by environmental legislations	1
It could lead to congestion of the courts	1

Source: Researcher's Field Survey, 2014

Three out of the legal practitioners sampled opposed making the right to a healthy environment justiciable and gave reasons. According to one respondent, the implementation mechanisms for the environmental right are lacking in Nigeria and the right would suffer from the generally poor enforcement of human rights. Another said that protection of the environment is best covered by environmental legislations and another was of the opinion that it could lead to congestion of the courts.

The support by majority of the legal practitioners for the provision of a direct right to a healthy environment in the Nigerian Constitution is evidence that environmental legislations have not gone far enough in protecting the environment. Making the right justiciable will result in better enforcement, lead to an increased consciousness of the importance of the environment in the minds of citizens. This in turn will improve compliance as well as check impunity and improve accountability on the part of all stakeholders.

Alongside this must be respect for the rule of law. Poor adherence to the rule of law is reflected in the reasons advanced by respondents on why many Nigerians are not keen on utilizing formal measures to enforce their human rights.

Public participation in the formulation and implementation of environmental laws and policies is important in ensuring the effectiveness of laws. This is recognised by the National Policy on the Environment. Ignorance of environmental issues and laws and policies relating to the environment is a major impediment to effective public participation in Nigeria. Evidence

from the research reveals that while Nigerians are generally aware of environmental issues in their localities, they are largely ignorant of the legislative and policy measures put in place to deal with these environmental challenges. The evidence also shows a link between awareness of environmental laws and participation in the implementation and enforcement of laws.

Most legislations and regulations on the environment will not be effective unless they are well understood and accepted by the public and are strictly enforced. The low rating assigned by respondents to the environmental agencies at all levels reveals dissatisfaction with the execution of their statutory duties. There is a clear need for political will and sincerity on the part of the government in tackling current environmental challenges.

Evidence from the study shows a wrong attitude and behaviour of many Nigerians towards the environment. Most environmental problems in Nigeria are man-induced. Coupled with this are widespread lack of patriotism and poor perception of citizenship duties and responsibilities. The government cannot be expected to do everything as citizens also play a crucial part in determining the condition of their environment. There is a clear need for the nation to develop an environmental ethic including rigorous and concerted public education on environmental protection at all levels.

The necessary climate and infrastructure to empower citizens to fulfil their citizenship duties and responsibilities in this regard must be provided. These include enhancement of participatory measures; provision of waste management facilities; forming of partnerships between enforcement agencies and citizens and the provision of citizenship suits in environmental legislations.

CHAPTER EIGHT

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

8.5 Introduction

Nigeria and South Africa face major environmental challenges that affect citizens' enjoyment of the right to life, the right to dignity of the human person, the right to a healthy environment and other human rights. Many of these patterns of environmental degradation and pollution are rooted in decades and even centuries of massive natural resource exploitation that benefitted a tiny minority while adversely affecting the majority of citizens. Constitutional environmental protection is gaining ground globally as a means of protecting the environment.

In the course of the study, particularly in answering our research questions, we made a number of findings and recommendations expected to enhance the protection of the right to environment in Nigeria. Thus, this concluding chapter presents the summary of findings, the recommendations, and the conclusion of the thesis.

8.6 Summary of Findings

This section is treated under two sub-headings. The first is a comparative presentation of the findings in the two jurisdictions in the study. The second is a general summary of findings.

8.6.1 Comparative Appraisal of Nigeria and South Africa

8.6.1.1 Constitutional Protection of Environmental Rights

South Africa's Constitution guarantees a fundamental right to an environment that is not harmful to human health and well-being on the same footing as civil and political rights. The Nigerian Constitution, on the other hand, does not provide for a direct right to environment. It rather provides for environment as a non-justiciable directive principle that can only be made effectual by implementing legislation. This has made the right to environment

ineffectual in Nigeria. In terms of providing a favourable environment for the promotion and protection of environmental rights, the South African Constitution is far ahead of Nigeria.

8.6.1.2 Legislative Protection of Environmental Rights

The right to environment is provided in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and forms part of Nigeria's municipal law. However, there is controversy surrounding its justiciability. In South Africa, the constitutional environmental right is reiterated in all environmental laws enacted since the adoption of the 1996 Constitution. This is further proof that constitutional environmental rights provide a solid platform for the enforcement of environmental rights in domestic legislations and that the South African Constitutional environmental right is stronger and more concrete than the environmental right in the African Charter.

8.6.1.3 Access to Environmental Justice

The South African Constitution has liberalised the rules on standing to sue for the enforcement of human rights. A person seeking to enforce the environmental right need not prove a personal interest in order to have the necessary standing to approach the court. The framework environmental law, the *National Environmental Management Act*, also provides for broad standing in environmental litigation for the purpose of enforcing environmental legislations. Conversely, rigid rules of *locus standi* are still applicable in Nigeria. This is by virtue of sections 6 (6) (b) and 46(1) of the Nigerian Constitution. The Fundamental Rights (Enforcement Procedure) Rules, 1999 have sought to liberalise *locus standi* in human rights enforcement in Nigeria. However, the failure of the legislature to amend the relevant sections of the Constitution has made it a controversial and problematic issue. Nigerian environmental legislations generally do not provide for citizen suits. Thus environmental litigation for the enforcement of the law is largely restricted to the environmental protection agencies and other

law enforcement bodies. Cases like *Centre for Oil Pollution Watch vs. NNPC*[1] illustrate the weak position of public interest litigation in environmental matters. Nigeria lags behind South Africa in this area.

8.6.1.4 Public Participation in Environmental Decision Making

In South Africa, public participation is related to the constitutional right to just administrative action. We found that public participation is entrenched in all post-1996 environmental laws. Environmental legislation provides for the mode and manner in which the consultative process (involving the general public) is to be carried out before the Minister and relevant agencies can take certain decisions. In Nigeria, public participation provisions in the framework environmental law, the National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act, are loosely framed with a section encouraging NESREA to coordinate and liaise with stakeholders. The Act fails to specify how public participation is to be carried out. The Regulations made pursuant to the NESREA Act also fail to provide for public participation in environmental decision making. The Environmental Impact Assessment Act provides for public participation in the EIA process. From this it is concluded that South Africa has provided more meaningfully and comprehensively for public participation in environmental governance and in this regard beats Nigeria. In practice we found that the provision of a constitutional environmental right and public participation provisions has created room for South African communities affected by environmental degradation to play a more vibrant role in environmental governance.

8.6.1.5 Access to Information on the Environment

The South African Constitution and the Promotion of Access to Information Act provides for access to information and this includes information on the environment. Uniquely, information held by a private person is available under the law where it is required for the protection of a constitutionally protected right. This provision has been judicially recognised in

[1](2013) 15 NWLR (pt. 1378) at 556.

the environmental context in several cases. In practice, applications for licences and permits are brought to the notice of the public in the manner prescribed by the legislation. The Waste Information System and other environmental data generated by environmental agencies are available on the internet. In Nigeria, we found that the Freedom of Information Act can be utilised to obtain information on the environment. However, this has not been judicially tested in the context of environment.

8.6.1.6 Development of Environmental Jurisprudence and Attitude of the Courts

With the provision of a constitutional environmental right in South Africa, the South African courts play a more prominent role than the Nigerian courts in environmental decision making. The courts are used more widely than before to either force the governments at various levels to carry out their environmental protection functions; to prevent anticipated or on-going breaches by non-compliant actors and to claim damages as a result of violations of environmental laws. In Nigeria the lack of a direct constitutional provision that proclaims environmental rights has affected judicial protection of the right. The major Nigerian court decision on environmental rights remains a High Court decision in the *Jonah Gbemre case*.[2]Neither the Court of Appeal nor the Supreme Court has issued any judgment on environmental rights in spite of the numerous instances of environmental degradation in Nigeria. The reverse is the case in South Africa where the Constitutional Court, Supreme Court of Appeal, and High Courts have all issued important environmental decisions influenced by the constitution. The favourable attitude of the South African courts is illustrated in several decisions including the decision not to award costs against an unsuccessful litigant whose action was brought pursuant to the constitutional environmental right.[3] Thus the South African courts are ahead of Nigeria in the development of environmental rights jurisprudence.

[2]*Jonah Gbemre vs. Shell Petroleum Development Company and two others*(2005) AHRLR 151 (NgHC 2005)
[3]*Trustees for the Time Being of the Biowatch Trust vs. Registrar, Genetic Resources and Others*[2009] ZACC 14.

8.6.1.7 Integrated Environmental Management

In order to respond to key threats to the environment in a coordinated manner, the national, provincial and local environmental departments in South Africa plan and implement joint compliance and enforcement operations. This is a practice worth emulating by federal and state enforcement agencies in Nigerian in order to avoid overlapping responsibilities, duplication and role conflicts.

8.6.2 General Findings

8.6.2.1 Widespread Recognition of Environmental Rights

There is increasing recognition of the right to environment at the national, regional and global level. There is a growing jurisprudence of treaty monitoring bodies extending the rights to life, dignity and other human rights to environmental protection. The United Nation's appointment of an Independent Expert on the Environment and Human Rights further underscores the growing acceptance of the right at the global level. Regional human rights instruments have codified the right in its substantive and procedural forms and regional courts and commissions spanning diverse continents have recognised and applied the right in their decisions. Environmental protection is provided in one form or the other in most national constitutions with a significant number explicitly recognising a justiciable environmental right. Judges from many countries have also upheld the right in their decisions, thereby creating a considerable body of environmental rights jurisprudence. In Nigeria, amendment of the Constitution to provide for justiciable right to environment finds support with majority of lawyers. The reasons advanced and envisaged outcomes include better enforcement and improvement in compliance, the importance of the environment to the right to life, improving accountability and checking impunity by corporations. This agrees with the findings from Boyd's survey of

experts in environmental law from different countries in which 80.8 percent were of the opinion that constitutional environmental rights would result in more rigorous enforcement.[4]

8.6.2.2 International Law Provides some Alternative to the Nigerian National Law

The African Commission on Human and Peoples' Rights and the ECOWAS Court of Justice have passed judgments upholding the right to a healthy environment in Nigeria. They have demonstrated that international and regional bodies have a vital role to play where national legal systems are deficient. The challenges in enforcing their judgments have lessened the impact of their decisions but have not rendered them ineffectual as illustrated by the commencement of environmental restoration in Ogoniland.

8.6.2.3 Obstacles to the Use of Legal Processes in Environmental Protection

In a survey of enforcement officials and legal practitioners we found that ignorance by the public of the legal framework, delay in the judicial system, high cost of litigation and restrictive rules of *locus standi* constitute the greatest obstacles to using legal processes to protect the environment in Nigeria. The inordinately long period taken by the courts in Nigeria to dispose of cases before them is illustrated by cases like *SPDC vs. Anaro*[5]. This constitutes a major obstacle to environmental protection. To these obstacles may be linked a growing trend by victims of environmental degradation instituting lawsuits against multinational oil companies and their Nigerian subsidiaries in foreign jurisdictions.

8.6.2.4 Factors Affecting Enforcement of Environmental Laws in Nigeria

The evidence from the survey shows that most Nigerians only know the environmental challenges in their localities but do not know the laws targeted at such problems. Neither are they involved in enforcement or implementation of the existing laws or policies. In Nigeria,

[4]Boyd, D. R. (2010).*The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment*. Unpublished PhD Dissertation, Resource Management and Environmental Studies, University of British Columbia, Vancouver. Pp. 135-136.

[5](2015) LPELR-24750(SC).

ignorance, non-justiciability of the right to a healthy environment, corruption, lack of capacity of environmental agencies and lack of political will are identified as the factors affecting the enforcement of existing environmental laws.

8.6.2.5 Factors Affecting Fulfilment of the Right to Environment in South Africa

In South Africa, the high economic cost of remedying legacy environmental problems; competing socio-economic challenges such as widespread unemployment and a large poor population; the economic and political clout of large corporate polluters are major factors affecting the enjoyment of the environmental right enshrined in the constitution. These have resulted in roll backs and cut backs in compliance time tables for large corporate polluters. Other constraints are legal constraints in enforcing environmental legislations against state organs and over-reliance on coal for power generation.

8.6.2.6 Involvement of Citizens in Implementation and Enforcement of Environmental Laws

Evidence from the survey is that the level of Nigerians' involvement in the implementation and enforcement of environmental law is low and is mostly in the area of environmental sanitation. Ignorance, apathy and poor attitude towards citizenship duties are major impediments here. Non-Governmental Organisations (NGOs) have been active in the articulation of environmental rights issues in Nigeria and South Africa. Through advocacy and litigation they have popularised the concept and have helped raise environmental awareness including increased reportage of environmental incidents by the press. These have increased pressure on companies to comply with environmental laws and many large companies now engage in environmental public relations. In terms of advocacy and litigation the South African NGOs and CBOs are leaders and this can be linked to the presence of a constitutional environmental right in the national Constitution. Major constraints NGOs and community based groups face in the promotion and protection of the environmental right include lack of

specialist knowledge and information; lack of legal resources and lack of finance. These challenges are being addressed by engaging and partnering with larger NGOs with the relevant expertise and access to funds.

8.6.2.7 Lack of Comprehensive Data on Environment in Nigeria

Although environmental data and statistics are very important in environmental management, Nigeria is very weak in this aspect. According to a recent report by UNICEF, challenges of governance in Nigeria include weak institutional capacity to gather data and provide reliable and consistent reports.[6] There is paucity of data on the environment, lack of access to information held by private organisations and difficulty in accessing information held by government agencies. NESREA does not even have its enabling Act on its website. In terms of environmental data South Africa has performed commendably with the publication of the *South African Environment Outlook Report* in 2007 and 2013. There is no comparable statistics on the environment in Nigeria. These and other environmental statistical documents published by the South African agencies are all freely accessible online, in contrast to the difficulty in accessing official reports of NESREA and other environmental bodies in Nigeria.

8.6.2.8 Rating of Environmental Agencies in Nigeria

Evidence from the survey reveals that most Nigerians have a poor perception of the environmental agencies. Most respondents rated the agencies as weak or ineffective. This shows that on the part of the public, there is widespread dissatisfaction with the fulfilment of the environmental protection mandate by government agencies.

[6] UNICEF (2012) Simplified Common Country Assessment Draft Final Report. Available at www.unicef.org/nigeria/NIGERIA-CCA-Final-Rev_2_JO.pdf. (Last accessed 25 August 2015).

8.7 Recommendations

We proceed to make several recommendations. These are in addition to those already made in the body of the research. It is hoped that these recommendations will be useful to all stakeholders and go a long way in facilitating the progressive realisation and fulfilment of environmental rights in Nigeria and South Africa.

8.7.1 Amendment of the Nigerian Constitution to make the Right to a Healthy Environment Justiciable

Making the right to a healthy environment justiciable is necessary in view of the environmental degradation in parts of Nigeria and that threatens the existence, health and livelihoods of communities. This will agree with the principle of interdependence and interrelatedness of all human rights. The Nigerian legislature, having recognised the link between the environment and the rights to life and to human dignity and the threat toxic waste dumping poses to the existence of Nigerians, needs to take a step further by amending the Constitution to make the right to environment a constitutional right, as has been done in many jurisdictions. Making it justiciable would also improve the judicial attitude towards protection of the environment.

Arguments advanced against the non-justiciability of socio-economic rights (such as lack of precise content, vague obligations) cannot stand in the face of jurisprudence developed by international and regional human rights treaty monitoring bodies, regional courts and national courts. Opponents of the right to a healthy environment need not fear that making the right justiciable would bring a halt to developmental activities. Protection of the right to a healthy environment has not hindered development in countries like India, Argentina and South Africa that provide for the right. Rather it serves as a means of ensuring that development is sustainable.

8.7.2 Adoption of Diverse Means of Enforcing the Right to Environment

Litigation is not the sole means of enforcing the right to environment provided in the African Charter Act. Executive and legislative arms of government have important roles to play for the fulfilment of the right. Some other means of protecting the right, apart from litigation, are by domesticating treaties that protect the environment, enacting stronger environmental laws and amending out-dated laws and amending Nigeria's environmental laws to provide for public participation and citizen suits, thereby empowering citizens and NGOs to sue for the breach of environmental laws. The federal and state legislatures, with responsibility for approving the budgets, can ensure that sufficient funds are channelled to projects on environmental protection. The executive needs to rigorously implement legislations and programmes aimed at protection of the environment and strengthen the capacity of environmental protection agencies.NGOs and concerned citizens who wish to go to court could bring their actions concurrently under section 33(1) of the Nigerian Constitution (the right to life) and article 24 of the African Charter Act.

8.7.3 Amendment of the Nigerian Constitution to liberalise *locus standi*

Amend the Nigerian Constitution to liberalise locus standi and strengthen public interest litigation While the *Fundamental Rights Enforcement Procedure Rules* 2009 are commendable in relaxing *locus standi* rules in human rights enforcement, the legislature needs to amend sections 6 (6) (b) and 46 (1) of the Nigerian Constitution to strengthen public interest litigation. Environmental legislations should also be amended to provide for citizen suits. This would complement the enforcement efforts of government agencies.

8.7.4 Amendment of Environmental Legislations to Provide for Public Participation

Amendment of existing environmental laws in Nigeria to clearly include public participation requirements in environmental governance is recommended. It is apparent that government agencies cannot do it all when it comes to environmental protection. Citizens are

to be seen as stakeholders with a vital role to play in protecting their environment. This will also enable interested and concerned citizens to monitor companies for compliance.

8.7.5 Creation of Data Bank on the Environment

Compliance monitoring and enforcement needs proper and up-to-date data on the environment. There is the need for more monitoring stations to be established by the environmental agencies at various levels. These agencies also need to collaborate and share environmental data in their possession as well as gather that diffuse data generated and held by companies, research bodies and educational institutions. In collaboration with the Nigerian Bureau of Statistics, a database on the environment should be established and made accessible to the public.

8.7.6 Environmental Education and Awareness

Lack of awareness and ignorance has been identified as a major factor responsible for non-compliance and the poor enforcement of environmental laws. The Government at all levels needs to urgently pursue a national rebirth campaign that will include environmental protection and the need for every Nigerian to work towards a clean environment. The level of irresponsibility displayed by the average Nigerian toward the environment is appalling as littering, illegal dumpsites, public defecation and other ills are rampant. The environmental agencies at all levels and environmental NGOs need to pursue education and enlightenment of the public on environmental protection and existing environmental law. This is especially necessary at the grassroots level. Efforts within the last ten years to include environmental protection in the primary school curriculum are commendable and should be built on by including same in the curriculum of Civic Education at the Secondary School level. The National Orientation Agency needs to devise ways for Nigerians to develop an environmental ethic and culture of cleanliness and care for the environment. The use of social media and Nigerian local languages in this regard is highly recommended. It is recommended that

Environmental NGOs establish environmental clubs in primary and secondary schools in order to 'catch them young'. The role of religious and traditional leaders in environmental education should also be explored.

8.7.7 Increased Funding and Capacity of Enforcement Agencies

The funding to environmental agencies needs to be increased and judiciously utilised. Alongside this is the employment and retraining of experts in environmental sciences and environmental management. Experts, who can formulate and execute cogent policies, and not politicians, should be put in charge of environmental ministries and agencies at all levels. Accountability and transparency need to be entrenched in order to ensure that funds allocated to environmental protection are not diverted or mismanaged. State and local governments are encouraged to form transparent and dedicated Public sector- Private sector partnerships to deal with the waste problem. Owners and/or occupiers of premises could be levied a modest sum for the provision of waste disposal facilities and penalties for non-compliance with environmental regulations should be strictly enforced. Establishment of companies specializing in recycling should also be encouraged. In this way environmental protection would also be a generator of employment.

8.7.8 Environmental Law Education for Judges

Environmental agencies as well as the National Judicial Institute need to ensure regular and consistent continuing legal education for judges together with the provision of Information Communication Technology (ICT). This would enable judges and other judicial officers keep abreast of trends in other jurisdictions in the area of environmental law as well as provide them with persuasive precedents. Evidence from the research is that environmental law education is low among Nigerian legal practitioners. The focus in environmental litigation needs to shift from mere compensation of victims of environmental violations to encompass the restoration and rehabilitation of the affected environment. Judges in Nigeria need to be more proactive and

progressive in interpreting the rights to life and human dignity in the Nigerian Constitution to include the right to right to environment as is the practice of the Supreme Court of India.

8.7.9 Speedy Implementation of Justice Sector Reforms

The delay and other ills in the judicial system are intolerable and need to be tackled in order to restore public confidence in the judicial system. Apart from ensuring the frontloading system works well, the courts should be adequately funded and equipped to meet modern challenges and the best qualified legal minds should appointed to the bench. Judges also need to take firm measures to curb the delay tactics often adopted by lawyers to frustrate cases filed against their clients.

8.7.10 Collaboration and Partnerships between NGOs and Communities

Challenges of lack of funds and skills that communities commonly face can be partly overcome by engaging and partnering with NGOs with the relevant expertise and access to funds. NGOs in turn need to be transparent in their finances and operations, access funds internally/ locally instead of depending on foreign donors who may want to foist their own environmental agendas onto them. NGOs, in all their work must ensure that communities are carried along and not 'used'. Community members' concerns and how these relate to the environment should be addressed and community members should be taught relevant skills like environmental monitoring and advocacy.

8.7.11 Development of Renewable and Cleaner Sources of Energy

South Africa's reliance on coal for most of its power generation and energy needs is taking a toll on its environment. This is one major reason why SA, despite its constitutional environmental right, has the largest ecological footprint in Africa.[7] The government needs to develop, in conjunction with the private sector, a time-table for the development of and movement to other sources of renewable energy like wind, solar, tidal, geothermal and

[7] Ecological Footprint: The Sustainable Scale Project. Retrieved on 9 August 2016 from www.sustainablescale.org/conceptualframework/understandingscale/measuringscale...

hydroelectric energy. Tax incentives and low interest loans could be provided for industrial facilities to enable them install and utilise these cleaner technologies.

8.7.12 Political Commitment and Good Governance

We finally recommend that the governments of Nigeria and South Africa should not pay lip service to environmental protection but ensure that environmental issues are made a priority nationally. In this wise the recent Nigerian government directive on the establishment of the Fund for the environmental restoration and clean-up of Ogoniland is commendable. Sustained commitment to environmental issues would be reflected in national leaders publicly and privately committing themselves to protection of the environment; spearheading the birth of an environmental ethic and corresponding values in the national consciousness; ensuring that laws and policies on the environment are implemented and adequate budgetary provisions made to tackle the environmental challenges. In this regard good governance is essential, with due observance of the rule of law, respect for human rights and zero tolerance for corruption and mismanagement.

8.8 Conclusion

This research, in answering the questions posed, examined the establishment of the right to environment, the impact of environmental pollution on the enjoyment of the right to life and other human rights. We examined the challenges to the recognition, protection and enforcement of the right. The thesis examined the environmental rights jurisprudence at regional courts and in several jurisdictions. We also examined the laws of Nigeria and South Africa for the presence of elements of environmental rights and the role that regulatory bodies, courts, NGOs and other bodies have played in promoting and protecting the right. Findings were made and recommendations proffered.

From the foregoing it can be concluded that the right to environment cannot be wished away as it is now firmly acknowledged on national and regional scenes. The distinction

between generations of rights and civil and political rights on the one hand and social and economic rights on the other hand are gradually disappearing as courts, governments and international and regional human rights courts and bodies increasingly treat them as interdependent and indivisible. Furthermore, and contrary to opposing views, protection of the right to a healthy environment has not hindered development in countries that provide for the right. Rather it serves as a means of ensuring that development is sustainable. We further conclude that it is not enough to have a right to environment in the national constitution and in legislations. Ultimately, there must be struggles centred on the right before the enjoyment of the right can be realised.

From comparing and contrasting the promotion and protection of environmental rights in Nigeria and South Africa, it is apparent that a constitutional environmental right offers advantages to environmental protection over and above environment as a directive principle. It provides a solid footing for the domestication and implementation of international obligations relating to environmental rights. It enhances access to justice in environmental matters, enhances public participation in environmental governance and more rigorous enforcement of existing laws as well as the enactment of more environment-friendly laws. It also results in a more favourable judicial attitude in matters relating to environmental protection. Since citizens have more awareness of constitutionally guaranteed rights, it also results in increased environmental awareness. The researcher, while not claiming that a constitutional environmental right would singlehandedly cure Nigeria's environmental ills, argues that it constitutes a useful additional tool for protecting the environment. This view is supported by the findings of the survey of legal practitioners in Nigeria.

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APPENDIX A: QUESTIONNAIRE ADMINISTERED TO SOME TARGET GROUPS

Dear Respondent,

RESEARCH ON ENVIRONMENTAL RIGHTS AND PROTECTION

I am a postgraduate student of the Faculty of Law, Ahmadu Bello University, Zaria and this research is in partial fulfillment of the requirement for the award of a doctoral degree in law.

This questionnaire is aimed at obtaining the views of literate Nigerians and environmental enforcement officers on environmental laws and the right to a satisfactory environment. Kindly answer all the questions applicable as uncompleted questionnaires will create problems in the analysis of same. The anonymity of each respondent is guaranteed and the researcher promises that data collected shall be used for the purpose of the research only. Your cooperation is thus highly solicited.

Thank you for your cooperation.

E.O. PopoolaEsq.

SECTION A (General Information)

1. Please, indicate your gender
   a. Male [ ] b. Female [ ]
2. Please, Indicate your age category
   a. 15-30 years [ ] b. 31-45 years [ ] c. 46-60 years [ ] d. 61 and above [ ]
3. Please, indicate your educational qualifications.
   a. Secondary School [ ]
   b. National Diploma or Certificate [ ]
   c. First Degree [ ]
   d. Postgraduate Degree [ ]
   e. Others (please specify _____)

SECTION B -Knowledge of Environmental Law and Environmental Rights

4. What is the most pressing environmental challenge in your locality?(Tick only one)
   a. Air pollution [ ] b. Water pollution [ ] c. Waste [ ] d. Flooding [ ]
e. Soil erosion [ ] f. Desertification [ ] g. Deforestation [ ]

5. Are you aware of any policy and legal instruments on environmental law in Nigeria?
   a. Yes [ ] b. No [ ]

6. If your answer to 6 is yes, please mention the policy and legal instruments known to you in the field of environmental protection and management.
    a. ----------
    b. ----------
7. In your own opinion, is there a right to a satisfactory or healthy environment guaranteed by the Constitution in Nigeria?
    a. Yes [ ] b. No [ ] c. Don't know [ ]
8. Is there a right to a satisfactory or healthy environment guaranteed by law in Nigeria?
    a. Yes [ ] b. No [ ] c. Don't know [ ]
9. If your answer to 9 is yes, please mention the law(s).
    a. ----------
    b. ----------
10. Please select the 3 greatest obstacles to using existing legal processes in Nigeria to secure environmental protection?
    a. Citizen suit provision does not apply [ ]
    b. Restrictive rules of locus standi [ ]
    c. Public generally ignorant of the legal framework [ ]
    d. Citizens/NGOs too passive to use the existing mechanisms [ ]
    e. Delay occasioned by the judicial system [ ]
    f. High cost of litigation [ ]
    g. Legal mechanisms are too complicated to use [ ]
    h. Limited funds of citizens/NGOs [ ]
    i. Lack of legal assistance [ ]
    j. Limited legal assistance [ ]

11. Please rate the following environmental enforcement bodies for effectiveness.

Agency/ministry	Very Effective	Effective	Weak	Ineffective	Undecided
National Environmental Standards & Regulations Enforcement Agency					
National Oil Spill Detection and Response Agency					
State Environmental Protection Agency					
Local Government Authority in your locality					

12. What, in your opinion, is the greatest factor impeding the enforcement of existing environmental laws in Nigeria? (TICK ONLY ONE)
    a. Ignorance of citizens [ ]
    b. Status of environmental rights [ ]
    c. Restrictive rules of locus standi [ ]
    d. Corruption [ ]
    e. Lack of capacity of environmental agencies [ ]
    f. High cost of litigation [ ]
    g. Attitude of judges [ ]
    h. Absence of citizen suits [ ]
13. How will you rate the general level of awareness of people in terms of environmental law in Nigeria?
    a. Very high [ ] b. High [ ] c. Low [ ] d. Very low [ ]
14. How would you rate the overall participation of your community in the enforcement of environmental laws?
    a. Very high [ ] b. High [ ] c. Low [ ] d. Very low [ ]
15. Have you been participating in the implementation/ enforcement of environmental law in your state or locality?
    a. Yes [ ] b. No [ ]
16. If your answer to 20 or 21 is yes, please give details of your experience, including challenges you faced.

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17. Are Nigerians, in your opinion, generally keen on enforcing their human rights that have been, are being or are likely to be infringed?
    a. Yes [ ] b. No [ ]
18. If no, please give possible reasons for this.

Thank you very much for completing the Questionnaire.

APPENDIX B: QUESTIONNAIRE ADMINISTERED TO LEGAL PRACTITIONERS

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Dear Respondent,

RESEARCH ON ENVIRONMENTAL RIGHTS AND PROTECTION

I am a postgraduate student of the Faculty of Law, Ahmadu Bello University, Zaria and this research is in partial fulfillment of the requirement for the award of a doctoral degree in law.

This questionnaire is aimed at obtaining the views of legal practitioners in Nigeria on environmental laws and the right to a satisfactory environment. Kindly answer all the questions applicable as uncompleted questionnaires will create problems in the analysis of same. The anonymity of each respondent is guaranteed and the researcher promises that data collected shall be used for the purpose of the research only. Your cooperation is thus highly solicited.

Thank you for your cooperation.

E.O. PopoolaEsq.

SECTION A (General Information)

1. Please, indicate your gender
   a. Male [ ] b. Female [ ]
2. Please, Indicate your age category
   a. 15-30 years [ ] b. 31-45 years [ ] c. 46-60 years [ ] d. 61 and above [ ]
3. Please indicate your age at the bar
   a. 1-7 years [ ] b. 8- 14 [ ] c. 15- 21 [ ] d. 22 and above [ ]
4. Please select the statement that best reflects your legal practice
   a. I work in the judiciary [ ]
   b. I work in private legal practice [ ]
   c. I work in the academic sector [ ]
   d. I work in a government ministry or agency [ ]
   e. I work for business [ ]
   f. Others (please specify_____)
5. Have you ever undergone a course or training on environmental law?
   a. Yes [ ] b. No [ ]

SECTION B -Knowledge of Environmental Law and Environmental Rights

6. What is the most pressing environmental challenge in your locality? (TICK ONLY ONE)
   a. Air pollution [ ] b. Water pollution [ ] c. Waste [ ] d. Flooding [ ] e. Soil erosion [ ] f. Desertification [ ] g. Deforestation [ ]

7. Are you aware of any policy and legal instruments on environmental law in Nigeria?

a. Yes [ ] b. No [ ]

8. If your answer to 7 is yes, please mention the policy and legal instruments known to you in the field of environmental protection and management.

a----------

b----------

9. In your own opinion, is there a right to a satisfactory or healthy environment guaranteed by the Constitution in Nigeria?
   a. Yes [ ] b. No [ ] c. Don't know [ ]
10. Is there a right to a satisfactory or healthy environment guaranteed by law in Nigeria?
   a. Yes [ ] b. No [ ] c. Don't know [ ]
11. If your answer to 10 is yes, please mention the law(s).

a----------

b----------

12. Please select the 3 greatest obstacles to using existing legal processes in Nigeria to secure environmental protection?
   a. Citizen suit provision does not apply [ ]
   b. Restrictive rules of locus standi [ ]
   c. Public generally ignorant of the legal framework [ ]
   d. Citizens/NGOs too passive to use the existing mechanisms [ ]
   e. Delay occasioned by the judicial system [ ]
   f. High cost of litigation [ ]
   g. Legal mechanisms are too complicated to use [ ]
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13. Please rate the following environmental enforcement bodies for effectiveness.

Agency/ministry	Very Effective	Effective	Weak	Ineffective	Undecided
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State Environmental Protection Agency					
Local Government Authority in your locality					

14. What, in your opinion, is the greatest factor impeding the enforcement of existing environmental laws in Nigeria? (TICK ONLY ONE)

a. Ignorance of citizens [ ]
b. Status of environmental rights [ ]
c. Restrictive rules of locus standi [ ]
d. Corruption [ ]
e. Lack of capacity of environmental agencies [ ]
f. High cost of litigation [ ]
g. Attitude of judges [ ]
h. Absence of citizen suits [ ]

15. In your opinion, should environmental rights be made justiciable in the Nigerian Constitution?

    a. Yes [ ] b. No [ ]

16. Please give reasons for your answer

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17. How will you rate the general level of awareness of people in terms of environmental law in Nigeria?

    a. Very high [ ] b. High [ ] c. Low [ ] d. Very low [ ]

18. How would you rate the overall participation of your community in the enforcement of environmental laws?

    a. Very high [ ] b. High [ ] c. Low [ ] d. Very low [ ]

19. Have you ever participated in the formulation of environmental law in your State or Locality?

    a. Yes [ ] b. No [ ]

20. Have you been participating in the implementation or enforcement of environmental law in your state or locality?

    a. Yes [ ] b. No [ ]

21. If your answer to 26 or 27 is yes, please give details of your experience including challenges you faced.

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22. Are Nigerians, in your opinion, generally keen on enforcing their human rights that have been, are being or are likely to be infringed?

    a. Yes [ ] b. No [ ]

23. If no, please give possible reasons for this.

Thank you very much for completing this Questionnaire