

CHAPTER FIVE
THE RIGHT TO A CLEAN ENVIRONMENT
UNDER NIGERIAN LAW

5.1 Introduction

The previous chapter evaluated the place of the right to a clean environment generally, and concluded that while its recognition is still contested at the international level, it is recognized in binding regional human rights instruments, various national constitutions and judicial decisions. This chapter builds on this discussion by examining the recognition, nature and scope of this right in the context of Nigeria. The Chapter is divided into two main parts. Part I, which is further subdivided into three sections and subsections, discusses the substantive right to a clean environment under Nigerian law. As Nigeria has a written constitution, the discussions commence by examining in the first section, the constitutional provisions for protection of the environment. The relevant provision is section 20 of the Nigerian Constitution, 1999, which is under Chapter II - Fundamental Objectives and Directive Principles of State Policy - on the duty of the Government to protect the Nigerian environment, and how this section could be interpreted to recognize the right to a clean environment. In the second section, Article 24 of the African Charter, which expressly provides for the right to a clean environment is discussed in the context of its scope, applicability and influence in Nigeria; while the third section considers existing constitutional provisions for first generation rights (such as the right to life, property, and privacy of citizens and their homes) that are directly implicated by breach of the right to a clean environment and may be interpreted robustly to encompass this right.

Part II, which is also divided into three sections, discusses the procedural aspect of the right to a clean environment under Nigerian law, including the rights to information, participation and access to justice, in the first, second and third sub-sections, respectively. While the procedural rights were discussed briefly in chapter four under the European regional system in view of the adoption of the Aarhus Convention, the intention here is to examine these rights with reference to enforcement of the right to a clean environment under Nigerian law, and how the failure to respect and observe these procedural rights could have serious and adverse consequences for the enjoyment of the substantive right to a clean environment.

PART I

SUBSTANTIVE RIGHT TO A CLEAN ENVIRONMENT

5.2 The Duty to Protect the Environment

Under this section, the chapter discusses the duty of the government to protect and improve the environment of Nigeria, and how this may be interpreted by the court to recognize the right to a clean environment. Although this duty is provided under Chapter II of the constitution, which is not directly enforceable, it is intended to discuss it before the express provisions of Article 24 of the African Charter, in view of the fact that in the hierarchy of legal norms, the constitution has precedence over a statute,¹

The Constitution of the Federal Republic of Nigeria, 1999 does not expressly provide for the right to a clean environment, but indicates a duty under section 20 on government to ‘protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.’ Compounding this lack of express provision, is the fact that section 20 is provided under Chapter II of the constitution – Fundamental Objectives and Directive Principles of State Policy – and by section 6(6)(c) of the same constitution, is not justiciable. This suggests that the failure, neglect or inability of the Nigerian Government to discharge this duty could not be challenged in a court of law. But the same constitution in section 13 empowers all branches of Government, not only to make, execute and interpret laws for the good governance of Nigeria, but also to effectuate the duties, goals, aspirations and programmes set out in Chapter II. So, even though the objectives and duties set out in Chapter II are not ‘justiciable’, they must be taken into account by the

¹ This will include the Nigerian Constitution, Acts of the National Assembly, Laws of the States Houses of Assembly. See Kelsen, *The Pure Theory of Law*, (University of California; Berkeley, 1967); K. Osho, *Nigerian Grundnorm* (Nigerian Law Publications; Lagos, 1986).

legislature in making laws, the executive in executing governmental policies as well as the judiciary in interpreting laws or the constitution itself. According to Jacobsohn, the identity of a polity is rooted more in “extra-constitutional factors such as religion and culture than in the language of a legal document.”² Therefore, in the absence of a national religion or culture to which all Nigerians subscribe, the unifying objectives and aspirations of the Nigerian polity, appears to include the “fundamental objectives and directive principles of state policy”, which the organs of Government must effectuate in legislating, executing policies or carrying out their judicial functions.

The relevant provisions of the constitution will now be examined, to see how, by virtue of section 13 the judiciary may give expression to section 20 of the constitution.

5.2.1 The Provisions of section 20

As already noted above, Section 20 of the Constitution of the Federal Republic of Nigeria, 1999 provides that: “The State shall protect and improve the environment and safeguard the water, air, and land, forest and wildlife of Nigeria.” It is the first time that an environmental provision is included in a Nigerian constitution,³ as neither the 1963 Republican nor the 1979 Presidential constitutions included similar or any environmental provisions. This is not surprising as issues relating to the environment had not assumed the same concern as they did since the Stockholm Declaration of 1972,⁴ the Rio Earth Summit of 1992,⁵ and the adoption by the UN of the

² G.J. Jacobsohn, *Constitutional Identity*, (Harvard University Press; London, 2010), 9.

³ L. Astegbua, ‘Environmental Rights, Pipeline Vandalisation and Conflict Resolution in Nigeria’, (2001) *IELTR*, 89; I.O. Smith, *The Constitution of the Federal Republic of Nigeria: Annotated*, (Ecowatch Publications Limited; 2005), 43.

⁴ Report of the UN Conference on Human Environment, UN Doc.A/CONF.48/14/Rev.1 adopted in UNGA Res.2997 (XXVII) of 1972

⁵ Report of the UN Conference on Environment and Development, UN Doc.A/CONF.151/26/Rev.1

Principles on Human Rights and Environment in 1994,⁶ and believed to have informed the decision by many countries to include environmental rights in their constitutions.⁷

Apart from the fact that section 20 of the Nigerian Constitution, 1999 appears only to impose a duty on the State to “protect and improve” the environment, it does not bestow any direct right on the citizens to a ‘clean environment’. The reason for this, it is submitted, perhaps not so much the deliberate act of the framers of the constitution not to follow the trend in Africa or other parts of the world, but simply that the 1999 Constitution is a rehash of the traditional civil and political rights provisions of previous constitutions which made social, economic and cultural rights non-justiciable.⁸ As a result of the novelty of section 20, it would be appropriate to briefly examine the origin of Chapter II provisions, and how this may be relied on to enforce the right to a clean environment, even though by section 6(6)(c) of the constitution, it is state not to be justiciable.

5.2.1.1 Fundamental Objectives and Directive Principles of State Policy

Chapter II of the Nigerian Constitution, 1999 contains provisions on Fundamental Objectives and Directive Principles of State Policy (hereinafter ‘Directive Principles’),⁹ which first appeared in the Presidential Constitution of 1979.¹⁰ The significance of including the Directive Principles in

⁶ Ksentini Report, UN Doc. E/CN.4/Sub.2/1994/9 (6 July, 1994)

⁷ See discussions in paragraph 4.5.5 of Chapter IV.

⁸ E. Egede, ‘Human Rights and the Environment: Is there a Legally Enforceable Right of a Clean and Healthy Environment for the “People’s of the Niger Delta under the Framework of the Nigerian Constitution of the Federal Republic of Nigeria?’’, (2007) 19(1), *Sri Lanka Journal of International Law*, 51-84, 65. Achara wonders why any nation should go through the expense and labour of writing a constitution only to make a part of it unenforceable in its court of law. See P.A.C.E. Achara, *The Constitution as Junction of Force and Law*, (Author House; Bloomington, Indiana, 2005), 131.

⁹ J. Akande, *The Constitution of the Federal Republic of Nigeria 1979 with Annotations* (Sweet & Maxwell; London 1982)

¹⁰ Nigerians are prolific constitutional writers. During 51 years of independence, Nigeria has written 11 constitutions, excluding those by her erstwhile colonial masters - (Richards, 1946; Macpherson, 1951 and Lyttleton, 1954). These include the Independence Constitution of 1960, the Republican Constitution of 1963, the Presidential Constitutions of

the constitution was to emphasize the relationship between citizens and government and the affirmation of the security and welfare of the citizens as the primary ends of government, and portrayal of government as agents of the people. According to Akande, the rationale for the provisions is that ‘government in developing countries have tended to be preoccupied with power and its material perquisites with scant regard for political ideals as to how society can be organized and ruled to the best advantage of all.’¹¹ Therefore, ‘Fundamental Objectives’ consists of ideals toward which the nation is expected to strive, whilst ‘Directive Principles’ identify the policies expected to be pursued in the effort to realize these national ideals.¹² The provisions do not guarantee, but enumerate socio-economic imperatives which depend on the material well-being of the government to realize them. It is submitted that so-called material well-being depends more on political rather than fiscal considerations, as not all Chapter II provisions require or involve any monetary expenditure. For instance, it is not for lack of money that government is unable to enforce existing environmental laws against the IOCs operating and polluting the Niger Delta environment. Granted that if the IOCs invest in environmental protection measures, government as a joint venture partner is obliged to pay its proportionate share, it is not always government’s financial inability to pay which results in the neglect, but political and other

1979, 1989, 1995 and 1999. Five other constitutions written in 1966, 1975, 1984, 1985 and 1993 did not come into force. The 1989 constitution also never came into force following the perennial postponement of hand over dates by the Babaginda administration in 1990 and 1992 and the subsequent annulment of the presidential elections held on June 12, 1993. The 1995 Constitution, which was produced by the 1994-95 National Constitutional Conference and amended by Abacha’s regime was never promulgated before his death in June 1998. The 1999 Constitution is largely copied from the 1979 Constitution and was promulgated by General Abdul-salam Abubakar with which he handed over power to General Obasanjo’s civilian administration on 29 May, 1999. See further E.E.O. Alemika ‘Fundamental Objectives and Directive Principles of State Policy within the Framework of a Liberal Economy’ in Ayua, Guobadia and Adekunle (eds.) *Nigeria: Issues in the 1999 Constitution* (NIALS; Lagos, 2000), 198-220, 198.

¹¹ J. Akande, ‘Fundamental Objectives and Directive Principles of State Policy within the Framework of a Liberal Economy: A Note’ in Ayua, Guobadia and Adekunle *Nigeria: Issues in the 1999 Constitution*, (NIALS: Lagos; 2000), 221-234, 221

¹² O Nnamuchi, ‘Kleptocracy and its many faces: The Challenges of Justiciability of the Right to Health Care in Nigeria’, (2008) 52(1), *Journal of African Law*, 1-42, 3

considerations.¹³ More often than not, it is the result, perhaps, of incompetence, corruption and lack of accountability than fiscal or even political considerations.¹⁴

5.2.1.2 Etymology of Directive Principles

Most of the Chapter II provisions of the Nigerian Constitution, 1999 was copied from the same chapter of the 1979 constitution, which was influenced by Part IV of the Indian Constitution of 1949, itself inspired by the Irish Constitution of 1937,¹⁵ the first to include Directive Principles in modern constitutions. The Irish Constitution, 1937 replaced the Constitution of the Irish Free State of 1922, imposed by the departing British Dominion Government. The Irish not only wanted an autochthonous constitution, but one different from the 1922 Dominion Constitution and which would include broad principles of social and economic policies to guide their legislature in formulating laws for the country, without creating any legal relations.¹⁶ Article 45 indicates that: ‘The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life,’ and that “The state guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of the citizen”. These

¹³ See generally E. Emeseh, ‘Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria, (2006) 24, *Journal of Energy & Natural Resources Law*, 574.

¹⁴ K. Feng, “The Human Rights Implications of Corruption: An Alien Tort Claims-Act Based Analysis”, (2004) *Wharton Research Scholars Journal*, online at http://repository.upenn.edu/wharton_research_scholars/6, (last accessed on 03/05/2010). P.D. Ocheje, ‘Refocusing International Law on the Quest for Accountability in Africa: The case Against the “Other” Impunity’, (2004) 15(4), *Leiden Journal of International Law*, 749-779; P. D. Ocheje, ‘Law and Social Change: A Socio-legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences, Act, 2000’, (2001) 45, *Journal of African Law*, 173-195; P D Ocheje, “In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa”, (2007) 51(2) *Journal of African Law*, 173-214; P D Ocheje, ‘Prisoners of Freedom: Human Rights and the African Poor, (Review)’, (2008) 54(3) *Africa Today*, 124-127; See also S. Marsh, ‘Show us the money’, *The Times*, Tuesday 22 February, 2011, 1-6.

¹⁵ S.P. Sathe, “India: From Positivism to Structuralism”, in J. Goldsworthy, *Interpreting Constitutions: A Comparative Study*, (Oxford University Press; Oxford, 2006), 220-221.

¹⁶ *T.D v. The Minister for Education* [2001] 1ESC 101 delivered on 17 December, 2001

provisions by their tenor appear to be moral adjurations or “constitutional conventions” from which the constitution itself was developed.¹⁷

Similarly the Indian Constitution of 1949 containing Directive Principles¹⁸ was intended to enable the new Indian government to comprehensively tackle the complex social and economic challenges facing them after independence.¹⁹ The drafting of the Indian Constitution at this time coincided with the adoption by the UN General Assembly of the Universal Declaration on Human Rights, urging member nations to include universal human rights principles in their national constitutions. Both the Fundamental Rights and the Directive Principles of State Policy were therefore included in the Indian Constitution. The Directive Principles were regarded as fundamental, though not justiciable, but all branches and agencies of government were expected to adhere to them, including the judiciary. The Indians endeavoured through legislative action to enact a number of laws reflecting the Directive Principles, including universal free elementary education to all children up to the age of 14;²⁰ welfare schemes for ‘caste’ students;²¹ land reform acts to provide ownership rights to farmers, banking facilities for the rural areas; a minimum

¹⁷ For an over-view of the Irish Constitution, see L. Alexander, *Constitutionalism: Philosophical Foundations*, (Cambridge University Press; Cambridge, 2001); D. Keogh and A. McCarthy, *The Making of the Irish Constitution, 1937*, (Mercier Press, Cork, 2007); J.M. Kelly, *The Irish Constitution*, 4th ed., (LexisNexis Butterworth; London, 2003).

¹⁸ C.M. Abraham, *Environmental Jurisprudence in India*, (Kluwer Law International; The Hague, 1999), 14; S. Chaudhry, “Effectiveness of Directive Principles of State Policy”, 9 February, 2011, online at papers.ssrn.com/sol13/papers.cfm?abstract_id=1758849, (last accessed 15/12/2011).

¹⁹ The chair of the Indian Constitution Drafting Committee, Dr. Ambedkar famously noted that: “It is therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the constitution, without any direction as to what our economic ideal or as to what our social order ought to be, we deliberately included the Directive Principles in our constitution.” See Abraham, *ibid*, 15.

²⁰ The 86th amendment of 2002 inserted a new article 21-A into the Constitution which seeks to provide free and compulsory education to all children between the ages of 6 to 14 years.

²¹ Including a law to outlaw atrocities against this group, see Prevention of Atrocities Act, 1995

wage;²² consumer protection act;²³ equal remuneration act;²⁴ legal aid for defence of the poor in criminal proceedings, among others. Apart from these legislative actions, the judiciary has creatively sought to enforce the provisions of directive principles whenever action is brought to do so, even though Article 37 provides that it is not enforceable. The discussions in the section below evaluate how the Nigerian courts could learn from the judicial experience in India to give expression to the seeming non-justiciable provisions of section 20 of the 1999 Constitution.

5.2.1.3 Justiciability of Chapter II Provisions

By virtue of section 6(6)(c) of the constitution, no person would be entitled to base an action on section 20 if the government fails or neglects to protect or improve the environment or safeguard the water, air, land, forest and wildlife in Nigeria. What then is the rationale for including Chapter II in the Nigerian constitution when it is not intended or capable of being enforced by law?²⁵ There is no doubt that given a literal interpretation, Chapter II provisions do not prescribe any ‘right’ as such, but a reification of constitutional imperatives of what the Government and the people of Nigeria aspire to achieve. It has also been suggested that although the use of the term ‘Fundamental Objectives’ and ‘Directive Principles’ may give the impression that these ‘directives’ are prescriptive, the language of right was not used and therefore not intended to be read as such; their only use being to provide the yardstick for a critical assessment of

²² Equal Remuneration Act, 1976

²³ Consumer Protection Act, 1986

²⁴ Minimum Wages Act, 1976.

²⁵ See Nnamuchi, *supra* note 12; See *Archbishop Olubunmi Okojie v. Lagos State* (1981) 2 NCLR 218; *Uzoukwu v. Ezeonu II* [1991] 6 NWLR (Part 200) 708; *Adewole v. Jakande*, (1981) 1 NCLR, 152; but see the decision of the Philippines Supreme Court in the case of *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (1994) 33 *ILM* 173, where the Court stated that the right to “a balanced and healthful ecology” is found under the Declaration of Principles and State Policies and not the Bill of Rights which did not make it any less important than the civil and political rights in the latter. As far as the Court was concerned a right to “a balanced and healthful ecology” need not even be written in the constitution as “they are assumed to exist from the inception of humankind.”

governmental actions.²⁶ Yet, it is not only when issues are capable of creating legal relations or enforceable at law that governments take them seriously. Even if Chapter II provisions are only ‘moral adjurations’, government has a responsibility to take them into account while formulating policies. Indeed as Bhagwati, J. insisted in *Minerva Mills v. Union of India*:²⁷

*It is therefore, to my mind, clear beyond doubt that merely because the Directive Principles are not enforceable in a court of law, it does not mean that they cannot create obligations or duties binding on the State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State; if they do, the State would be bound by a constitutional mandate to carry out such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law.*²⁸

That is the purpose of these provisions and that was the reason that both the Irish and Indian constitutions provided for them, and apparently informed the framers of the Nigerian constitution to include them in both the 1979 and 1999 constitutions.

On the other hand, section 13 provides that ‘it shall be the duty and responsibility of all organs of government, and of all authorities and persons including the legislature, executive and the judiciary to conform to, observe and apply the provisions of Chapter II of the constitution.’ This appears to mean that for any of the Chapter II provisions to be enforced by legal action, the legislature must make a law, the breach of which could be the subject of legal action. But section 13 did not refer only to the legislature; it refers also to the judiciary as well as the executive. While the executive branch initiates and executes policies, the legislature is expected to enact laws for the good governance of the country. The judiciary cannot on its own initiate an action to challenge either the executive or the legislature unless and until proceedings are issued by citizens. Therefore, if the executive branch fails in its duties under Chapter II, it is for the

²⁶ B. O. Nwabueze, *Constitutional Law of the Nigerian Republic*, (Butterworth; London, 1964), 408.

²⁷ (1980) AIR (SC), 1789.

²⁸ *Ibid*, 1806.

legislature to enact laws for the implementation of those provisions, and on the basis of such laws, citizens would be entitled to bring suit to enforce them.

The Supreme Court had occasion to rule on the significance of Chapter II provisions in the case of *Attorney General of Ondo State v. Attorney General of the Federation and 35 Others*,²⁹ when it indicated that the rights contained in Chapter II may be enforceable in circumstances where the legislature had enacted a law pursuant thereto.³⁰ One of the issues which came up for determination in this case was whether the Anti-Corruption Bill enacted by the National Assembly pursuant to section 13 was beyond their powers and therefore unenforceable, and whether that Act could be enforced against a private person as the law purported to do. The Supreme Court observed that:

It has been argued that the Fundamental Objectives and the Directive Principles of State Policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such persons in authority and should not be extended to private persons, companies or private organizations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the Constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the Constitution. Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore, to be eradicated effectively, the solution of it must be pervasive to cover every segment of the society.

The purport of this dictum is that even though the provisions of Chapter II are not directly enforceable, the National Assembly has the power to legislate on any of the issues listed therein, thereby making them enforceable at law, whether against the government, private persons or

²⁹ (2002) 6 SC (Pt.1), 1.

³⁰ O.O. Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52(1), *Journal of African Law*, (2008), 89, 104.

corporations.³¹ But where the National Assembly fails to do so, then any person whose rights are abridged by the failure of government to perform any of the duties prescribed by Chapter II may apply to court to compel the Government to do its duty, for instance where the government failed to legislate to protect the environment or to enforce existing regulations, properly or at all. In the case of *Marangopoulos Foundation for Human Rights v Greece*,³² brought under the European Social Charter, the applicants complained of the government's inability to prevent the negative environmental impacts and failure to develop appropriate strategies to prevent and respond to the health hazards stemming from lignite mining. The complainant also alleged that there was no legal framework guaranteeing security and safety of persons working in lignite mines. The European Committee of Social Rights concluded that the government had violated the Charter. While this case may not be relevant in the case of Chapter II of the Nigerian constitution, it illustrates what the court (in this case the European Committee of Social Rights) could do to hold Governments to account where they fail in their duty to citizens.

The court must not shirk its responsibility simply because a constitutional duty is stated not to be 'justiciable'. It is the court's duty to hold the executive to account, when called upon to do so, and this it must do by interpreting constitutional provisions creatively to meet the purpose,³³ and spirit of the constitution.³⁴ According to a writer, the self-limiting factor of the judiciary that it

³¹ See generally Amao, *supra* note 30, *ibid*. See also *AGF v. Guardian Newspapers Limited* (1999) 5 SCNJ, 324; *INEC v. Musa* (2003) FWLR (Pt.145), 729. In *AG Lagos State v AG of the Federation* (2002) FWLR (Pt.92), 1775, the Supreme Court held that the purport of Section 20 is not concerned with making laws for the physical layout and developmental control of any town or region, but for the purpose of the reclamation and rehabilitation of devastated desertification and effect of indiscriminate burning activities.

³² Complaint No. 30/2005.

³³ For a discussion on a purposive constitutional interpretation, see P.E. Osho, "Towards a Purposive Approach to the Interpretation of the 1999 Constitution", available at <http://www.nigerianlawguru.com>, (last accessed on 31/12/2011).

³⁴ This may include objectives, goals, aspirations of the people and which have formed an integral element of the political culture of the nation. See P. Eke, "Military Rule and Damage to the Spirit of the Nigerian Constitution", 1

does not initiate the process for the exercise of its power notwithstanding contemporary social experience, indicates that it is endowed with the resources with which it can and does influence society.³⁵ He continued that judicial decisions in specific cases affect not only the parties before a court, but the wider society, in terms of their civil rights, individual freedoms and property rights, and in other cases have direct impact on the course of political, social, cultural and economic development. In that way, the judiciary shares in the burdens of governance and a major machinery of the state.³⁶

For far too long the Nigerian judiciary distanced itself in the face of an environmental crisis to which the Niger Delta has been subjected, only occasionally doling out miserly awards under common law principles, which are often too technical and expensive for the ordinary people to fathom. For instance, in none of the cases in which an order for injunction was prayed did the court grant one, often deferring to the economic considerations of the State.³⁷ The right to a clean environment should present the court with the opportunity to assume “a more relevant position in societies in transition from a troubled past where there is a common aspiration for societal rebirth”, with an urgent call for “repositioning the rule of law as a beneficial, rather than exploitative principle for the organization of society as a whole.”³⁸ Although the provisions of section 6(6)(c) of the Nigerian constitution 1999 are explicit, so was Article 37 of the Indian

December, 2010, available at http://www.waado.org/nigerdelta/Nigeria_Facts/MilitaryRule/federalism_ekeh.htm, (last accessed on 31/12/2011).

³⁵ H.O. Yusuf, “Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria”, (2008) 30(2) *Law and Policy*, 194-226, 195-6. The author cited the examples of the US supreme court’s decision in *Bush v Gore (2000)*, which proved decisive in the election to the presidency of the United States in rather controversial circumstances, and the case of *Hamdan v Rumsfeld, Secretary of State for Defense (2006)* in which the court decried the Bush administration’s detention of “terror suspects” in Guantanamo Bay, and declared the plans to prosecute them before military commissions, illegal. Ibid, 196.

³⁶ Ibid.

³⁷ See discussions in paragraph 3.2.5.of Chapter III.

³⁸ Yusuf, supra note 37, 198.

Constitution, 1949 from where it originated, yet the Indian judiciary has managed over the years to creatively enforce them.³⁹

Directive Principles are intended to amplify the duties and obligations of Government against which their actions may be measured, and the judiciary can rely on section 13 to enforce the provisions of section 20 of the constitution. This will happen if the Nigerian judiciary become as creative and activist as their Indian counterparts, not only in construing this provision widely to enforce the duty imposed on government, but also in all circumstances in which government or its agencies engage in activities which interfere with the lives and livelihood of its citizens. In the instant case, the courts should enforce section 20 in circumstances where the government: firstly, is engaged directly or indirectly, in oil exploration and production activities, which cause pollution; secondly, as joint venture partner in all the IOCs operating in Nigeria whose operations pollute the environment and have the potential of causing, and often cause harm to its citizens; and thirdly, (through the DPR) as the regulator and enforcer of pollution control measures, but unable to do so against the IOCs of which, through the NNPC, it is a part. Arrangements such as these, with over-lapping and conflicting functions, which affect the objectivity of these agencies, require judicial intervention to hold the government responsible or make the polluter to pay.⁴⁰

³⁹ See generally S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press; Oxford, 2006).

⁴⁰ Professor An-Na'im, making a case for the enforcement of ESCR, advocates appropriate and credible supervision by the judiciary for ensuring that States do not encroach on the human rights of their citizens be they civil and political or economic, social and cultural rights, especially where the state itself is a party to a dispute about the legal entitlements of its citizens. See A. An-Na'im, "Context and Methodology: the Second Message of Islam", in W. Twining, ed., *Human Rights, Southern Voices*, (Cambridge University Press; Cambridge, 2009), 101; Yash Ghai, in the same vein, suggested that courts could play an important role in refining and elaborating rights, quoting a dictum in *Gosselin v Quebec (Attorney General)* (2002-12-19) SCC, 332, that "While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation, questions of how much the state should spend, and in what manner, does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concerns, this is a question about

In the area of environmental protection, the Indian court has recognized the right of every Indian to live in a healthy or pollution-free environment, by invoking the environmental provisions in Part IV to flesh out the constitutional right to life. In this regard, Dam and Tewary observed that:

*In recognizing the right to a clean environment, the Court drew inspiration from Article 48-A enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the Constitution. The recognition of the right to a clean environment and, consequently the right to a clean air and water was a culmination of the series of judgments that recognized the duty of the state and individuals to protect and preserve the environment.*⁴¹

It is submitted that whilst section 20 of the Nigerian Constitution is not directly justiciable by virtue of section 6(6)(c), an activist Nigerian court could as in India, invoke the breach of the duty imposed therein to hold the Government and its agencies liable for the violation of the right to a clean environment. The Nigerian judiciary has on occasion shown flashes of activism ranging from military suspension of the constitution in *Lakanmi v Attorney General of Western Region*,⁴² to election cases in *Amaechi v. Omehia*.⁴³ A flash of activism in an environmental context was

what kinds of claims individuals can assert against the state. The role of courts as interpreters of the Charter and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a Charter right exists – in this case, to a level of welfare sufficient to meet one’s basic needs – without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is properly speaking, non-justiciable.” See Yash Ghai, “Universalism and relativism: Human Rights as a Framework for Negotiating Interethnic Claims”, in Twining, *Ibid*, 153-154. But there is now a debate among Western human rights scholars whether the judiciary, which is unelected, should be given such enormous interpretative powers rather than parliament. See T. Campbell, *et al*, (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, (Oxford University Press; Oxford, 2011).

⁴¹ S. Dam and V. Tewary, ‘Polluting Environment, Polluting Constitution: Is a ‘Polluted’ Constitution Worse than a Polluted Environment?, (2005) 17(13), *Journal of Environmental Law*, 383, 386 quoted by E.P. Amechi, ‘Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation’, *Law, Environment and Development Journal*, (2010) 6(3), 320-333, 326.

⁴² (1971) 1 UILR, 201, where the Supreme Court of Nigeria, declared null and void the provisions of both a Military Decree and an Edict, which ousted the jurisdiction of the court, although the Federal Military Government later promulgated the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970 which effectively nullified the judgment. .

⁴³ See *Alhaji Atiku Abubakar & ors. v Alhaji Umaru Musa Yar’Adua & ors* (2008) 1 NILR, 251. In *Amaechi v. Omehia*, (2008), 1 NILR, 181, a candidate who neither stood for nor canvassed for votes was enthroned as Governor of Rivers State on grounds that his substitution after winning the Party’s primaries was improper, and therefore, was

shown by the court in *Gbemre's case*,⁴⁴ in which the judge declared that Article 24 of the African Charter was infringed by gas flaring and pollution of the environment by the respondents. The court also ordered the Attorney General to take steps to amend or repeal the laws which allowed the oil companies to flare gas in the Niger Delta, as they violate the right to life and dignity of the human person provided by sections 33(1) and 34(1) of the Nigerian constitution, respectively; and decreed a perpetual injunction restraining the first two respondents from further flaring of gas. The judge further ordered the Managing Directors of the first two respondents to appear before him with immediate plans to cease flaring of gas in these communities. Although neither the Attorney General nor the two other respondents complied with the orders (the judgment having been appealed), more of such judgments and orders would send the correct signal not only to the government but the IOCs that their actions would be liable to review. While this measure of activism was shown by particular judges in the cases mentioned, much is also expected of Counsel to bring such suits to court and urging the court to make particular orders. It is therefore, not only the judges who must be activist, but also Counsel knowledgeable in that area of the law (as appears to be the case with a number of environmental lawyers qualifying and returning to practice in Nigeria), bringing such actions and urging the court to rule on such cases regardless of their novelty.

deemed to have won the subsequent elections. In the earlier case of *Engr. Charles Ugwu v. Senator Ifeanyi Ararume*, (2007) 6 *NILR*, 81, the Supreme Court ruled as improper the substitution of the defendant's name without giving 'cogent and verifiable' reason as required by section 34(2) of the Electoral Act, 2006. In defiance of the Supreme court, the ruling Peoples' Democratic Party suspended the Plaintiff from the Party and refused to field any candidate for the gubernatorial elections in Imo State and instead supported the candidature of Chief Ikedi Ohakim, a member of a rival political party, who went on to win the elections in that State. It is believed that the attitude of the PDP gave rise to the unusual stance taken by the Supreme Court in the subsequent case of *Amaechi v. Omehia*, which facts are similar, save that in *Amaechi's case*, Mr. Omehia did not take part in the primaries, whereas Mr. Ugwu took part and scored only 36 votes as against 2076 votes scored by Mr. Ararume.

⁴⁴ Discussed more fully in the section below.

5.3 Right to a clean environment under Article 24 of the African Charter, 1981

Apart from section 20 of the constitution, as shown in the *Gbemre case* mentioned above, another provision which the courts in Nigeria could rely on to protect the right to a clean environment is Article 24 of the African Charter. Nigeria has ratified several international human rights and environmental treaties,⁴⁵ but the ratification of the African Charter on Peoples and Human Rights (hereinafter the “African Charter”)⁴⁶ is significant, in that it also incorporated the Charter into its domestic law by virtue of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Decree.⁴⁷ Article 1 of this Act states that:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Right shall have the force of law in Nigeria and shall be given full recognition and effect and shall be applied by all authorities and persons exercising legislative, executive or judicial power in Nigeria.

This provision is explicit and unimpeachable and therefore, the Charter is part of Nigerian law as if it was re-enacted as a Bill of Rights by the National Assembly and enforced under the Nigerian constitution.⁴⁸ As far back as 1990, the Supreme Court held that:

The African Charter on Human Rights, of which Nigeria is a signatory, is now made into our law [sic] by the African Charter (Ratification & Enforcement) Act, 1983. Even if its aspect of our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated. By signing international

⁴⁵ Including the ICCPR; ICESCR (and protocol concerning individual petition); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Elimination of all Forms of Discrimination Against Women, Convention on the Rights of the Child, among others. Some of the Environmental instruments to which Nigeria is party or ratified include, the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal; Stockholm Convention on Persistent Organic Pollutants; Cartagena Protocol on Biosafety to the Convention on Biological Diversity; Montreal Protocol on Substances that deplete the Ozone Layer; Kyoto Protocol to the UN Framework Convention on Climate Change; Convention on Biodiversity; and UN Framework Convention on Climate Change, 1992.

⁴⁶ (1981) 21 *ILM* 58; See also E. Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’, (2007) 52(1), *Journal of African Law*, 249-284.

⁴⁷ Now Cap 10 Vol. 1, Laws of the Federation of Nigeria, 1990

⁴⁸ See section 12 of the CFRN, 1999 which provides that all treaties must be incorporated by an Act of the National Assembly before they would have effect in Nigeria.

*treaties we have put ourselves on the window of the world. We dare not unilaterally breach any of the terms without incurring some frowning of our international friends.*⁴⁹

While the African Charter as incorporated into Nigerian law by the National Assembly is not superior to any other Act and could be amended or abrogated by an amending Act, it is a Treaty which must be incorporated into Nigerian law by legislation, and is therefore, unlike any other enactment by the National Assembly. That point was made in the above dictum by the Supreme Court. The amplitude of Article 24 of the African Charter for the enjoyment of environmental rights in Nigeria is fully appreciated when discussed against the background of the first oil pollution case in which it was invoked in Nigeria in the case of *Gbemre v Shell*, albeit indirectly to enforce the fundamental rights enumerated in Chapter IV of the Nigerian constitution.

5.3.1 Article 24 and analysis of *Gbemre's* case

The case of *Jonah Gbemre v. Shell Petroleum Development Company & Ors*⁵⁰ relied on Article 24 of the African Charter, which provides that “All peoples shall have the right to a general satisfactory environment favourable to their development”. Here, the Plaintiffs sued Shell, the NNPC and the Attorney General of the Federation, claiming among other things, that the oil exploration and production activities of Shell, which led to incessant gas flaring, violated their rights to life and the dignity of the human person under sections 33(1) and 34(1) of the 1999 Constitution and articles 4, 16, and 24 of the African Charter. The action was commenced by the

⁴⁹ *Garba v. Attorney General of Lagos State* reported in (1994) 4 *Journal of Human Rights Law and Practice*, 205; *Agbakoba v. Director State Security Services* (1994) 6 NWLR 475; See also *Ogugu v. The State* (1994) 9 NWLR 1, 26-27 and 47, where the court held that the African Charter, even though domesticated, was superior to other domestic laws. But this was rejected by the supreme court in *Abacha v Fawehinmi* (2000) 4 SCNJ 401.

⁵⁰ Suit No. FHC/B/C/53/05, Federal High Court, Benin Judicial Division, 14 November, 2005

applicant for himself and as representing other members, individuals and residents of Iwherekan Community in Delta State of Nigeria.⁵¹ The reliefs sought include:

“(a) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of the human person provided in sections 33(1) and 34(1) of the Nigerian constitution and reinforced by Articles 4, 16, and 24 of the African Charter, inevitably includes the right to a clean poison-free, pollution-free and healthy environment;

(b) A declaration 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 is a violation of their fundamental rights to life (including healthy environment) and dignity of the human person;

(c) A declaration that the failure of the 1st and 2nd Respondents to carry out an environmental impact assessment in the Applicant’s community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, 2004 and contributed to the violation of the Applicant’s said fundamental rights to life and dignity of the human person;

(d) A declaration that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-injection Act, 2004 and section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, 1984, under which the continued flaring of gas in Nigeria was authorized are inconsistent with the Applicant’s right to life and/ or dignity of the human person, and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution; and

⁵¹ Counsel for the Plaintiffs drew a long list of members of this community which the Court regarded as ‘copious and unwieldy’ and requested the Applicant to commence these proceedings for himself and as representing the other members of the community. This is remarkable in view of the earlier decision in *Barrister Ikechukwu Okpara & Ors (for themselves and as representing Runmekpe, Eremah, Akala-Olu and Idama Communities in Rivers State, Nigeria) v. SPDC, TotalFinaElf, NAOCL, Chevron/Texaco, NNPC, Attorney General of the Federation*, Federal High Court, Port Harcourt (judgment delivered on 29 September, 2006), where the court refused representative action on grounds that a human rights enforcement action could not be brought in a representative capacity.

(e) An order of perpetual injunction restraining the 1st and 2nd Respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the Applicant's said community.”

Counsel for the applicant in his submissions, urged that the sum total of their depositions showed that gas flaring poisons and pollutes the air, water, food and vegetation of the applicant's community and causes terminal diseases such as chronic bronchitis, decrease in lung functions, painful breathing and cancer, and that the right to life protected by the Nigerian constitution and the African Charter will only have meaning if the things that endanger or diminish it are removed. That having shown that the effect of this massive flaring of gas endangers and diminishes life, it does not allow for full enjoyment of life, if anything it impairs the critical human organs and ultimately leads to death in many cases. Therefore any laws (such as section 3(1) of the Associated Gas Re-Injection Act), which permits the endangerment of life or which takes life, violates the constitutionally guaranteed right to life.

The court found for the applicants and declared:

“(1) that the constitutionally guaranteed fundamental rights to life and dignity of the human person provided in sections 33(1) and 34(1) of the Nigerian constitution, and reinforced by Articles 4, 16 and 24 of the African Charter, inevitably includes the right to a clean, poison-free, pollution-free and healthy environment;

(2) that the actions of the Respondents in continuing to flare gas in the course of its oil exploration and production activities in the Applicants' communities is a violation of their

fundamental rights to life (including healthy environment) and dignity of the human person as provided by the relevant provisions of the constitution and the African Charter;

(3) That the failure of the 1st and 2nd Respondents to carry out EIA in the Applicants' communities concerning the effects of their gas flaring activities is a clear violation of section 2(2) of the EIA Act and contributed to a further violation of the said fundamental rights;

(4) That the provisions of section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which gas flaring is allowed in Nigeria are inconsistent with the Applicant's rights to life and/or dignity of the human person, and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution." The court further held and ordered that the 1st and 2nd Respondents are restrained, whether by themselves, their servants or workers or otherwise from further flaring of gas in the Applicants' communities. The court also held and ordered the Attorney General of the Federation to immediately set in motion, after due consultation with the Federal Executive Council, necessary processes for the amendment by the National Assembly of the relevant sections of the Associated Gas Re-Injection Act and the Regulations to bring them in line with the provisions of Chapter IV of the Constitution, especially in view of the fact that the said Act, even by itself, also made continuous gas flaring a crime having prescribed penalties in respect thereof.

5.3.2 Comments on the *Gbemre* decision

The above case was the first time Article 24 of the African Charter was relied on to address the oil pollution problems in the Niger Delta. All previous attempts were anchored mainly on the common law, which as shown in the discussions in Chapter III have failed over the years to ameliorate the problems of the people of this area. *Gbemre's case* was the first attempt to use

human rights as an option open to the victims, with some success. While Article 24 was relied on by the claimant, it was not in its substantive formulation, but to interpret and enforce such rights as life and dignity of the human person, both of which are provided for under sections 33(1) and 34(1) of the Nigerian constitution and therefore directly justiciable by virtue of section 6(6)(b). The claimants avoided other rights under the Nigerian constitution violated by pollution (such as health (Section 17(3)(c) and (d)), being a right under Chapter II of the constitution and therefore, not enforceable by virtue of section 6(6)(c), unlike the rights to life and dignity which are directly enforceable by virtue of section 6(6)(b). Instead the claimants relied on it (right to health) under Article 16 of the African Charter, which is directly enforceable by virtue of it being incorporated into Nigerian law by the African Charter on Human and Peoples Right (Ratification and Enforcement) Act, 1983.

Another interesting element of *Gbemre's case* was the amplitude of remedies provided, including (a) declarations that their rights to life and dignity (under the Nigerian constitution) and to health and healthy and satisfactory environment were violated under Articles 16 and 24 of the African Charter, by the incessant gas flaring activities of the Respondents, and a further declaration that the relevant laws such as the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which gas flaring is allowed was unconstitutional, null and void for violating these fundamental rights; (b) decreed a perpetual injunction restraining the Respondents to desist from continuing any gas flaring activities in the communities; and (c) gave consequential orders, not only for the Attorney General of the Federation, in consultation with the Federal Executive Council to take steps to amend or repeal these laws, but also ordering the 1st and 2nd Respondents to appear before him at a particular date to provide detailed plans on how and when these

activities would cease. These remedies are only available under a human rights action as opposed to common law actions, which are limited to compensatory awards. The claimants in this case were not interested in monetary awards, but simply wanted the gas flaring activities to stop. Again, not only Shell was sued, but the human rights action enabled the claimants to join the NNPC, which is a joint venture partner with Shell in their activities in those communities, but also the Nigerian Government through the Attorney General of the Federation. Other than perhaps, an application for an injunction, all the other remedies pleaded and awarded would not have been possible under a common law action.

What is evident from the case is that the fundamental human rights provision of the Nigerian constitution was the benchmark against which all laws should be validated and any laws or actions of government or its agencies or individuals, which violate these rights, are to the extent of their inconsistencies null and void. That is to say that any existing laws permitting the flaring of gas, which in one way or the other impinge on the rights of the oil producing communities is null and void. The court appeared to imply also that the environment is the source of life and all life-support systems and any pollution of the environment will violate Article 24 of the African Charter and therefore, affects the enjoyment of all human rights such as the right to life, dignity of the human person, property and other economic rights derived from the environment.

While the orders made by the court are novel when compared to previous discussions in Chapter III (although rendered nugatory by a long-standing appeal by the Respondents and which have not been diligently prosecuted), it no doubt affected the thinking not only in governmental circles, but also in the National Assembly. Although the Gas Flaring legislation has not been amended or

repealed as ordered by the court, the National Assembly has discussed this matter on several occasions and given indication that gas flaring must stop. The Nigerian government was also ‘persuaded’ to commence negotiations with the militant groups operating in the Niger Delta, which culminated in an amnesty programme, which was a way of government saving face in the wake of international and local condemnation. There is now a programme of rehabilitation of the area, not only with the creation of a new Ministry for the Niger Delta, but also expanding the powers of the Niger Delta Development Commission in the development of the area.

No other human rights instrument has provided the courts in Nigeria with as much latitude to interpret any of its provisions as widely as the African Charter.⁵² This flexibility was evident even during successive military administrations when the fundamental human rights provisions of the constitution were either suspended or abrogated.⁵³ The African Charter has enriched Nigeria’s

⁵² See generally O. C. Okafor, *The African Human Rights System: Activist Forces and International Institutions*, (Cambridge University Press; Cambridge, 2007); G.W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (Transnational Publishers, Inc. New York, 2003); M. Evans and R. Murray, eds., *The African Charter on Human and Peoples’ Rights*, 2nd Ed. (Cambridge University Press; Cambridge, 2008); R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press; Cambridge, 2004).

⁵³ In *Garba & Ors v Lagos State Attorney General & Ors* reported in (1994) 4 JHRLP, 205; *Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria & Ors* reported in (1994) 4 JHRLP, 218; *Comptroller of Nigerian Prisons v Adekanye & Ors* (1999) 10 NWLR (Pt.623), 400; *Ubani v Director of State Security Services & Ano* (1999)1 NWLR (Pt.625), 129, the African Charter was used to nullify ouster clauses in military decrees. Although in *Fawehinmi v. Abacha* (1996) 9 NWLR (Pt.475), 701 the Court of Appeal held that “Notwithstanding the fact that Cap 10 (The African Charter) was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decrees No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria,” this was reversed by the Supreme Court in *Fawehinmi v Abacha* (2000) 4 SCNJ, 401. Details of these cases were discussed by A.A. Oba, “The African Charter on Human and Peoples’ Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11”, (2004) 4(2) *African Human Rights Law Journal*, 275-302. See also I O Smith, ‘Enforcement of Human Rights Treaties in a Military Regime: Effect of Ouster Clauses on the Application of the African Charter on Human and Peoples’ Rights in Nigeria’ (2000) 9, *Review of the African Commission on Human and Peoples Rights* 192. Ouster Clauses are a common provision in military decrees hence it frequently features in human rights actions during military rule. It is worthy of note that of Nigeria’s fifty years of independence, the military has ruled for nearly thirty, and each of the six military administrations abrogated the constitution in force at the time, either wholly or in part. The military administrations include those of Aguiyi-Ironsi/Nzeogwu - Feb-July 1966; Gowon - 1966-1975; Murtala/Obasanjo - 1975-1979, Buhari/Idiagbon - 1984-1985, Babaginda – 1985-1993; Abacha – 1993-1997 and Abdulsalam – 1998-1999. See Niki Tobi, “The Legitimacy of Constitutional Change in the Context of the 1999 Constitution”, in Ayua, Guobadia and Adekunle, (eds.), *Nigeria: Issues in the 1999 Constitution*, (NIALS; Lagos, 2000), 21-42.

human rights jurisprudence and made a phenomenal impact on the judiciary. Uwaifo JCA (as he then was) in *Peter Nemi v. AG of Lagos State & ano*⁵⁴ opined that:

*... it is not enough that we (Nigeria) have ratified the African Charter. We must move with the rest of the human race in the implementation of those rights. While the Executive may take steps to examine or set in motion ways of improving human rights situations, the Judiciary should actively show its impetuous readiness to complement or indeed surpass the efforts of the Executive by an inspiring judicial approach to, or definition and recognition of, circumstances of human rights where appropriate and feasible.*⁵⁵

One other aspect of *Gbemre's case* which requires further comment relates to the submission by leading counsel for the first Respondent that the Fundamental Rights (Enforcement Procedure) Rules made pursuant to the 1979 constitution for the enforcement of human rights in Nigeria did not apply to the African Charter. Even though the court rejected this submission, it is significant. The 1979 Rules were promulgated for the enforcement of the rights provided under Chapter IV of the 1979 constitution, at a time when the African Charter had not been acceded to nor incorporated into Nigerian law and therefore, was not contemplated at the time the Rules were made in 1979. But the court has always implied that those Rules applied *mutatis mutandis* to the African Charter or else its provisions would not have been relied upon to enforce the rights of Nigerians at the time the Chapter IV provisions were either suspended or abrogated by military Decrees.⁵⁶ This question came up for determination in *Abacha v Fawehinmi's case*,⁵⁷ where the

⁵⁴ (1996) 6 NWLR 42.

⁵⁵ Ibid, at 58

⁵⁶ In *Ogugu v. State* (1994) 9 NWLR (Pt.366), 1 the Supreme Court, stated that “although the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act has not made a special provision like section 42 of the 1979 constitution for the enforcement of its Human and People Rights within a domestic jurisdiction, there is no *lacuna* in our laws for the enforcement of its provisions which like all other laws fall within the judicial powers of the courts as provided by the constitution and all other laws relating thereto. Thus by virtue of the provisions of Sections 6(6)(b), 236 and 230 of the 1979 constitution as amended or modified by the Constitution (Suspension and Modification) Decree 107 of 1993, it is apparent that the Human and People Rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.” Ibid, 25-26; See also *Ekpu v. Attorney General of the Federation* (1998) 1HRLRA, 391; Contrast with *Enahoro v. Abacha* (1998) 1 HRLRA, 424 where the Federal High Court of Lagos, refused to uphold the Africa Charter on grounds that since it was now domestic law, it was inferior to the Federal

court of appeal, having made all its decisions, including the superiority of the African Charter as against military decrees which ousted the jurisdiction of the court to entertain human rights actions, refused the reliefs sought on grounds that the application was made under the 1979 Rules, which could not be used to enforce the rights enumerated under the African Charter, but only for those under the 1979 Constitution. The Supreme Court did not accept this interpretation and castigated the court of appeal, holding that there was nothing wrong in using the 1979 Rules for the enforcement of the African Charter.⁵⁸ The Supreme Court berating the Court of Appeal in this case is curious, as both courts had previously held that the 1979 Rules could not be used to enforce the rights under the African Charter which were not created by the 1979 Constitution.⁵⁹ This confusion has now been resolved by the promulgation of a new set of Rules in 2009 which provide that the Rules apply both for the enforcement of the rights under the 1999 constitution as well as the rights provided under the Africa Charter.⁶⁰

5.4 Right to a Clean Environment through existing civil and political rights

Following from the discussions on Article 24 of the African Charter and the way the Nigerian court in *Gbemre's case* linked the right to a clean and healthy environment with the right to life, and dignity of the human person, it falls to discuss the constitutional provisions for the rights directly implicated by breach of the right to a clean environment. It is intended to discuss the

Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, which outs the court's jurisdiction.

⁵⁷ (1996) 9 NWLR (Pt.475), 710.

⁵⁸ Per Iguh, JSC, (2000) 4 SCNJ, 401, 435.

⁵⁹ *Zamani Lekwat & Ors v Judicial Tribunal on Civil Disturbances in Kaduna State & Ano* (1993) 2 NWLR (Pt.276), 410, and *Kokoro-Owo v Local Government Services* (1995) 6 NWLR (Pt.404) 760 (CA), and *Osazuwa v Edo State Civil Service Commission* (1999) 10 NWLR (Pt.622), 280; *University of Nigeria Teaching Hospital Management Board v Nnoli* (1994) 8 NWLR (Pt.363), 376, *Dangtoe v Civil Service Commission, Plateau State* (2001) 4 SCNJ, 131. (SC).

⁶⁰ This and related issues will be discussed more fully in Chapter VI.

right to a clean environment as part of the right to life and other rights, and how the constitutional provisions relating to these rights could be deployed to protect or recognize environmental rights. Discussions under this part will be limited to the right to life, property, and privacy of citizens and their homes, as these are the core aspects of human life which when affected by environmental degradation go to the foundations of life itself and or threaten human existence. This creative and robust interpretation of existing rights, enumerated in Chapter IV of the Nigerian Constitution,⁶¹ is another method by which the right to a clean environment could be realized provided Nigerian judges are prepared to be as creative and/or activist as their Indian counterparts.⁶² India was the first to embrace⁶³ and foster an extensive and innovative jurisprudence on environmental rights.⁶⁴ The court did not only relax the traditional rules of standing which permitted only aggrieved persons to sue,⁶⁵ but also allowed members of the public,⁶⁶ or other public-spirited individuals to bring public interest litigations.⁶⁷ Until recently Nigerian judges applied a most rigid rule of

⁶¹ Astegbua, supra note 3, 89.

⁶² The former Chief Justice of Nigeria, Mr. Justice Mohammed Uwais observed during the 2002 global judges symposium that: “The greatest deterrent to prosecution of [oil-related] environmental damage in Nigeria today is scepticism with which prosecutors are likely to approach the courts having regard to what is known of the judicial posture.” He urged Nigerian judges to ‘assimilate and understand the evidence before them’ and ‘apply “new” principles such as sustainable development and other germane environmental considerations to issues in a way that goes [beyond] an unflinching devotion to the principles of nuisance, negligence and trespass.’ Quoted by Ebeku supra note 13, 316.

⁶³ See L. Rajamani, ‘The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip’, *RECIEL* (2007) 16(3), 274-286

⁶⁴ Ibid, quoting M R Anderson, ‘Individual Rights to Environmental Protection in India’ in A Boyle and M R Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press; Oxford, 1996), 199.

⁶⁵ In *Re Sidebottam* (1880) 14 Ch.D 458, Lord Justice James defined an aggrieved person as ‘a man who has suffered a legal grievance, a man against whom a decision has been pronounced which wrongly deprived him of something, or wrongly affected his title to something’, *ibid*, 465; The question of standing to sue in Nigeria caused a lot of furore and it is one aspect of Nigerian law in which so much time and ink was expended both by Nigerian courts as well as scholars, in an attempt to understand its real purport. An exegesis of this controversy was undertaken by T. I. Ogowewo in ‘Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria’, (2000) 2, *Brooklyn Journal of International Law*, 528-589

⁶⁶ *Sunil Batra (II) v. Delhi Administration* (1980), 3 SCC 488

⁶⁷ *S P Gupta v. Union of India* (1981) Supp SCC 87

standing⁶⁸ yet was prepared in *Gbemre's case* to interpret existing Chapter IV provisions to enforce the right to a clean environment. The enjoyment of such rights as life, property and privacy of citizens and their homes will inevitably be impaired without upholding the right to a clean environment. These rights will now be discussed in the following section.

5.4.1 Right to Life

Thomas Hobbes,⁶⁹ once described life as “solitary, poor, nasty, brutish and short”, and saw man as inseparable from nature, but driven by competition and addicted to power - as its acquisition guarantees him material well being.⁷⁰ The consequence of this constant battle is man’s natural right and liberty to seek self-preservation by any means, which informed the belief that there is only one fundamental right – a man’s right to his own life.⁷¹ According to Rand, other rights are consequences or corollaries of the right to life.⁷² For Rand, life is a process of self-sustaining and self-generating actions geared towards the support, furtherance, fulfillment and the enjoyment of life.⁷³ That is to say that life is the precursor to other rights: there must be life before a man would engage in other pursuits, including liberty or happiness. Therefore, that a man has a right to his own life means that he has the freedom from physical compulsion, coercion or interference by others. According to Rand, the right to life is the source of all rights, and the right to property

⁶⁸ The rules of standing to sue is still largely confused and will be discussed more fully in paragraph 6.2.1 of Chapter VI. Suffice to say that in *Douglas Oronto v. Shell* (1999) 2 NWLR (Pt 591), 466, the Federal High Court held that the plaintiff did not have standing despite being a native of one of the affected communities and a frontline environmental activist, on ground that he did not show that his right was affected nor any direct injury suffered by him. This is without prejudice to the fact that the supreme court had conferred standing on a private citizen to sue in public nuisance almost 8 years earlier. See *Adediran v Interland Transport Ltd* (1991) 9 NWLR (Pt.214), 155.

⁶⁹ Thomas Hobbes, *The Leviathan*, 1651, Ch. 13

⁷⁰ This is particularly poignant in Nigeria where politics appears to be the most lucrative industry and guarantees public office-holders immeasurable wealth. See R. Schubert, “Revisiting the Oil Curse: Are Oil Rich Nations Really Doomed to Autocracy and Inequality?” *Oil and Gas Business*, (2006), 1; D.J. Smith, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria*, (Princeton University Press; Princeton, 2007).

⁷¹ See Ayn Rand, “Individual Rights”, online http://aynrandlexicon.com/lexicon/individual_rights.htm, (last accessed 22/04/2010).

⁷² Ibid.

⁷³ Ibid.

is its only implementation.⁷⁴ Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life. But life is not limited to mere animal existence, but is coupled with the right to engage in economic activities in order to sustain and preserve his life.

The dictum of the Pakistani supreme court is apt in this respect, when it interpreted the right to life under the 1973 Constitution to include the right to a healthy environment and stated in *Zia v. WAPDA*⁷⁵ that:

*The word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution [of Pakistan] but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of the present controversy suffice it to say that a person is entitled to protection of the law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.... A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards to life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of would impinge the fundamental rights of a citizen. In this view of the matter the petition is maintainable.*⁷⁶

Therefore, ecological abuse from oil industry operations in the Niger Delta in some respects is more serious than physical abuse such as violence, torture or inhuman and degrading treatment. Ecological abuse takes a more sinister outlook when carried out directly, sustained or tacitly condoned by the State, which has the obligation to protect its citizens against such abuses. Therefore, human rights are intended not only to protect life, but also people's means of

⁷⁴ Ibid.

⁷⁵ (1994) PLD 693.

⁷⁶ Ibid, at 712-713, per Akhtar, J.

livelihood as any threat to the environment on which they depend for their livelihood impinges directly on their right to life.⁷⁷ Pollution of land and rivers for a community whose primary occupation is farming and fishing, or of fresh water courses, will inevitably threaten their means of livelihood (and therefore, life) as there would be no food to eat or water to drink, just as their health and life will be imperiled, and property rights violated.⁷⁸

Guaranteed by all human rights instruments both at the international, regional and national levels, the right to life is the right which gives expression to all other rights. The ICCPR,⁷⁹ and the ICESCR,⁸⁰ both provide that, “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.⁸¹ The African Charter⁸² also provides that “every human being shall be entitled to respect for his life and the integrity of his person”. And the Nigerian constitution provides in Section 33(1) that “every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”. The right to life is not limited to protection against the termination of life, but arguably includes any activities the effect of which may cause injury to life. The African Commission has stated that “the right to

⁷⁷ See Articles 3, 17 and 25 of the Universal Declaration of Human Rights, which provides in Article 3 that everyone has the right to life, liberty, and security; in Article 17 that everyone has the right to own property and no one shall be arbitrarily deprived of his/her property, and in Article 25 that everyone has the right to a standard of living adequate for the health and well-being of him/herself and his/her family, including food, clothing, housing, medical care, social services and security.

⁷⁸ The Land Use Act, 1978 is believed to be the most insidious instrument by which the Nigerian Government expropriated the land of the people without compensation and converted erstwhile owners into mere occupiers. See R. Ako, “Nigeria’s Land Use Act: An Anti-thesis to Environmental Justice”, (2009) 53, *Journal of African Law*, 2; R. Ako and P. Okonmah, “Minority Rights Issues in Nigeria: A Theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region”, (2009) 16, *International Journal on Minority and Group Rights*, 53-65; R. Ako, P. Okonmah and Taiwo Ogunleye, “The Niger Delta Crisis: A Social Justice Approach to the Analysis of Two Conflict Eras”, (2009) 2(2), *Journal of African Development*, 105

⁷⁹ Adopted Dec. 16, 1966, and entered into force March 23, 1976, G.A Res. 2200 A (XXI).

⁸⁰ Adopted 16 December 1966 and entered into force 3 Jan. 1976, G.A Res. 2200 A (XXI).

⁸¹ Art. 6(1) of ICCPR.

⁸² Adopted June 27, 1981 and entered into force Oct., 21, 1986, OAU Doc. OAU/CAB/LEG/67/3/Rev. 5 (hereinafter the “African Charter”).

life is the fulcrum of all other rights. It is the fountain through which other rights flow and any violation of this right without due process amounts to arbitrary deprivation.”⁸³

Exposure to toxic pollutants, carcinogenic agents, persistent gas flares associated with oil exploration and production in which IOCs are engaged impinge directly on the right to life. The Indian Supreme Court specifically stated in *Surya Dhungel v. Godavary Marble Industry*⁸⁴ that a clean and healthy environment is a part of the entirety of life and therefore, a polluted environment is a threat to life. While in *Tellis and ors v. Bombay Municipal Corporation and ors*,⁸⁵ the Supreme Court derived a right to livelihood from the right to life. The Nigerian court in *Gbemre’s case* also stated that the constitutionally guaranteed fundamental rights to life provided in section 33(1) of the Nigerian constitution, inevitably includes the right to a clean, poison-free, pollution-free and healthy environment, and that the actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicants’ communities is a violation of their fundamental right to life (including healthy environment). The court further held that the provisions of section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which gas flaring is allowed in Nigeria are inconsistent with the Applicant’s rights to life and therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

The ramifications of this judgment are far-reaching, in that the court not only declared that oil pollution which violates the right to a clean environment is a danger to life, and that any laws which allows the oil companies to flare gas, a very serious polluting activity, is unconstitutional.

⁸³ African Commission, Communication 223/98- *Forum of Conscience v. Sierra Leone*, at Para. 19.

⁸⁴ Nepal Kanoon Patrika, Case No.35, Judgement of 31 October, 1995, 169.

⁸⁵ (1987) L.R. C’Wealth 351, 368-369 (India)

The court not only decreed a perpetual injunction to restrain the respondents from further continuing to flare gas, but also ordered the Attorney General of the Federation to take steps after consulting with the Federal Executive Council to present a Bill in the National Assembly to either amend or repeal those laws which allow gas flaring. Although the Attorney General did not carry out the orders (the judgment having been appealed by the respondents, provided the Attorney General a ‘stay of execution’ with regard to either amending or repealing the offending law and regulation which allows gas flaring in Nigeria), members of the National Assembly took the hint and presented a private member Bill for cessation of gas flaring in Nigeria.⁸⁶

5.4.2 Right to Property

A breach of the right to property may also be interpreted as a breach of the right to a clean environment where land is damaged by oil pollution or affects adversely the enjoyment of the right to property. This right is regarded as a fundamental part of life, liberty and the pursuit of happiness. Samuel Adams wrote that among the natural rights of citizens are the rights to life; to liberty; and to property; together with the right to support and defend them in the best manner possible.⁸⁷ According to Rand, “since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life”.⁸⁸ Rand’s expression here implies a fundamental right of man to sustain his life by engaging in one economic activity or the other to eke out a living. People of oil producing communities have the right not only to

⁸⁶ In 2009 the Nigerian Senate passed a Gas Flaring Bill, making it illegal for operators to flare gas in Nigeria beyond 31 December, 2010. This date was later shifted to 31 December, 2012. However, The Chairman of the Senate Committee on Ecology and Environment, Bukola Saraki, said a new bill will be introduced in the Senate to end gas flaring by 2015.

⁸⁷ S. Adams, “The Rights of the Colonists”, *The Report of the Committee of Correspondence to the Boston Town Meeting*, (Edes and Gail: Boston, 1772), 2-3, cited by L. Rose, “Property Rights and Environmental Public Policy”, *Florida Student Philosophy Blog*, 3 March, 2010, online <http://unfspb.wordpress.com/2010/03/03/property-rights-and-environmental-public-policy/>, (last accessed on 05/05/2010).

⁸⁸ A. Rand, *Capitalism: The Unknown Ideal*, (Signet; New York, 1986) , 9

live on their land,⁸⁹ but also to depend on it for their livelihood. They not only eke out a living by farming and fishing, but they also have a close affinity to their land.⁹⁰

One affront endured by the people of the Niger Delta was the enactment in 1978 of the Land Use Act, section 1 of which stripped them of their ownership rights to land. They not only lost in one fell swoop the ownership of their land, but also the privileges hitherto enjoyed as landlords to the IOCs operating in their areas. Once government took over all land and vested it in the Governor of the State, the IOCs promptly withdrew these privileges and atone directly to government rather than the communities. This is partly responsible for the hostility which exists between the government, oil producing communities and the IOCs operating in the Niger Delta,⁹¹ exacerbated by the military campaigns subsequently waged by the Federal Government.⁹² Okonta noted the causal link between (non)participatory rights and conflicts in the Niger Delta, when he said:

The present crisis in the Niger Delta can be better understood as a long-drawn out historical process, itself propelled and animated by complex international economic and political forces and which the local inhabitants have been trying to comprehend, resist or turn to their own advantage these past one hundred years with varying degrees of success and failure. In other words, it is a story of power and resistance to it; of alien and imposed authority and attempts to indigenize it and make it accountable to the people it

⁸⁹ Undue interference by oil pollution which renders property uninhabitable or affects its enjoyment could amount to expropriation by the State. In *Merlin v British Nuclear Fuels* (1990) 2 QB, 557, it was held that the radioactive dust that affects the value of plaintiff's house amounts to a partial expropriation of the property. See K. Stanton, *et al*, *Statutory Torts*, (Sweet & Maxwell; London, 2003), 148.

⁹⁰ In an editorial by A. Nossiter of Reuters titled, "When'll Oil Spill End in N'Delta?", published in the *International*, Sunday 4 July, 2010, he stated that "The Niger Delta, where the wealth underground is out of all proportion with the poverty on the surface, has endured the equivalent of the Exxon Valdez spill every year for 50 years by some estimates. The oil pours out nearly every week and some swamps are long since lifeless. Perhaps no place on earth has been as battered by oil... Small children swim in the polluted estuary here, fishermen take their skiffs out and market women trudge through oily streams... As many as 546 million gallons of oil is spilled into the Niger Delta over the last five decades or nearly 11 million gallons a year."

⁹¹ See generally P. Okonmah, "Right to a Clean Environment: The Case for the Oil producing communities in the Nigerian Delta", (1997) 41(1) *Journal of African Law*, 44.

⁹² See Ako, Okonmah and Ogunleye, "The Niger Delta Crisis: A Social Justice Approach to the Analysis of Two Conflict Eras" (2009) 11(2), *Journal of African Development*, 105-122, 110; Ako, Obokoh and Okonmah, "Forging peaceful Relationships between oil companies and host communities in Nigeria's Delta Region", (2009) 3(2), *Journal of Enterprising Communities: People and Places in the Global Economy*, 205-216; R. Ako, "Ensuring People Participation in the Sustainable Development of the Niger Delta Region of Nigeria: Environmental Impact Assessment as a Viable Tool," (2006) 3(1&2), *Environtropica*, 1-15.

*purports to rule; an epic tale of ordinary men and women battling against vastly more superior forces threatening to take the bread from their mouth and destroy their way of life into the bargain.*⁹³

Locke was the first to make the case for private property as a natural right when he indicated that an individual has a claim to “property in his own person,”⁹⁴ and by adding labour to the resources found in nature, he adds something of himself and gains a proprietary claim to them.⁹⁵ To the extent that man has a right to own or use land for sustenance, means that it should only be taken away from him for good reason and after payment of adequate compensation. To do otherwise would be to affect his humanity and his ability to nurture and sustain himself. Oil pollution which affects property or makes the enjoyment of the property rights of the people of the Niger Delta is a clear violation of their right to property, which is guaranteed by the constitution. For instance, in *Budayeva and Ors v Russia*,⁹⁶ the applicants sued the Russian government for failure to minimize the mudslide hazards in a mining district, which resulted in the loss of life and property. Although the court found for the loss of life, it stated that the applicants could not demonstrate that “but for” the official failure to act, their property would have been safe. While the applicants could not demonstrate that government’s failure to act resulted in loss of property, in the absence of any Nigerian authority on the point, this case was used to illustrate the fact that the government would be liable for failure to act in order to protect life and property of its citizens. The level of

⁹³ I Okonta, “The Lingering Crisis in Nigeria’s Niger Delta and Suggestions for a Peaceful Resolution”, online: http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm.

⁹⁴ ‘Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This, nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state of nature hath provided, and left it in, he hath mixed his labour with, and joined it to something that is his own, and thereby makes it his property. It being removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men’, J. Locke, *Second Treatise of Government*, reproduced by P. Laslett, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* (Cambridge University Press; Cambridge, 1964) para 138, cited by R. Barnes, *Property Rights and Natural Resources* (Hart Publishing; Oxford, 2009), 31

⁹⁵ L. Rose, *supra* note 87, *ibid*.

⁹⁶ (App. No. 15339/02 (20 March, 2008)

pollution in the Niger Delta is such that it would not happen, but for want of care, due diligence and failure to properly regulate by the Nigerian government and its agencies.

Another aspect of the right to property which could have implications for the right to a clean environment is in respect of the divestment of ownership and control of property rights related to land involved in oil industry activities. This not only removes proprietary control over decisions including issues related to pollution on such lands, but also the reliefs, including compensation arising from pollution and degradation of their land. The right to own land does not discount the right of the State by the power of 'eminent domain' to acquire land for public purposes save that this acquisition must be coupled with payment of prompt and adequate compensation as provided by law.⁹⁷ The right of eminent domain is universally subscribed to, but the allodial right of the State to appropriate private land for public purpose must be tempered by the right of the property owner to receive prompt and adequate compensation.⁹⁸ The Supreme Court of Nigeria recognizes this right,⁹⁹ and so does the US Supreme Court.¹⁰⁰ But the power of the court to inquire is not whether the state has the right to take private property, but whether it was taken with or without paying just or adequate compensation as provided by the law or the constitution. The right to property implies some form of ownership, including the right to have access to one's property and

⁹⁷ Section 44 of the CFRN, 1999. See W. Akpan, "Oil, People and the Environment: Understanding Land-Related Controversies in Nigeria's Oil Region", on-line at <http://www.codesria.org/IMG/pdf/akpan.pdf>, (last visited on 30/11/2010).

⁹⁸ See K.S.A. Ebeku, "Oil and the Niger Delta People: The Injustice of the Land Use Act", (2000) 9, *CEPMLP*, 14; S. Ogedengbe, "Compulsory acquisition of oil exploration Fields in Delta State, Nigeria: The compensation problem", (2007) 25(1), *Journal of Property Investment & Finance*, 62-76

⁹⁹ Notable Supreme Court decisions on the Land Use Act include *Nkwocha v. Governor of Anambra State* (1984) 6 SC 362; *Abioye v. Yakubu* (1991) NWLR 130; *Savanah Bank v. Ajilo* (1989) 1 NWLR (Pt.97) 305 and *Awojugbagbe Light Industries v. NIDB Trustees Limited and Chinekwe* (1993) 1 NWLR 485. No other Nigerian academic has written more on the Land Use Act than Professor J O Omotola, some of whose articles on the point, include: J O Omotola, "Interpreting the Land Use Act", (1992) 1(1), *Journal of Nigerian Law*, 108-120; J. O. Omotola, "The Supreme Court and the Land Use Act", (1987-88) 8&9, *Journal of Private and Property Law*, 1-3; J. O. Omotola, "Does the Land Use Act Expropriate?", (1985) 3, *Journal of Private and Property Law*, 1-6.

¹⁰⁰ *Mississippi & Rum River Boom Co. v. Patterson* 98 US. 403 (1878)

not to have it invaded or encroached upon by others.¹⁰¹ This right is recognized both by international,¹⁰² as well as municipal law.¹⁰³ For instance, the UDHR provides that “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”.¹⁰⁴ In the same vein, the African Charter provides that “[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”¹⁰⁵ Also, section 43 of the 1999 Constitution provides for the right of every Nigerian “to acquire and own immovable property anywhere in Nigeria,” and forbids the compulsory acquisition of property without prompt and adequate compensation,¹⁰⁶ with “a right of access for the determination of his interest in property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria”.¹⁰⁷ The taking of land from the people of the Niger Delta and the constant interference by oil pollution on their land, is a violation of their property rights. In most cases, compensation is not paid as Government could compulsorily acquire land for ‘overriding public purpose’, but where it is paid, this does not reflect the full value of the land as only improvements made, such as buildings or crops are recompensed (land belonging to government while the people are only occupiers). Instances abound where land has

¹⁰¹ See African Commission, Communication 140/94, 141/94, and 145/95- Constitutional Rights Projects, *Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Thirteenth Annual Activity Report 1999-2000, Annex V., para. 54.

¹⁰² See Art.25, UDHR; Art.11, ICESCR; Article 5(e)(iii), ICERD and Art.27(3), Convention of the Rights of Child (CRC); Art.8(1), Declaration on the Right to Development; Arts. 10, 11(c), 22, 23, 25, 26, 27 and 31, The Draft Declaration on the Rights of Indigenous Peoples and the U.N Sub-Commission on the Prevention of Discrimination and Protection of Minorities Resolution 1994/8.

¹⁰³ Even though the Land Use Act, 1978 vests all land in the state in the Governor of that State, the statutory right to occupy indefinitely (unless acquired by Government for overriding public purpose), implies a form of ownership or interest which should not be interfered with lightly either by the State or individuals. See M.B. Nuhu and A.U. Aliyu, “Compulsory Acquisition of Communal Land and Compensation Issues: The Case of Minna Metropolis”, 3-8 May, 2009, online at http://www.fig.net/pub/fig2009/papers/ts07e/ts07e_nuhu_aliyu_3383.pdf, (last accessed on 10/11/2011).

¹⁰⁴ See Universal Declaration of Human Rights, adopted Dec. 10, 1948, Article 17

¹⁰⁵ Article 14.

¹⁰⁶ Section 44 (1) (a), CFRN, 1999.

¹⁰⁷ Section 44 (1) (b), CFRN, 1999.

not been compulsorily acquired for any ‘overriding public purpose’ for which compensation may be paid (whether adequate or not), but pollution emanating from oil spills and gas flares, make the enjoyment of such land impossible and therefore, an undue interference on the property rights of the owners of such land.

The Land Use Act divests ownership rights to land and vests the same in the Governor of the State to hold for the benefit of all Nigerians.¹⁰⁸ This method of expropriation or ‘compulsory acquisition’ inevitably impairs the right of ownership of property.¹⁰⁹ The Land Use Act compounded the misery of the people of oil producing communities of the Niger Delta when applied in conjunction with other legislation such as the Petroleum Act 1969,¹¹⁰ the Lands (Title Vesting, etc.) Act 1993¹¹¹ and the 1999 Constitution.¹¹² These laws appropriate all mineral resources anywhere in Nigeria to the Federal Government without obligation to pay any or adequate compensation.¹¹³ Also, section 47(2) of the Land Use Act provides that “[n]o court shall

¹⁰⁸ Section 1 of the Land Use Act, 1978, Cap. 202, LFN, 1990.

¹⁰⁹ Nuhu and Aliyu, *supra* note 106.

¹¹⁰ Petroleum Act, Cap. 350 LFN 1990 (now Cap. P10 LFN 2004) which vests in the State “the entire ownership and control of all petroleum in, under or upon any lands” in Nigeria, including land covered by water that is in Nigeria or under its territorial waters or forms part of its continental shelf.

¹¹¹ Lands (Title Vesting etc.) Decree No. 52 of 1993 which vests in the Federal Government the title of all lands within 100 metres limit of the 1967 shoreline of Nigeria as well as all lands reclaimed from any lagoon, sea or ocean in or bordering Nigeria.

¹¹² Item 39, Part I Exclusive Legislative List of the CFRN, 1999

¹¹³ Section 77 of the Petroleum Act only expects oil operators to pay to the landowner ‘such sums as may be a fair and reasonable compensation for any disturbance of the surface rights of such owner or occupier and for any damage done to the surface of the land upon which his prospecting or mining is being or has been carried on and shall in addition pay to the owner of any crops, economic trees, buildings or works damaged, removed or destroyed by him or by any agent or servant of his compensation for such damage, removal or destruction.’ This provision does not define clearly what is ‘fair’, ‘just’ or ‘reasonable’, leaving the operators to pay only for land value, economic trees/crops and physical structures. Akpan, believes the ‘current market value’ of land in the rural areas is meager if it has any value at all. For instance the market value of land may be calculated in terms of annual rentals for land acquired for petroleum drilling or related activities and which varied from \$3.85 per hectare (in the case of ‘swamp’ and ‘sand beaches’) to \$7.69 per hectare (in the case of ‘dry land’). In the case of permanent damage to land, the oil operators were expected to ‘capitalize’ the applicable rental amount ‘for a one-time payment for a term of 20 years at a rate of 5%. Thus, a ten-hectare parcel of ‘dry land’ currently worth \$76.9 in yearly rental would in the event of permanent damage bring its owner a one-off payment of \$209.04. The payment for damaged crops is even more laughable as the full amplitude of the loss suffered cannot be quantified. In making distinctions between ‘economic’

have jurisdiction to inquire into any compensation paid or to be paid under this Act”. That is to say that although the Federal Government of Nigeria could appropriate land and all mineral resources in land with or without payment of compensation (whether adequate or not), by section 47(2) of the Land Use Act, the courts are also debarred from entertaining any action brought to inquire into the adequacy or otherwise of the compensation paid. This provision has since declared void to the extent of its inconsistency with constitutional provisions by the Supreme Court.¹¹⁴ Had the court not made this declaration, the situation of the people of the Niger Delta would have more desperate as the government would have given them no lee-way whatsoever.

5.4.3 Right to privacy of citizens and their homes

An extension of the right to property is the right to respect for privacy of citizens and their home: that is to say, the peaceful enjoyment of one’s privacy, family life and home. This right is essentially to guard against arbitrary interference with private and family home by public authorities.¹¹⁵ Section 37 of the constitution provides that “the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected,” and secures to Nigerians a sphere encompassing life, physical well-being, including their homes and workplace.¹¹⁶ The Niger Delta area of Nigeria is severely exposed to all kinds of noise, air, water and pollution from oil industry activities and other interference. Noise from machinery and equipment is common place; so is nuisance from oil spills and waste, which may give rise to health problems by exposure to them.

and ‘food’ crops, little attention is paid to the fact that some crops that may have little ‘economic’ value had important cultural significance for local people. Akpan, *supra* note 97, 5-6.

¹¹⁴ See *Nkwocha v. Governor of Anambra State* (1984) 6 SC 362; *Lemboye v. Ogunseyi* (1990) 6 NWLR (Pt. 155) 210.

¹¹⁵ Article 17 ICCPR; Article 8 ECHR; Article 11 ACHR; Article 14 ACHPR, quoted in the *World Conservation Union Paper on “Human Rights and Environment: Overlapping Issues*, assessed in <http://www.ciel.org>.

¹¹⁶ *World Conversation Union Paper*, *Ibid.* Note that the ECHR interpreted the term ‘home’ in *Niemietz v. Germany* (1992) 16 EHRR 97, Par. 30 as applicable also to business premises, under article 8 of the ECHR.

Environmental harm which amounts to breach of the right to private life and home was exemplified in the case of *Lopez Ostra v. Spain*¹¹⁷ where the national authorities failed to regulate a privately-owned polluting tannery that produced air pollution and made the local residents' living conditions unbearable. The applicant alleged violation by a public authority of her right to respect for her home, which made her private and family life impossible (Article 8), as well as making her a victim of degrading treatment (Article 3). Although it was not proved that there was a causal link between the health damage suffered and the pollutants released from the plant, the European Court of Human Rights noted that severe environmental pollution may affect individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life. The court held that the State failed to strike a fair balance between the town's economic well-being (in having a waste-treatment plant) and the applicant's enjoyment of her home and private and family life. And in *Powell & Raynor v United Kingdom*¹¹⁸ the court held that the pollution need not reach the point of affecting health, if the enjoyment of home, private and family life are reduced and there is no fair balance struck between the community's economic well-being and the individuals effective enjoyment of guaranteed rights.

No judicial authority in Nigeria exists, to the researcher's knowledge where privacy of home and family life has been relied on in an environmental pollution case hence reliance was placed on foreign authorities. It is suggested that in future, the court may be urged to interpret the relevant provisions of the Nigerian constitution which protect civil and political rights, as being part of the

¹¹⁷ (1995) 20 *EHHR* 277; See also *Guerra & others v. Italy*, 26 *EHHR* 357 (1998) ECtHR; *Moreno Gomez v. Spain*, Application no. 4143/02, Chamber Judgment of 16 November 2004, Unpublished. Similar approach was taken recently by IACHR in *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, IACHR. Report 40/04 (2004), 153, 194.

¹¹⁸ ECtHRts (1990) Ser. A No. 172.

right to a clean environment, as a polluted environment, which directly affects life or exposes the people to life-threatening health conditions; or which affects the enjoyment of property or the compulsory acquisition of it without proper or adequate compensation; or directly or indirectly affects the enjoyment of the privacy of citizens and their homes, impinges on these rights. With particular emphasis to property, the current arrangement by which all land in the State is vested in the Governor of that State and all minerals in such land is vested in the Federal Government leaving the previous owners of land as mere occupiers, even the little interest they have as occupiers is eroded by incessant oil spills and gas flares, which impinges on the enjoyment of land and therefore, their property rights. While they no longer have absolute power over land (as a result of the rights of the Governor and the Federal Government as trustee and owners of minerals under land, respectively), the occupiers proprietary interests are not extinguished (what they lost is the power to deal or alienate without the consent of the Governor). Therefore, any diminution of their enjoyment of land by oil spills and consistent gas flares, which diminishes their enjoyment of the land they occupy (by making it unclean and unsatisfactory for habitation), is a violation of their property right.

PART II
PROCEDURAL ASPECTS OF
THE RIGHT TO CLEAN ENVIRONMENT

5.5.1 Introduction:

Having discussed in Part I of this chapter the substantive right to a clean environment, shown to exist by creative and expansive interpretation of the duty of the government to protect and improve the environment under section 20 of the constitution – Fundamental objectives and directive principles of state policy, or under Article 24 of the African Charter which expressly provides for the right to a clean environment, or by expansive and robust interpretation of some existing civil and political rights under the Nigerian constitution, Part II discusses the framework for enforcement of this right, which inevitably straddles the procedural aspect of the right to a clean environment, including the right to information, participation and access to court. The section will show that without proper observance and respect for these procedural rights, the full enjoyment of the right to a clean environment will be illusory.

In Part II, the thesis discusses the three procedural rights under Nigerian law, including the right to information, participation and access to court (or justice). Having discussed these rights in relation to the European regional human rights system, in view of its adoption of the Aarhus Convention,¹¹⁹ it is intended here to discuss these rights in relation to Nigeria. Any repetition of some of the comments or issues already discussed in Chapter IV is deliberate only for emphasizing how they relate to Nigeria.

¹¹⁹ See paragraph 4.5.2.1 of Chapter IV.

This Part is divided into three main sections: the first section deals generally with the right to information, the second with the right to participation, while the third section discusses access to court (or justice).

5.5.2. Procedural Rights under Nigerian law

Nigeria is not a signatory to the Aarhus Convention 1998,¹²⁰ and there is currently no developed framework recognizing procedural rights or specifically relating to the environment as exists in countries such as the United Kingdom who are signatories to it. However, as will be demonstrated in the following sections, procedural rights, including the right to information, right to participation and access to court can be gleaned from the relevant provisions of the Nigerian constitution or statute. These rights hold the promise of helping people re-engage with environmental decision making, not only by guaranteeing the rights to environmental information and to participate in environmental decision making, but also the right to have access to the courts through procedures that are fair, equitable, timely and not prohibitively expensive.¹²¹ According to Morrow, the promotion of public participation in environmental decision-making is a social good, linked to some of the most fundamental elements of modern governance, including democratic values, accountability, improved decision-making and education.¹²² It is fair to say that observance of these procedural rights in respect of the oil industry in Nigeria has been marginal, and has in part contributed to the oil pollution crisis in the Niger Delta. For instance, there is very little information flow between the people of oil producing communities, the

¹²⁰ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June, 1998), Doc ECE/CEP/43

¹²¹ K. Morrow, "The courts and Public Participation in Environmental decision-making", in J. Benidickson, *et al*, (eds.), *Environmental Law and Sustainability after Rio*, (Edward Elgar Publishing Limited; Cheltenham, 2011), 138-157, 150.

¹²² Morrow, *Ibid*, 139.

government and the IOCs operating in these areas. The Nigerian oil industry operates like a ‘closed shop’ in which only privileged technocrats at the federal government level and their allies are entitled to engage in. Decisions about where, when and who explores for or trades in Nigerian oil is taken exclusively by the Federal Government.¹²³

There is also little if any participation of the people in decision making regarding the oil industry. Every decision comes directly from the federal government without any or proper discussions or consultation regarding the impact of these activities on the people or their environment. There is also little or no interaction between the people and the oil companies regarding the impact of their operations. Only recently, pursuant to the EIA Act, 1992, that the Ministry of Environment, now advertises for some form of participation on Environmental Impact Assessments. Access to the court, although available, is limited to common law actions to those who are able and can afford to sue. Such suits are mainly against the IOCs who are the operators of the oil facilities in the Niger Delta. The government or any of its agencies are hardly parties to oil pollution cases, as most litigants consider that they could not sue the government in tort,¹²⁴ and also section 12(1) of the NNPC Act, 1977 expressly imposes limitation of one year for bringing an action against the corporation. This has the (un)intended consequence of shutting the doors of litigation to a large number of people, as most oil pollution cases would take more than one year in appropriate cases to investigate and determine that an action is necessary. Therefore, the kernel of this thesis is essentially how to widen access to all those who may be affected by the impact of oil pollution

¹²³ This is illustrated by the fact that throughout the presidency of General Olusegun Obasanjo between 29 May, 1999 and 28 May, 2007, he also doubled as the Minister for Petroleum Resources, with only an adviser on petroleum matters, and all decisions regarding the oil industry and even appointment to executive positions in the two agencies directly involved in the industry - the NNPC and DPR - are made and approved by him. The situation is not markedly different today, except that there is now a substantive Minister for Petroleum Resources whose office is situated in the headquarters of the NNPC, rather than at the Federal Secretariat where other ministries are based.

¹²⁴ See *Fela Anikulapo-Kuti v Government of Nigeria* (1985) 2 NWLR (Pt. 6), 211

but are limited by, or unable to maintain an action, or whose damages cannot fit into the confines and technicalities of common law actions. These issues will be discussed under access to court (or justice) at paragraph 6.3.1.4, but only after discussing the rights to information and participation, below.

5.5.3 The Right to Information

The right to information in the context of the environment has at least two strands: the right to obtain information from government on request, and government's affirmative duty to inform the people of any or imminent environmental dangers and emergencies.¹²⁵ The right to seek, receive and impart information without interference is guaranteed by a number of international environmental law instruments,¹²⁶ and the Nigerian constitution.¹²⁷ However, there is no clear framework by which this can be achieved in Nigeria, with regard to environmental rights, although as discussed below, there is scope for achieving this through the recently enacted Freedom of Information Act, 2011. In most cases consultation with the communities, if at all held, is limited to discussions with Chiefs or selected individuals known to the oil companies and who may not represent the views of the entire community.¹²⁸ Such limited consultation is insufficient to put the environmental impacts of oil exploitation activities adequately within the knowledge of the community. Given the limited knowledge by the local people of the technical details, nature and impact of oil pollution, and the role which the local population could play in

¹²⁵ M. Mollo, *et al*, *Environmental Rights Report, Human Rights and the Environment*, Materials for the 61st Session of the United Nations Commission on Human Rights, Geneva, March 14-April 22, 2005, online at www.earthjustice.org.

¹²⁶ Art.19, ICCPR; Article 6(a)(ii) UN Framework Convention on Climate Change, May 9, 1992, UN Doc. A/CONF. 151/726, 31 *ILM* 849 (1992), Article 14(1), Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 *ILM*. 1228 (1993), Article 19, African Charter.

¹²⁷ Section 39(1)

¹²⁸ See Amnesty International, *Nigeria: Are Human Rights in the Pipeline*, 9 November, 2004. (AI, AFR 44/020/2004, 41.

environmental protection or in safe-guarding oil installations and facilities, it is curious that the oil companies do not take the local communities into confidence.¹²⁹ Taking them into confidence and with responsibility to protect oil facilities would reduce incidents of sabotage and strengthen the relationship between IOCs and the host communities.¹³⁰ Although people of oil producing communities may not be the most learned in the nuances of the oil industry, both the government and the oil companies have obligation to ensure proper consultation with appropriate representatives of the people who will in turn relate and/or interpret the same to their people. It is presumptuous to assume that since the people are not knowledgeable in the technical world of oil industry operations, there is no need to inform them of the consequences of oil industry operations or pollution. There is also an obligation on the government to release information about its own projects so as to increase public knowledge and awareness,¹³¹ and give express notice to those likely to be affected by any situation or event, which effect could be deleterious to the environment.¹³²

The Freedom of Information Act which was recently signed into law in Nigeria, after many years of demand,¹³³ establishes the right of any person to access or request information contained in any written form, which is in the possession or custody of a public official, agency or institution howsoever described.¹³⁴ Section 1(2) of the Act provides that an applicant under this Act need not demonstrate any specific interest in the information being applied for. It also provides that

¹²⁹ C.O. Orubu, *et al*, "The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement", (2004) 16(3), *Journal of Human Ecology*, 203-214, 210.

¹³⁰ *ibid*.

¹³¹ See Morrow, *supra* note 121.

¹³² *ibid*.

¹³³ J. Campbell, "Nigeria: Freedom of Information Act Becomes Law", 7 June, 2011, available at <http://www.blogs.cfr.org/campbell/2011/06/07/nigeria-freedom-of-information-becomes-law/>, (last accessed on 1/12/2011).

¹³⁴ Section 1(1).

every public institution “shall ensure that it records and keeps information about all its activities, operations and businesses and cause to be published such information in accordance with the provisions of the Act.” The Act also provides that any request for access to information from a public or government organization shall be attended to by the head of such organization not later than 30 working days from the date of receipt of the application, failing which an applicant may issue proceedings for an order for such information to be released.¹³⁵ These provisions could be relied on to gain information such as exploration programmes, their locations, EIA reports and pollution control measures, among others. The Act, however, empowers heads of institutions to decline access to information if such would jeopardize national security, affect the conduct of international affairs or amount to the release of trade secrets of the country.¹³⁶ It is arguable whether this provision will further restrict the provision of information as it could be argued that release of any information would amount to release of ‘trade secrets of the country’. This Act will enable people with interest in the oil pollution problems in the Niger to request information from the relevant government agencies such as the NNPC and the DPR regarding any matter on

¹³⁵ Section 20, Freedom of Information Act, 2011.

¹³⁶ Section 15. Being a new Act, there has been no interpretation by the courts of what amounts to ‘trade secret’. But this is no different from similar provisions under the Freedom of Information Act, 1992 in Queensland, section 45(1) of which relates to trade secrets, business affairs and research. The intention is not to disclose certain information held by government agencies or individuals carrying on commercial activities and who supply information to government agencies or about whom government agencies collect information or government agencies which carry on commercial activities. Such information as could compromise national security or commercial trade secrets which disclosure may give competitors undue advantage are exempt. See *Cannon and Australia Quality Eggs Farms Limited* (1994) discussed by the notes on ‘Trade Secrets’ and ‘information of commercial value’, by the Office of the Information Commissioner, Queensland, 5 October, 2006, available online at <http://www.oic.qld.gov.au>. See also the US Department of Justice Guide to the Freedom of Information Act, 2006 as amended by OPEN Government Act, 2007, Exemption 4 of which protects ‘trade secrets and commercial or financial information obtained from a person that is privileged or confidential’, online at http://www.justice.gov/oip/foia_guide09/exemption5.pdf. Ditto under the Freedom of Information Act, 2004 in the UK, section 43 of which sets out an exemption for trade secrets or information likely to prejudice the commercial interests of any person, but does not apply to environmental information (which is governed by the Environmental Information Regulations 2004), where such information concern emissions, discharges and other releases. See the Freedom of Information Act – Awareness Guidance No.5, online at http://www.ico.gov.uk/upload/documents/library/freedom_of_information_awareness_guidance_5_v3_07_03_08.pdf

which they hold information. Considering the manner in which the Federal Government and its officials guard issues relating to the oil industry, the provision on ‘trade secret’ is worrisome as NNPC or DPR may be reluctant to release information relating to their activities, using ‘trade secret’ as an excuse, and would be prepared to resist any legal challenge to compel them to release such information. Whatever the limitations of this Act, it appears to be a step in the right direction, as refusal to release such information could be ground for challenge in court.¹³⁷ Much will depend on how much awareness people have of the existence of this Act, and the cost of mounting legal challenge in the event of refusal to disclose information.

5.5.4 Right of Participation

As a means for pursuing environmental protection, participation is based on the right of those who may be affected by a project to have a say in the determination of their environmental future. The right to participate is provided for by Article 25 of the ICCPR¹³⁸ and Article 13 of the African Charter. Under domestic legislation, there are relevant provisions under the Environmental Impact Assessment Act 1992, which provide a framework for some level of participation in specified projects, including those in the oil industry.

The human rights violations to which the people of the Niger Delta have been subjected over the years, are in part due to their exclusion from any consultation or involvement whatsoever in the industry. Before the Land Use Act was enacted in 1978 by which all lands in the State are now vested in the Governor, the people of oil producing communities, as land owners (and landlords to

¹³⁷ Section 1(3). See generally L. Arogundade, (Ed.), *Freedom of Information Act and Civil Society*, (International Press Centre; 2003), online at <http://www.ipcng.org/freedom%20of%20information%20act.pdf>.

¹³⁸ Article 25, ICCPR UN GA Resolution 2200A (XXI), UN doc.A/6316 (1966); Article 13, African Charter, OAU doc.CAB/LEG/67/3 rev.5, 21 ILM 58 (1982).

the IOCs operating in the areas), were consulted by the oil companies for various oil industry activities affecting their communities. They were paid rent for use or easement for oil facilities passing through their land and generally given recognition. The people were awarded non-technical contracts, which provided employment for those not engaged in traditional vocations such as fishing or farming. The people reciprocated these gestures by ensuring that oil installations were protected against damage or vandalism, as well as appreciating that there would be fall-outs from oil industry activities which may affect them adversely. But once the IOCs believed they no longer have obligations to the people, but to the Federal Government these privileges were withdrawn, yet the people continued to bear the brunt of industry pollution. This contributes to the tension and the current impasse in the Niger Delta as the people now see the oil industry as an instrument of oppression, not of development of which they have a part.

Participation should have come by way of consultation during Environmental Impacts Assessments (“EIAs”) or providing the right and opportunity to challenge any projects which would have adverse effects on the people and or their environment. But it is common knowledge that most projects are carried out in the Niger Delta without proper, if any consultation.¹³⁹ Prior to the enactment of the Environmental Impact Assessment Act of 1992, oil industry activities were carried out without any impact assessment whatsoever. Section 2(2) of the Act provides that an EIA is carried out before any project or activity where “the extent, nature or location of a proposed project or activity is such that it is likely to significantly affect the environment”. Currently, there is a semblance of consultation where the Ministry of Environment publishes details of EIAs to be conducted and requesting interested parties to make submissions. Although the level of participation is not high, at least there is an indication of the provision of a forum for

¹³⁹ See the case of *Douglas Oronto v Shell* (1999) 2 NWLR (Pt. 591), 466.

such participation,¹⁴⁰ but what is not provided is technical assistance or adequate finance to enable local people to take part in any consultation. It is one thing to now have a right, but another to have the means to participate. The oil industry is a highly sophisticated and technical business and its operations involving many facets. Any meaningful participation by the people should involve government or industry assistance with employment of professionals to assist the local people or in assessing materials produced or for auditing and monitoring compliance.

5.5.5 Right of Access to Justice (or Court)

The term ‘access to justice’ is sometimes used interchangeably with ‘access to court’, but they have two different connotations. Whereas access to justice in environmental matters includes the right to seek and be given information, and to participate, access to court, on the other hand, refers to the right of people to challenge in court, any environmental decisions which may have impact on them. It is in this later connotation that discussions in this segment will focus, although will also invariably involve the former.

Access to court is provided by the combined effect of sections 6(6)(b) and 46 of the 1999 Constitution. Section 6(6)(b) provides that the judicial powers vested in the courts: “shall extend to all matters between persons or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person”. On the other hand section 46(1) provides that “Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.”

¹⁴⁰ See N Echefu and E. Akpofure, “Environmental Impact Assessment in Nigeria: regulatory background and procedural framework”, UNEP EIA Training Resource Manual: Case studies from developing countries, available online at <http://www.unep.ch/etu/publications/14%2063%20to%2074.pdf>, (last accessed on 31/12/2011).

Section 6(6)(b) is clear and unambiguous as to the right of a person to bring an action against individuals, government or governmental or other authority and to any person (including IOCs) in regard to any question as to the civil rights and obligations of the person initiating such actions. This means that anyone who is aggrieved about any matter whatsoever, including an environmental matter can bring an action in court. And section 46 fortifies this right to bring an action or mount a challenge against the action of an individual, government or authority, if the person bringing the action alleges violation of his fundamental human rights.

It is not enough to have this right, as there are barriers which may impede its exercise. The first and most fundamental barrier is the cost of bringing an action in court in Nigeria, more so an environmental matter, which may not very familiar to the courts and would be very expensive to litigate.¹⁴¹ Whether for judicial review or indeed to mount a civil action for compensation or to enforce a right, the costs are prohibitive as to discourage the average litigant from the oil producing communities. Lord Robert Carnwath once said that:

*litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.*¹⁴²

Although Nigerian law guarantees a successful party the recovery of his costs, it is not so much the risk of paying large sums of money in costs (as Nigerian courts hardly award substantial costs against losing parties), but garnering the initial funds to commence litigation. And if the matter is against a body such as the NNPC in the case of oil pollution or the Attorney General of the

¹⁴¹ The question of expertise in environmental matters as well as legal aid scheme for this kind of cases, are discussed in Chapter VI below.

¹⁴² Quoted by Coalition for Access to Justice for the Environment, “Access to Environmental Justice: Making it Affordable”, online at http://www.foe.co.uk/resource/briefings/caje_general_briefing.pdf, (last accessed on 01/09/2010).

Federation in the case of the Nigerian Government, the costs of such actions could be so prohibitive as to deter any litigant, or if the action is against an IOC with limitless funds as well as the ability to retain the services of the most expensive law firms or lawyers to defend these actions. As a result, the oil companies defend every action no matter how weak their defences, aware that they could wear out the claimant financially. Therefore, although access may be available, litigants are often deterred by the costs of bringing an action, and that is the reason many deserving cases cannot make it to court, and why both the Government and the IOCs, even though have broken the law, are not held to account.¹⁴³

5.5.6 Conclusion

This chapter discussed the recognition of the right to a clean environment under Nigerian law. The chapter was divided into two main parts. Part I examined the existence or otherwise of a substantive right to a clean environment under the Nigerian Constitution, 1999 as provided in section 20 of the Constitution. As Section 20 falls under the Chapter II provisions - Fundamental Objectives and Directive Principles of State Policy - which by section 6(6)(c) of the same Constitution are not justiciable, it became necessary to examine the origin of these constitutional provisions. The thesis traced their origin to the Irish Constitution, 1937, which influenced the drafters of the Indian Constitution, 1949, provisions of which were apposite for the time, but now seat inelegantly in modern constitutions. The Indians have by judicial creativity and activism subordinated the non-justiciability of these provisions to the Fundamental Human Rights provisions of their constitution. This creativity was commended to the Nigerian courts.

¹⁴³ There will be more discussion on access to court, including other factors which may affect it, in Chapter VI.

In Article 24 of the African Charter can be found a more potent and less controversial arsenal for the realization of the right to a clean environment, more-so since the African Charter has been incorporated into Nigerian law and can be relied upon directly to enforce this right. This was discussed in the second section of Part I. The jurisprudence which evolved from reliance on this Charter is phenomenal, not only in the African regional human rights, but also the municipal court systems. In Nigeria particularly, the African Charter remains a beacon even at the height of military dictatorship. Its impact engendered some activism in Nigerian courts and influenced executive action and civil society struggles.

In the third section of Part I, the thesis suggested how the right to a clean environment could be achieved through existing civil and political rights, expressly provided under Chapter IV of the Nigerian Constitution, 1999. While the right to a clean environment is being advocated as a substantive right, the thesis posited that with robust interpretation, these civil and political rights could be interpreted expansively and purposively to cover environmental rights, since it is the environment which gives life and therefore expression to other rights, and a distorted environment would not guarantee the enjoyment of other fundamental rights enumerated in the said Chapter IV of the Nigerian constitution. The Indian, and to a lesser extent Pakistani and Bangladeshi, Supreme Courts have held in some of the cases discussed, that the right to life includes the right to a clean environment and that life and other fundamental rights are meaningless without a wholesome environment.

Part II, which is also sub-divided into three main sections discussed the procedural aspects of the right to a clean environment, through which this right may be realized, including the rights to

information, participation and access to justice or to the courts. In discussing these procedural rights, the thesis showed that while the right to information is provided under the Nigerian constitution, the centralized nature of the oil industry and dominated by the Federal Government, makes it difficult for information to be obtained regarding where and why exploration activities occur in particular areas of the Niger Delta. Perhaps, the situation would change with the newly enacted Freedom of Information, Act 2011, which obliges government institutions and agencies to provide information regarding any aspect of their activities, with the right of challenge in the event of failure to do so.

With regard to the right to participate, it was shown that the people who are impacted by oil industry activities do not participate or have the opportunity to participate fully in discussing matters relating to the industry. While the Environmental Impact Assessment Act, 1992 mandates EIA in all projects which may have environmental impact, the level of participation is impeded by the lack of professional assistance for the local people, in an industry that is so technical and sophisticated. The Chapter concluded with discussions on the right of access to court (or justice), which is recognized under Nigerian law, but in practice is impeded by several factors, not least the cost of litigation in Nigeria, which is prohibitive and beyond the purse of many victims of oil pollution.

It was shown in this chapter that the right to a clean environment exists and is recognized under Nigerian law both in its substantive and procedural aspects, the later being the mechanisms through which the right may be enforced. But these procedural rights are not robustly implemented, even though they are provided for both by the constitution as well as statute law.

The right of access to court is important as it has a number of challenges or factors which may affect its realization, some of which are judicial or institutional while others are non-judicial, non-institutional or extra-legal. These factors and the opportunities for ameliorating them are discussed in the next chapter.