CHAPTER SIX

ENFORCEMENT OF THE RIGHT TO A CLEAN ENVIRONMENT

OPPORTUNITIES AND CHALLENGES

6.1 Introduction

In the second part of the previous chapter, the procedural aspect of the right to a clean environment was discussed, including the rights to information, participation and access to court (and to justice). Following from that discussion, this chapter discusses enforcement of the right to a clean environment, which can only be actualized with unhindered access to the courts. A number of factors or challenges may affect the ability of victims to enforce this right, some of which may be within the judicial system itself (institutional) or outside of it (non-institutional). A range of issues such as corruption, incompetence, timidity, executive lawlessness and interference with the judicial process, security of tenure for judges and inadequate judicial infrastructure will be discussed as well as other technical legal problems which may affect or impede enforcement. The institutional challenges are discussed in the first section while, the non-institutional factors are discussed in the second section. The chapter will conclude in the last section with an evaluation of the opportunities presented by the new Fundamental Human Rights Enforcement Rules, 2009.

6.2 Judicial Challenges

Litigating the right to a clean environment is dependent on access of victims of oil pollution to the court, which itself is dependent on the intersection between legal rights recognized in a given society, and the procedural gateways created by law for the enforcement of such rights.[1] Amechi believes that the latter is very important as most people whose rights have been infringed or threatened by environmental degradation in Nigeria have been denied access to justice because of the burdensome procedural rules or injustices in the legal system.[2] He opined that where the cause of action arises in private law, failure to discharge the onerous burden of proof associated with reliance on tort rules, has led to the failure of many environmental cases.[3] Also the strict application of *locus standi* rules in causes of action arising from public law has led to the failure of environmental cases against governmental bodies.[4]

The right to a clean environment is expressly recognized under Nigerian law by virtue of Article 24 of the African Charter, but the realization of this right depends entirely on whether or not the Nigerian courts are prepared to declare that particular acts of environmental degradation violate this right, enabling any person who feels that this right is being, or has been violated in relation to him could bring an action in any court to seek redress. Amechi opines that bringing such an

[1] 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', (2010) 6(3), *Environment and Development Journal*, 320-333.
[2] Ibid, 322.
[3] *Chinda & 5 Ors v. Shell-BP* (1974) 2 RSLR 1; *Shell Petroleum Development Company v. Chief Amachree and 5 Ors* (2002) FWLR, 1656
[4] The difficulty with private law action was discussed in Chapter III above. There are very few public law actions for environmental degradation in Nigeria, falling mainly on *locus standi*, discussed in paragraph 6.2.1. NNPC which should have been the focus of most of these actions, by its enabling Act cannot be sued where the matter complained of is over one year old. That is to say that the action whether in private or public law cannot be brought to court after one year, which is too short a time to determine damage, instruct counsel and file an action in court. See section 12(1) of NNPC Act 1977; See generally A. Onuoha, 'The Dilemma of Restorative Justice when 'All Are Guilty': A Case study of the Conflicts in the Niger Delta Region of Nigeria", online at Http://kms1.isn.ethz.ch/serviceengine/files/.../ichaptersection/chaptewr4.pdf, (last accessed 15/01/2011).

action will decrease the reliance on common law actions as litigants or victims no longer have to prove fault or causation, but only the creation of an unhealthy environment. That is to say that the degradation (or pollution) resulted or will result in the creation of an environment that is not favourable to the applicant's life, health, well-being or socio-economic development.[5] However, it is one thing to have a right and another for the courts to so declare or enforce them. Therefore, much would depend on access to court in all its many facets. According to Atapattu:

> *The importance of these rights (i.e. the procedural rights) is that they contribute to the development of a decision–making process which is transparent and participatory and which holds the government entity in question accountable for its actions. Applied in relation to environmental issues these include the right to have access to information affecting one's environment, the right to participate in decisions affecting the environment and the right to seek redress in the event one's environment is impaired.*[6]

Perhaps, the most pervasive challenge to access to court is the issue of standing to sue, on which a lot of time, resources and judicial time has been spent over the years, and would require detailed treatment.

6.2.1 *Locus Standi*

One notable impediment to access to court and by implication to justice in Nigeria is the slavish application by courts of the principles of standing to sue. In England from where Nigeria's common law was inherited, standing to sue is determined no longer by whether a litigant is

[5] Amechi, supra note 1, 327

[6] S. Atapattu, "The Right to a Healthy Life or the Right to Die Polluted? The Emergency of a Human Right to a Healthy Environment Under International Law', (2002) 16, *Tulane Environmental Law Journal*, 16, 111.

aggrieved or directly affected by the act or omission called to question,[7] but whether the cause of action lies in private or public law.[8] If in private law, the test is the cause of action itself, whereas in public law it is the existence of sufficient interest, which itself is liberally interpreted. Amaechi[9] discussed the following English cases to buttress this point. For instance, in *Felixstowe, Exparte Leigh,*[10] a journalist sought a declaration that the policy adopted by the Chair of the Justices not to reveal the names of sitting Magistrates for security reasons was unlawful. The court held that he had the standing to do so. Also in *R v. Inspectorate of Pollution, Exparte Greenpeace (No.2),*[11] the court allowed Greenpeace (an environmental organization) to challenge British Nuclear Fuels' decision to test its new Thermal Oxide reprocessing plant at Sellafield. The court relied on the fact that Greenpeace was a highly respected and responsible environmental organization, better able to mount such a focused challenge than an individual. The same liberal interpretation was given in *R. v. Foreign Secretary, Exparte World Movement Limited,*[12] where another pressure group was held to have the standing to challenge the decision of the Secretary of State for Foreign and Commonwealth Affairs to grant overseas aid for the purpose of constructing a hydro-electric power station in Malaysia. And in *R v. Secretary of State for Foreign and Commonwealth Affairs, Exparte Rees-*

[7] The change came in 1978 through Order 53 on the recommendation of the Law Commission which unified the procedure for judicial review, indicating that the issue for judicial review is no longer whether a person was "aggrieved", but whether he has "sufficient interest". See J.E. Bonine, "Broadening "Standing to Sue" for Citizen Enforcement", 1999, available online at http://www.inece.org/5thvol2/bonine.pdf, (last accessed 30/12/2011). Lord Diplock famously said in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* (1982) AC 617 that "it would be a grave lacuna in our system of public law if a pressure group or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

[8] See the judgment of Lord Hoffmann in *O'rourke v Mayor of the London Borough of Camden* (12 June, 1997) reported online at http://www.publications.parliament.uk/pa/ld199798/idjudgmt/jd970612/rourk01.htm, (last accessed on 30/12/2011).

[9] Amechi, supra note 1, 212.

[10] (1987) QB 582

[11] (1994) 4 All ER 328

[12] (1995) 2 WLR 386

Mogg,[13] a citizen because of his sincere concern for constitutional issues successfully won the right to challenge the ratification of a treaty.

However, in Nigeria the issue of standing to sue appears confused, not least by the differing decisions and interpretation of section 6(6)(b) of the Constitution by the courts, including the Supreme Court. In *Senator Adesanya v The President of the Federal Republic & Another,*[14] despite the succinct opinion given by Fatayi-Williams, CJN in his lead judgement in that case, a strict and perhaps, erroneous interpretation was still given to section 6(6)(b) of the 1979 Constitution. Fatayi-Williams CJN in that case, opined:

> *I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour-mongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of Law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process."*

He even extended standing to foreigners residing in Nigeria, at page 376, paragraph 3, when he said:

> *In my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is*

[13] (1994) QB 552

[14] (1981) 1 All NLR, 32; Also in *Thomas v. Olufosoye* (1986) 1 NWLR (Pt.18), 669, Obaseki, JSC in his lead judgment held at 682 that "The term 'locus standi' was extensively discussed in the case of *Senator Adesanya v. The President of the Federal Republic & Ano.* (1981) 1 All NLR 32. It cannot stand independently from the provisions of section 6(6(b) of the Constitution of the Federal Republic of Nigeria 1979".

governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his civil right to see that this is so. This is because any law that is inconsistent with the provisions of that Constitution is, to the extent of that inconsistency, null and void by virtue of the provisions of Sections 1 and 4 to which I have referred earlier."

Yet, the Supreme Court departed from that decision in *Fawehinmi v. Akilu,*[15] when it introduced the so-called 'neighbourhood test' for determining the standing to sue in criminal cases. But in *Owodunni v. Registered Trustees of the Celestial Church of Christ & ors,*[16] Ogundare, JSC who delivered the lead judgment said:

"A word or two on Adesanya v President of the Federal Republic of Nigeria (supra). It appears that the general belief is that this court laid down in that case that the law on locus standi is now derived from Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 (re-enacted in section 6(6) (b) of the 1999 Constitution). I am not sure that this general belief represents the correct position of the seven Justices that sat on that case, only 2 (Bello and Nnamani JJ.SC) expressed views to that effect. In my respectful view, I think Ayoola JCA (as he then was), correctly set out the scope of Section (6) Subsection (6) (b) of the Constitution when in N.N.P.C. v Fawehinmi & Ors. (1998) 7 NWLR (Pt.559) he said:

'In most written constitutions, there is a delimitation of the power of the three independent organs of the government, namely: the executive, legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the states in the court and defines the nature and extent of such judicial powers does not directly deal with the rights of access of the individual to

[15] (1987) 4 NWLR (Pt.67), 797. But in the later case of *Akinnubi v. Akinnubi* (1997) 2 NWLR (Pt.486), 144 the Supreme Court appeared to revert to *Adesanya*, supra note 14.
[16] (2000) 10 NWLR (Pt.675), 315

the court. The main objective of Section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of power between the judiciary on the one hand and the other organs of government on the other hand, in order to obviate any claim of the other organ of government, or even attempt by them, to share judicial powers with the courts. Section 6(6)(b) of the Constitution is primarily and basically designed to describe the nature and extent of judicial powers vested in the courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination of questions ranging from locus standi to the uncontroversial questions of jurisdiction."

That the sub-section does not lay down the plenitude of the Nigerian law on locus standi is borne out by the decision of this court in Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) where this court recognized the right of a citizen to lay a criminal charge against anyone committing an offence or who he reasonably suspects to have committed an offence.[17]

Although it was held that the strict rules of standing to sue in Nigeria was ameliorated by the decision in *Adediran v. Interland Transport*,[18] the decision in *Douglas v. Shell*[19] which came a few years after, indicate that the law was yet to be settled. In that case, an environmental activist sought to compel the respondents to comply with the provisions of the Environmental Impact Assessment Act before commissioning their project, which entails production of liquefied natural gas in the volatile and ecologically sensitive Niger Delta region. The suit was dismissed on grounds that the plaintiff could not show that he was directly affected, even though he was a member of one of the communities which may be affected by the project.

[17] At 345.
[18] (1991) 9 NWLR (Pt. 214) 155
[19] (1999) 2 NWLR (Pt.591) 466.

However, this law appears now settled with the liberal content of the new Fundamental Human Rights (Enforcement) Rules, 2009. The new Rules, expressly removed all previous strictures to standing to sue, providing that any interested or public-spirited party, including individuals, NGOs or public interest litigators may now approach the court.[20] This means that third party and representative actions, which was not allowed under the common law for litigating oil pollution injuries in the Niger Delta, unless with leave of court, is now possible. It was held that one could not enforce a right on behalf of another, and each and every person damaged by oil pollution must either bring separate actions (or listed as party).[21] Under the new rules, even third parties who are not directly involved may now bring an action.

6.2.2 Procedural Impediment

The decision to stay the orders of Mr. Justice Nwokire in the case of *Gbemre v. Shell*[22] no doubt dampened the euphoria that attended this case, and exposed the difficulties faced by litigants in Nigeria. The trial judge had ordered Defendant's managing director, NNPC's group managing director and the Attorney General of the Federation to appear before him, granted a perpetual injunction to stop gas flaring in some communities in the Niger Delta and ordered the Attorney General to set the machinery in motion for repeal or amendment of the laws permitting gas flaring in Nigeria, on grounds that such laws violated the claimants' fundamental right to life, dignity and their right to a clean and satisfactory environment provided under Article 24 of the African Charter. Whilst not diminishing the historic nature of the decision, the challenge to

[20] Preamble 3(e)
[21] *Barrister Ikechukwu Okpara & ors. (for themselves and as representing Rumuekpe, Eremah, Akala-Olu and Idamu Communities in Rivers State, Nigeria) v. SPDCL, Total/FinaElf, NAOCL, Chevron/Texaco and Attorney General of the Federation,* unreported Federal High Court, Port Harcourt, Judgement delivered on 29 September, 2006. In *Gbemre's case,* leave was specifically sought and granted before the claimant was able to bring the action in his name on behalf of the community.
[22] (2005) unreported, judgement 14 November, 2005.

achieving environmental justice in Nigeria lies, not so much with the preparedness of the courts to declare these rights, as the difficulties in enforcing court judgments in Nigeria. While challenges exist in enforcement of court orders generally in Nigeria, the Nigerian judiciary appears steeped in 18th century infrastructures set up by erstwhile colonial masters. Although there now exists glistering new court buildings in some jurisdictions and computers in court rooms, the mentality of the judges, the administrative staff, and most of the legal practitioners, remains very conservative.[23] Cases still take too long to be heard (with interminable adjournments caused not only by judges being swamped with work, but also the practitioners who request them), the laws and procedures are obsolete and the infrastructures antiquated. When judgments or awards are given, the process of enforcement is tedious. Almost in all cases the losing party appeals against a judgment (sometimes up to the Supreme Court), whether or not there are errors of law. So that litigants are, by default, denied the fruits of their judgment.

Secondly, the mechanisms for enforcing court orders have seen little improvement since colonial times. In developed countries, court judgments are habitually obeyed, and parties against whom judgments are given attempt to comply with orders made by the court, be they money judgments, injunctions or declarations. It is not always so in Nigeria, where the ethos or habitual respect for the law have not been fully developed. Only in criminal cases is there a semblance of judicial authority or compulsion (as in such cases the accused person may already be in custody or if on bail, will promptly be re-arrested after sentence and detained).

[23] H. Yusuf, "Gas Flare – Oil majors in race to beat 2012 deadline, Daily Independent, 24 May, 2010, cited by R.T. Ako, "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India", (2010) 3 *NUJS Law Review*, 423-445, 437.

In human rights cases, the litigant is not so much interested in money judgment; rather they are more interested in declarations, which implementation would provide relief. But where a declaration is rendered nugatory by frivolous and sometimes interminable interlocutory applications and appeals, this prolongs the suffering for which the original application was brought. In *Gbemre's case*,[24] even though a perpetual injunction was decreed, this and the other orders given by Mr. Justice Nwokire were discharged by the Court of Appeal on grounds that an appeal serves as a stay of execution of the judgement, with the appellants failing to prosecute their appeal diligently.[25] This means that the status quo has remained, yet the injuries for which the original case was brought are still being inflicted.

6.2.3 Judicial Timidity, Incompetence and Corruption

Although judges have shown flashes of activism in some cases, in the majority of cases there is evidence of timidity, even incompetence.[26] This is made worse by the lack of security of tenure, which would make otherwise activist judges timorous.[27] It takes a courageous Judge like Mr. Justice Nwokire in the *Gbemre case* to find that the gas flaring activities of Shell Petroleum affected the right to a clean environment of the claimants. In construing Article 24 of the African Charter, the judge further held that the constitutionally guaranteed rights to life and dignity of the human person inevitably includes the right to a clean, poison-free healthy environment and that Shell's continuous gas flaring in the area was in violation of this right.

[24] Supra note 22.
[25] Ako, supra note 23, 439.
[26] See *Wang Ching Yao & Ors v Chief of Staff Supreme Headquarters* reported in G Fawehinmi, *The Law of Habeas Corpus* (1986) 437, where the court of appeal stated that "on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets". Ibid, 447. Indeed, in *Labiyi v Anretiola* (1992) 8 NWLR (Pt.258), 139, the judged averred that in the hierarchy of laws in Nigeria under military regimes, military decrees were superior to the unsuspended provisions of the constitution. This decision attracted several criticisms. See Yusuf, supra note 23, 281.
[27] For instance Justice Nwokire, after the judgment was transferred from his duty post to Katsina in the Northern part of Nigeria. See Ako ibid, 438.

Even though the Respondents - the Federal Government through the Attorney General, Shell and NNPC - have failed to comply with the orders given by the court, instead instituted an appeal which they have failed to prosecute, that decision remains a landmark on environmental rights in Nigeria. While this case is on appeal, it cannot be enforced as an appeal stays execution of a judgment,[28] and the Respondents knew this and have deliberately failed to pursue their appeal. The government and the oil companies know that if the decision is allowed to be enforced, it would open a floodgate of litigation (and that might well still happen under the new Fundamental Rights (Enforcement) Rules, 2009). But what is rather odd is that although the African Charter has been incorporated into Nigerian law since 1983, it is the first time that Article 24 has been relied on by Counsel and pronounced upon by a judge in an environmental case in a Nigerian court.

Allegations of corruption are not as rife in the judiciary as in the wider Nigerian society, but it is an affliction to which even the judiciary is not immune.[29] In the first place, Nigeria is a highly bureaucratic State, perhaps, more so by the judicial branch. In a study by Aluko and Adesopo, they stated the Nigerian bureaucracy to include the administrative machinery and personnel of government and the corpus of rules and regulations that govern their behavior, and observed that

[28] See Order 50 of the Federal High Court Rules, 2000.

[29] The fact that the *Gbemre's case* is languishing in the Court of Appeal over seven years after the decision without listing is evidence of corruption within the judiciary. In fact former Chief Justice of Nigeria, Justice Aloysius Katsina-Alu declared that "the entire nation was presently soaked in corruption and that the judiciary sector is not exempt." See I. Ige, "Entire Nation's soaked in corruption", Vanguard Newspaper, 16 July, 2010, online at allafrica.com/stories/201007160202.html, last accessed on 30/12/2011. See generally United Nations Office on Drugs and Crime, *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States: Technical Assessment Report,* January 2006 (United Nations; New York, 2005); A. Babatunde, "The State, Judicial Sector Reforms and Judicial Corruption in Nigeria: A Sociological Perspective", 6 December, 2011, proceedings of the National Conference of Nigerian Anthropological and Sociological Association, held at Usman Dan Fadio University, Sokoto, Nigeria, available at SSRN: http://ssrn.com/abstract=1968990, (last accessed on 31/12/2011). See also I. Okoli, 'Re: Outsourcing Justice: Time to Claim our Profession Back,' *ThisDay Lawyer,* Tuesday 6 July, 2010. In an address titled, 'Reform Nigeria's Judiciary, Or Else', Professor Wole Soyinka stated that Nigerian judges are overly corrupt, timid and incompetent, online at http://www.saharareporters.com, (last accessed on 23/02/2011).

they are corrupt, inefficient and over-staffed. They are also accused of nepotism, ethnic loyalties, elitism, inability of superiors to delegate responsibilities, unreliability of junior staff in executing delegated tasks, failure of all to apply specialized knowledge and training skills in the management of public service and failure to appreciate the importance of timeliness or efficiency in the performance of tasks, and concluded that the whole Nigerian bureaucracy was not result-oriented. They added that over the years routine bureaucratic services have been slowly converted into an intricate network of favours provided only in exchange for some kinds of favour given or expected. And because the Nigerian society is excessively corrupt, the bureaucrats too have grown corruptible and corrupt. And thus corruption is an integral feature of the Nigerian bureaucracy.[30] Members of the judiciary are not immune from the above societal malaise, although there are wide-ranging sanctions for any judges accused of corruption.[31] While timidity appeared more widespread during the military regimes,[32] judicial incompetence[33] is slightly more difficult to deal with, may take time to manifest, and more often than not give rise to miscarriages of justice.

6.2.4 Executive Lawlessness

The Nigerian Government and its agencies are notorious for disobeying court orders.[34] Although rampant during successive military administrations, it is not unfamiliar with civilian

[30] M.A.O. Aluko and A.A. Adesopo, 'An Appraisal of the Two Faces of Bureaucracy in Relation to the Nigerian Society', (2004) 8(1), *Journal of Social Sciences*, 13-21, 18

[31] R.E. Badejogbin and M.E. Onoriode, "Judicial Accountability and Discipline in Nigeria: Imperatives for the New Democratic Order", available online at http://www.ancl-radc.org.za/judicial_accountability_and_discipline.doc, (last accessed on 30/12/2011); See ICJ report, *Attacks on Justice: Federal Republic of Nigeria*, available online at http://www.icj.org/IMG/NIGERIA.pdf, (last accessed 30/12/2011).

[32] Most of the cases cited by Yusuf, supra note 23,were during military regimes.

[33] Badejogbin and Onoriode, ibid, 9.

[34] See ICJ report, ibid, 5-6. Mr. Justice Brandeis said long ago in *Olmstead v United States* (1928) that "...In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example.

administrations either. Allied to this is the subtle but persistent intimidation of members of the judiciary, who dare to rule against Government or its agencies, (although some improvement has been made in the superior courts, i.e. the Court of Appeal and the Supreme Court, where a number of cases have been held against the Government, notably in election petition cases).[35] In *Gbemre's case*, the Judge in question has since been transferred out of his base, which is evidence of lack of security of tenure, as the government could find other reasons to relieve him of his post. As there is stay of execution of the orders made, both the NNPC and the Attorney General could not comply with any of the orders given by the Judge and the case is languishing in the Court of Appeal with Shell failing to pursue its own appeal.[36] Needless to say that gas flaring has continued.

6.2.5 Lack of Effective Enforcement Mechanism

One of the major draw-backs to access to justice in Nigeria is that even when judgments are given, the process of enforcement is not only tedious, but difficult, sometimes impossible. There is little respect for the law, especially by powerful individuals and organizations. Most courts do not have enough bailiffs and the few available are not properly equipped. Except in possession hearings, the work of bailiffs, appear limited to serving process, not to enforce court orders. There is little coordination between the courts and the police save in criminal cases.[37]

Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites anarchy." Quoted in R. E. Salhany, *The Origin of Rights*, (Carswell; Toronto, 1986), 135

[35] *Peter Obi v INEC & Ors*, (2007) 11 NWLR (Pt.1046), .378), 116; *Dapianlong v. Dariye*, (2007) 8 NWLR (Pt.1036), 239; *AG Federation v Atiku Abubakar*,(2007) 3 NWLR (Pt.1022), 01; *Adeleke & Ors v Oyo State House of Assembly*,(2007) 4 NWLR (Pt.1025), 423; *Ladoja v INEC* (2007) NWLR (pt.1047), 115.

[36] Although Shell has since pulled out of Ogoniland and now concentrates on off-shore exploration activities, previous infractions have not been remedied and therefore, future cases could still be brought against Shell. Shell recently auctioned four of its on-shore oil blocks for billions of dollars. See *ThisDay Newspaper*, 4 July, 2011.

[37] The police are mainly used as a force for intimidation by government, sometimes preoccupied with guarding institutions, politicians and the rich. Circumstances in which the police may assist in enforcing court orders against

Consequently, where an order or declaration is obtained against government, powerful individuals or organizations in environmental cases, for instance, they could be ignored as in *Gbemre's case,*[38] without any consequences or reprisals. There are even instances in which courts have ruled that individuals be released from detention by Government security agencies and they failed to do so.[39] But declaration is one thing and enforcement another. Although a court judgment may be appealed or ignored, it is still a judgment of the court and the public opprobrium which such declarations attract in some respects will have some political impact.

6.3 Opportunities

This section discusses the opportunities presented by the new Fundamental Rights Enforcement Rules, 2009, for the right to a clean environment.

6.3.1 The Fundamental Rights (Enforcement Procedure) Rules, 2009

The above Rules were promulgated by the Chief Justice of Nigeria in exercise of his powers under section 46(3) of the Nigerian Constitution, 1999. The Rules are stated to be the rules of procedure in all applications for the enforcement or securing the enforcement of Fundamental Rights under Chapter IV of the 1999 Constitution and the African Charter on Human and Peoples Right (Ratification and Enforcement) Act. These Rules repealed and replaced the old rules which only applied to Chapter IV provisions of the Fundamental Human Rights of the 1979

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the government are rare. On police, see generally Cleen Foundation, *Analysis of Police and Policing in Nigeria,* available online at http://www.cleen.org/policing.%20driver%20of%20change.pdf. (last accessed 30/12/2011).

[38] (2005) unreported, judgement of 14 November, 2005.

[39] *Lagos State Government v Ojukwu* (1986) 1 NWLR (Pt.18), 621; *Fawehinmi v. Col. Akhilu* (1987) 4 NWLR (Pt.67), 797; *Olisa Agbakoba v SSS* ((1998) NWLR (Pt.595), 425.

Constitution.[40] The overriding objectives of the new Rules as stated in Paragraph 3 of its Preamble include among others, expansive and purposive interpretation, respect for municipal, regional and international bills of rights, granting of consequential orders which may be just and expedient, provide access to justice to all classes, allow public interest litigation, advance democracy, good governance and human rights and culture, give human rights actions priority. As a result of the novelty of these objectives, it would be necessary to discuss them in detail below.

6.3.1.2 Expansive and Purposive Interpretation

Paragraph 3(a) of the Preamble to the Rules provides that the "Constitution, especially Chapter IV as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them." This mandate, not only applies to Chapter IV of the Nigerian Constitution, but also of the African Charter and enables the right to a clean environment as provided under Article 24 of the African Charter to be realized by a simple action where a litigant alleges that his or her right has been or is being threatened or violated by the act or omission of government or any of its agencies, corporate entity or individuals.

This expansive and purposive interpretation presupposes the indivisibility and interdependence of civil and political and economic, social and cultural rights,[41] and laid to rest any lingering doubts about the justiciability or otherwise of the socio-economic rights enumerated in the

[40] See The Fundamental Rights (Enforcement Procedure) Rules, 1979, made pursuant to the Constitution of the Federal Republic of Nigeria, 1979, available online at http//:www.nigeria-law.org/FundamentalRights(EnforcementProcedure)Rules1979.htm, (last accessed on 06/11/2011).
[41] On Cultural Rights generally, see E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, (Martinus Nijhoff Publishers; Leiden, 2007).

African Charter, not least the right to a clean environment.[42] By this provision, the Nigerian courts are enjoined not only to be creative, but also activist as the Indian courts have done over the years, by expansively and purposively interpreting civil and political rights in such a way to include or make economic, social and cultural rights enforceable, provisions which otherwise fell within the Directive Principles of State Policy and therefore, unenforceable.[43] For instance, in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi,*[44] the Indian Supreme Court declared that:

> *the right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.*[45]

6.3.1.3 Respect for Municipal, Regional and International Bills of Right

Paragraph 3(b) of the Rules also provides that for the "purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court

[42] For arguments on the enforcement of socio-economic rights, see H.O. Yusuf, 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria', (2008) 8, *African Human Rights Law Journal,* 79; S. Ebobrah, 'The Future of Economic, Social and Cultural Rights Litigation in Nigeria', (2007) 1(2), *Review of Nigerian Law and Practice,* 108, quoted by Amechi, supra note 1, 329.
[43] See section 6(6)(c) of the 1999 Constitution.
[44] (1981) 2 SCR 516, at 529
[45] Ibid., 529.

is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include: (i) the African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system, (ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system." Under the 1979 Rules, regional and international Bills of Rights had only persuasive force in Nigerian courts, but could now be relied on by Counsel and the court is mandated to take them into consideration in determining whether or not a particular right has been violated.

This provision is revolutionary, in that although Nigeria practices the dualist method of domesticating treaties which presupposes the incorporation of such treaties or adoption by the National Assembly before they apply in Nigeria,[46] under the new Rules, international Bills of Right may be cited with persuasive authority. That is to say, municipal (including the African Charter, which is now a domestic law and Chapter IV provisions of the Nigeria constitution), regional (including the African Charter and all the Protocols[47] and other human rights treaties, such as the European Convention on Human Rights and the Inter-American Human Rights Convention), international human rights instruments such as the Universal Declaration, the

[46] Justice Philip Nnaemeka-Agu, 'The Domestic Application of International Human Rights Norms: The Nigerian Experience' in *Developing Human Rights Jurisprudence: A Third Judicial Colloquium on The Domestic Application of International Human Rights Norms,* Vol. 3, (Commonwealth Secretariat; London, 1991), 23-28; See also J. Nakuta, 'The Justiciability of social, economic and cultural rights in Namibia and the role of the Non-Governmental Organizations', online at http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/nakuta.pdf, (last accessed 28/11/2011).

[47] A similar provision can be found in Article 3(1) of the Protocol to the African Charter which extends the jurisdiction of the Court to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". Nmehielle believes that Article 3(1) was not only important but innovative and compares it with Article 32(1) of the European Convention and Article 62(3) of the American Convention, but broader than these later Conventions which limit the jurisdiction of their respective courts to the application of the Conventions and their Protocols. See V. Nmehielle *The African Human Rights System: Laws, Practice and Institutions,* (Martinus Nijhoff Publishers; The Hague, The Netherlands: 2001), 264.

ICCPR and the ICESCR as well as other international human rights instruments, may be cited and the court would have to take them into consideration in deciding cases. This provision is not intended to abandon, undermine or challenge the dualist school of domesticating treaties, but simply to recognize the growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statutory or common law – was uncertain or incomplete.[48] According to one writer, in an era of increased global communication, new patterns of international solidarity and local engagement with international norms are being witnessed, with growing reliance by civil society organizations and community based groups on formal human rights norms emanating from multiple sources, ranging from international covenants and conventions to local codes of conduct, as they reinforce the normative starting point of domestic engagement with litigation, law reform and social transformation. Where local laws do not provide sufficient protection, recourse to protections included in international human rights laws can be of significant strategic importance.[49]

6.3.1.4 Consequential Orders which may be just and expedient

Paragraph 3(c) of the new Rules provides that for the "purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the court may make consequential orders as may be just and expedient." This provision presupposes that Counsel for an applicant may urge and the court could make consequential orders, including but not limited to declarations, injunctive reliefs and money orders where it is just, expedient and equitable to do

[48] M. Kirby, 'Domestic courts and international human rights law: The ongoing judicial conversation', (2010) 6(1), *Utrech Law Revie*w, 168-181, 170

[49] C. Sheppard, 'Reducing Group-based Inequalities in a Legally Plural World', Centre for Research on Inequality, Human Security and Ethnicity Working Paper No.75, February 2010, online at http://www.crise.ox.ac.uk/pubs/workingpapers75.pdf

so. It is generally believed that human rights actions are mainly declaratory and in deserving circumstances injunctive and coupled with money orders where the court thinks it is just and equitable to do so.[50] Considering the category of people who may bring actions to redress oil pollution injuries in the Nigerian Delta, the court may be urged to consider making orders not only for declarations and injunctions, but also for aggravated damages against the oil companies, as well as orders for the future conduct of their exploration activities, including remediation and conservation. That is to say that the court may be urged and could make orders for the sustainable exploitation of the oil resources in the Niger Delta in such a way as to protect the natural environment. In *Gbemre's case,* the Judge ordered not only the appearance before him of the managing directors of Shell and NNPC to put before him the steps their respective organizations were taking to stem further and future gas flares, but also decreed perpetual injunction against further gas flares, and requested the Attorney General of the Federation to take steps to send a Bill to the National Assembly for repeal of the Associated Gas Re-Injection Act, 1979[51] and the Associated Gas Re-Injection (Continued Flaring of Gas Regulations), 1984[52] which the court found were inconsistent with the rights to life and dignity of the human person provisions of the 1999 Constitution and Article 24 of the African Charter.[53] The implications of this type of order are far-reaching. It is only in a human rights action that an order such as this could be made, and not in a common law action which is not only restricted to seeking

[50] *Nosiru Bello v AG of Oyo State* (1986) 5 NWLR, 828
[51] Cap 26, Laws of the Federation of Nigeria (LFN), 1990
[52] Ibid.
[53] In the Pakistani case of *Mobashir Hassan & Ors v Federation of Pakistan & Ors* (2007) Constitution Petition Nos. 76/ 2007, judgment delivered on 16 December, 2009, online at http://agehi.org/NROJudgement.pdf, (last accessed on 26/02/2011), the Supreme Court declared the National Reconciliation Ordinance, 2007 (NRO) unconstitutional and discriminatory. In giving consequential orders, the Court expressed displeasure at the lack of proper and honest assistance and cooperation by the Prosecutor General and suggested that the Federal Government relieve him of his posts. The court further set up Monitoring Cells in the Supreme Court and in the High Courts throughout the country to monitor cases in which accused persons had been acquitted or discharged under section 2 of the NRO, 2007, and directed the Secretary of the Law Division in the Government of Pakistan to take immediate steps to increase the number of Accountability Courts to ensure expeditious disposal of cases.

compensation for quantifiable damages suffered, but also riddled with technicalities. The orders that could be made here may include declarations, money orders, injunctions, orders for remediation of impacted sites and any further orders which the court deems fit in the circumstances. Although *Gbemre's case* was heard before the promulgation of the 2009 Rules, which are more liberal than the 1979 Rules, it shows the courage and creativity of Mr. Justice Nwokire. Besides, some of the strictures which prevented such actions from coming to court in the the past include the cost of litigation in Nigeria, the tedium and length of time it takes to resolve and other procedural strictures such as leave and interminable interlocutory applications which are features of such litigation. While NGOs (both local and international) may wish to assist, they could not be parties to human rights action in Nigeria as they would be unable to show that they were directly affected (*locus standi* rules). Under the new Rules NGOs and other such public spirited persons may now sue either in their names or as public interest litigators. Therefore, the question of an NGO assisting a litigant behind the scenes may not arise under the new Rules. Also, as a result of the provisions of the new Rules, human rights actions may now be fast-tracked without leave or any particular originating process, instead of the previous arrangement where application for leave as well as questions whether or not the application was brought under the correct process, which slowed down proceedings. So that while *Gbemre* was hailed as a landmark case, being the first in which the right to a clean environment was held to exist, it was more so having over-come a number of procedural hurdles before final determination. While Mr. Justice Nwokire was hailed as courageous, the new Rules should make any judge, given similar facts and circumstances to reach the same conclusion.

6.3.1.5 Access to Justice to all classes

In paragraph 3(d) of the Preamble, the new Rules mandate the courts to "proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented". This means that the doors of the courts would not only be open but widened to all manner of cases in which litigants complain of violation of their rights. While the 'poor, illiterate and uninformed' are the ones more likely to be affected by oil industry pollution, they had little, if any access to the courts under the old Rules. Under the new rules they would be able to have access whether or not they are represented or have the means to litigate. While these are lofty ideals, it is argued that environmental litigation can sometimes be testy, complex and technical, requiring counsel knowledgeable in this area of law to represent victims, considering that their opponents, the IOCs or Government are the most knowledgeable, formidable and aggressive opponents a litigant would confront in court. They also have limitless funds to fight litigation to the hilt. Although litigating environmental matters may be challenging, what is clear from the new rules is that litigants can no longer be entirely deterred by the cost of funding as is the case under common law actions, or the length of time it takes to reach final judgment. Order III Rule 1 of the rules indicate that an application "shall be fixed for hearing within 7 days from the day the application was filed," and the "hearing of the application may from time to time be adjourned where extremely expedient, depending on the circumstances of each case or upon such terms as the Court may deem fit to make, provided the Court shall always be guided by the urgent nature of applications under these Rules"[54]. .

[54] Order IV Rule 2.

It is stated elsewhere[55] that most of the foreign litigation against the IOCs operating in the Niger Delta were either funded or litigated by NGOs. A large number of cases fail to reach the courts as a result of the inability of the victims to afford to litigate on their own, as only the most notorious and egregious cases are taken up by these NGOs, with a greater number un-litigated and un-remedied. It is submitted that this is largely responsible for the impunity with which both Government and the IOCs have operated over the years, in the knowledge that most of their actions would not be challenged in court. The fear of litigation (perhaps, not the costs) and the shame which a successful suit against IOCs or Government and the opprobrium which a declaration of violations of human rights attracts, would deter flagrant and indiscriminate pollution at best, and at the worst, curb impunity.

The Legal Aid system in Nigeria is not well developed or adequately funded. It was initially intended to provide legal assistance, mainly for serious criminal cases under a *pro bono* scheme, which was so ill-equipped and miserly funded as to be virtually ineffective.[56] The current system by which legal aid is now extended to civil and human rights cases will enable other indigent litigants to benefit. A recent amendment to the Nigerian Legal Aid System[57] will improve not only the quality, but also the scope of representation. It is now a condition for elevation to the status of Senior Advocate of Nigeria (equivalent of Queen's Counsel), that a practitioner must provide his/her *pro bono* credentials for assessment. This will ensure that experienced

[55] In paragraph 3.3.4 of Chapter III

[56] Indeed, representation under the Scheme was provided mainly by lawyers undertaking national youth service after their first degree programmes, who may not be experienced or knowledgeable in any particular area of law. See D. McQuoid-Mason, "Legal Aid in Nigeria: Using National Youth Services Public Defenders to Expand the Services of the Legal Aid Council" (2003) 47(1), *Journal of African Law*,107-116; Other challenges for the Legal Aid Council, among others, include lack of funding and inability to access victims in those areas of the country where they have no offices. See U.A.H Baba, "An Overview of the State of Legal Aid Scheme in Nigeria", online at http://www.ilagnet.org/jscripts, (last accessed on 18/11/2011).

[57] See the Legal Aid Act, 2011, Cap L9, Laws of the Federation, 2004.

practitioners will join in providing legal assistance, and hopefully including cases of human rights violation in the Niger Delta. At present, the legal aid system is at its infancy in terms of the scope and availability to qualifying persons. But it is presently mainly funded by government, which may constrain its availability for litigants pursuing civil or human rights cases against government. If this be the case, it maybe that the only avenue open to victims of oil pollution who could not afford to sue or be funded by NGOs would be through the *pro bono* scheme, under which senior counsel may be available to offer free representation. Having said that, with the new Rules lawyers may be able to offer legal representation on a conditional fee arrangement, in the absence of a well funded and accessible legal aid system.

6.3.1.6 Public Interest Litigation

The new rules not only expanded the category of persons who may now sue, but listed them for the avoidance of any doubt. By this singular provision NGOs and other public-spirited persons may now bring action on behalf of and to enforce the violation of the rights of others, particularly in oil industry cases where it is not only those closely associated, but others far removed from the vicinity, who may be affected by such environmental pollution.

Ordinarily those bringing actions under the old rule must show standing or establish that they are directly affected or have a grievance or that their legal rights have been abridged or threatened by the action, omission, neglect or default in the execution of any environmental law, duties or authority of the State. In other words, only those directly affected by oil pollution in the Niger Delta would have standing to sue under the old Human Rights rules. As a result, NGOs and other public-spirited persons could not sue either in their own names or on behalf of victims. It

is still difficult for NGOs to sue under common law tort actions as they would not be proper parties to such actions. Even under human rights actions, this is also difficult as a result of the procedural impediments, in addition to the cost and the length of time such actions take to resolve. That is the reason NGOs concentrate on human rights actions outside the Nigerian jurisdiction as they would not wish to be bogged down with such processes as applications for leave and other interlocutory matters for many years. As a result, it was not possible to see active and particularly aggressive involvement of NGOs in these actions in Nigerian courts. The old rules did not also allow public interest litigation. And as funds are scares even for NGOs, they would not wish to expose themselves to costs which would arise in a drawn-out litigation with IOCs with huge legal budgets, in a jurisdiction so unpredictable. These constraints compel most NGOs to shy away from getting involved, save in the most serious cases which could be brought under the African human rights system or foreign litigation.

Under the new Rules,[58] the Court "shall encourage and welcome public interest litigation in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*: in particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights action on behalf of any potential applicant.[59] The Rules continued that "in human rights litigation, the applicant may include any of the following: (i) anyone acting in his own interest; (ii) anyone acting on behalf of another

[58] Paragraph 3(e) of the Preamble to the Fundamental Rights Enforcement Procedure, Rules, 2009

[59] In *Oronto-Douglas v. Shell* (1999) 2 NWLR (Pt.591), 466. Judgment delivered on 17 February, 1997, an environmentalist and a member of the community which would be affected, was held not to have *locus standi* to challenge the non-performance of an EIA. The reasoning behind this decision was the Government's economic interests and desire to roll out the Nigerian Liquified Natural Gas project which was nearing completion and ready to be commissioned. Government's interference ensured that although the matter was appealed at the Court of Appeal, that court only ordered remittance to another judge at the Federal High Court, and by the time this was listed, the project had been commissioned and the applicant did not see the need to pursue the appeal. See generally R. Ako, "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India", (2010) *NUJS Law Review*, 423.

person; (iii) anyone acting as a member of, or in the interest of a group or class of persons; (iv) anyone acting in the public interest, and (v) associations acting in the interest of its members or other individuals or groups." This provision is also revolutionary, since Nigerian courts did not allow public interest litigation, as has been established in India, to defend the interests of the disadvantaged and the downtrodden.[60] Regarded as innovative for enhancing the social and economic rights of the disadvantaged and marginalized groups in India, public interest litigation has been criticized for encroaching on the principles of separation of powers.[61] That is to say that some of the decisions and orders given by the courts in public interest litigations, amount to judicial law-making. And in recent times, public interest litigation has been hijacked by middle class population to fend off pollution in their areas.[62] While this may well be so, it is undeniable that public interest litigation in India has contributed in highlighting egregious environmental pollution cases there and those who bear the brunt of environmental pollution - the poor and marginalized segments of the population - have had their voices heard as a result. The results will be immeasurable in Nigeria where some of the most serious environmental pollution issues, especially in the Niger Delta area could possibly be brought to the public glare, not only by the poor victims who were unable to bring these cases to court as a result of financial and other legal disability, but also public spirited individuals who have the capacity and competence to do so.

[60] G. Varun, 'Public Interest Litigation in India: Overreaching or Underachieving? (1 November, 2009) World Bank Policy Research Working Paper Series, online at SSRN: http://ssrn.com/abstract=1503803.pdf, (last accessed on 26/02/2011)
[61] Also A. Desai and S. Muralidhar, 'Public Interest Litigation: Potential and Problems', in B. N. Kirpal, *et al* (eds.) *Supreme but not Infallible – Essays in Honour of the Supreme Court of India*, (Oxford University Press; New Delhi, 2000), 159.
[62] Varun, ibid.

6.3.1.7 Advancement of democracy, good governance and human rights and culture

The new Rules also mandate the court to "contribute towards the advancement of Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights." This may be a tall order, although we have urged elsewhere that the Nigerian judiciary should play more a prominent role as the third tier of government, which it failed over the years to live up to.[63] The courts may contribute towards the advancement of democracy by playing more prominent role not only by seizing deserving opportunities to intervene or pronounce on legislative and executive actions, but also in upholding the sanctity and respect for the law. A step was taken recently in this direction in the case of *Amaechi v Omehia*[64] where the Supreme Court not only upheld the appellant's right as the duly elected candidate of the Peoples' Democratic Party ('PDP') in the 2007 elections, but also ordered his swearing-in as Governor of Rivers State, even though he did not canvas or take part in the elections. The supreme court was of the view that the PDP took the laws into their own hands and in clear violation of section 34(2) of the Electoral Act, 2006 substituted the appellant's name in a manner not intended by the law and therefore, even though the applicant did not canvass nor take part in the elections, his substitution after winning the party's primaries, was unlawful and therefore, he was entitled to become Governor of the state, his Party having won the elections in that state. By this declaration, the Supreme Court appeared to have formulated a remedy where none existed. While the basis for reaching this conclusion is a curious one, the court apparently took the view that if new elections were ordered, the PDP and the electoral commission may device methods to cheat the Applicant out of his hard-won primaries. It is a decision which may haunt the Supreme Court for a while, especially as it

[63] See Yusuf supra note 23.
[64] *Amaechi v. Omehia,* (2008), 1 *NILR*, 181

appeared to diminish rather than enhance democracy even though its aim was to ensure 'justice' for a candidate it believed was unjustly treated by his Party.

Good governance on the other hand, can only be promoted where there is respect for the rule of law by all, no matter how highly or lowly placed. An activist judiciary could promote good governance, not by competing with the other branches of government, but by interpreting and applying the law according to its letters and spirit. In the area of environmental protection, the court would promote good governance by objectively adjudicating on judicial review cases, testing and determining whether or not IOCs operating in the area have conducted EIAs, carried out consultations with the local community, and by ensuring that where injuries occur, those damaged are properly and adequately compensated. Also the court could lend its weight in the fight against corruption by applying not only the criminal law to imprison those convicted, but also decreeing restitution and forfeiture of assets, as well as tracing those in the hands of third parties.

Developing a human rights culture is easier said than done, but the new Rules would give the human rights community the imprimatur to approach the court where there is evidence of or threatened violation of the human rights of the people. Under the old Rules, the process of approaching the court was particularly tedious, expensive and technical. A litigant would first bring an *ex parte* application for leave, and only if leave was granted would the opportunity be given to him to bring the application before the court.[65] Unless the Applicant was able to persuade the court that there are triable issues, leave was routinely refused. But the new Rules

[65] Order 2, Rule 2.

have dispensed with the question of leave,[66] meaning that anyone could approach the court, no matter how trivial the threat or actual violation of his rights, provided he shows that his rights are being or likely to be violated by the actions of another. The removal of leave has the added incentive of saving time as justice delayed is justice denied. The new Rules will ensure that human rights actions are dealt with by the court in a timely manner without the technicalities and procedural nuances that attended the old dispensation.

6.2.1.7 Human Rights actions given priority

Paragraph 3(g) of the Preamble to the new Rules provides that human rights suits shall be given priority in deserving cases, and where there is any question as to the liberty of the applicant or any person, the case should be treated as an emergency. Under the old rules, the courts were not overly concerned about the time it took to hear an action,[67] but under the new Rules, Order IV Rule 1 provides that human rights cases must be heard seven days from the date the application is filed. Unlike the old Rules, the current Rules have set out in its overriding objectives that no human rights case[68] is to be struck out on the basis that a party has no standing to sue, and went further to set out the persons who may bring an action, including NGOs and public interest litigants. The specific mention of the African Charter in the Rules reinforces the applicability of the rights contained therein, including socio-economic rights and appears to lay to rest the

[66] Order II, Rule 2 stated that "And application for the enforcement of the Fundamental Right may be made by any originating process accepted by the Court which shall, subject to the provisions of these Rules, lie without leave of Court"

[67] In the case of *Odafe & ors v Attorney General & ors (2004) AHRLR* 205, Nwodo J (as she then was) held that "A dispute concerning socio-economic rights such as the right to medical attention requires the court to evaluate and give judgment consistent with the Constitution. I therefore, appreciate the fact that the economic cost of embarking on medical provisions is quite high. However, the statutes have to be complied with and the State has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the State has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness. They cannot help themselves even if they wanted to because they are detained and cannot consult their doctor." Ibid, 211.

[68] Preamble (3)(e)

justiciability or otherwise of these categories of rights by expressly defining fundamental right as including "any rights provided for in Chapter IV of the Constitution and includes any of the rights stipulated in the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act."

It must be stated that since the rights under the African Charter are bestowed by an act of the National Assembly, they remain susceptible to amendment and modification at the whim of the legislator, whereas those rights included in Chapter IV of the Constitution are immutable. Therefore, any inconsistency between the provisions of the African Charter and Chapter IV provisions of the Constitution will be resolved in favour of the latter provisions.[69] We consider that it will be inconceivable for the African Charter provisions to be tampered with by the National Assembly considering the phenomenal impact it has made to human rights jurisprudence in Nigeria. We make this assertion considering that the new Rules also enjoin the courts to take cognizance of other Bills of Rights such as the African Charter and the Universal Declaration and other instruments of the United Nations human rights system. This means that in an action under the new Rules counsel would be able to cite with approval provisions of these other Bills of Right and the judicial approval or opinions on them in Nigeria or other jurisdictions.

[69] See *Labiyi v Anretiola* (1992) 8 NWLR (Pt.258), 139 where the Supreme Court enunciated the hierarchy of laws in Nigeria to rank the constitution at the apex, followed by laws made by the national assembly. But in *Garba v Lagos State Attorney General* (1994) 4 *Journal of Human Rights Law and Practice*, 205, the African Charter was elevated as a 'treaty with international flavour that cannot be unilaterally abrogated'. This was rejected in *Abacha v Gani Fawehinmi* (2000) 4 SCNJ, 401 and the supreme court held that the African Charter was like any other laws made by the National Assembly and was not superior to the Nigerian constitution.

63.1.8 Other Salient Provisions of the Rules

Under Order II, rule 1 of the new rules, an applicant only needs to file a motion on notice or any other originating process accepted by the court, accompanied by a Statement and an affidavit in support and a written address. These applications are now required to be heard within 7 days, and under Order IV, rule 3, *ex parte,* in the event of extreme urgency or exceptional hardship. Under Order II, rule 6 any respondent with preliminary objection would be required to file a written address accompanied with a counter-affidavit, which the applicant would be entitled to respond to within 5 days. Therefore, the days of interminable applications (including interlocutory) and appeals for leave before the actual application to enforce, are now history.

Secondly, limitation of action, which was a major issue under the old rules has now been abolished by the new rules, and under Order III, rule 2[70] there is no longer a statute of limitation in respect of an application for the enforcement of fundamental human rights.

Thirdly, with regard to the appropriate court where an application for the enforcement of human rights may be commenced, Order II, rule 1 provides that an applicant 'may apply to the Court in the State where the infringement occurs or is likely to occur, for redress'. And Order II, rule 2 described the court in question as 'the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja,' meaning that both the Federal as well as the State High Courts would have coordinate jurisdiction in respect of actions under this Rule.[71] But where the infringement, as in oil pollution cases, implicates the Federal Government or any of its

[70] It is arguable whether the courts will be minded to put down Section 12(1) of the NNPC Act, 1977, which provides that actions against NNPC must be brought within one year of the act complained of. Considering that most oil pollution cases require thorough (including scientific) investigation, this provision has the (un)intended consequence of eliminating a number of actions against the NNPC as a result of this limitation period.

[71] See s.272 of the CFRN, 1999; *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt. 117), 517; Zakari v. IGP (2008) 8 NWLR (Pt.670), 666 and *Jack v. University of Agriculture, Makurdi* (2004) 5 NWLR (Pt.865), 208.

agencies, then it is assumed that the Federal High Court would have exclusive jurisdiction,[72] or conversely where the matter implicates a State Government or any of its agencies the jurisdiction will be that of the State High Court.[73] It is unfortunate that the new rules did not take the opportunity to finally put to rest the lingering dichotomy between the jurisdictions of the Federal and State High Courts, especially as in most oil pollution cases, the victims are poor farmers and fishermen who may not be able to sue in the Federal High Court situated in state capitals rather than in State High Courts which have divisions in localities nearer to them.[74] Besides, the over-concentration of cases in which the Federal Government is implicated in the Federal High Courts, has the tendency or potential of clogging up that court, occasioning delays, and in human rights cases - requiring swift and decisive trials to mitigate imminent and/or actual danger - this may pose grave difficulties.

5.8.2 Conclusion

As a result of the significance of access to court (and justice) for the enforcement of the right to a clean environment, this was discussed in a separate chapter, divided into three main sections. The first section, discussed some of the challenges facing enforcement, some of which are judicial or institutional. Particular attention was paid to the controversy relating to standing to sue in Nigeria, created largely by the courts through their rather strict and conservative interpretation of section 6(6)(b) of the 1999 Constitution and its 1979 predecessor. It was

[72] See section 251 of the 1999 Constitution; *Tukur*, ibid at 516-517; *NEPA v Edegbero* (2002 18 NWLR (Pt.798), 79.

[73] In the recent case of *Adetona v IG Enterprises Limited* (2011) 7 *NWLR*, (Pt 1247), 535, the Supreme Court restated that while the jurisdiction of the State High Courts is unlimited, and that of the Federal High Court limited, including enforcement of human rights, if the subject matter on which the application is brought involves matters enumerated in section 251(1) of the Constitution or on which the Federal Government or any of its agencies is a party, then the Federal High Court has exclusive jurisdiction. Ibid, 564-565.

[74] Order II, rule 1 insists that 'where such infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the State shall have jurisdiction"

posited that English law from where this doctrine was initially developed has since departed from a restrictive, to a more liberal interpretation of this doctrine, yet Nigerian judges, even the supreme court, continued to give differing and sometimes confusing interpretation of this provision and by so doing effectively shut the doors against many litigants. But the new Rules have now put this controversy to rest by expressly providing that no human rights case should be struck out on the basis of standing. Other challenges included procedural impediments, judicial timidity, corruption, incompetence, executive lawlessness. The second section discussed other non-institutional factors which may affect the enforcement mechanisms, including lacking of judicial instruments, authority and infrastructure for enforcing court judgements, which ultimately denies litigants the fruits of their victory. While the new rules have the potential to open the floodgates of human rights litigation in Nigeria, these lofty ideals will be limited without improvement and upgrade of existing judicial infrastructures, particularly the instrumentality for enforcement. An effective judicial system (with all the powers and authority to enforce its judgement) will compel obedience and respect for the law. Respect for the law can only be achieved if courts and their officials as well as the police are equipped to enforce the law against individuals, corporate entities and the government, without any fear or favour or else court orders would remain paper-tigers, worth less than the parchment on which they are promulgated.

In the third section, the opportunities presented by the new Fundamental Human Rights Enforcement Rules which came into force in December 2009 to mitigate some of these judicial or institutional challenges, were discussed, as the new Rules introduced many novel provisions, which if properly followed will open the gates widely for the realization and actualization of

environmental and other human rights in Nigeria. The new Rules also take on board most of the criticisms levelled against the old Rules, particularly and most importantly, the fact that it applied only to the 1979 constitution and was never amended to include the Africa Charter when it was ratified in 1983. Whereas the new rules expressly provide that they not only apply for the enforcement of the Chapter IV provisions of the 1999 Constitution but also the African Charter, which expressly provides in Article 24 for the right to a clean and healthy or satisfactory environment.

In conclusion, it is posited that the nascent right to a clean environment is still in its formative years, but holds great promise to people of oil producing communities in the Nigerian Delta as can be seen from the case of *Gbemre v. Shell*. Inspite of its recognition at the international and regional levels, the remedies which this right provides is best attained in domestic court and before judges who have the courage to declare and enforce it. The reaction of the Nigerian Government and the levity with which Shell treated the outcome, is evidence that challenges exist, not only for the judiciary which must declare and uphold this right, but also for the advocates who bring these matters to court. In terms of speed and the far-reaching remedies which it provides, including injunctive relieves,[75] the human rights regime is far more practicable than the current common law tort actions. Besides, it would enable victims of oil pollution to join the Nigeria Government, which appears to value the economic benefits of oil exploitation above the protection of the people of the oil producing areas and the natural environment.

[75] In *Gbemre's case*, the people were more interested in abating the nuisance of oil pollution and gas flares than pecuniary benefits. This stance defeats the arguments advanced by oil companies and Government that most oil spills are caused by sabotage for pecuniary reasons. While not discounting instances of sabotage which may be driven by pecuniary benefits, in the majority of cases, the local communities are only interested in abating the nuisance and being left alone.