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ANALYSIS OF THE ENFORCEMENT OF ISLAMIC LAW OF CRIMES IN NORTHERN NIGERIA: AN OVERVIEW OF DECISIONS OF SOME SHARI'A COURTS IN KEBBI AND SOKOTO STATES OF NIGERIA

BY

DR. BAWA SAHABI TAMBUWAL*

ABSTRACT

Laws are made and promulgated to serve the interest of the people in terms of protecting their lives, dignity, property, and fundamental human rights, and to guide and regulate their individual and collective conducts to ensure that everything about the society operates within its ambit. The people, in turn, submit and adhere to the demands of the Laws which attend to their own needs and expectations. Consequently; there ensues mutuality of a sort between the demands of the Laws on the people, and the expectations and needs of the people on the Laws. It is therefore the contention of this paper that laws founded on Divine provisions are the most receptive to the adherents of the Creed that promulgated them. Thus, this paper explores the achievements, so far recorded, in the implementation of the Islamic Law of crimes in Sokoto and Kebbi States, and the prospect a more wholesome implementation holds in ensuring a more humane, peaceful and just society.

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INTRODUCTION

Majority of the inhabitants of Sokoto and Kebbi States are Muslims. Islam as a religion was widely practised in the defunct Sokoto Caliphate (which includes the present Kebbi State and beyond) prior to the advent of colonialism. For any law to command the obedience of the people of an area, such law must be recognized and should be consistent with their basic social values. Shari'ah is the law of the Muslims. It is enjoined upon them in their earthly activities. Naturally, the people of Sokoto and Kebbi States are receptive to a legal system rooted in Shari'ah. Islamic law of crimes therefore has, since its modest implementation, recorded some landmark achievements at the level of its comprehensive reception by the people, and the bright prospect it holds following an unrestricted implementation of all aspects of the Shari'ah in this area. This paper examines those achievements and prospects.

VIABILITY OF SHARI'AH IN SOKOTO AND KEBBI STATES: OVERVIEW OF SELECTED CASES

Notwithstanding the problems associated with the enforcement of Shari'ah in Sokoto and Kebbi States, the desire for the enforcement of Shari'ah in the two states remains unprecedented. This can be seen from the fact that most of those convicted by Shari'ah Courts in Sokoto and Kebbi States Shari'ah Courts accepted the verdicts wholeheartedly. Some cases decided by Shari'ah courts in Sokoto and Kebbi States can be used to illustrate this point.

In the case of *C.O.P v Umaru Aliyu Tureta*[1] the accused, Umar Aliyu, aged 30 years, was charged with stealing a sheep from a dwelling house valued at ₦6,500.00, before the Upper Shari'ah Court II Sokoto on 12th April, 2001 contrary to section 147 Shari'ah Penal Code (SPC). He pleaded guilty to the charge. The Court still went ahead to hear witnesses, before he

1. USCII/SK/CR/109/01 *(Unreported). In an Interview by this Researcher with Dr. S.U. Umar age 43(A Medical Officer in-charge) at Specialist Hospital, Sokoto, (where the Amputation took place) on 26th August, 2006.*

was finally convicted, based on the evidence adduced by the prosecution, and sentenced him to hand amputation as provided by the Shari'ah. The trial judge gave him 30 days within which to appeal to the Shari'ah Court of Appeal (S.C.A).

The convict refused to appeal despite pressures from non-governmental organizations, human right organizations, and some individuals. The sentence was executed in Sokoto. It was reported that, the convict, after the amputation woke up at night and exclaimed "Alhamdulillah" (Praise be to Allah)

When interviewed by this researcher, on 20th August, 2008 at Unguwar Rogo Jumu'at mosque Sokoto, Umaru then aged 39 years said, he preferred to suffer the punishment in this world, instead of the Hereafter. He said that he believed an appeal to set aside the judgment may give him only a temporary relief, as he was sure the punishment in the Hereafter will be more severe. He explained further that he had been a notorious offender and hoped that if his hand is amputated in accordance with the Shari'ah, Allah may forgive him of all his misdeeds in this world, and on the Day of Judgment.

The case of *C.O.P. v. Maryam (Margaret)*[2] is another example of the willingness of people in Sokoto to submit to the punishment of Shari'ah. In this particular case, the accused (formerly known and called Margaret) was charged with drunkenness in public place before the Upper Shari'ah Court II, Sokoto, together with one other person contrary to sec. 151 of the SPC. The court declined jurisdiction because she was a non Muslim and therefore not bound by the Shari'a Law. The court directed that the case be transferred to the Magistrate Court. But the accused insisted that she wanted to be tried by the Shari'ah court. She was given one week within which to decide where she should be tried. On the adjourned date, she chose to

2. USC/11/SK/CR/27/02 (Un reported).

embrace Islam so as to confer jurisdiction on the Shari'ah court to try her.

Shortly after she embraced Islam, she chose to be re-named Maryam. The court then tried her and finally she was discharged, because she committed the offence when she was a non Muslim, and as such not bound by Islamic law[3]

When this researcher interviewed her on 30th August, 2009 at Old Airport Area Sokoto on what motivated her to accept Islam, and why she insisted to be tried by a Shari'ah court, Maryam, then aged 30 years, answered that she had since wanted to embrace Islam because all her mates who were Muslims were all married. She said that some of them even had two or three children. She further said that she was tired of spinsterhood and believed that as a Muslim, she would see a man to marry her. She eventually got married and now has two children.

In the case of *C.O.P v. Sani Shehu and One Other.*[4] The accused persons (1) Sani Shehu and (2) Garba Dandare (alias Danjega) were charged before the Upper Shari'ah Court II Sokoto with offence of Armed Robbery contrary to section 155(b) of the Shari'ah Penal Code Law of Sokoto State. They pleaded guilty to the charge and were consequently convicted by the court and sentenced to amputation of their right wrists and left legs accordingly. The convicts were given 30 days within which to appeal if they were dissatisfied with the verdicts. They refused to appeal against the sentence. *They however told the Court that, they were satisfied with the sentences passed on them. They prayed to Allah to forgive them*

3. Al-Manawi, M.A. Faiju al-Qadeer Commentaries on Jami'ul al Sageer, Vol.3 Hadith No. 3064.
4. USC/II/SK/21/01 (Unreported).

their sins adding that "We shall surely serve as a lesson to others"[5]

It should be noted here that, both the local and international opposition against the enforcement of Islamic law of crimes are predicated on a porous and mischievous claims, and they are both one and the same in their origin, Judeo-Christian and tactics: hiding behind the provision of the constitution of the Federal Republic of Nigeria 1999 as amended[6]

In any case, we have chosen not to dismiss, with a wave of the hand, those claims laid by the non-Muslims against the implementation of the Shari'ah laws in North Western States of Nigeria, viz Sokoto, Zamfara, Katsina and Kebbi States. Instead, we have chosen to give the lie to some of these 'genuine' claims by exposing their weaknesses and in most cases, unjustified stance. The oft - repeated charge against the Shari'ah laws by the local and international Judeo-Christian opposition is over punishments of stoning to death and hand amputation. The charges are that, it is 'barbaric', 'inhuman' and 'against' the universal convention on human rights'. These charges against stoning to death and hand amputation as prescribed by the Shari'ah laws for certain offences ranging from adultery, theft, murder and unrepentant blasphemy, creates the false impression of a 'more humane and civilized way of dying or killing' a condemned offender. Gassing an offender to death, a favoured way of carrying out the death sentence by the Western World as well as death by hanging or injection of fatal substance into the body of a convict is more obnoxious than the so much vilified stoning to death or hand amputation.[7]

5. The Monitor News Paper 21st December, 2001, page 1 and 2 and the Daily Trust 20th December, 2001 page 1.
6. Section 34 (1) (a) Constitution of the Federal Republic of Nigeria.
7. Tambuwal B.S. Enforcement of Islamic Law and Crimes in North Western States of Nigeria. Local and International Judeo Christian Re-Elections in Journal of Private and Business Law, Usman Danfodio University, Sokoto, 2014 edition.

According to Lashawn Jefferson, Executive Director of the Women's Rights Division of the Human Rights Watch, the death sentence by stoning passed on a woman, Amina Lawal, for adultery, by a Katsina State Shari'ah Court in March 2002 is "a cruel and inhuman application of Shari'ah (Islamic Law)" she further charged that "the legal system (Shari'ah) is being used to punish adult women for consensual sex". She thus concluded that "the death penalty is never an appropriate punishment for a crime, and in this instance, the very nature of the crime is in doubt.[8]

On its own part, amnesty international not only condemned the ruling, but went further to describe the judgment as ".... Incompatible with Nigerian Constitution and also with Nigeria's legal obligations under international human rights law and the African Charter for Human and People Rights". It described stoning to death as "... the ultimate form of torture or cruel, inhuman and degrading punishment prohibited by both the International Covenant on Civil and Political Rights (ICCPR), the convention against torture"[9]

However, the constitution of the Federal Republic of Nigeria 1999[11] as amended provides inter alia:

34.-(1) Every individual is entitled to respect for the dignity of his person, and accordingly-

(a) no person shall be subjected to torture or to inhuman or degrading treatment;

On the other hand, it should be noted that, in execution of sentence or order of court in respect of a criminal offence of

8. IRIN, Abidjan 20 August 2002
9. In Alemika, Etannibi E.O. and Okoye, Festus O. Edited Human Rights and Shari'ah Penal Code in Northern Nigeria.

which a person has been found guilty, cannot be a torture or inhuman or degrading treatment of his right to dignity.[10]

*The case of Aliyu Ibrahim Adamawa*is a clear evidence that most of the convicted persons by Shari'ah Courts in Sokoto and Kebbi States accepted the verdict regardless of the severity or consequence of the punishments. In that case, *Aliyu Ibrahim Adamawa* took himself to the Upper Shari'ah Court II Sokoto all the way from Nasarawa Area of Jimeta Local Government of Adamawa State so as to be prosecuted under Islamic Law. Asking for death penalty as he claimed to have blasphemed against the Prophet Muhammad (S.A.W) he stated that he was neither in any bad condition nor facing any predicament and was not forced by anybody to commit the offence.[11]

When interviewed, Ibrahim said "I want to be sentenced to death, because my blasphemy still irritates me and if I die without prosecution under Islamic Law, I will die an infidel.[12] However, given that the alleged offence was apparently committed in Adamawa State, the trial court declined jurisdiction over the case. This is however an achievement brought about by the enforcement of Islamic Law of Crimes, because it affords people like Aliyu Adamawa options to submit to the jurisdiction of Islamic Law Court and be tried in accordance with the dictate of their religious faith. Hitherto, Muslims were forced to be tried in accordance with the Western, Judeo – Christian English Law bequeathed by colonial heritage, whether they liked it or not. However, with the enforcement of Islamic Law of Crimes in States of Northern Nigeria, a Nigerian Muslim, in the person of Aliyu, could decide to give himself up to the adjudication of the Shari'ah

10. *Ibid* section 35(1) (a) Constitution, Federal Republic of Nigeria 1999.
11. USC/II/SKCR/65/2002 (Unreported)
12. The Daily Trust Newspaper of 8th July 2002 pages 1 & 2 see also New Nigeria Newspaper 10th July 2002 page 28.

even in matters that were particularly personal, but which he found obnoxious to the well – being of his belief.

SHARI'AH LAW OF CRIMES AND THE RIGHTS OF NON MUSLIMS IN SOKOTO AND KEBBI STATES

Shari'ah is the law ordained by Allah (S.W) which should be in use in any Islamic state. In this case, both Muslims and non-Muslims living in such a State are bound by its ordinances, because it guarantees justice. In all aspects of human life, it is on this basis Muslims who are in the majority in every Islamic State must ensure that non-Muslims are treated fairly in the application of Islamic law of crimes.

But in Nigeria, calls for the application of Shari'ah always elicit negative reactions from non-Muslims. In fairness, it must be stated that not all the non-Muslim Nigerians oppose the application of Shari'ah. Some non-Muslims even commended the operational effects of Shari'ah in Sokoto and Kebbi States. For example, a former Director General of the National Orientation Agency (NOA), Dr. Ifeanyi Chukuka, had commended an Upper Shari'ah Court Judge of Sokoto State for exposing an attempt by one Mr. Sudan (an accused person) to bribe him (the Judge) over a scandal. Chukuka described the Judge's action as being in line with the Federal Government stand on corruption.[13] This commendation by Dr. Chukuka, however, arose as a result of the Court's verdict in the case of *C.O.P v (1) Muhammad Jabbi (2) Isa Abdullahi Sudan*[14] (State Director of National Orientation Agency and his Accountant respectively).

In that case, the first and second accused persons were charged before the Upper Shari'ah Court II Sokoto on 21st June,

13. The Guardians Newspaper Thursday 16th August 2001 at page 4.
14. USC/II/SK/CR/FI/24/2001 (Unreported).

2001 for offences of cheating and conspiracy contrary to sections 178 and sections 125 of Shari'ah Penal Code. They were alleged to have falsified the Account of one Alhaji Umar Aliyu Durbawa and cheated him of the sum of ₦186, 555.54 meant for his pension entitlements. They pleaded guilty to the charges, and despite all pressures to influence the course of justice, the judge convicted them and sentenced each of them to 40 strokes of the cane on their bare back. They were also fined ₦7000 each or a jail term of 18 months. Their attempt to bribe the judge with ₦37, 000 was also turned down and exposed. They were ordered to pay back their victim his money to the tune of ₦186,555.54.

The framers of the SPC 2000 in Sokoto and Kebbi States, however, inserted a provision in the Shari'ah Court Law (SCL) 2000 which allows non-Muslims options to be tried or not to be tried in a Shari'ah Court in cases involving them. For instance, section 9 of the SCL 2000 of Sokoto and Kebbi States dwells on suspects of different religious affiliation. It provides:

Where only one or more of several suspects or accused person(s) are Muslims, The Shari'ah court shall not have jurisdiction to hear and determine the case, but the court shall have the power to try the Muslims and refer the case of the others to the Area or Magistrate Courts, of jurisdiction to try the offence(s).

Also section 3 of the SCL (Shari'a Courts Law) 2000 on punishment of offences states thus,

> *Every person who professes the Islamic faith and or every other person who voluntarily consents to the exercise of the jurisdiction of any Shari'ah Court shall be liable to punishment under the Shari'ah Penal Code for every act or omission contrary to the provisions thereof of which he shall be guilty within the State.*

Acting on the above provision of law, a Christian girl, *Yemisi Nelson* of Usmanu Danfodiyo University Sokoto insisted that her case be heard by a Shari'ah Court instead of a magistrate court even though she is a Christian[15]. This is in line with the provision of the Glorious Qur'an which vehemently opposes the imposition of religious belief on any unyielding heart. Islam does not need to be advocated for. In its sublime relevance to the betterment of the conditions of humanity, here and in the Hereafter, lies its irresistible eternal appeal.

Evident from the preceding testimonies by persons directly 'affected' by the so-called heavy-handedness of the Shari'ah is the irrefutable, wholehearted acceptance of the wholesome provisions of the Shari'ah by the mass of Nigerian Muslims.

Inherent in this are lessons for the Nigerian law-makers and law-implementers that Laws are willingly well-received, embraced and conformed to with zealotry by the people only when such laws are deemed to be just and without prejudice in their application to all. Likewise, laws must be comprehensive and wide-ranging in their coverage of known and anticipated human misdemeanours.

Similarly, yearning for the entrenchment of the Shari'ah does not necessarily translate into religious bigotry, it only indicates, at once, the people's discontent with man-made laws, and their preference for the Divinely-sourced laws, that is the Shari'ah.

CONCLUSION

In conclusion, Shari'ah is generally acceptable to Muslims in Sokoto and Kebbi States. Enacting a law with an Islamic content is not the same with creating an Islamic state. After all, despite the enforcement of aspects of Shari'ah law of crimes, the power to make law for the peace, order and stability of a

15. Daily Trust 27th December 2001 pages 1 and 2.

state lies in the constitution. The enactment of Shari'ah Penal Code Laws No. 2 of 2000 and No. 3 of 2000 enacted by Sokoto and Kebbi States legislatures respectively, is as good as the constitution itself, because it is a constitutional power so exercised.

Finally, the prospects of Shari'ah enforcement in the States, despite the seemingly insurmountable odds placed on its way by both local and international oppositions spearheaded by the Judeo-Christians could be seen as the beginning of the realization of Allah's promise to make the course of His religion and the Shari'ah a successful one.

CONSTITUTIONALIZING ENVIRONMENTAL RIGHTS IN NIGERIA: REFLECTIONS ON THE QUESTION OF APPROACH

BY

DAMILOLA S. OLAWUYI*

ABSTRACT

Ever since the 1972 Stockholm Declaration proclaimed that man's natural and manmade environment are essential to his well-being and to the enjoyment of his basic human rights- especially the right to life, there seems to be a consensus amongst scholars that: there exist a link between the environment and human rights; that a clean environment is a sine qua non for the enjoyment of other human rights; and that without a clean environment, man may not live to enjoy the other recognized forms of rights such as the right to life and the right to education. For example, the 2008 Constitution of Ecuador became the first constitution in the world to grant legally enforceable rights to trees, plants and non-human objects. It recognises natural communities and ecosystems as legal persons with legal rights; it also invests in every citizen a right to initiate court action to enforce this right on behalf of threatened ecosystem. This was followed by Kenya in 2010 and Bolivia in 2011. Notably too, a 2006 ordinance enacted in Tamaqua, Pennsylvania United States of America, The Tamaqua Borough Sewage Sludge Ordinance, also accorded legal rights to trees, plants and non-human elements of the ecosystem.

Nigeria like many other African countries continues to face increased pressure from activists, advocates and scholars to grant justiciable constitutional recognition to a human right to

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environment or an environmental right. Different approaches have been suggested for recognizing these linkages between human rights and environment in the Nigerian constitution. This ranges from the idea of developing a substantive human right to environment; the re-interpretation of existing human rights to cater for the environment and the adoption of a procedural approach. These suggested approaches have been hugely debated. This paper provides a critical exploration and analysis of the paradoxes and debates surrounding each of these approaches. It unpacks the respective strengths and limits of each of these approaches as paths for achieving environmental protection in Nigeria.

INTRODUCTION

The cross cutting linkages between the environment and human rights has been one of the hottest and the most discussed issues in Nigeria, in the last decade. It has also remained a topical issue in public international law in general. As Anderson notes, 'never before have so many people raised so many demands relating to such a wide range of environmental and human matters, and never before have legal remedies stood squarely in the centre if wider social movements for human and environmental protection'.[1] At the centre of the debates lay the basic arguments that: environmental pollution poses a threat to the enjoyment of several human rights including the right to life. Environmental scholars, NGOs and interests groups have therefore called for the need for constitutional recognition and protection of enforceable environmental rights in Nigeria, to provide justice to victims of environmental pollution.

While the linkages between human rights and the environment seem to be well accepted by scholars, the legal approaches advocated for mainstreaming human rights norms into environmental policies and regulations have been subjects of ink consuming debates. This is the question of approach. While some scholars argue for the substantive recognition of human rights through an enforceable "human right to environment", others view the adoption of procedural safeguards through which environmental rights may be protected as the better approach. In essence, scholars have yet to agree on the appropriate legal and policy framework for achieving the linkages and legal partnerships between human rights and the environment. As McCrudden notes:

...mainstreaming human rights is a desirable policy but there is a need for considerably more discussion as to the most effective

1. BoyleA. and Anderson M., (eds.) *Human Right Approaches to Environmental Protection* (Oxford: OUP 1996) 1.

practical means of achieving this...some methods that have been suggested might be counter-productive.[2]

This paper unpacks the legal debates on the question of approaches for mainstreaming environmental rights into the Nigerian Constitution. It examines the different approaches that have been propounded, in literatures on the recognition of constitutionally enforceable environmental rights in Nigeria. In the second section of this paper, we discuss two main strategies that have been proposed in the literature: thesubstantive rights approach and the procedural rights approach. Justifications are provided for the choice of the procedural rights approach as a holistic policy framework for mainstreaming human rights norms into the Constitution. Here, it is shown that a process-based approach provides preventive, transformative and long-term solutions for dealing with the human rights impacts of environmental problems. It avoids the human rights versus environment arguments; prompts changes in institutional practices and also provides a preventive/long-term process through which human rights are systematically integrated into environmental systems, structures and practices.

LINKING HUMAN RIGHTS AND THE ENVIRONMENT: SUGGESTED APPROACHES

Ever since the 1972 Stockholm declaration proclaimed that man's natural and man-made environment are essential to his well-being, over 130 countries have granted constitutional recognition to environmental protection while about 60 of them

2. McCrudden J., 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart 2005), also available at <http://ssrn.com/abstract=568642>. See also McCrudden J., 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' in McLaughlin E. and Faris N. (eds), *Section 75 Equality Duty: An Operational Review* (2004).

grant individual and fundamental human rights to clean environment to their citizens. European countries such as France,[3] Spain,[4] Portugal,[5] Hungary,[6] Norway,[7] Bulgaria,[8] Croatia,[9] Russia,[10] Poland,[11] Turkey,[12] and Ukraine,[13] have constitutional provisions on the environment. In the Americas, Argentina,[14] Chile,[15] Brazil,[16] Columbia,[17] Costa Rica,[18]

3. Charter of the Environment of 2004 (France) Art.1 ("Everyone has the right to live in a balanced and health- friendly environment)
4. Art. 45 ("Everyone has the right to enjoy an environment suitable for the development of the person)
5. Art 66(1) of the 1982 Constitution, ("Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it)
6. Ch.I, & 18 of the Revised Constitution of 1990 recognizes and enforces everyone's right to a healthy environment.
7. Pt. F, Art. 110 b ("Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved")
8. Art. 55 (Citizens have the right to a healthy and favourable environment)
9. CROAT. CONST. Ch. II, Sec. III, Pt. III, Art. 69, ("Everyone shall have a right to a healthy life...the State shall ensure conditions for a healthy environment...")
10. RUSS. CONST., sec. I, ch. II, art. 42 ("Everyone shall have the right to a favourable environment)
11. POL. CONST ch.II, art 86 : 1) Public authorities shall pursue policies ensuring ecological safety of current and future generations. 2.) The protection of the environment is the duty of public authorities. 3.) Everyone has the right to be informed of the condition and protection of the environment. 4.) Public authorities shall support the activities of citizens to improve the quality of the environment.
12. TURK. CONST. Ch. VIII (A)., Art. 56 (1982) (Everyone has the right to a healthy, balanced environment)
13. UKR. CONST., ch. II, art 50 ("Everyone has the right to an environment that is safe for life and health...")
14. ARG. CONST. first pt., ch. II, art. 41 ("All inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations...")
15. CHILE CONST. ch. III, art. 19(*) ("The right to live in an environment free from contamination")

Ecuador,[19] Paraguay,[20] and Venezuela,[21] have also constitutionalized environmental rights. African countries have not been left behind. Countries such as Benin,[22] Ethiopia,[23] Niger,[24] Mali,[25] Cameroon,[26] South Africa,[27] Togo,[28] Burkina Faso,[29] Nigeria[30] and most recently Kenya[31] have also provided

16. BRAZ. CONST. tit.II, ch.I, art.5, para.LXXIII("Any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or the patrimony of an entity in which State participates…to the environment…")
17. COLOM. CONST. tit. II, ch.III, art. 79, ("Every individual has the right to enjoy a healthy environment.")
18. COSTA RICA CONST. tit.V, art. 50 (as amended on June 10, 1994) ("Every person has the right to a healthy and ecologically balanced environment…")
19. ECUADOR CONST. tit.II, ch. 5, sec.2, art. 86 ("The State shall protect the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainable development…")
20. PARA. CONST., pt.I, tit. II, ch.I , sec. I, art. 7 (" Everyone has the right to live in a healthy, ecologically balanced environment.")
21. VENEZ. CONST. tit.III, cha.IX, art. 127, ("Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment")
22. BENIN CONST., Art. 27 (Every person has the right to a healthy, satisfying and lasting environment)
23. ETH. CONST. ch.III, pt.II, art. 44(1) ("All persons have the right to a clean and healthy environment..")
24. NIGER CONST. tit.II, art. 27 (currently suspended by the military junta on the … of February, 2010) ("Each person has a right to a healthy environment.")
25. MALI CONST. tit.I.a rt. 15 ("Every person has the right to a healthy environment.").
26. CAMEROON CONST., Preamble (" Every person shall have a right to a healthy environment.") Note that para.65 of the Constitution provides that the "Preamble shall be part and parcel of this Constitution")
27. SOUTH AFR. CONST. ch.2, art. 24 ("Everyone has the right to (a) an environment that is not harmful to their health and well being; and (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures …")
28. TOGO CONST. tit.II, subsec. I, art. 41 ("Anyone has a right to a healthy environment")
29. BURK. FASO CONST. tit. I, ch. IV, art. 29("The right to a healthy environment is recognized; the protection, the defense and the promotion of the environment are a duty for all.") , art. 30 (" Every citizen has the right to

for environmental rights in their constitutions. Same for Asian countries such as India,[32] East Timor[33] and South Korea.[34] These trends, suggest the importance of environmental protection to nations of the world.

However, many of these constitutional rights are placed in the non-justiciable sections of the Constitution, making them unenforceable in courts. Apart from Ecuador, Bolivia and Kenya that have new constitutions that establish justiciable environmental rights, many of the other referenced constitutions, establish non-enforceable environmental rights. In Nigeria for example, the 1999 Constitution specifically makes environmental protection a state objective in chapter two on

initiate an action or to join a collective action under the form of a petition against the act...affecting the environment...")

30. 1999 CONST. OF NIGERIA, Sect. 209 ("The State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria")

31. Section 42 of Kenya's 2010 Constitution states that:
Every person has the right to a clean and healthy environment, which includes the right a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and b) to have obligations relating to the environment fulfilled under Article 70.
2010 Constitution of Kenya, available at <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/l8do0kz/-/published+draft.pdf> accessed 21 December 2014.

32. INDIAN CONST. Art. 48-A states, "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". Also, Part 4-A of the Constitution, Article 51 A (G) states that, "It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

33. E. TIMOR CONST. pt II, tit. III, art. 61(1) (" All have the right to a human, healthy and ecologically balanced environmen: and the duty to protect it and improve it for the benefit of the future generations.")

34. REP. KOREA. CONST. ch. II, art. 35(1) ("All citizens shall have the right to a healthy and pleasant environment.")

Fundamental Objectives and Directive Principle of State Policy.[35] Section 20 of the Constitution expressly provides that:

The state shall protect and improve the environment and safeguard the water, air, land, forest and wild life in Nigeria.[36]

However, Section 6(6)(c) of the Constitution makes this provision unenforceable. Section 6(6)(c) provides that:

> *The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution.*

This provision of section 6(6)(c) denies the courts the power to adjudicate on any issue having to do with the enforceability of the provision of section 20 of the Constitution. For example, in *Okogie (Trustees of Roman Catholic Schools) and other v. Attorney-General, Lagos State*, the Court of Appeal, while considering the constitutional status of the said Chapter stated:

> *While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of*

35. See the provisions of the chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).
36. Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).

> *government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution.*[37]

The non-justiciable status of environmental rights in Nigeria has continued to fuel calls for more robust constitutional recognitions for environmental rights in Nigeria. Scholars and advocates have suggested different approaches for constitutionalizing environmental rights to make them enforceable and effective.[38] The have been calls to consider other alternative windows for mainstreaming enforceable constitutional human rights on the environment into the Nigerian Constitution. This ranges from the idea of amending

37. [1981] 2 NCLR 337.

38. Knox J., 'Linking Human Rights and Climate Change at the United Nations' (2009) 33(2) Harvard Environmental Law Review 477-498; Rajamani L., 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) Journal of Environmental Law 22:3; Parsons A., 'Human Rights and Climate Change: Shifting the Burden to the State?' (2009) 9(2) Sustainable Development Law & Policy 22-23; StallworthyM., 'Environmental Justice Imperatives for an Era of Climate Change' (2009) 36(1) Journal of Law and Society 55-74; Hohman J., 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18(2) Transnational Law & Contemporary Problems 296-316; Posner E. and Sunstein C., 'Climate Change Justice' (2008) 96 Georgetown Law Journal 1565-1597.

the constitution to include a substantive human right to a healthy environment,[39] to the re-interpretation of existing human rights to cater for the environment and the procedural approach.[40] As Boyle queried:

> *...Should we continue to think about human rights and the environment within the existing framework of human rights law in which the protection of human rights is the central focus – essentially a greening of the right to life, private life, and property – or has the time come to talk directly about environmental rights – in other words a right to have the environment itself protected? Should we transcend the anthropocentric in favor of the ecocentric?*[41]

These suggestions have been hugely debated and contested.[42] Considering the confusions that surround these debates,

39. OgbodoG., "Environmental Protection in Nigeria: Two Decades After Koko Incidence" (2010) 15(1) *Annual Survey of International and Comparative Law* pp. 1-18; Shelton D., 'Developing Substantive Environmental Rights' (2010)1 Journal of Human Rights and the Environment, 89-120; Turner S., *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Towards the Environment* (London: Kluwer Law International 2009); Paellemarts M., 'The Human Right to a Healthy Environment as a Substantive Right' in Dejeant-Pons M., and Paellemarts M., (eds), *Human Rights and the Environment* (Council of Europe 2002) 11-15.
40. Anderson M., 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle A., and Anderson M., (eds) *Human Right Approaches to Environmental Protection* (OUP 1996) at 11.
41. Boyle A., 'The Role of International Human Rights Law in the Protection of the Environment ' in Boyle A., and Anderson M., (eds.) *Human Right Approaches to Environmental Protection* (OUP, Oxford 1996) at 43.
42. Rajamani L., 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) Journal of Environmental Law 22:3; Fitzmaurice M., *Contemporary Issues in International Environmental Law* (Edward Elgar 2009) 170; Boyle A.,

particularly the tendency to confuse one approach or proposal with the other, it is pertinent to show how each differ from the other, and to explore the strengths of one approach over the other. The different approaches are discussed under two broad headings: the substantive rights approach consisting of the re-interpretation approach and the new rights approach; and secondly the procedural rights approach.

SUBSTANTIVE HUMAN RIGHTS APPROACH

Since Boyle and Anderson's 1996 path-breaking treatise that examined the linkages between human rights and the environment, scholars have argued in favour of an approach that protects the environment through substantive and enforceable sections of the Constitution.[43] The core of the argument here is that environmental protection can best be achieved when it is given binding recognition in core legal instruments.[44] Scholars propose that environmental protection can be recognised either by establishing or constitutionalizing a new human right to environment; or secondly by re-interpreting existing human

'Human Rights or Environmental Rights? A Reassessment' (2007) XVIII Fordham Environmental L Rev 471 at 497; Kravchenko S., 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 Vermont Journal of Environmental Law 513-547.

43. Boyle A. and Anderson M., (eds.) *Human Right Approaches to Environmental Protection* (Oxford: OUP 1996).

44. Turner S., *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (London: Kluwer Law International 2009); Paellemarts M., 'The Human Right to a Healthy Environment as a Substantive Right' in Dejeant-Pons M., and Paellemarts M., (eds), *Human Rights and the Environment* (Council of Europe 2002) 11, 15; Atapattu S., 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tul. Envtl. L.J. 65; May J., 'Constitutionalizing Environmental Rights Worldwide' (2006) 23 Pace Envt. Law Rev. 113; Ebeku K., 'The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited' (2007) 16(3) Rev. Eur. Community & Int'l Envtl L. 312

rights such as the right to life or the right to health to include environmental protection as an element.[45] Boyle calls this the 'greening' of already existing rights and remedies to cater for environmental protection.[46] This indirect approach calls for states, courts and international organizations to derive environmental protection from existing human rights instruments.

a) Reinterpreting Existing Rights: The Indirect Approach

A main approach suggested for dealing with human right issues in environmental protection is the re-interpretation of existing human rights to cover environmental issues. This expansive approach focuses on the interpretation of existing human rights such as the right to life, to protect the environment. As Anderson argues 'existing rights must be re-interpreted with imagination and vigour in the context of environmental concerns which were not prevalent at the time existing rights were first formulated'[47] Harding also notes that existing human rights such as the right to life, right to health and right to information are already robust in themselves to protect the environment and that proposals for new constitutional environmental rights are at best superfluous.[48] He argues that environmental rights can be incorporated silently and less dramatically into existing human rights by amending or greening these rights, making it unnecessary to create a new

45. Shelton D., 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89-120.
46. Boyle A., 'The Role of International Human Rights Law in the Protection of the Environment ' inBoyle A. and Anderson M., (eds.) *Human Right Approaches to Environmental Protection* (Oxford: OUP 1996) 43.
47. M Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', *ibid.* at 7-8.
48. Harding A., 'Practical Human Rights, NGOs and the Environment in Malaysia' *ibid.* at 227.

right.[49] Anderson seemed to be in agreement with this when he argued that:

> *existing rights, if fully realized are so robust in themselves that proposals for new environmental rights are at best superfluous and at worst counter-productive. The body of existing rights at the international level is detailed and comprehensive. An argument may be made out that if activists devoted their attentions to securing additional ratifications and campaigning for effective implementation of existing international instruments, rather than dreaming up and promoting new standards then environmental protection will follow automatically...*[50]

Boyle has also argued that the right to life, personal liberty, political information and the freedom of association can be utilized to provide remedies for environmental concerns without the need for creating another right.[51]

This approach emphasizes placing environmental concerns under existing human rights.[52] It is an approach that has been

49. *ibid* 229. See also Shelton D., 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denv J Int'l L &Pol'y 129.

50. Anderson M., 'Human Rights Approaches to Environmental Protection' in Boyle A. and Anderson M., *Human Rights Approaches to Environmental Protection* (Oxford: OUP 1996) 4.

51. Boyle A., 'The Role of International Human Rights Law in the Protection of the Environment' *ibid.* at 43-46.

52. See Doelle M., 'Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to Take Climate Change Seriously' (2004) 1(2) Macquarie Journal of International and Comparative Environmental Law 182; Lewis B., 'Climate Change and Human Rights: Perspectives of Environmental and Indigenous Rights' (2008) 1(1) Journal of The Australasian Law Teachers Association 155.

mainly developed internationally by the judiciary as a response to environmental concerns brought before them.[53] For example, in the *Gabcikovo Nagymoros Case*, Judge Weeramantry of the International Court of Justice (ICJ) recognised the protection of the environment as a 'sine qua non for numerous human rights such as right to health and the right to life itself'.[54] The African commission also adopted this approach in the recent case of *Endorois Welfare Council v Kenya*.[55] The Commission linked environmental protection to other human rights when it found the Government of Kenya in violation of the rights to freedom of religion, property, culture, religion, environment, natural resources and the right to development of the indigenous people of Endrois.

The recent case of *Mossville Environmental Action Now v United States*- an environmental pollution petition brought before the Inter-American Commission against the US Government is another example.[56] In this case, the US Government had opposed the admissibility of the petition on the grounds that 'there is no such right as the right to a healthy environment either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination'.[57] The court however held that while the US may not recognise the right to

53. See Post H., 'Hatton and Others: Further Clarification of the 'Indirect' Individual Right to a Healthy Environment' (2000) Colum. J. Envt. 25.
54. Gabcikovo Nagymoros (Hungary/Slovakia) (1998) 37 ILM 162, 206 (Separate Opinion of JudgeWeeramantry).
55. *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council vs. Kenya*, African Court for Human and Peoples' Rights, Case No. 276/2003.
56. Organization of American States, Inter-Am. Commission on HR, *Mossville Environmental Action Now v United States*, Report no 43/10, Petition no 242/05, Admissibility, OEA/Ser L/V/II 138 (17 March 2010) 5.
57. Response of the Government of the United States, <http://www.elhumanrights.org/docs/US-Response-to-Mossville-Petition-09-06.pdf> accessed 12 May, 2014.

environment as alleged in the petition, the Commission finds the petition admissible based on a broad interpretation of international and Inter-American human rights systems.

The European Court of Human Rights has also recognised these linkages in a number of cases.[58] For example in the *Lopez Estra case*, the court held that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their fundamental human rights.[59] In *Yanomani Indians v Brazil*, The Inter-American Commission on Human Rights held that Brazil had violated the Yanomani Indians' right to life, liberty and personal security by not taking measures to prevent the environmental damage that resulted in the loss of life and cultural identity among the Yanomani.[60]

This approach has been adopted with success in a number of national courts with India taking a notable lead. In India, judges have, in a number of cases equated environmental pollution to a direct violation of the right to life.[61] The right to life has been interpreted in India to include the right to survive as a species, right to a good quality of life, the right to live with

58. See also *Guerra v Italy*, 4 BHRC 63 (1999); *Hatton v. United Kingdom* (2002) 34 E.H.R.R. 1; Kyrtatos v Greece (2003) 36 EHRR 242 [52]; *Taskin v Turkey* (2006) 42 EHHR 50; *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Fadeyeva v Russia* (2007) 45 EHRR 10; *Tatar v Romania* (App no 67021/01) 27 January 2009; *Leon and AgnieszkaKania v Poland* (App no 12605/03) 21 July 2009; *Olujic v Croatia* (App no 22330/05) 5 February 2009.

59. ECHR (16798/1994).

60. Inter-Am. C.H.R. 7615, OEA/Ser.L.V/II/66 doc. 10 rev. 1 (1985).

61. See *Rural Litigation and Entitlement Kendra v Uttar Pradesh* AIR 1985 SC 652 where the petitioner alleged that unauthorized mining in the Dehra Dun area adversely affected the ecology and environment. The Supreme Court of India upheld the right to live in a healthy environment and issued an order to cease mining operations notwithstanding he significant investment of money and time by the company. See also *Mathur v Union of India* (1996) 1 SCC 119; *M.C. Mehta v Union of India* (1997) 2SCC411; *Francis Coralie Mullin v Union Territory of Delhi* AIR 1981 SC 746,*CharanLalSahu v Union of India* AIR 1990 SC 1480.

dignity and the right to livelihood.[62] For example in *Subhash Kumar v State of Bihar*, the Indian Supreme Court observed that "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life".[63] The same position was taken in the Pakistani case of *Shela Zia v WAPDA*.[64]

Similarly, in the Nigerian case of *JonahGbemre v Shell* the Nigerian federal court in a radical position held that Shell's action 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 right to life (including healthy environment) and dignity of human persons guaranteed by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights.[65]This approach was also adopted by the African Commission on Human Rights in *The Social and Economic Rights Action Center and the Center for Economic, and Social Rights .v. Federal Republic of Nigeria*.[66]The Commission held that oil operations in the Ogoni Communities has resulted in the violation of several rights of the Ogoni people as guaranteed by the African Charter. These include, Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of

62. See Sahharwal Y., 'Human Rights and the Environment' <http://www.supremecourtofindia.nic.in/new_links/humanrights.htm> accessed 12 March, 2014.
63. AIR 1991 SC 420.
64. PLD 1994 SC 693.The Pakistani Supreme Court held that Article 9 of the Constitution of Pakistan which states that no person shall be deprived of life includes the right to a clean environment. .
65. No. FHC/B/CS/53/05, (Nov. 14, 2005) Federal High Court of Nigeria, available at http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf
66. Comm. No. 155/96 [2001].

peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment). The Commission held that the Nigerian Government had condoned and facilitated these violations by failing to monitor the operations of the oil companies and to responding to the plight of Ogoni communities. The ruling of the commission derives the right to environmental protection from a number of existing rights to provide justice to the Ogoni community.

However, this approach could at times be faced with the problem of uncertainty and indeterminacy. As Churchill notes, there are only a handful of cases in which civil and political rights have been applied to environmental complaints with success before international courts.[67] As elaborate as the jurisprudence and rhetoric of courts on the question of linkages are, they have not been given detailed recognition in legislative or hard law instruments. As such, some courts have found this as a basis for a radical departure from the position that such linkages exist. It is not uncommon for protagonists to argue that there is no such right as a right to environment under the Nigerian constitution or under international law.[68]

Such arguments show the shortcomings of approaching environmental protection through an indirect approach.[69] A right

67. Churchill R., 'Environmental Rights in Existing Human Rights Treaties', in Boyle A. and Anderson M., *Human Rights Approaches to Environmental Protection* (Oxford: OUP 1996) 89.

68. See the decision in *Tanner v Armco Steel* (1972) 340 F. Supp 532, 537 where the US court held that 'no legally enforceable right to a healthful environment...is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution'. See also *De Shaney V Winnebago County Dept. of Soc. Serv.*, (1989) 489 U.S 1189, 195-96, decision affirmed in 556 F.2d 576 (4th Cir. 1977); *Upper W. Fork River Watershed Association V Corps of Engineers* (1977) 414 F. Supp. 908 (N.D.W.Va); *Lindsey v. Normet* (1972) U.S 405 U.S 56. In these cases, the courts refused to recognise a right to environment.

69. See Posner E., 'Climate Change and International Human Rights Litigation: A Critical Appraisal'(2007) 155 University of Pennsylvania Law Review1925; Averill M., 'Linking Climate Litigation and Human

to a healthy environment is not yet constitutionally recognized in Nigeria, as such while the indirect approach of establishing this linkage might work in certain cases, it might not work in more complex cases.[70] This reduces the chance of seeking and obtaining redress through this approach to mere probability.[71] Unless there is an express constitutional recognition of a right to healthy environment, the linkages between environment and human rights might remain obscured in Nigeria.

The indirect approach could also bring hardship to environmental claimants in cases where such pollution has not brought about any loss of life, or has not violated other rights like personal liberty, political participation and the freedom of association.[72] In such cases, it will be difficult to bring claims under any of these rights. Communities may suffer from huge environmental pollution from an adaptation project but remain unable to seek redress if for example it does not lead to death (thus the right to life is still intact) or does not impair their movements in any way (the right to free movement is still intact).[73] As Francioni notes:

Rights'(2009) 18 Review of European Community and International Environmental Law139; Osofsky H., 'The Inuit Petition as a Bridge: Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 American Indian L. Review 675; Post H., 'Hatton and Others: Further Clarification of the 'Indirect' Individual Right to a Healthy Environment' (2000) Colum. J. Envt. 25.

70. *Ibid.*

71. *EHP V Canada* Communication No. 67/1980, see also the Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States, December 7, 2005. Available at <http://www.ciel.org/Climate/Climate_Inuit.html> accessed 12 March, 2014.

72. See Marshall J., 'The Human Right to a Clean Environment. Phantom or Reality? The European Court of Human Rights and English Courts Perspectives on Balancing Rights in Environmental Cases (2007) 76(2) Nordic J. Intl. Law 103.

73. Shelton D., 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law, at 134.

> *...it does not make much sense to engage human rights language to combat environmental degradation only when such degradation affects. the rights to life, property, and the privacy of certain directly affected individuals. This reductionist use of human rights may even be counter-productive in that it tends to reduce environmental values to the very limited sphere of individual interest, thus adulterating their inherent nature of public goods indispensable for the life and welfare of society as a whole. This does not mean that the human rights approach to environmental protection considered above should be discontinued. On the contrary, my plea is for a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human right discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole.*[74]

The express constitutional recognition of the linkages between human rights and environment through enforceable provisions has been identified as a possible way to prevent such situations. As Gearty notes, environmental protection needs a more direct

74. Francioni F., 'International Human Rights in an Environmental Horizon' (2010) 21(1) European Journal of International Law 55.

guarantee in human rights law than can be provided by the right to privacy or by civil and political rights generally.[75]

B) The New Human Rights Approach

There have been unprecedented demands for a constitutional amendment in Nigeria to link environmental protection and human rights through the creation of an enforceable human right to a healthy environment.[76] This approach remains the most debated approach to mainstreaming human rights norms into environmental protection in Nigeria and under international law.[77] Proponents of a right to healthy environment in Nigeria call for its adoption as the best approach to provide for the effective protection of the environment from pollution caused by oil-related pollution; trans boundary movement of hazardous

75. Gearty C., *'Do Human Rights Help or Hinder* Environmental Protection?' (2010) 1 Journal of *Human Rights* and the Environment 7-22.

76. OgbodoG., "Environmental Protection in Nigeria: Two Decades After Koko Incidence" (2010) 15(1) *Annual Survey of International and Comparative Law* pp. 1-18; Abdulkadir B.A and Sambo A.O., "Human Rights and Environmental Protection: The Nigerian Constitution Examined" Journal of Food, Drug and Health Law(2009), 2, pp. 61-73; Knox J., 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477-498; Postiglione A., 'Human Rights and the Environment' (2010) 14(4) The International Journal of Human Rights, 524-541; Von Doussa J., 'Human Rights and Climate Change: A Tragedy in the Making' (2008) 31(3) The University of New South Wales Law Journal 953-964; Harrington J., 'Climate Change, Human Rights and the Right to be Cold' (2007) 18 Fordham Environmental Law Review 513-535; see also Lewis B., 'Climate Change and Human Rights: Perspectives of Environmental and Indigenous Rights' (2008) 1(1) Journal of the Australasian Law Teachers Association 153-161.

77. United Nations, 'Outcome Document of the High Level Expert Meeting on the New Future of Human Rights and Environment: An Agenda for Moving Forward (Nairobi, 30 November – 1 December 2009) <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=cTNdmZ_wGK0%3d&tabid=2046&language=en-US> accessed 12 March, 2014.

wastes; and other environmental concerns facing Nigeria.[78] The crux of the argument here is that environmental protection is fundamental enough to be accorded justiciable human rights status.[79]

Constitutionalizing environmental rights has the potential of giving environmental issues greater moral urgency as it will emphasize the seriousness of the threats of environmental pollution to human existence and the need to act fast. It has also been said that bringing environmental pollution under the human rights regime has the potential of offering individuals the opportunity to hold polluters directly accountable before for their pollution.[80]It has also been argued that a susbtantive environmental right could be a better way to place environmental matters at par with other urgent concerns such as crime, terrorism and torture.[81]

An enforceable environmental right could also protect environmental values from governmental fluctuations. If recognised, environmental rights are likely to endure and survive as legal norms due to the usual inertia and reluctance of governments to amend the constitution.[82] Another factor is that

78. May J., 'Constitutionalizing Environmental Rights Worldwide' (2006) 23 Pace Envt. Law Rev. 113; Ebeku K., 'The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited' (2007) 16(3) Rev. Eur. Community & Int'l Envtl L. 312.

79. See Lee J., 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law.' (2000) 25 Columbia Journal of Environmental Law 305.

80. Turner S., *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (London: Kluwer Law International 2009) 56-70.

81. Nickel J., 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification' (1993) 18 (1) Yale J. Int'l L. 281.

82. See Collins L., 'Environmental Rights for the Future? Intergenerational Equity in the EU'(2007)16(3), Rev. Eur. Community Int'l Envtl. L. 321; Cook K., 'Environmental Rights as Human Rights' (2002) 2 Eur. Hum. Rts. L. Rev. 196; De Vos P., 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution'

constitutionalizing environmental rights would offer a more coordinated, detailed and well-documented approach for dealing with the linkages between environment and human rights.[83] Up to this point, these linkages have developed in a fragmented manner across federal and state courts. This has not fostered a broad understanding of the linkages in Nigeria; it has also resulted some courts failing to recognise the existence of a right to environment in Nigeria.[84]

However, this approach may be criticized for a number of reasons. The first and the strongest is the lack of certainty or precision in defining the scope and content of this proposed human right.[85] One substantive requirement of a right is that it should give rise to practicable and identifiable rights and obligations.[86] Human rights must be determinate in scope and

(1997) 13 South African Journal on Human Rights 44;Hassan P., 'Environmental Rights as Part of Fundamental Rights: the Leadership of the Judiciary in Pakistan' (2003) IUCN/Ecopravo-Lviv/UNEP 'EECCA Region Judges Symposium', May 2003; Klaus B., 'Human Rights and the Environment: Redefining Fundamental Principles' in Brendan Gleeson and Nicholas Low, *Governing for the Environment: Global Problems, Ethics and Democracy* (Palgrave, Hampshire 2001); A Palmer, 'An International Right to Environment: a New Generation?' (2006)15 Interights Bulletin 141; M Soveroski, 'Environment Rights versus Environmental Wrongs: Forum over Substance?' (2007) 16(3), Rev. Eur. Community Int'l Envtl. L. 261.

83. Osofsky H., 'Learning from Environmental Justice: A New Model for International Environmental Rights,' (2005) 24(1) Stanford Environmental Law Journal 91.

84. See Carlson J., 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18(1) Transnational Law & Contemporary Problems 45-68.

85. Burger M., 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment' (2003) 28 Colum. J. Envtl. L. 371-377; Cullet P., 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 Netherlands Q. Hum. Rts., 25.

86. United Nations, 'Setting International Standards in the Field of Human Rights' G.A., Res. 41/120, U.N. GAOR, 41st Sess., Supp. No. 53, at 178, 179, U.N. Doc. A/41/53(1987).

consistent in formulation.[87] At the present, scholars have yet to come up with a consistent answer to the question 'how should a constitutional human right to environment be defined in Nigeria? Which dimensions of the environment are to be protected and what degree of environmental change is permissible?' A constitutional right to a clean environment in Nigeria is likely still some time away because the legal community is still struggling to define the exact scope of such a human right. Different adjectives have been used in describing this proposed right; which makes it difficult even for scholars to agree a common definitional standard. It has been expressed as a right to a 'healthful'. 'clean' environment,[88] 'healthy' environment,[89] 'decent' environment,[90] 'safe' environment,[91]

87. See Goodhart M., *Human Rights: Politics and Practice* (Oxford: OUP 2009); see also Griffin J., *On Human Rights* (OUP 2008).

88. Okonmah P., 'Right to a Clean Environment: The Case for the People of Oil Producing Communities in the Niger Delta' (1997) 41 Journal of African Law 43-67; Gibson N., 'The Right to a Clean Environment' (1990) Sask L. Rev. 54; Shaw M., *International Law* (CUP 2008) 847; J Marshall, 'The Human Right to a Clean Environment, Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing in Environmental Cases (2007) 76(2) Nordic J. Int L.103.

89. Martens M., 'Constitutional Right to a Healthy Environment in Belgium' (2007)16(3) Rev. Eur. Community & Int'l Envtl L. 287; Paellemarts M., 'The Human Right to a Healthy Environment as a Substantive Right' in Dejeant-Pons M. and Paellemarts M., (eds), *Human Rights and the Environment* (Council of Europe, Strasbourg 2002) 11, 15; Atapattu S., 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tul. Envtl. L.J. 65; McClymonds J., 'The Human Right to a Healthy Environment: An International Legal Perspective' (1992) 37 N.Y.L. Sch. L. Rev. 583; Ebeku K., 'The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited' (2007) 16(3) Rev. Eur. Community & Int'l Envtl L. 312;Fabra A., 'Enforcing the Right to a Healthy Environment in Latin America' (1994) 3(4) Rev. Eur. Community Int'l Envtl. L. 215; Giorgetta S., 'The Right to Live in a Healthy Environment in Schrijver N. and Weis F., (eds) *International Law and Sustainable Development: Principles and Practice* (MartinusNijhoff Publishers 2004).

'adequate' environment,[92] 'viable' environment,[93] , 'good' environment[94] and even a 'right to be cold' to mention just a few.[95] The use of different expressions to describe the same proposal reflects the general lack of development of an agreeable substantive right.[96]

This aside, there is also a lack of an agreed standard on what the content of this right will be. As Crawford puts it, 'so far as the claims such as the right to...the environment are concerned, the difficulty is that there is as yet no level of articulation of consequences of those rights, failing which they can only be said to have been accepted as pleasant sounding formulae...'[97] Without proper definition and characterization, such a constitutional right might be easily overstretched to cover trivial incidences. Establishing an indeterminate right might open the floodgate of cases and litigation for the violation for all manner of environmental offences.

The new human rights approach is thus very debatable, as it stands with little prospect, for the resolution of some of these

90. Steiger H., Demel B., Fey H., and Malanczuk P., 'The Fundamental Right to a Decent Environment' in Bothe M., (ed) *Trends in Environmental policy and Law* (IUCN 1980).
91. Nickel J., 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification (1993) 18 Yale J. Int'l L., 281.
92. Hayward T., *Constitutional Environmental Rights* (Oxford: OUP 2005).
93. See Collins L., 'Environmental Rights for the Future? Intergenerational Equity in the EU' (2007)16(3), Rev. Eur. Community Int'l Envtl. L. 321.
94. Turner S., 'The Human Right to a Good Environment – The Sword in the Stone (2004) 4 Non St. Actors & Int'l L., 277; Turner S., *A Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International 2009) xv.
95. See Collins L., 'Environmental Rights for the Future? Intergenerational Equity in the EU' (2007)16(3) Rev. Eur. Community Int'l Envtl. L. 321.
96. Turner S., *A Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment* (London: Kluwer Law International 2009) 48.
97. Crawford J., *The Rights of Peoples: Some Conclusions* in Crawford J., (ed) *The Rights of Peoples* (Oxford: OUP 1992) 55-68.

critical points in the near future. It is therefore pertinent to develop an understanding of how existing human rights instruments can be employed to protect the environment in Nigeria. There is a need to focus on an approach which mainstreams already endorsed human rights norms into environmental planning and protection. Existing human rights provide ready-made foundations on which we can build on in an attempt to highlight the cross-cutting issues in environmental protection and international human rights law. It is also a more practicable approach as it analyses law as it is rather than based on what law ought to be – an approach which most times lead to more problems than solutions.

Procedural Rights Approach

In this part, this paper proposes the adoption a participatory or due process approach to human rights mainstreaming to achieve constitutional recognition and protection for the environment. This approach emphasises mainstreaming existing human rights norms, standards, and principles into legislation, policies, and planning on the environment, so as to ensure that citizens' interests are protected at all times. The procedural rights approach calls for an interpretation and mainstreaming of the rights of members of the public to information, participation in environmental decision-making and access to review procedures.[98] As Anderson notes:

> *...the desired quality of the environment is a value judgment which is difficult to codify in legal language and which will vary across cultures and communities; it is very difficult to arrive at a single precise formulation of a*

98. See Common Wealth, 'Human Rights and Climate Change: An Approach Discussion Paper 5 (July 2009); see alsoEbbesson J., 'Information, Participation and Access to Justice: the Model of the Aarhus Convention' (2009) United Nations Expert Meeting, Back ground Paper No. 5.

> *substantive right to a decent environment. Therefore the more flexible, honest and context-sensitive approach is to endow people with robust procedural rights, which will foster open and thoroughgoing debate on the matter.*[99]

The procedural rights approach has been described as a holistic approach to environmental protection, which would strike a partnership between environmental regulation and human rights.[100] Through participatory rights, the design of environmental policies could be strengthened so that their execution and approval would be dependent on the consent and cooperation of stakeholders, individuals and communities. This way, many human rights infringements due to environmental pollution may be avoided.[101] Procedural rights provide preventive/long-term processes through which human rights are systematically integrated into environmental systems, structures and practices so as to avoid the source of the problems in the first place.

This approach is in tandem with the precautionary principle of international environmental law. The precautionary principle requires States to anticipate and avoid environmental damage before it occurs, especially where failure to do so would result not only in environmental degradation, but in human rights

99. Anderson M., 'Human Rights Approaches to Environmental Protection: An Overview' in *Human Rights Approaches to Environmental Protection* (Oxford: OUP 1996) at 10-11.

100. See KasS., 'Integrated Justice: Human Rights, Climate Change, andPoverty' (2009) 18(1) Transnational Law & Contemporary Problems 115- 138; Carlson J., 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18 (1) Transnational Law & Contemporary Problems 45-68.

101. This is in line with the principles of prevention and precaution under international environmental law.

violations as well.[102] According to the principle, where there are threats of serious or irreversible damage, governments should take all effective measures to prevent environmental degradation, even the lack of full scientific certainty shall not be used as a reason for postponing such preventive measures. This approach calls on governments to anticipate and respond to credible environmental threats.[103]

This approach could also help to reduce litigation arising from environmental projects as it allows citizens to take part in the process for project approval and execution. Unlike substantive rights where enforcements are mainly triggered by violations, a procedural rights approach prompts changes in institutional practices so that right holders are incorporated in the decision-making process. This prevents violations and reduces the possibility of litigation.

Stakeholders who would most likely be affected by an environmental problem are the most credible sources of information when it comes to environmental threats. By providing them with the opportunity to bring forward the existence of such threats, governments can better anticipate and respond to these threats and take necessary precautions to avoid them. Environmental risks can be avoided when information on such risks are gathered transparently, disseminated efficiently and dealt with collectively with the participation of those citizens concerned. As noted in Principle 10 of the Rio Declaration:

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102. Principle 15 of the Rio Declaration which states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation'.

103. Article 3(3) of the UNFCCC urges States to take 'precautionary measures to anticipate prevent or minimize the causes of climate change and mitigate its adverse effects'. The United Nations Framework Convention on Climate Change.
<http://unfccc.int/resource/docs/convkp/kpeng.html.>accessed 10 January 2014.

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

Principle 10 recognises public access to information, public participation in decision-making proceedings, and access to review procedures and remedies (access to justice) as prerequisites of a procedural rights approach. These three elements have also been recognised in many international environmental treaties as pillars of a procedural approach.[104]

The most comprehensive recognition of these principles is contained in the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (The Aarhus Convention).[105] The convention guarantees the

104. See Shelton D., 'Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001' (2002) Paper presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (Geneva 14-16 January 2002).

105. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770

rights of access to information, public participation, and access to justice in environmental matters. Described by the former Secretary General of The United Nations – Kofi Atta Annan, as the most impressive elaboration of Principle 10 of the Rio Declaration, the Aarhus Convention emphasizes the rights of citizens to participate in environmental issues and obliges States Parties to collect and publicly disseminate information on policies relating to the environment.[106] Each State Party is expected under the Convention to provide information to a requesting party on proposed or existing activities which could significantly affect the environment, without the latter having to state an interest.[107] This information shall be made available as soon as possible, except where it is impracticable to do so.[108]

These three pillars of access to information, public participation, and access to justice can be reflected in environmental laws in Nigeria, and in the Nigerian constitution to provide opportunities for the public to play more active roles in policy formulation. Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that every citizen shall have the right and opportunity to participate, without distinction and without unreasonable restrictions, in the conduct of public affairs, directly or through freely chosen representatives.[109] Article 27 also provides that in states in which ethnic, religious or linguistic minorities exist, persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or

<http://treaties.un.org/doc/Publication/MTDSG/Volume%2011/Chapter%20XXVII/XXVII-13.en.pdf> accessed 19 March, 2010.

106. See Statement of the UN Secretary General, <http://www.unece.org/env/pp/> accessed 12 January 2010.

107. Article 4 of the Aarhus Convention.

108. *Ibid.*

109. International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

to use their own language. Article 23 of the Inter American Convention on Human Rights also provides that every citizen shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives.[110]

Summarily, the procedural approach focuses on mainstreaming human rights safeguards that ensure due process, deliberative democracy, accountability and access to justice into policymaking. Mcrudden alluded to this when he noted that: Mainstreaming concentrates on government pro-actively taking human rights into account. Mainstreaming approaches are intended to be anticipatory, rather than essentially remedial, to be extensively participatory in the definition of the issue and how it might be addressed, and to be integrated into the activities of those primarily involved in policymaking. It aims to complement existing approaches to compliance, rather than replace them. It emphasises compliance rather than enforcement. It does not see litigation as central to achieving compliance... Mainstreaming should, thereby, encourage greater resort to evidence based policymaking and greater transparency in decision-making, since it necessitates defining what the impact of policies is at an earlier stage of policymaking, more systematically and to a greater extent than is currently usually contemplated. And, to the extent that mainstreaming initiatives can develop criteria for alerting policymakers to potential problems before they happen, it is more likely that a generally reactive approach to problems of inequality can be replaced by proactive early-warning approaches.[111]

110. American Convention on Human Rights (Adopted 22 November 1969, entered into force 18July, 1978) O.A.S. Res. 447 (IX-0/79).

111. J McCrudden, 'Mainstreaming and Human Rights' in C Harvey (ed.) *Human Rights in the Community. Rights as Agents for Change* (Oxford: Hart, 2005)7.

In the table below, I summarize some of the notable differences between a substantive rights approach and a procedural approach to human rights mainstreaming.

TABLE ON PROCEDURAL V. SUBSTANTIVE RIGHTS APPROACHES

Substantive Rights Approach	Procedural Rights Approach
Focus on immediate causes of human rights violations	Focus on underlying, structural and institutional causes of rights violations
Individuals are objects and recipients of human rights	Individuals are subjects and are empowered to protect and claim their rights
Emphasis on protecting human rights	Emphasis on realizing human rights
Focus on inputs and outcome	Focus on process and outcomes
Are focused and sector based	Emphasis on holistic, integrated and multidimensional approach to issues
Corrective and reactive Approach to human rights	Preventive, precautionary and anticipatory approach
Offer universal protection of fundamental rights and freedoms	Target selection and focus on marginalized members of the society
Focus on top down approaches for rights protection	Focus on bottom up and locally owned approaches to rights protection

CONCLUSION

Of the two main approaches proposed for exploring and recognizing the intersections between human rights and the environment in Nigeria, the procedural rights approach arguably stands out as a promising and less contested approach through which human rights norms could be constitutionalized. Through procedural rights, the design of environmental policies could be strengthened to anticipate, avoid and prevent some of the impacts of environmental pollution on human rights issues in Nigeria, unlike traditional approaches that are reactive in nature. By ensuring that the execution and approval of projects are dependent on the consent and cooperation of stakeholders, individuals and communities, environmental pollution and human rights infringements due to development projects, may be avoided.

Practically, what this approach means is that the constitution as well as environmental legislation such as the National Environmental Standards and Regulations Enforcement Agency Act (NESREA), and the Environmental Impact Assessment Act would be reformed to include elements of participation and inclusion; accountability; equality and non-discrimination; empowerment; and access to justice. The Constitution would be reformed to provide a threshold requiring governments and project proponents to demonstrate that these elements have been complied with and guaranteed to the public in the planning and execution of all projects that might impact environmental quality. Any project that does not satisfy the elements would either be referred back or refused approval. It would also include establishing complaint mechanisms and procedures for stakeholders or private individuals whose human rights in general have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects. Constitutionalizing procedural rights such as

access to information, public participation and access to justice can contribute directly to the realization of several human rights in Nigeria including environmental protection. A due process approach ensures the incorporation of human rights principles in the design, implementation and monitoring of developmental policies and projects.

As policy makers draw up frameworks for constitutional reform process in Nigeria, it is important to refocus debates about constitutional environmental rights in Nigeria to make them incorporate procedural rights, as opposed to the perennial agitation for substantive rights. We cannot continue to think of environmental protection as an end that could be achieved by the substantive codification of a right to a healthy environment in a section of the constitution. The codification of a right to environment will arguably not stop all the environmental pollution in Nigeria in one day. As discussed in this paper, substantive rights are inherently reactive, with their application often triggered by violation. A process-based approach on the other hand provides an anticipatory, preventive and long-term process through which human rights are systematically integrated into applicable environmental legislation, structures and practices. Its persistent and continuous adoption by international development organizations such as the United Nations, governments at regional and national levels coupled with its rapid ascendancy in scholarly works point to the emergence of the procedural approach as a more forward looking legal frame through which national authorities may progressively protect, respect and fulfill the rights of the public. Through the process-based approach governments may better anticipate and prevent the likely impacts of projects on environmental quality and on the fulfilment of human rights in general.

THE STATUS OF NIGERIANS RIGHTS TO LIFE AND THE ENVIRONMENT: A COMPARATIVE CRITIQUE OF THE NIGERIAN CONSTITUTION.

BY

JACOB CHUKWUKA UMOKE Esq.*

ABSTRACT

Going by the current environmental and security challenges in the country, one might be tempted to believe what some Nigerian comedians have said that the cheapest commodity in Nigeria is human life. The right to life which is entrenched in the Nigerian Constitution, is seriously threatened by the harsh environmental issues facing the country and the weak status of the constitutional provisions for the protection of the environment. The situation is exacerbated by the lackadaisical attitude exhibited by government towards environmental protection, vis a vis human rights. This research work therefore explores the current status of the right to life in Nigeria in the face of weak constitutional provision. The author establishes a link between environmental right and right to life. The paper also explores and appreciates the robust provisions in the constitution and laws of other countries and compares and contrasts them with those of Nigeria, in order to press demand home for the establishment, promotion and protection of environmental right.

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INTRODUCTION

We have posited before, in our earlier work on human rights, that every man, even the half-evolved type, has some basic rights, which no one is permitted to deny him as long as he/she keeps his own side of the social contract.[1] In Nigeria, environmental law was developed in response to the public perception that human life and the environment were inadequately protected. It is at this point that the environment needs protection.

This work seeks to discuss the extent of the protection of the constitutional right to life in Nigeria. In so doing, efforts will be made to show whether the current provision in the constitution of Nigeria, for the protection of the environment, is adequate enough, and whether it enables Nigerians to challenge the abuse of their rights to a healthy environment and their life in particular. Consequently, we would be comparing the Nigerian constitutional provision for the environment with similar provisions in other countries' constitutions. We shall then attempt stating the current status of the right to a healthy environment by showing the link between right to life and right to the environment. Some useful recommendations and conclusion shall be made.

THE CONCEPT OF RIGHT

Many a time we come in contact with people in the street quarrelling and you hear one of them shouting on top of his voice "I have the right to do this or that"; "it is my right, and no man can take it away from me"; "you don't have the right to treat me like that". But then, the concept of right may not be as simple as they often assume it to be, neither is it standing on a

1. Umoke J.C. "Human Right is Human Wrong" Towards the Jurisprudential Status of the Rights of Persons in Custody", *Nigerian National Human Rights Commission Journal (NNHRCJ) Vol. 3, DECEMBER 2013, PP. 189-229 particularly at p. 190.*

straight line. Instead, I think it revolves in a rather cyclical manner. Thus, your right stops where my own starts, and so on. Thus, it has been argued that the morality of human rights consists of two connected claims, the first of which is this: *Each and every (born) human being has equal inherent dignity.*[2]

The opposite of right is wrong, a definition of which is necessary for a better grasp of the concept of right. A wrong is the breach of one's legal duty; violation of another's legal right.[3] "A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability.[4] A wrong is a wrong act – an act contrary to the rule of right and justice. A synonym of it is injury in its true and primary sense of ***injuria*** (that which is contrary to ***jus***).[5]

A wrong may safely be likened to an offence in this discussion in the sense that it offends the rights of man. For the meaning of an offence, I adopt the definition offered by the Criminal Code[6] as follows: *an act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any Act or law, is called an offence.*[7]

A wrong may also be viewed as a civil act in the Law of Torts. Thus, "*a tort is a wrongful act that causes injury to a*

2. Perry,M.J., "Human Rights as Morality, Human Rights as Law", *Emory University School of Law Public Law & Legal Theory Research Paper Series Research Paper No. 08-45(2008)*
3. 8th Edition, p.1665
4. Pollock, F., *A First Book Of Jurisprudence for Students of the Common Law*, (London Macmillan,1904), cited in Black's Law Dictionary, 8th Edition as Frederick Pollock, *A First Book Of Jurisprudence 68 (1896)*p.1665
5. Salmond,J., "*Jurisprudence* 227 (Glanville L Williams ed., 10th ed. 1947). See note 3 above
6. Cap C38, Laws of the Federation of Nigeria (LFN), 2004.
7. Section 2 of the Criminal Code, Cap C38, Laws of the Federation of Nigeria (LFN), 2004

person or property and for which the law allows a claim by the injured party to recover damages (money)".[8]

Martin Luther King Jr. declared, in the same spirit, that "man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.[9]Sometimes we violate a human being not by doing something to hurt her but by refusing to do something to protect her. "Sins against human rights are not only those of commission, but those of omission as well.[10]

However, for the purpose of addressing the title of this research work, the following groups of rights have been briefly discussed to illustrate the wrong being committed each time they are violated.

HUMAN RIGHT

Various doctrines of natural law have given rise to the concept that every individual has certain inherent fundamental rights worthy of protection.[11]This concept has been recognized as a principle of constitutional law in civilized states.[12]The concept of human right has led to so many misunderstandings and wars

8. Werber, S.J. *"Tort."* Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008
9. Quoted in Nicholas D. Kristof, "The American Witness," New York Times, March 2, 2005.
10. Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed (1999). p* 133
11. World Law: Comment on International Recognition And Protection Of Fundamental Human Rights. *Duke Law Journal, Vol. 1964: 846*
12. See Oppenheim, International Law 736-37 (8th ed. Lauterpacht 1955). Recognition of this concept is found, for example, in the preambles to the United Nations draft Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. See text accompanying notes 42-47 infra. These preambles state that equal and inalienable rights for all members of the human race derive from the inherent dignity of the human person and are the foundation of freedom, justice and world peace. U.N. Doc. No.A/5655 (1963).

among nations. According to Umozurike, "human rights are those liberties, immunities and benefits which, by accepted contemporary values, all human beings should be able to claim as of right in the society in which they live."[13]
Working defined human rights as "the rights that all human beings have, just because they are human."[14]Ezejiofor adopts the Universalist theory when he defined human rights "as moral rights which every human being everywhere at all times, ought to have, simply because of the fact that, in contradistinction with other beings, he is rational and moral".[15]Ibidapo-Obe (1995:86) similarly sees "human rights as the species of rights which are recognized as appertaining to man by the very nature of his humanity".[16]

Professor Nwazuoke argued that one point of major agreement is that the addition of the adjective 'human' to rights, indicate that the rights in question belong solely to human beings, and all that is needed to have them is human nature.[17] It is on this basis that they have been described as inalienable.[18]Eze defined human rights as "demands or claims which individuals or groups make on society, some of which are protected by law and have become part of the *lexleta*, while others remain aspiration to be attained in the future."[19]

13. Umozurike, O., "The Status of Human Rights", *Constitutional Rights Journal, vol.5*, 1995.p.11.
14. Dworkin, R.,"Is Democracy Possible Here?", (2006), 24-51
15. Ezejiofor, G. *Protection of Human Rights under theLaw* (London: Butterworths, 1964). P.3.
16. Ibidapo-Obe, A. "Human Rights and State Security: The Nigerian Experience", *Journal of Human Rights Law and Practice, vol. 5, No. 1*,1995. P.86.
17. Nwazuoke, A.N., *Introduction to Human Rights Law* (Abakaliki, Copycraft Int'l Limited, 2006), P.7.
18. *Ibid.*
19. Eze, O., *Human Right in Africa: Selected Problems* (Lagos: Macmillan, 1984), P.5.

These rights are what KarelVasak called the first generation rights.[2] The meaning of right and human right will be better appreciated by examining the following summary by Perry:

> *When talking about rights including human rights either as legal or as moral concepts, to say that one has a "right", is to say that one has a justified claim. To say "B has a legal right that A should not do X to him" is to say "B has a justified claim that A's doing X to him is legally forbidden". (To say "B has a legal right that A should do Y for him" is to say "B has a justified claim that A's doing Y for him is legally required".) Similarly, to say "B has a moral right that A should not do X to him" is to say "B has a justified claim that A's doing X to him is morally wrong". Morally "wrong", that is, in the sense of morally forbidden--forbidden by true morality, correctly informed. "B has a justified claim that A's doing X to him is legally forbidden." Such a claim can be translated, and typically is translated, into the language of rights--the language, that is, of legal rights: "B has a*

2. Belonging to this first generation are rights such as those set forth in Articles 2–21 of the Universal Declaration of Human Rights, including freedom from gender, racial, and equivalent forms of discrimination; the right to life, liberty, and security of the person; freedom from slavery or involuntary servitude; freedom from torture and from cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; the right to a fair and public trial; freedom from interference in privacy and correspondence; freedom of movement and residence; the right to asylum from persecution; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and the right to participate in government, directly or through free elections. Also included are the right to own property and the right not to be deprived of it arbitrarily

> *legal right that A should not do X to him." (Such a claim can also be translated into the language of legal duties: "A has a legal duty not to do X to B.). Many people talk about human rights not only as legal concepts but also as moral concepts. "B has a justified claim that, because he has inherent dignity, A's doing X to him is morally wrong." That way of talking leads naturally to: "A's not doing X to B is morally right (because B has inherent dignity)." And that way of talking, in turn, leads naturally to: "B has a moral right-a moral human right--that A should not do X to him."[T]he idea of a [moral] human right grew out of a transmutation of the discourse of what is actually [morally] right into the discourse of having a natural right.*[21]

The *Universal Declaration of Human Rights*[22] has captured the basic rights[23], which everybody who has a right to a particular

21. Perry, M.J., *"Human Rights As Morality, Human Rights As Law"University of San Diego Law School Legal Studies Research Paper Series No. 08-079, 2008. This paper can be downloaded without charge from: The Social Science Research Network Electronic Paper Collection: http://ssrn.comabstract=1274728 University of San Diego Law School Legal Studies Research Paper Series No. 08-079*

22. A statement affirming the dignity and rights of all human beings, adopted by the United Nations (UN) in 1948. It is based on principles expressed in the UN Charter. The Universal Declaration of Human Rights was prepared by the Commission on Human Rights of the Economic and Social Council (ECOSOC) of the United Nations. Eleanor Roosevelt, social activist and widow of United States president Franklin D. Roosevelt, chaired the commission. French jurist and Nobel laureate René Cassin was the declaration's principal author.

23. These rights include the right to life, liberty, and security of person; to freedom of conscience, religion, opinion, expression, association, and assembly; to freedom from arbitrary arrest; to a fair and impartial trial; to

nationality should enjoy. Chiefly among these rights, we believe, are the rights to life and the right to a healthy environment that supports life. The Apex court of Nigeria per Kayode Es, JSC (as he then was) in *RansomeKuti v. A.G of the Federation*[24], defined human right in the following words:

"is a right which stands above the ordinary laws of the land and which is in fact antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our constitution since independent is to have these rights enshrined in the constitution so that the right could be immutable to the extent of the non-immutability of the constitution itself."

In *Igwe v. Ezeanochie*[25], it was held to be universal in the sense that all people have and should enjoy them and to be independent in the sense that the exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country. It is our submission that a right to life in an unfavourable environment is not a secured or guaranteed life.

RIGHT TO LIFE

The right to life is one of the rights guaranteed under chapter IV of the *Constitution of the Federal Republic of Nigeria, 1999* (as amended). According to the constitutional provision, "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

freedom from interference in privacy, home, or correspondence; to a nationality; to a secure society and an adequate standard of living; to education; and to rest and leisure. The declaration also affirms the rights of every person to own property; to be presumed innocent until proven guilty; to travel from a home country at will and return at will; to work under favourable conditions, receive equal pay for equal work, and join labour unions at will; to marry and raise a family; and to participate in government and in the social life of the community

24. *(1985) 2 NWLR (Pt 6) 211at 230*
25. *(2010) 7 NWLR (Pt. 1192) 61.*

court in respect of a criminal offence of which he has been found guilty in Nigeria."[26] However, to every general rule, there is an exception. However, the exceptions to the above rule are minimal as contained in Section 33 (2)[27] of the Constitution.

As a child, my parents used to tell me not to argue with the man holding a gun. If I ask them whether I should keep quiet and allow people violate my rights, they would say, "***na person wey dey alive dey claim right***"; meaning that only a living person can lay claim to rights. The man with a gun, according to my parents, is the man who wields political power. The above statement stresses the importance of human rights, especially the right to life. It is pertinent at this juncture to state that even the right to life which is the most guaranteed is not absolute in itself.

Irrespective of the limited exceptions to the right to life above, it has been observed that other circumstances exist in Nigeria, that deprive Nigerian citizens, resident in Nigeria, and others who are not citizens, but resident in the country, the right to life indirectly. One of these unfortunate circumstances is the deplorable state of our environment caused majorly by pollution. Since environmental pollution is not the concentration of this research, let me concentrate on the failure of the constitutional provisions to protect the environment, and how such failure has threatened life. This is because the right to life

26. *Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999* (as amended).

27. (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary -
(a) for the defence of any person from unlawful violence or for the defence of property;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
(c) For the purpose of suppressing a riot, insurrection or mutiny.

in Nigeria must be construed to include a right to a favourable and healthy environment that guarantees living in Nigeria.

ENVIRONMENTAL RIGHT

Before delving into the concept of environmental right, let me first attempt defining the environment itself. I must state that Environmental right being one of the emerging rights in the arena of international human rights law and international environmental law, is difficult to define. The Ksentini Report[28] offers what may be the broadest definition, or better still, components, of environmental rights.[29] Broadly speaking, environmental rights are composed of the 'substantive' right to a clean environment, and 'procedural' rights to act to protect the environment, the right to information and finally access to justice.[30]

Temitope has opined that the definition of environmental rights may also be viewed through the lenses of the growing

28. Human Rights and the Environment: Final Report of Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9, (1994) ('the Ksentini Report'), 74.

29. It suggests that the possible components of substantive human rights or perhaps several environmental rights can be seen in one source which sets out no less than fifteen rights relative to environmental quality. These include: a) freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development; b) protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; c) the highest attainable standards of health; d) safe and healthy food, water and working environment; e) adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; f) ecologically sound access to nature and the conservation and the use of nature and natural resources; g) preservation of unique sites; and h) enjoyment of traditional life and subsistence for indigenous peoples.

30. Temitope, R. "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India", *NUJS LAW REVIEW Vol. 3, 2010. p. 423.*

body of international[31], regional and national decisions/ awards, sizeable number of conventions and proposals of academic writers (including draft treaties and model codes), as well as contributions from other areas of law (including international human rights law, and international labour law), that have contributed to the philosophy and jurisprudence of clean, healthy and decent environment.[32]

The first recital of the Universal Declaration, repeated in several major international human rights conventions, recognizes the "equal and inalienable rights of all members of the human family.[33]" Other global meetings to expound on the concept of sustainable development were held in Rio de Janeiro in 1992 and Johannesburg in 2002. Rio took stock of developments since the Stockholm Conference and reiterated the relationship between the environment and sustainable

31. Thus, The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (More popularly referred to as the Aarhus Convention after the Danish city where it was adopted in June 1998) views environmental rights as strengthening the role of members of the public and environmental organizations in protecting and improving the environment for the benefit of future generations. The Convention recognizes citizens' environmental rights to information, participation and justice and it aims to promote greater accountability and transparency in environmental matters. For further reading, see Press Release, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, "Environmental Rights Not a Luxury", October 29, 2001. Available at http://www.unece.org/env/pp/press.releases/01env15e.html (Last visited on May 21, 2004).

32. Temitope, R. op. cit. p.427.

33. *Universal Declaration of Human Rights*, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71. See also ICCPR; *International Covenant on Economic, Social and CulturalRights*, December 16, 1966, 993 U.N.T.S. 3, first recital; *Convention against Torture and OtherCruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, 1465 U.N.T.S. 112, first recital; *Convention on the Rights of Persons with Disabilities*, December 13, 2006, 993 U.N.T.S. 3, recital (a); *Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3, first recital.

development while emphasizing that environmental protection should constitute an integral part of the development process.[34] Very relevant to this discussion is Principle 10 of the Rio Declaration[35] that formulated the link between human rights and environmental protection largely in procedural terms.[36]

Some soft law international instruments, in particular the *Vienna Declaration and Programme of Action*, further underscored the importance of solidarity in the realization of human rights.[37] In particular, a resolution of the Human Rights Council adopted in 2009 according to Mayer[38], reaffirmed that

34. Positive results of the conference include the publication of Agenda 21, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, the Rio Declaration, and the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests. *See generally* UN Conference on Environment and Development, available at *http://www.un.org/geninfo/bp/enviro.html* (Last visited on January 11, 2011).

35. Principle 10 states that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

36. Shelton, D. Human Rights and Environment Issues in Multilateral Treaties, Joint UNEP-OHCHR Expert Seminaron Human Rights and the Environment, January 14-16, 2002, Geneva, *Background Paper No. 1, Adopted between 1991 and 2001.*

37. See *Vienna Declaration and Programme of Action*, July 12, 1993, World Conference on Human Rights, U.N. Doc. A/CONF.157/23; *Monterrey Consensus*, March 22, 2002, United Nations International Conference on Financing for Development, U.N. Doc.A/CONF.198/11; *ParisDeclaration on Aid Effectiveness*, March 2, 2005, OECD High Level Forum on Aid Effectiveness; *Accra Agenda for Action*, September 4, 2008, OECD Third High Level Forum on Aid Effectiveness.

38. Mayer, B. "The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads: Fraternity, Responsibility and Sustainability", *Supreme Court Law Review, Vol. 2012,p.723*

"all human rights are universal, indivisible, interdependent and interrelated " and underscored that "climate change is a global problem requiring a global solution."[39]

It is therefore my contention that the concept of environmental rights can also be interpreted alongside the international law that provides obligations of states to protect internal environmental occupants within their territory. In particular, international human rights treaties demand that each state "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction."[40]

LINK BETWEEN RIGHT TO LIFE AND THE ENVIRONMENT

Rules of environmental protection are majorly aimed at preserving basic natural resources in order to secure human survival. One of the most eloquent statements of support for a link between environmental protection and human rights on the international scene is found in Vice-President Christopher Weeramantry's separate opinion in the ***Gabčikovo-Nagymaros case***[41]before the International Court of Justice. Weeramantry noted that the "protection of the environment is likewise a vital

39. Human Rights Council, Resolution 10/4,"Human rights and climate change.", March 25, 2009, 4th and 9th recitals.

40. International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S.171 [hereinafter ."ICCPR."], Art. 2.1. See also *Convention for the Protection of Human Rights andFundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 222 [hereinafter ."*European Convention.*"], art. 1; *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, November 22,1969, 1144 U.N.T.S. 123 [hereinafter ."*Pact of San Jose.*"], art.1; *Convention on the Rights of theChild*, November 20, 1989, 1577 U.N.T.S. 3, art. 2.1; Human Rights Committee, General Comment No. 23, ."The rights of minorities (Art. 27).", August 4, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5, §4, and General Comment No. 31, ."Nature of the General Legal Obligation Imposed on States Parties to the Covenant.", May 26, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, §10; *Bankovicv.Belgium(2001), 12 E.C.H.R. 333.*

41. *Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 88 (Sept. 25).*

part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."[42]

Any deterioration of the environment is a danger to the life of man. Man, in this sense, means a living person, and this includes both high, low, rich and poor, free citizens and prisoners. For instance, persons in custody have been accorded the right to an environment that guarantees their healthy living. Thus, according to Howard, *"The late act for preserving the health of prisoners requires that an experienced Surgeon or Apothecary be appointed to every gaol: a man of repute in his profession. His business is, in the first place, to order the immediate removal of the sick, to the infirmary; and see that they have proper bedding and attendance. Their irons should be taken off; and they should have, not only medicines, but also diet suitable to their condition. He must diligently and daily visit them himself; not leaving them to journeymen and apprentices. He should constantly inculcate the necessity of cleanliness and fresh air; and the danger of crowding prisoners together: and he should recommend what he cannot enforce. I need not add, that according to the act, he must report to the justices at each quarter-sessions, the state of health of the prisoners under his care."*[43]

It has become clearer that large scale operations harming the environment also may have severe effects on the enjoyment

42. *Gabčikovo-Nagymaros case (supra)*
43. Howard,J., "*The State of Prisons in England and Wales* p'', cited in Lines, R., "The Right To Health Of Prisoners In International Human Rights Law", *International Journal of Prisoner Health, March 2008; 4(1): 3_53.* 43 John Howard (1726-1790) was a British social reformer, who was instrumental in obtaining the passage by Parliament in 1774 of two penal reform acts that improved sanitary conditions and health care in prisons. Later, Howard was appointed commissioner of a new penitentiary where prisoners were to be rehabilitated through work and religious teachings.

of basic human rights.[44] This was seen in Ogoniland, Nigeria,[45] and in the construction of the Yadana and Yetagun natural gas pipelines in Burma.[46]Furthermore, in *Shell v. Ambah,*[47] dredging activities on Shell's property led to the destruction of property on the adjacent land belonging to the Wesewese family. Mud dredged from Shell's land reportedly covered and destroyed 16 fish ponds as well as various fish channels and fish lakes. Now you would ask, a man whose source of livelihood has been taken away by oil spillage, what further hope does he still have for living? Indirectly, his right to life has been cut short.

Environmentally minded scholars: Ocheri[48], Gbche[49], and Aja,[50] have associated environmental pollution with human activities and albeit persistent human interaction with the

44. Cf. Osofsky, H.M., "Learning from Environmental Justice: A New Model for International Environmental Rights", *Stanford Environmental Law Journal, Vol. 24 : 71, 2005. Pp. 91-94* .
45. Coomans, F., "The Ogoni Case Before the African Commission on Human and Peoples' Rights", *Int'l. & Comp. L.Q. Earth Justice, Environmental Rights Report, Human Rights and the Environment, Vol. 52:749, 2007.Pp. 70-71.* available at http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf. retrieved on June 20th. 2013 at 2 pm.
46. See EARTHRIGHTS INT'L, TOTAL DENIAL CONTINUES. available at http://www.earthrights.org/burmareports/total_denial_continues.html. The situation relating to the Yadana and Yetagun pipelines reached U.S. courts under the Alien Tort Claims Act, *28 U.S.C. § 1350, in Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).*
47. *Shell v. Ambah. (1999) 3 NWLR 1.*
48. Ocheri, M. I., "Environmental Health Hazards and national Survival and Stability: A need for Education", *Benue State University Journal of Education (BSUJE)* Vol 4. *No. 2 2003. Pp. 67 – 174.*
49. Gbche, N.T., "Land Development in Nigeria: An Examination of Environmental Degradation Associated with land use Types", Conference Paper at the Department of Geography Benue State University (B.S.U.) Makurdi. January 2004.
50. Aja, J. O., "Environmental Education as a panacea for a sustainable development in Nigeria: Schools Environment in Focus". *African Journal of Environmental Laws and Development Studies,* Vol. 1, *Part I. 2005. Pp. 114 – 127.*

environment. Research has also shown that as the population of a country grows/increases with attendant pressure on the environment especially in the wake of improved technologies, environmental abuse and pollution is nevertheless heightened with corresponding effects on lives of people and other living organisms.

CRITICISMS OF THE NIGRIAN CONSTITUTION

Environmental protection is enshrined in the Constitution of the Federal Republic of Nigeria where it is made an objective of the Nigerian State to improve and protect the air, land, water, forest and wildlife of Nigeria.[51] The constitution also recognises foreign laws.[52]Section 12 establishes, though impliedly, that international treaties (including environmental treaties) ratified by the National Assembly should be implemented as law in Nigeria.[53] But sadly, due to the weakness of the constitutional

51. Section 20 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

52. Section 19 (d) provides that one of the foreign policy objectives shall be the respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. These international laws include the ones that relate to environmental protection. It was in an effort to avoid the horror of oil pollution that the Nigerian government is signatory to most international Conventions that relate to oil and environmental pollution. Some of these are: International Convention for the Prevention of Pollution of the Sea by Oil, 1954-71; the Geneva Convention on the Continental Shelf and the High Seas, 1958; International Convention on Civil Liability for Pollution (CLC), 1969; Convention on the Law of the Sea, 1982; International Convention for Oil Pollution Damage (IOPC Fund), 1971; the International Convention for the Prevention of Pollution From Ships as Modified by the Protocol of 1978; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Waste, Bio-diversity convention at Rio-De-Janeiro, 1992 and Montréal Protocol and Vienna Convention on Ozone Protection among others.

53. Thus section 12. (1) States that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Subsection (2) provides that the National Assembly may make laws for the Federation or

provision for environmental protection, cases related to human rights and environmental degradation is quite common in Nigeria, particularly in the area of oil exploration.[54]

The provision in the Constitution presupposes that the Government of Nigeria should always take necessary precautions to protect the rights of the people in all policies formulated to exploit natural and human resources of the state.[55] My problem with the above provision is the use of the word "precautionary". The word precaution means an action taken to protect against possible harm or trouble or to limit the damage if something goes wrong[56]. Hence, it entails the exercise of caution to forestall future troubles or a protection against possible undesirable events. The above constitutional provision did not make for a clear foresight to protect against possible harm or trouble or to limit the damage if something goes wrong. That I believe, accounts for why the government and its agencies concern themselves with post environmental disaster activities such as donation of relief materials to surviving victims rather than preventing such calamities from happening in the first place.

It is worthy to note that Nigeria's Constitution does not contain provisions on the right to an environment under the chapter containing the fundamental rights, let alone a healthy

any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

54. Okonkwo, P.D., "Right to a Clean Environment: the Case for the People of Oil Producing Communities in Nigerian Delta", *Journal of African Law, vol.41, 1997, 43-67.*

55. Razzaque, J., "Human Rights and the Environment: the national experience in South Asia and Africa", Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 4. Retrieved from: http://www2.ohchr.org/english/issues/environment/environ/bp4.htm. Accessed on July 4th, 2013 at 6:42 am.

56. Microsoft® Encarta® 2009. © 1993-2008 Microsoft Corporation.

environment. As observed above, the closest reference to environmental protection in the Constitution is contained in section 20. Unfortunately, this section is contained in Chapter II of the Constitution titled 'Fundamental Objectives and Directive Principles of State Policy'[57] which is meant to be read in conjunction with section 6(6)(c)[58] of the Constitution to the effect that the provisions of the Chapter are unenforceable against the State. In other words, rights under the chapter are not justiciable.

It can therefore be argued that from the express provision of section 20 above, that the Nigerian government is charged with the responsibility of protecting the environment. Accordingly, it will be a failure on the side of the government for any harm to befall any biotic or abiotic component of the environment over

57. Directive Principles of State Policy are in the form of instructions/guidelines to the governments at the centre as well as states. Though these principles are non-justiciable, they are fundamental in the governance of the country. The idea of Directive Principles of State Policy has been taken from the Irish Republic and Indian constitutions. They were incorporated in our Constitution in order to provide economic justice and to avoid concentration of wealth in the hands of a few people. Therefore, no government can afford to ignore them. They are in facts, the directives to the future governments to incorporate them in the decisions and policies to be formulated by them. This is a laudable and unprecedented provision in the anal of constitutional law making in Nigeria, as it sets specific agenda and policy directives to the operators of the constitution and other State agencies. The Directive Principles are just like a polestar that provides direction. Their basic aim is to persuade the government to provide social and economic justice in all spheres of life, keeping in view its limited material resources. The provision aggregates the feelings, aspirations and expectations of the citizens in governance and affords a measure against which government actions can be tested.

58. Section 6 (6) (c) of the Nigerian Constitution 1999 (as amended) provides that the judicial powers vested in accordance with the foregoing provisions of this section – shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

which they have the power to protect. Consequently, any government that fails to take sincere, serious and urgent precautionary measures to prevent environmental harm to its people thereby causing such people to lose their rights to life via preventable environmental mishaps, is an irresponsible government. Apart from being irresponsible for failing in its responsibility, such a government commits a crime. This is because, any act or omission by the government, which causes a citizen or a non-citizen to lose his/her life in an unconstitutional manner, I opine, is a crime, following the definition of offence in the Criminal Code Act.[59] It may not be murder due to the fact that the government officials may not intend death of the victims by their acts or omission; but, it should be construed anyway, as manslaughter because of their lack of intention to kill.[60] But then, the argument that nothing is an offence unless stated by a written law, and its punishment prescribed, will always override the above submission of ours.

It is very sad to note that the Nigeria's 'constitutional' responsibility to protect the environment is a mere fancy word which has no action. It is a pretentious proposition since the person who proposed it could not have meant it. Otherwise, how could the protection of the environment *vis a vis* the right to a healthy environment not feature in the fundamental rights under chapter IV of the constitution? The definition[61] of the

59. Section 2 of the Criminal Code Act CAP.77 L.F.N. 1990 ACT CAP. C38 L.F.N. 2004 provides that "An act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any Act, or Law, is called an offence".

60. Section 317 of the Criminal Code provides that a person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter.

61. Section 37 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act defines the word 'Environment' to include water, air, land and all plants and human beings or animals living therein and the inter-relationships which exist among these or any of them.

environment is not complete without human being or man included. One can say that human being is the environment and the environment is human being because both form part of each other. I cannot therefore see a reason the provision under section 20 of the constitution judicially unenforceable against the government. It is indeed bad news that the entire chapter II of the constitution which contains the fundamental objectives and directive principles of state policy is not justiciable.

COMPARATIVE ANALYSIS OF OTHER COUNTRIES' CONSTITUTIONS

For a better appreciation of the above constructive criticism of the Nigerian constitution, let us take a cursory look into the constitutional provisions of the constitution of other countries. The countries below have in one or the other similar provisions in their constitutions for environmental protection with Nigeria. However, they have moved on with the current global issues affecting the environment and the right of their citizens to life; they have more robust and richer provisions, which ensure better guarantee of their people's rights, hence, the call for Nigeria to reciprocate the same efforts for the sake of all and sundry. Some of these constitutions are as analysed below.

THE CONSTITUTION OF INDIA

India has woken up to the utmost reality that environmental deterioration could eventually endanger life of present and future generations. Therefore, the right to life has been used in a diversified manner in India.[62] It includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity

62. Cf. Razzaque, J. Human Rights and the Environment: the national experience in South Asia and Africa. Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 4. Available at: *http://www2.ohchr.org/english/issues/environment/environ/bp4.htm*. Accessed on July 4th, 2013 at 6:42 am.

and the right to livelihood. In India, this has been expressly recognised as a constitutional right. However, the nature and extent of this right is not similar to the self-executory and actionable right to a sound and healthy ecology prescribed in the *Constitution of the Philippines.*[63] *Article 21 of the Indian Constitution* states: 'No person shall be deprived of his life or personal liberty except according to procedures established by law.' The Supreme Court of India expanded this negative right in two ways in the following cases *Maneka Gandhi v. Union of India,*[64] and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[65]. Firstly, any law affecting personal liberty should be reasonable, fair and just. Secondly, the Court recognised several unarticulated liberties that were implied by article 21.[66] It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to a clean environment. [67]

In India, the link between environmental quality and the right to life was first addressed by a constitutional bench of the Supreme Court in the *CharanLalSahu v. Union of India.*[68] In *Subhash Kumar v. State of Bihar*[69], the Court

63. Section 16, Article II of the 1987 Philippines Constitution states: 'The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. This right along with Right to Health (section 15) ascertains a balanced and healthful ecology. See also, Antonio G.M. La Viña, 'The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case' (1994) RECIEL Vol 3, No.4, pg 246-252. See also the case of *Minors Oposa v. Sec. of the Department of Environment.63*
64. *AIR 1978 SC 597, 623-624.*
65. *AIR 1981 SC 746, 749-750.*
66. Directive principle such as equal pay for equal work , free legal aid, right to speedy trial, right to livelihood, right to education and DP relating to environment [Article 48-A] are read in conjunction with the fundamental rights.
67. Leelakrishnan, P. *Law and Environment.* India: Eastern Book Company, 1992. Pp. 144-152.
68. *AIR 1990 SC 1480.*

observed that the 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the court recognised the right to a wholesome environment as part of the fundamental right to life. [70] In *M.C. Mehta v. Union of India*,[71] the Supreme Court dealt with the problem of air pollution caused by motor vehicle operating in Delhi.[72] In general, the Indian courts have given the rights to life[73] as linked to right to a quality and

69. AIR 1991 SC 420/ 1991 (1) SCC 598

70. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment. This was reaffirmed in *M.C. Mehta v. Union of India (1998) 9 SCC 589*. The case concerned the deterioration of the world environment and the duty of the state government, under article 21, to ensure a better quality of environment. The Supreme Court ordered the Central government to show the steps they have taken to achieve this goal through national policy and to restore the quality of environment.

71. *(1991) AIR SC 813 (Vehicular Pollution Case); (1992) Supp. (2) SCC 85; (1992) Supp. (2) SCC 86; (1992) 3 SCC 25.*

72. It was a public interest petition and the court made several directions towards the Ministry of Environment and Forests. Decisions such as this indicate a new trend of the Supreme Court to fashion novel remedies to reach a given result, although these new remedies seem to encroach on the domain of the executive.

73. Another expansion of the right to life is the right to livelihood Article 41, which is a directive principle of state policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between article 41 and article 21 was established in the 1980's in the case of *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180. In the Court's view, 'Deprive a person of his right to livelihood and you shall deprive him of his life.....Any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21.' Also, in *Kirloskar Bros. Ltd v. ESI Corporation (1996) 2SCC 682*.Similar view applied in *State of Punjab v. Ram Lubhaya Bagga (1998) 4 SCC 117*. The court opined that the expression 'life' assured in article 21 has a much wider meaning which includes a right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to

healthy environment, a satisfactory interpretation to a very large extent.

THE CONSTITUTION OF BANGLADESH

It is pertinent to note that the Constitution of Bangladesh does not explicitly provide for the right to a healthy environment either in the directive principles or as a fundamental right. *Article 31* states that every citizen has the right to protection from 'action detrimental to the life liberty, body, reputation, or property', unless these are taken in accordance with law. It added that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law. If these rights are taken away, compensation must be paid. *Article 32* states: "No person shall be deprived of life or personal liberty save in accordance with law". These two articles together incorporate the fundamental 'right to life'. By implication, the right to life includes the right to a healthy environment capable of supporting the growth of a meaningful 'existence of life'.

In the case of *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others*[74], the Supreme Court of Bangladesh agreed with the argument presented by the petitioner, that the constitutional 'right to life' does extend to include right to a safe and healthy environment. In a more recent case, the Appellate Division and the High Court Division of the Supreme Court have dealt with the question in a positive manner. The Appellate

eliminate sickness and physical disability of the workmen. In this case, the court used the right to life to protect the health of the workmen by providing them with medical facilities and health insurance.

74 *(Unreported)* The case involved a petition against various ministries and other authorities for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the city of Dhaka. Cited by Razzaque, J. Op.cit.

Division, in the case of *Dr. M. Farooque v. Bangladesh,*[75] has reiterated Bangladesh's commitment in the 'context of engaging concern for the conservation of environment, irrespective of the locality where it is threatened."[76]

THE CONSTITUTION OF PAKISTAN

Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberty, save in accordance with the law. The Supreme Court in *Shehla Zia v. WAPDA,*[77] decided that article 9 includes 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'.[78] The human rights case of *The Employees of the Pakistan Law Commission v. Ministry of*

75. *(1997) 49 Dhaka Law Reports (AD)1.* The legality of an experimental structural project of the huge Flood Action Plan (hereinafter, FAP) in Bangladesh was questioned. The petitioner alleged that FAP is an anti-environment and anti- people project. That FAP is adversely affecting and injuring more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna.

76. Thus, the Court Per Chowdhury,J, (Para.101) decided and stated as follows: "Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life."

77. (PLD 1994 SC 693).

78. The petitioner questioned whether, under Article 9 of the Constitution, citizens were entitled to protection of law from being exposed to hazards of electro-magnetic field 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. In this case, Salem Akhtar, J. commented that "Under our Constitution, Article 14 provides that the dignity of man and subject to law, the privacy of shall be inviolable. The fundamental right to preserve and protect the dignity of man and right to 'life' are guaranteed under Article 9. If both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. "(Emphasis mine).

Works[79], dealt with the meaning of Article 9 of the Constitution.[80] In the case of *Amanullah Khan v. Chairman, Medical Research Council,*[81] the Supreme Court stated that the citizen could get protection under article 9 because right to life includes quality of life as well. Furthermore, Article 9 was given judicial imprimatur again in the case of *General Secretary, West Pakistan Salt Miners Labour*

79. *1994 SCMR 1548*

80 In this case, the Supreme Court of Pakistan held that: 'Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.'

81 *1995 SCMR 202* This was a human rights case against cigarette companies; the petitioner sought a ban on cigarette commercials on television. In his view, the western companies were unable to sell cigarettes in their own countries and they were aiming at the developing countries. He added that they were using the advertising to that end and this has resulted in catastrophic calamities in the form of cancer and heart disease. Similar arguments were put forward by the *Thailand-Restriction on Importation of Importation and Internal Taxes on Cigarettes (Thai Cigarette Case)* Panel report adopted on November 7, 1990, BISD/37/S/200. Also, in the *Voyage of Discovery Case (W.P No 4521 of 1999)* in Bangladesh, the petitioners (Bangladesh Cancer Society, Bangladesh Anti-drug Federation, Consumer Association of Bangladesh, Welfare Association of Cancer Care and Work for Better Bangladesh) argued that the activities of British American Tobacco violated the country's law (Tobacco Products Control Act 1988 and Ordinance of 1990) and government's health policy. The court granted a stay on all campaign activities of the 'Voyage of Discovery'. See *Prof. Nurul Islam (Cigarette Advertising Case) v. Bangladesh 52 DLR 2000 413.* In *India, K. Ramakrishnan v. State of Kerala [AIR 1999 Kerala 385]*, the court held that smoking of tobacco in any form in public places is illegal, unconstitutional and violative of Article 21. Smokers pose a serious threat to lives of innocent non-smokers who get themselves exposed to tobacco smoke, thereby violating their right to life guaranteed under article 21 of the Constitution of India.See also, *Pakistan Chest Foundation v. Government of Pakistan* (1997) CLC 1379.

Union (CBA) *Khewara, Jhelum v. The Director, Industries and Mineral Development*[82] where the court stated that:

> *"The word 'life'...cannot be restricted to a vegetative life or mere animal existence. In hilly area where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean persons residing in another part of the country where water is in abundance, does not have such right. The right to have unpolluted water is the right to every person wherever he lives."*(Emphasis mine).

The cases discussed above show that the Pakistan judiciary has firmly established a right to healthy environment.[83]

CONSTITUTION OF SOUTH AFRICA

Section 11 of the Constitution of Republic of South Africa,deals with the right to life, which is a non-derogable right. Under *Section 24*, everyone has the right to an environment that is not harmful to health or well-being. In addition, this section

82. *Punjab, Lahore 1994 SCMR 2061.* In this case, the petitioner sought to enforce the right of the residents to have clear and unpolluted water. They contended that if the miners were allowed to continue their activities, which were extended in the water catchment area, the watercourse, reservoir and the pipelines would get contaminated. The Court held in favour of the petitioner and said that if the water becomes contaminated, it would cause serious threat to human existence and the general public would be under serious threat.

83. Noteworthy is the fact that the Pakistani Judiciary has consistently mentioned and applied Indian cases where the Indian judiciary prioritised environmental and human rights aspects For example: Case *General Secretary, West Pakistan Salt Miners Labour Union*(CBA) *Khewara, Jhelum v. The Director, Industries and Mineral Development*, Punjab, Lahore 1994 SCMR 2061. In *Shehla Zia v. WAPDA* (PLD 1994 SC 693), the SC applied Indian cases such as: *R.L. & E.K. v. State of UP* (AIR 1985 SC 652) and *M.C. Mehta v. Union of India* (AIR 1988 SC 1115 and AIR 1988 SC 1037).

provides that the government must act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society.[84] Under the Constitution, the state has a duty to protect, promote, respect and fulfill socio-economic rights. The case of *Government of the Republic of South Africa v. Grootboom and others*[85] is quite instructive. Section 24 demonstrates that right to a healthy environment is part of the socio-economic right of South Africa. This second generation right is often applied by the court to give a meaningful interpretation of right to life.

To ensure that the environmental rights under the Constitution are protected, and that the government follows transparent and reasonable procedures, there are two more fundamental rights. *Section 32* deals with right of access to information and *Section 33* deals with right to a just administrative decision. Section 32 can be used by the community groups to find out more about harmful industrial development, which will have a detrimental effect on their life and well-being. According to the Constitution, these rights are not absolute, and may be limited if the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom (section 36 of the Constitution).

84. Section 24: Everyone has right to (a) to an environment that is not harmful to their health or well-being: and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

85. *[2000 (11) BCLR 1169 (cc)]*. This case dealt with right to adequate housing and shelter. The Constitutional court emphasised the need to have a close relationship between the right access to adequate housing and other socio-economic rights in the Constitution.

From the above comparative study of other countries' constitutions, it is evident that the Nigerian Constitution needs to be stepped up in the interest of the lives of Nigerians and the life of the Nigerian environment.

THE CURRENT STATUS OF RIGHTS TO LIFE AND THE ENVIRONMENT

Looking at the non-justiciability of the provision of Section 20 of the Constitution, one might be tempted to conclude that there is no hope. However, by virtue of *sections 12 (a) and 19(d)* of the Constitution, it can be seen that Nigeria has imbibed the substantive right to a healthy environment provided for under Article 24[86] of the African Charter on Human and Peoples' Rights by ratifying the same. Thus, *Section 33 and 34* which guarantee fundamental human rights to life and human dignity respectively, have also been argued to be linked to the need for a healthy and safe environment to give these rights effect. Many argue that this right to life along with section 20, confirm a right to a healthy environment.

In *Gani Fawehinmi v. Abacha,*[87] the Court of Appeal held that the human rights in the African Charter on Human and People's Rights having been enacted into Nigerian national law, was superior to a decree. The African Charter 1981, article 24, proclaimed that the right to a satisfactory environment for development is a human right. The decision in this case is to the effect that article 24 of the charter can be relied upon by a Nigerian to enforce his environmental right instead, of relying on section 20 of the 1999 Constitution, which is not justiciable. In the case of *Kokoro-Owo v. Lagos State*

86. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Article 24 provides thus: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

87. (1996) 9 NWLR part 475, p 710

Government,[88] the court also recognised that environmental degradation can give rise to a violation of human rights.

Furthermore, Ebobrahhas contended that even though it ousts the jurisdiction of the courts with respect to its Chapter II, the Nigerian Constitution does not prohibit justiciability of social, economic and cultural rights and such rights can be litigated upon, depending on the normative basis chosen by a prospective litigant. He further submitted that that the African Charter on Human and Peoples' Rights constitutes a veritable normative framework for the realization of certain socio-economic rights in Nigeria, and that a claim brought under this Charter can be vindicated either before the national courts in Nigeria or the ECOWAS Community Court of Justice.[89] Citing Uwaifo JSC[90], he submitted that 'the Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. ... It simply means that all ...Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to any one of them through appropriate enactments as occasion may demand.'

According to Otubu, this is a sound academic view-point but since no law has been enacted 'to give expression to any one of them', the enforceability of these rights today remains with future legislation.[91] Thus, environmental, rights when linked to the right to life, can comfortably and validly be contended in the courts successfully.

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88. (1995) 6 NWLR 760 at 765.
89. Ebobrah, S.T. The Future of Economic, Social and Cultural Rights Litigation in Nigeria. *CALCALS Review of Nigerian Law and Practice Vol. 1(2) 2007. p.48*
90. *A.G. Ondo State v A G. Federation, (2002) 9 NWLR (Pt 772) 222 at 391.*
91. Otubu, A. Fundamental Right to Property and Right to Housing in Nigeria: a Discourse. *ActaUniversitatisDanubius Journal vol. VII, no. 3, 2011 pp. 25-42 at 38.*

CONCLUSION AND RECOMMENDATIONS

The very essence of this research is to make some useful recommendations, which if well taken by the government; we sincerely believe, will assist in solving some of the various problems that we have analysed here. However, we do not claim to have all the answers to environmental issues that threaten the right to life in Nigeria; and this work was not embarked upon to solve all the problems. But we believe it will inspire the move towards the right direction in protecting the environment in general and the life of man in particular.

We must admit that the situation has certainly improved in Nigeria, though many might argue less than one would hope for in the transition to more democratic rule.[92] Nigeria has made so many laws on environmental management.[93] Theoretically, the laws appear laudable, but in practice, leave little to be desired, as the provisions enshrined in the various instruments of intervention are rarely enforced; due to inadequate human resource; inadequate and mismanaged funds, low degree of public awareness of environmental issues; corruption on the part of enforcement officers, among others.[94] Furthermore, though Nigeria is signatory to a large number of international and sub-regional treaties, it has not promulgated the constitutionally mandated laws at the national level to give legal effect to most of these international treaties in the country.[95]

Having identified the foundational weakness of the right to life in Nigeria as occasioned by the legal comatose state of the

92. Osofsky, H.M., "Climate change and Environmental Justice: Reflections on Litigation Over Oil Extraction and Rights Violations in Nigeria", *Journal of Human Rights and the Environment, Vol. 1 No. 2, 2010, pp. 189-210 at 210.*

93. Egun, N.K.,"Environmental Responsibility: Nigerians How Far?", *Journal of Applied Technology in Environmental Sanitation, 1:2,* 2011, *143-147.*

94. Okafor, E. E., "Hassan R. A. and Doyin-Hassan, A. Environmental Issues and Corporate Social Responsibility: The Nigeria Experience", *Journal of Human Ecology, Vol. 23:2,* 2008, *101-107.*

95. Okoroduda – Fubara M. T., *Law of Environmental Protection: materials and Text* (Ibadan: Caltap Publication (Nigeria) Limited, 1998) P.6.

right to environment, we sincerely propose an urgent amendment of section 20 of the constitution. It is our strong position that even if amending the entire Chapter II will hamper government activities, at least the section, which provides for the protection of the environment, should be made a fundamental right. This is because, in the real sense of it, the right to a healthy environment is more holistic than the right to life. Only living people talk about other rights! Only people who are alive discuss standard of living. People residing in an unhealthy, unfavorable and harsh environment are not living; they are merely breathing.

The recent decision of the Court of Justice of the Economic Community of West African States (ECOWAS Court), cannot be overlooked in this research. In the case the *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*[96], the Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution. The Court considered certain issues raised by the Federal Republic of Nigeria, notably – (1) that the Court lacks jurisdiction to examine the alleged violations of the said Covenants; (2) lack of *locus standi* on the part of the plaintiff; (3) the Plaintiff's failure to produce the Amnesty International report at the time of lodgment of the substantive application; and (4) that certain facts pleaded by the Plaintiff have come under a three-year statute bar. The rulings delivered by this court on these issues are instructive enough, and I respectfully, urge our courts to so emulate.

The court held that the new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05

96. Suit No. ECW/CCJ/APP/10/11.

of 19 January 2005 provides: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State ". This provision, which gives jurisdiction to the Court to adjudicate on cases of human rights violation, results from an amendment made to the 6 July 1991 Protocol A/P1/7/91 on the Community Court of Justice. The raison d'être of this amendment is Article 39 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which provides: "Protocol A/P1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights...".

> *The court further held that "When the Member States were adopting the said Protocol, the human rights they had in view were those contained in the international instruments, with no exception whatsoever, and they were all signatory to those instruments. Thus attests the preamble of the said Protocol as well as paragraph (h) of its Article 1, which stipulates the principles of constitutional convergence common to the Member States, which provides: The rights set up in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual organization shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights". Thus, even though ECOWAS*

> *may not have adopted a specific instrument recognizing human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African. We believe that the above decision is a step in the right direction towards environmental right and justice.*

Finally, humbly call on Nigerian courts, to relax the rule relating to the institution of joint action. This would assist the victims of environmental degradation to pool resources together in order to challenge the activities of the major actors involved in pollution of the environment. Nigerian courts should also be ready and willing to adopt the human right approach to the protection of the environment since environmental degradation has a high impact on the enjoyment of the basic rights. In this regards, we recommend that Nigerian courts should emulate the courts in other jurisdiction cited above such as India, Pakistan, Philippines and South African in their approach to environmental matters.

BALANCING THE SAME SEX MARRIAGE (PROHIBITION) ACT, 2014 WITHIN FUNDAMENTAL HUMAN RIGHTS IN NIGERIA

By

DR. Y. A. FOBUR*

ABSTRACT

This discourse examines the Same Sex Marriage (Prohibition) Act, 2014 within the context of the constitutional guarantees of the rights to private and family life, freedom of association and freedom from discrimination conferred upon Nigerians who are homosexuals or lesbians. These fundamental rights conferred upon Nigerians who are homosexuals or lesbians are considered within the context of the qualifications imposed upon them by the same constitution that creates and confers same upon them. In essence, the discourse considers whether the Same Sex Marriage (Prohibition) Act is unconstitutional by infringing on the fundamental rights of Nigerian homosexuals or lesbians or the rights created by the constitution are qualified rights that the state has the right to abridge in the interest of public peace, public morality, public safety, public defence, public order and public health. Furthermore, it examines whether fundamental human rights in Nigeria could be abridged for the purpose of protecting the rights and freedoms of other Nigerians especially, who are in the majority.

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INTRODUCTION

Same-sex marriage also known as gay marriage is a marriage between two people of the same biological sex and/or gender identity. Legal recognition of same sex marriage or the possibility of performing a same sex marriage is sometimes referred to as marriage equality or equal marriage by its exponents while the legalization of same sex marriage is characterized as redefining marriage by those opposed to it.

The first laws in modern times enabling same sex marriage were enacted during the first decade of the 21st Century and vary from one national jurisdiction to the other. The introduction of same sex marriage laws has varied by jurisdiction, being variously accomplished through either legislative change to already existing marriage laws, court rulings based on constitutional guarantees of equality, or by direct popular vote i.e. through a ballot initiative or a referendum. No doubt, the recognition of same sex marriage as an institution is a political, social, human rights and civil rights issue, as well as a religious issue. In many nations around the globe, debates continue to arise about the legality and justification for same sex marriage, or civil union[1].

1. Same sex marriage is recognized in many parts of the world and applicable to states as a whole or in some parts of some states. In the world today same sex or gay marriage or civil union is recognized from the North, East, West and South of the globe. For instance it is recognized in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Mexico, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, the United States, Israel and Uruguay for now.
In the US for instance, same sex marriage is recognized in some states within it and by the federal government. Seventeen states and the District of Columbia have legalized same sex marriage and civil union. Eight Native American tribal jurisdictions issue marriage licenses for same sex couples. The state of Oregon recognizes same sex marriage performed in other jurisdictions. Limited recognition has been granted to out of state same sex marriages or civil unions in the states of Ohio, Missouri and Colorado.

The guarantee and protection of fundamental human rights in Nigeria has a long history. From the 1960[2], 1963, 1979 to the 1999 Constitutions of the Federal Republic of Nigeria, fundamental human rights have been enshrined in them to protect and defend Nigerian citizens from abuse of power by either governments or its agents as well as other fellow citizens[3]. These rights have been conferred upon all citizens of Nigeria and all authorities are under obligation to observe and enforce the observance of fundamental human rights. Pursuant to the determination to observe and enforce the observance of fundamental rights, Nigeria is signatory to treaties both under the auspices of the United Nations and the African Union[4].

The movement to obtain civil marriage rights and benefits for same sex couples in the United States began in the 1970s, but became more prominent in American politics in 1993 when the Hawaii Supreme Court declared the state's prohibition to be unconstitutional in the case of Baehr vs Lewin, 1993, HSCR, 1076, at p. 1081 On May 17, 2014 Massachusetts became the first U.S. State and the Sixth jurisdiction in the world to legalize same sex marriage following the Supreme Court's decision in Goodridge vs Dept of Public Health 2014, MSR, 158 six months later. From the beginning the 21st Century, public support for same sex marriage has grown considerably around the globe, especially in the US. National polls conducted since 2001 in the US, show that majority of Americans support legalizing it. On May, 2012 President Barak Obama became the first sitting US President to publicly declare support for the legalization of same sex marriage or civil union; while the states of Maine, Maryland and Washington became the first states to legalize same sex marriage or civil union through popular votes on November 6, 2012.

2. The Willink's Commission Report of 1958/1959 had recommended provisions for the protection of human rights under the 1960 Nigeria's Independence Constitution.
3. See Sections 20-28 of the 1963 Constitution of the Federal Republic of Nigeria. See also Sections 30 – 42 of the 1979 Constitution of the Federal Republic of Nigeria. See also Section 30 – 43 of the 1999 Constitution of the Federal Republic of Nigeria as amended.
4. Nigeria is a signatory to the United Nations Charter 1945, the United Nations Declaration on Human Rights 1948, the International Covenant on Civil and Political Rights, 1966, International covenant on Economic, Social and Cultural Rights 1966 as well as the African Charter on Human and Peoples Rights 1981, and came into force in 1986. Nigeria has only ratified these

Nigeria's National Assembly has the primary role of enacting laws for the peace, order and good government of the Federal Republic of Nigeria on matters which are on the Exclusive Legislative List[5]. In January, 2014 the National Assembly enacted the Same Sex Marriage (Prohibition) Act, 2014 which was assented to by the President of the Federal Republic of Nigeria and thus, becoming an Act of the National Assembly. The Act, it would appear, has far reaching consequences on the fundamental human rights and obligations of some Nigerians such as homosexuals, lesbians etc from marriage between persons of same gender, solemnization of same and for other related matters.

The provisions of the Same Sex Marriage (Prohibition) Act, 2014 have some implications for the fundamental rights of Nigerians, who may be homosexuals or lesbians or even those that are not, but are indirectly involved in activities of homosexuals or lesbians in view of their fundamental rights to freedom of private and family life[6], freedom of thought, conscience and religion[7], freedoms of peaceful assembly[8] and association to freedom from discrimination[9].

This discourse x-rays the Same Sex Marriage (Prohibition) Act, 2014, its implications for fundamental rights to private and family life, thought, conscience and religion to freedoms of peaceful assembly, association and from discrimination as enshrined in the 1999 Constitution of the Federal Republic of Nigeria (as amended). It further examines whether or not the

conventions but only domesticated the African Charter on Human and Peoples Rights 1981 at the municipal level.

5. Section 4 (3) of the 1999 Constitution of the Federal Republic of Nigeria as amended.
6. Section 37.
7. Section 38.
8. Section 40.
9. Section 42.

same sex marriage or civil union entered into between persons of the same sex in Nigeria and same shall not be recognized as entitled to the benefits of a valid marriage[21].

A marriage contract or civil union entered into between persons of the same sex by virtue of a certificate issued by a foreign nation is void in Nigeria and any benefit accruing there from by virtue of the certificate shall not be enforced by any court of law. [22] The Act further prohibits the solemnization (celebration) of same sex marriage or civil union in places of worship including churches and mosques[23]. The Act further declares that only marriages contacted between man and woman (heterosexual marriage) are valid in Nigeria[24]. It specifically prohibits the registration, sustenance, meetings and processions of gay clubs, societies and organizations in Nigeria[25]. Though the section restrictively uses the term 'gay', it is suggested that the provision of section 4 applies with full force to the lesbian, bisexual and transgender. The same section prohibits direct or indirect public show of same sex amorous relationships[26].

The Act further provides for offences and penalties under the Act. Persons who engages in same sex marriage or civil union are liable, upon conviction, to 14 years imprisonment[27]. Any person who registers, participates in their organizations, meetings or procession is liable, on conviction, to 10 years imprisonment[28].

20. 7(b).
21. 7(0).
22. Section 1 (1).
23. Section 1 (2).
24. Section 2 (1). No certificate issued to persons of same sex in a marriage or civil union shall be valid in Nigeria under Section 2 (2) of the Act.
25. Section 3.
26. Section 4 (1).
27. Section 4 (2).
28. Section 5 (1).

Any person or group of persons that witnesses, abet and aid the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and shall be liable on conviction to a term of 10 years imprisonment[29]. Any state high court in Nigeria has original jurisdiction to try any person charged with any of the offences created under the Act[30].

By the combined effects of Section 5 (3) of the Act, any one who advocates registration of homosexual clubs, organizations or societies may be liable to being charged under the Act; even though a person may not be homosexual, lending support to the operation, sustenance of homosexuals organization has become an offence. Even if an individual does not have homosexual orientation, it is now a crime to support and/or participate in meetings or processions of homosexuals

THE LEGAL STATUS OF FUNDAMENTAL RIGHTS IN CONTEMPORATY JURISPRUDENCE

No doubt the protection and enforcement of fundamental human rights have been given prominence under the United Nations era[31]. It has been taken to a level that effectively challenges states sovereignty where there is evidence of their abuse by the state. It has become the responsibility of not only the states but the global community to promote, protect and defend human rights. Violation of fundamental human rights by any state has been elevated to a position of justification for intervention in the internal affairs of that state[32]. The claims by states of the

29. Section 5 (3).
30. Section 5 (2).
31. Articles 55 and 56 of the UN Charter impose upon the United Nations and its members the legal obligations to promote respect for and observance of human rights.
32. Y.A. Fobur "The UN Security Council and the politics of Intervention in Regional Conflict. A case study of the Intervention in the Libyan Crisis "in

concept of state sovereignty or domestic jurisdiction to independently administer their affairs is no longer acceptable in international law as justification for human rights abuse. In the words of Magdalena, S.:

In more recent years, this argument has lost ground when human rights are at stake. The Second World War is a turning point in the way the international community regards its responsibility for the protection of and respect for human rights. The longstanding principle of state sovereignty vis-à-vis nationals has in the course of the years been eroded. The UN Charter explicitly proclaimed human rights to be a matter of legitimate international concern[33].

It is now settled in international law, that international action can be taken against a state if there is evidence of abuses of human rights under the cover of domestic jurisdiction or internal affairs whether or not it causes regional or global insecurity[34]. The doctrine of state sovereignty has since the Second World War been qualified in two ways in the words of Magdalena:

First how a state treats its own subject is nowadays a legitimate concern of the international community. Secondly, there are now superior international standards established by common consent which may be used for appraising standards of domestic laws, and the actual conduct of sovereign states within

Bayero University Journal of Public Law (BUJPL) Vol. 2 No. 2, December, 2010, 82. See also Timothy F. Yerima" Balancing State Sovereignty and Human Rights Protection under the African System. The Local Remedies Rule in focus in Human Rights Review Vol. 2, No. 2. July, 2011, 425. See also the Tunis Morocco Nationality Decree Case (1923) PCIJ Series B. No. 41. See further the case of *Procutor v. Tadic* (1996) 35 TLM 35.

33. Magdalena S. et al, Human Rights Reference Handbook (Cuidad Colon Costarica: University for Peace 2004), at 15.

34. Brownlie, I. Principles of Public International Law 4th Edn, 1990, 287

their territories and in the exercise of their internal jurisdiction[35].

Thus, from the examination of the legal status of human rights under the United Nations regime, human rights issues cannot be deemed to be matters which fall essentially within the domestic jurisdiction of any state and international action in respect of such matters cannot be seen as affront to the doctrine of state sovereignty. Any action of a state such as Nigeria based on capricious violations of human rights cannot be justified. Therefore, there is the need for states to balance human rights protection and the concept of domestic jurisdiction or state sovereignty under the present UN regime. More importantly, where the breach of fundamental rights by a state or states constitute breach of, or threat to peace or acts of aggression, the global community must intervene. This task must be clearly understood and practiced by all nations as the days of absolute or blind application of the doctrine of state sovereignty or domestic jurisdiction are gone for good. The words of Boutrous Boutrous Ghali (one time Secretary General of the United Nations) sums it all:

The foundation-stone of UN approach to human security is and must remain the state. Respect for its fundamental sovereignty and insecurity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed. Its theory was never matched by reality.

It is the task of leaders of states today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more independent world[36].

35. Magdalena, op. cit. See also Shaw, MN International Law (5th Edition) Cambrige: Cambrige University Press, 2003, 254.
36. Magdalena, op. cit. 26.

FUNDAMENTAL HUMAN RIGHTS GUARANTEED UNDER THE NIGERIAN CONSTITUTION

The 1999 Constitution as amended guarantees certain fundamental rights to Nigerian citizens. These rights are fundamental to Nigerian citizens that may not be arbitrarily taken away by any person or authority save by the due process of law. The rights being examined within the context of this discourse are the rights which would appear to be in conflict either directly or by implication, with the Same Sex Marriage (Prohibition) Act. These rights include the right to private and family life, the right to peaceful assembly and association and the right to freedom from discrimination. Some of these rights are examined hereunder.

RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION

The constitution confers on every person and in particular Nigerian citizens the right to assemble freely and associate with other persons, and in particular; to form or belong to any political party, trade union or any other association for the protection of their collective interests[37].

By virtue of section 40 of the 1999 Constitution, every person shall be entitled to assemble freely and associate with other persons and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest.

In words of Justice Adekeye, JCA in the case of *IGP v. ANPP*[38]; the rights to freedom of assembly and freedom of expression are the bone of any democratic form of government. Besides their embodiment in the supreme law of the land, the 1999 Constitution, and the African Charter on Human and

37. Section 40.
38. (2007) 18 NWLR (Pt. 1066) 457, 494-495, paras: H-A.

People's Rights adopted as Ratification and Enforcement Act Cap. 10, Laws of the Federation of Nigeria, 1990, a plethora of decisions of Nigerian courts have endorsed same.

The rights conferred under the section is qualified by the constitution. Its provides that the provisions of the section shall not derogate from the powers conferred by the constitution on the Independent National Electoral Commission with respect to political parties to which the commission does not accord recognition. This qualification was interpreted in the case of *Mbanefo v. Molokwu*[39] where Justice Tsamiya, JCA held ***inter alia:***

The right given under section 40 of the 1999 Constitution is not absolute as same can be tampered with under a law or circumstance reasonably justifiable in any democratic society. Thus, where a person voluntarily joins a political party and the party makes rules governing the conduct of its members (its constitution) which infringes on a member's right to a associate with another political party, such a member cannot challenge his party's directive as a breach of his constitutional right. This is the position in a political party.

RIGHT TO FREEDOM OF MOVEMENT

Every citizen of Nigeria is entitled to move freely through out Nigeria and to reside in any part threat, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom[40]. In the case of *Obasanjo v. Yusuf*[41] the court held *inter alia* that every Nigerian citizen has a right to move freely and reside in any part thereof. However, the constitution goes on to stipulate that nothing in it shall invalidate any law that is reasonably justifiable in a democratic society imposing

39. (2009) 11 NWLR (Pt. 1153) 431, 451 para. F-H. See also *Rimi v. PRP* (1980) 2 NCLR 763.
40. Section 40.
41. (2004) 9 NWLR (Pt. 877) 144.

restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria[42] or any other country to be tried outsider Nigeria for any criminal offence[43] or to undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty[44].

FREEDOM FROM DISCRIMINATION

The constitution confers upon every citizen of Nigeria of particular community, ethnic group, place of origin, sex, religion or political opinion shall not by only that reason[45] to be subjected either expressly by, or in the practical application of, any law in force in Nigeria many executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religion or political opinion are not made subject;[46] be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinion[47]. Equally no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth[48].

The right to freedom from discrimination enshrined in the constitution was exhaustively interpreted by the Court of

42. Section 4 1 (1).
43. Section 41 (2) (a).
44. Section 41 (2) (i)
45. Section 41 (2) (b) (ii).
46. Section 42 (1).
47. Section 42 (1) (a).
48. Section 42 (1) (b).

Appeal of Nigeria in the case of *Asika v. Atuanya*[49] where Justice Denton – West, JCA held *inter alia:*

By section 42(1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 as citizen of Nigeria of a particular community, ethnic groups, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person, be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religions, or political opinion are not made subject; or, be accorded either expressly by or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or disadvantage that is not accorded to citizens of Nigeria if other communities, ethnic groups, places of origin, sex, religions or political opinions. No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

In this case the court was denouncing the denial of the Appellants of the right to acquire and own immovable property of their deceased father just because they were women. The court specifically referred to section 43 of the Constitution which empowers every citizens of Nigeria the right to acquire and own immovable property anywhere in Nigeria. Justice Denton – West, JCA, in **ASIKA's** case supra went on to restate the position of the law on non discrimination as follows:

> *Again one may ask why in some parts of Nigeria women are by subordinate laws and customs deprived of ownership and right of inheritance to acquire and own immovable property. Why are the women subjected to this disability or deprivation by reason only of*

49. (2008) 17 NWLR (Pt. 1117) 484, 513 – 514, paras. G – H.

their feminine attribute? The constitutional provisions are quite clear and unambiguous. Despite the luck of ambiguity in the Constitution. Nigerian women in certain parts of Nigeria are not entitled to inherit any landed property as was envisaged in this appeal, as and same could be gleaned from the proceedings, the statement of claims, the statement of defence and indeed, the judgment itself. In the judgment even though the learned trial Judge had found in favour of the appellants, he nevertheless refused to grant them the reliefs sought on the grounds that if same is granted it could cause or wreak injustice to the respondent[50].

RIGHT TO PRIVACY OF LIFE

The privacy of Nigerian citizens, their homes, correspondence, telephone conversations and telegraphic communications is guaranteed and protected under the constitution[51]. The privacy of life within the context of the constitution includes the freedom to engage in any form of marriage that is lawful by Nigerian legislation.

The right to privacy of Nigerian citizens was considered by the court in the case of *Inec v. Action Congress*[52] where the 2nd Respondent in the petition was to be compelled to disclose the person he voted for in the election which was the subject matter of the appeal before the court. The court held ***inter alia*** that the 2nd Respondent's right to privacy would have been infringed if

50. PP. 513 – 514. paras. G – B.
51. Section 42 (2).
52. (2009) 2 NWLR (Pt. 1126) 524.

he were to be compelled to disclose the candidate he voted for in the election.

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief; and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance[53]. No person attending any place of education shall be required to receive religious instructions or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own or a religion not approved by his parent or guardian[54]. The right includes freedom for one to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest one's religion as belief in feeding, practice, worship and observance.

The exercise of this right has been very controversial in Nigeria. Starting from the case of *Bishop Okogie v. The President, Federal Republic Of Nigeria*[55] where 'Bishop Okogie challenge an Act of the then National Assembly regulating the establishment of private and public schools in Nigeria. The court nullified certain sections of the Act on the grounds that they offended the Applicant's right to propagate his religion

53. Section 37.
54. Section 38 (1).
55. (1980) 1 NCLR 281. For instances, in Osun and Lagos states, students and parents of some students have approached the courts over the ban on the usage of hijab (veil) used by Muslim female students in schools. The decisions of the courts have been contradictory. While the court in Osun State upheld the validity of the usage the courts in Lagos State held that the ban of an the usage of the hijab (veil) did not amount to denial of the rights of the rights of female students to practice their religion.

through the establishment of private schools. Hence, there have been other similar cases under the 1999 Constitution where people have challenged one act or omission of government as encroaching on their rights to freely practice their religion.

No religious community or denomination shall be prevented from providing religious instructions for pupils of that community or denomination in any place of education maintained wholly by that community or denomination[56]. Provided nothing in section 38 of the Constitution shall entitle any person to form, take part in the activity or be a member of a secret society[57].

IMPLICATIONS OF THE SAME SEX MARRIAGE (PROHIBITION) ACT, 2014 VIS-À-VIS FUNDAMENTAL HUMAN RIGHTS

A lot have been written and said about the implications of the Same Sex Marriage (Prohibition) Act, 2014 upon fundamental human rights violations since the bill was proposed in the National Assembly and after the passage of the Bill by the National Assembly and its assent to by the President. From the United Nations to the U.S, Britain and the European Union, there were calls on Nigeria not to pass the bill into law. The European Union had threatened to withdraw aid to Nigeria if it dared pass the bill into law. The backbone of the arguments of the opponents of the Act have been that it infringed the fundamental human rights to their private and family lives, freedoms of thought, conscience and religion, rights to peaceful assembly and association, freedoms of association and from discrimination of some categories of Nigerians who are affected by the Act

56. Section 38 (2).
57. Section 38 (3)

The exponents of same sex marriage however, make series of arguments in support of their stance. Writers such as Gail Methabane[58] liken prohibition on same sex marriage especially in the US to past US prohibitions on interracial marriage. while Fernando Espuetas[59] argues the same sex marriage be allowed because it extends civil rights to a minority group. He argues that many same sex couples want the right to legally marry because they are in love and would want to honour their relationships in the greatest and best way society has offered; by making a public commitment to stand together in good and bad times, through all the joys and challenges family life brings. It has further been argued against the Act that even if it is conceded that laws tend to regulate behaviour on the basis of the standards acceptable to the majority at any point in time, the law should not be discriminatory in any way.

The enactment of the Same Sex Marriage (Prohibition) Act, 2014 may be described as a comprehensive assault on the right of association and peaceful assembly of homosexuals and those who may support their right to enjoy fundamental freedoms (of association and expression) as well as a direct challenge to the foundation and survival of Nigeria's constitutional democracy. The exponents of the Act further argue that rather than the state being preoccupied with regulating and criminalizing purely personal voluntary relationships among adults, to the extent of attacking fundamental rights of association and expression, the state should become concerned with fighting corruption which destroys the capacity of the state to attend to the well being of Nigerian citizens which may also partly be at the root of social processes leading to varied orientations in sexuality[60].

58. The Weekly Standard. May 5, 2013. p. 16.
59. Commentary: "Latinos should see Gay Marriage as a civil right – CNN" CNN November 7, 2008.
60. *Ibid*

The opponents of same sex marriage ground their opposition to the institution on religious concerns, parenting concerns, concerns that changes on the definition of marriage would lead to the inclusion of polygamy or incest, and in natural law reasoning[61]. They further argue that legalizing same sex marriage would convey a societal approval of homosexual lifestyle, which the holy books of Quran and Bible call sinful and dangerous both to the individuals involved and to society at large[62]. They further argue that children do best when they are raised by father and mother and that legalizing same sex marriage therefore, is contrary to the best interest of children[63]. They further argue that redefining marriage to include same sex relationships would have harmful effects on biological family, children's rights, and social welfare and eventually lead to the legalization of polygamy and polyandry or group marriage[64].

DEROGATION FROM HUMAN RIGHTS BASED ON ANY LAW REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY.

It would appear that the view held by the exponents/proponents of the Act has the support of the present state of the law in Nigeria. The constitution provides for circumstances under which fundamental human rights could be derogated from according to law. It provides:

Nothing in Sections 37, 38, 39, 40 and 41 of the Constitution shall be invalidated by any law that is reasonably justifiable in a democratic society

(a) In the interest of defence public safety, public order public morality or public health; or

61. George et al., Robert, P. "What is Marriage?" Harvard Journal of Law and Public Policy. 2014, 16.
62. *Ibid.*
63. *Ibid.*
64. *Ibid.*

(b) For the purpose of protecting the rights and freedom of other persons[65].

The jurisprudence on the doctrine of the law being reasonable justifiable in a democratic society to qualify fundamental rights varies from one jurisdiction to the other. The phrase is not defined under Nigeria's law but any legislation that is in interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of others is reasonably justifiable under the constitution. The courts in Nigeria have also not specifically interpreted the extend and scope of the phase either.

The jurisprudence from the African Charter on Human and Peoples Rights, 1981 as enforced by the African Commission to the European Convention on Human Rights, 1950 as enforced by the European Court of Human Rights to the United Nations Declaration on Human Rights, 1948 envisaged that fundamental human rights established therein could be derogated from. The African Charter on Human and Peoples Rights, 1981 provides as follows on the derogation of the rights and freedoms created by it:

The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest[66].

In the same vein, most of the rights established by the European Convention on Human Rights contain circumstances under which fundamental rights could be derogated from. It provides *inter alia* that there shall be no interference by public authority with the exercise of any of the rights enshrined under the Convention except such as is in accordance with the law and is necessary in a democratic society in the interests of national

65. Section 45.
66. Article 27 (2) of the African Charter on Human and Peoples Rights, 1981 which Nigeria ratified in 1986.

security, public safety or the economic well being of the country for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedoms of others[67].

The Universal Declaration of Human Rights, 1948 also makes qualifications for the enjoyment of human rights established by it. It provides:

In the exercise of his rights and freedoms, every one shall be subject only to such limitations as are determined by law sorely for the purpose of securing due recognition and respect for the rules and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society[68].

The European Court of Human Rights in the *Hassan And Chaush v. Bulgaria*[69] has held that the right to freedoms of thought, conscience and religion are not absolute and that, the state could legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the impacting of information and ideas, judged to be incompatible with the respect for the freedom of thought, conscience and religion of others. Similarly, in the case of *Gunduz v. Turkey*[70] could held that the Applicant's brand of Islamic propagation was capable of causing disaffection not only amongst Muslims but Christians as well and thus, the state prohibition of his preaching did not amount to a denial of his freedom of thought, conscience and religion as the prohibition law as reasonably justifiable in a democratic society.

Thus, the law on derogation from fundamental rights is universal save that different phrases have been used in the various laws in most jurisdictions that established those rights.

67. Article 8 (2) European Convention on Human Rights.
68. Article 29 (2) The Universal Declaration of Human Rights.
69. No. 48420/10, ECHR 2013, 231.
70. No. 35071/97, ECHR 2013, 148.

Nigeria's law on derogation on human rights is thus valid as there is no inconsistency between it and any of the provisions of the African Charter on Human and Peoples Rights, 1981 which it has domesticated and bound by it.

It is the considered opinion of this author that the Act criminalizing same sex marriage or civil union in all their ramifications in Nigeria is reasonably justifiable in a democratic society such as Nigeria meant to protect and defend the common interests of defence, public morality, public safety, public order and health of Nigerians. The Act is also meant to protect and defend the rights and freedoms of other Nigerians who are not engaged in homosexuality.

Laws in most countries of the world have always been based on majority opinion, morality or votes which are deemed to be the opinions of the majority of citizens of every state; Nigeria inclusive. The nexus between law and morality cannot be effectively divorced. This is because law is taken to be a reflection of the morality of every society. Law may have the problem of compliance and enforcement were it not based on the common morals of the state or society it is meant to be applicable to. There is a world of difference between the common morals that exist in Nigeria and those of the West led by the United States, Britain, France etc. In the words of Rev. Kaigama:

> *Nigeria is an independent country. We have our ethical liberty to decide what is good for us. We have gone beyond the period of colonialism when everything was imposed on us. As a sovereign nations, we have a right to determine our present and future lifestyles.*

This is what Nigeria has done through the National Assembly and signed by the president of our country so, we should have no apology to anybody outside Nigeria. This is our country and

we should be allowed to determine how we live and what we do. Nigerians not foreigners should determine our human rights. Nigeria is an independent country. We have our ethical liberty to decided what is good for us. We have gone beyond the period of colonialism when everything was imposed on us. As a sovereign nations, we have a right to determine our present and future lifestyles. This is what Nigeria has done through the National Assembly and signed by the president of our country so, we should have no apology to anybody outside Nigeria. This is our country and we should be allowed to determine how we live and what we do. Nigerians not foreigners should determine our human rights[71].

CONCLUSION

Same sex marriage and/or civil union is one of the global products of the first quarter of the 21st Century. Though the rationale or justification for the coming into existence of the institution is still controversial, there is no gainsaying that it has come to stay. Those who propose it justify the institution as their exercise of their fundamental human right naturally conferred upon them as human beings. The opposition to this redefinition of the marriage institution challenges it on moral and religious basis as being immoral and contrary to the teachings of some religious books such as the Holy Qur'an and the Bible.

Nigeria as a nation has joined the league of nations which have not only banned same sex marriage and/or civil union but has gone further to criminalize it. It punished any person/s who engages in same sex marriage and/or civil union. It also punishes any person who organizes, witnesses or aids and abets same sex marriage and/or civil union. It further proscribes the

71. Rev. Ignatius Kaigama, the Catholic Archbishop of Jos Sunday Trust, February 2, 2014, 12.

celebration or recognition of same sex marriage or its certificate issued outside Nigeria in any part of Nigeria.

Nigeria is a party to almost all international conventions or protocols on fundamental human rights under the United Nations and African Union regimes apart from being bound by the United Nations Charter which obliges it to uphold the protection, and defence of all human rights to its citizens. All these convention under the auspices of the United Nations and the African Union have been ratified by Nigeria but only domesticated the African Charter on Human and Peoples Rights by local legislation and therefore, binding upon it to apply and enforce. This is in addition to the fundamental rights enshrined its constitution. Thus, the prohibition of same sex marriage under the Act has no implication with Nigeria's international human rights obligations since the international human rights instruments provide for derogation from human rights for certain reasons.

More so, no fundamental human right is absolute even in those democracies such as the U.S. and its allies in the West who threaten Nigeria with economic sanctions for passing the bill into law. In the interest of peace, public morality, defence, public safety, public order and public health, the fundamental rights to private and family life, freedom of thought, conscience and religion; freedom of expression; right to peaceful assembly and association, freedom of movement and the right to freedom from discrimination could be derogated from; for the purpose of protecting the rights and freedoms of other persons i.e. majority of Nigerians who are against the institution of same sex marriage and/or civil union.

OIL EXPLORATION AND ENVIRONMENTAL DEGRATION IN THE NIGER DELTA: BENCHMARKING THE HUMAN RIGHTS ISSUES INVOLVED

BY

RUFUS MMADU*
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ABTRACT

This article evaluates oil explorations in the Niger Delta and its effects on the environment. In doing this, the paper weighs the benefits accruable from oil exploration to the Nigerian economy on the one part and the resultant degradations and pollution that have ravaged the Niger Delta region including its inhabitants on the other part. The questions asked are – is oil exploration worth the danger and environmental hazards poised to the people of the Niger Delta or the Government is simply sacrificing the peoples' lives on the altar of 'economic growth'? Of what use is the right to life where the means of living is taken away? The paper traces the concept of environmental rights by drawing the link between the environment, human rights and sustainable development. The paper finds that although the Nigerian oil industry has impacted on the country's political economy and the environment of host-communities, it has nevertheless left a big hole in the habitat the Niger Delta people call home. An analysis of legal provisions and statutes of some countries will be presented to highlight the status of the right to environment.

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KEYWORDS: Oil Exploration, Environmental Degradation, Human Rights, Nigeria

INTRODUCTION

The petroleum industry has commercially extracted oil from the Niger Delta for the past fifty years, during which time it has devastated the natural environment. As oil is spilled in the Niger Delta annually,[1] gas flaring, which was supposed to have ceased in 1984, continues to pollute the air till today.[2] The oil and gas sector's reckless disregard for the environment endangers the people of the Niger Delta. More than 80% of the population depends upon the natural environment for their livelihood; they require healthy soil for farming and clean rivers for fishing.[3]

In 1989, the Nigerian government publically committed to 'sustainable development based on proper management of the environment in order to meet the needs of the present and future generations.'[4] Sustainable development recognizes that a healthy natural environment is an essential foundation for lasting social and economic development. Nigeria pledged to manage its environment and promote sustainable development through a system of environmental laws.[5] Unfortunately, Nigeria's lawmakers have long favored short-term economic gain, through support of the oil and gas industry, over long-term

1. Adam Nossiter, 'Half a World from the Gulf: A Spill Scourge 5 Years Old. *N.Y. TIMES*, June 17, 2010 at A1.
2. Daniel Howden, 'Visible from Space, Deadly on Earth: The Gas Flares of Nigeria. *INDEP*. April 27, 2010 at 17.
3. Amnesty Int'l, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, 14 (2009).
4. Kaniye S.A. Ebeku, 'Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues', 189 (2006) *Quoting National Policy on the Environment* (1989) 1 (Nigeria).
5. *Id* For any material or substance to quality to be called a resource, such item must be physically and technically accessible to man with attendant uses. This implies that naturally endowed resources, be it renewable and non-renewable are destined to be used by man

environmental protection. As a result, Nigeria's environmental laws are weak and underenforced. Nigeria's environmental laws have failed to halt the environmental destruction caused by the oil and gas sector. Though sustainable development is unquestionably linked to human rights, this article focuses on the environmental aspect of sustainable development within the purview of the right to life and right to the dignity of the human person under the Nigerian 1999 Constitution.

The Niger Delta basin, though just about 2% of the total area of Nigeria, is endowed with abundant natural resources. These include oil and natural gas, sand and gravel and rich biological diversity among others. Granted the Niger Delta as fragile as it is, has become the hub of extractive and related industries. The activities of these companies have tremendous impact on the health of ecosystems and biodiversity of the area (Niger Delta). Some techniques presently employed by the companies presuppose that degradation of the environment is inevitable. However, there are aspects of the industrial processes causing pollution and loss of biodiversity, which are avoidable, but allowed to thrive due to environmental negligence, disrespect for biodiversity and lack of political will, laws and implementation of laws.

Part II of the paper provides a comprehensive overview of the Niger Delta's natural environment, its history of oil and gas operations, and the environmental damage caused by the oil and gas sector. Part III examines the effectiveness of agencies, statutes, and the Nigerian Constitution in protecting Nigeria's environment. It also focuses on the role of the African Charter on Human and Peoples' Rights in Nigeria's system of environmental laws. Although this paper is primarily aimed at identifying flaws in Nigeria's environmental laws particularly the Constitution, it also identifies where provisions exist for citizen enforcement of environmental preservation and

sustainable development. For Nigeria's government to fulfill its promise of sustainable development, it must reform its current system of environmental laws to hold oil and gas operators responsible for the harm they have caused and to prevent future damage. The paper is concluded and recommendations made in Part IV.

OIL AND GAS OPERATIONS IN NIGERIA

Nigeria has a coastline of 853km bordering the Atlantic Ocean in the gulf of guinea. It has a maritime area covering 46,500km^2 between 0 – 20m depth and Economic Exclusive Zone (EEZ) of 210,900km^2. The Atlantic Ocean coastline is interrupted by a series of estuaries, which form the Niger Delta swamp in the middle where the lower Niger River system drains the waters of Rivers Niger and Benue into the ocean. To be precise, Niger Delta covers all the land between latitude 4°15^{1}N and 4°50^{1}N and longitude 5°25^{1}E and 7°37^{1}E with a total area of 20,000km^2.[6] It is characterized by extensive interconnectivity of creeks, deltaic tributaries, flood plains, mangrove swamps and other coastal features.[7]

The interaction of the people of the Niger Delta with their environment has seriously been influenced by the many forms of oil-generated environmental pollution and degradation evident throughout the area. Corrugated iron sheets popularly used for roofing in the area now have a life span of 10 years or less, farming and fishing have become impossible, streams are so polluted that the people have resorted to drilling bore-hole for drinking water. Many can no longer feed their families because of price inflation; girls have turn to prostitution in order to survive and to be educated. Organised protest to press for

6. Andrew Powell, *Shell-Shocked: The Environmental and Social costs of Living with Shell in Nigeria*, Greenpeace International, (1994).
7. Dublin-Green, C. O. and Tobor, J. G., 'Marine Resources and activities in Nigeria', *NIOMR Technical Paper*, No. 84, 25p.

demands often meet with fierce police and sometimes military repression and loss of life.

The oil companies tend to collaborate with the government and deny these communities proper redress and compensation, but rather, leave them with broken promises; these are the issues that threaten the stability of the region. Under international law these records of environmental destruction and abuses constitute human rights violation. However, the oil companies cannot be made liable under the current international human rights law as they do not provide an avenue of legal redress for victims of environmental degradation.[8] The challenge is therefore on the domestic governments which have signed international conventions that protect human rights such as the rights to life, healthy environment, political and minority rights to ensure its compliance.

The environmental harm must be connected to a substantive right in order to meet the requirement of international Human Rights law; the law must therefore be evolved to include environmental protection as a measure to improve people's lives through preservation of environment; an obligation for the international community.[9]

8. Rufus A. Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*', *Afe Babalola University: Journal of Sustainable Development Law and Policy*, Vol. 2 Iss. 1 (2013), pp. 149-170; Rufus A. Mmadu, 'The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How *Kiobel* Added Salt to Injury', *Afe Babalola University: Journal of Sustainable Development Law and Policy*, Vol. 1 Iss. 1 (2013) pp. 73-85; Rufus A. Mmadu, 'killing the Goose that Lays the Golden Eggs: *Kiobel* and Corporate Accountability for Torts: Whither the Search for Environmental Justice', *Nigerian National Human Rights Commission*, Vol 1 Issue 3 2013, pp. 77-118, Abuja, Nigeria.; Rufus A. Mmadu, 'Environmental Justice in the Niger Delta and Corporate Accountability for Torts: *Kiobel* as an Impetus for the Enactment of Petroleum Industry Legislation in Nigeria', *Nigerian National Human Rights Commission*, Vol 1 Issue 3 2013, pp. 164-202. Abuja, Nigeria.

9. *Ibid* note 8.

The central issues for achieving peace in the Delta region are to strengthen the utilization of available domestic laws, compliance with the universally acceptable human rights laws, and community involvement through autonomy in the management and control of local natural resources, promoting environmental and social justice for the people of the Niger Delta.

A. Nigeria and the Niger Delta

Nigeria is a country of 932,768 square kilometers located in the heart of West Africa.[10] It is a tropical country with a coastline of about 800 kilometers.[11] The country has two main rivers, the River Niger and the River Benue, which converge in Lokoja and continue flowing south into the Atlantic Ocean.[12] Over the past forty to fifty million years, the rivers have deposited sediment where the waters slow to meet the sea.[13] This process formed the Niger Delta, the massive flood plain that bulges into the Gulf of Guinea.

The geographic dimension of the Niger Delta is approximately 26,000 square kilometers, representing 2.8% of Nigeria's total land mass.[14] A World Bank study conducted in 1995 identified four distinct ecological zones in the Delta: mangroves, freshwater swamp forests, lowland rainforests, and barrier island forests.[15] Nigeria's mangrove swamp forest,

10. Augustine Ikein, 'Introduction to Nigeria and the Politics of Niger Delta Development', in Augustine A. Ikein, Diepreye S. P. Alamieyeseigha, Steve S. Azaiki's *Oil, Democracy, and True Federalism*,University Press of America, Jan 1, 2008, p1.
11. *Id.*
12. *Id.*
13. Kamiye S.A. Ebeku, *ibid* note 4.
14. *Ibid.*
15. World Bank. Defining an Environmental Development Strategy for the Niger Delta, at V1 (1995).

located predominantly in the Niger Delta, is the largest in Africa and the third largest in the world.[16]

The mangrove swamp is a sensitive ecosystem that is essential to the local economy. It is the most ecologically rich zone, consisting of more flora and fauna than any other delta ecological zone.[17] The freshwater swamp forest is the largest and most heterogeneous of the ecological zones. It consists both of riverbank levees (which rarely flood and are used mostly for agriculture) and back swamps (which are flooded most of the year).[18] The lowland rainforest ecological zone covers about 7,400 square kilometers, but little of the forest remains.[19] Most of the land has been cleared by slash and- burn techniques and converted to palm-oil plantations.[20] The barrier island forests are freshwater forests found between the coastal beaches and the mangroves. The forests consist of rainforest species along the inland side of the beach ridge and freshwater swamp forests further inland at lower elevations.[21] Where the barrier-island forest is most inaccessible, it remains pristine and holds the highest concentration of biodiversity in the Niger Delta.[22] While the region remains understudied, the most comprehensive study to date identified sixteen rare and three endemic plant species, twenty-seven mammalian species with declining populations, and five rare mammalian species.[23]

While the geographic Niger Delta is a defined area, the political Niger Delta is far more difficult to classify. Some define the Delta ethnographically because the region is occupied

16 Kaniye S.A. Ebeku, *ibid* note 4, at 127.
17 *Id.* at 128.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id at 132*
23 [Summary Volume] Niger Delta Environmental Survey, Phase Two Report p. 11.5, at 211 (2004) [hereinafter NDES Phase Two Report].

principally by the Ijaw people.[24] More popularly, the Niger Delta is synonymous with the oil producing regions of Nigeria.[25] With widening oil exploration outside of the geographic Niger Delta, this definition has become increasingly indeterminate. Yet, it remains powerful because inclusion in the Niger Delta 'has tended to connote some proprietary rights over [Nigeria's] oil Wealth'.[26] The common understanding of the political Niger Delta today can be seen in Phase Two of the Niger Delta Environmental Survey.[27] The survey extended its study to the oil-producing states contiguous to the geographic Niger Delta, including not only Rivers, Bayelsa, and Delta States, but also areas of Abia, Akwa Ibom, Edo, Imo, and Edo States.[28] For the purposes of this paper, the Niger Delta includes these contiguous oil producing areas.

B. Oil and Gas Operations

The German-owned Nigerian Bitumen Company was the first to search for oil in Nigeria in 1908.[29] Both the first and second World Wars interrupted the search. Shell d'Arcy, a consortium owned by Royal Dutch Shell and British Petroleum, finally discovered crude oil in commercial quantities in 1956.[30] Shell found oil in what is now Bayelsa State in the heart of the Niger Delta.[31] By 1958, the production rate had reached 5,100 barrels

24 Ikein, *ibid* note 10, at 15.

25 *Id.*

26 Oma Djebah, 'Tackling the Niger Delta Conundrum', *The Niger Delta Congress* (Aug. 2003). Available at <http://www.nigerdeltacongress.com/articles/tackling_the_niger_delta_conundr.htm> accessed 06 June, 2014.

27 NDES Phase Two Report, *ibid* note 23, p 2.3.3, at 30.

28 *Id.* at VII.

29 Edwin Egede, 'Human Rights and the Environment: Is There a Legally Enforceable Right of a Clean and Healthy Environment for the "Peoples" of the Niger Delta Under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?', 19 *Srilanka Journal of Int'l Law*, 51, 55 (2007).

30 *Id.* at 56.

31 Kaniye S.A. Ebeku, *ibid* note 4 at 70.

per day, and Nigeria began shipping its first crude oil to Europe.[32]

Today, Nigeria produces approximately 1.787 million barrels per day, 30 and Royal Dutch Shell remains the country's dominant oil company.[33] While there have been numerous oil finds, no onshore reserves have been located outside of the broader Niger Delta region.[34]

Oil remains essential to the Nigerian economy. The U.S. State Department reports that oil and natural gas accounted for 37% of Nigeria's Gross Domestic Product in 2006.[35] Furthermore, 97% of Nigeria's exports are fuel and mining products.[36] Oil revenues account for approximately 90% of annual revenues for the federal, state, and local governments.[37] The wealth realized by oil and gas production has not reached the people of the Niger Delta. Since the 1990s, protests related to oil revenues have been frequent, widespread, and sometimes violent. The alleged inequity issues include the non-participation of the Niger Delta people in oil operations; non-payment of compensation or inadequate compensation for land acquired for oil operations or damages arising therefrom; unemployment (particularly in oil companies); underdevelopment of the Niger Delta region, despite the huge revenues oil contributes to the well being of the Nigerian State; and inequitable revenue allocation formula in the country.[38]

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32 *Id.*

33 *Shell Blames Sabotage in Spills*, HOUS. CHRON., May 5, 2010, § (Business), at 1.

34 Kaniye S.A. Ebeku, *ibid* note 4 at 70.

35 *Background Note: Nigeria*, U.S. Dept. of State. Available at < http://www.state.gov/r/pa/ei/bgn/ 2836.htm> Accessed 06 June 2014.

36. *Id*

37. Kaniye S.A. Ebeku, *ibid* note 4 at 73, 'The Illusion of Sustainable Development in Nigeria', 391.

38. *Id.* at 301.

Militants have kidnapped oil workers, attacked oil installations, and sabotaged pipelines.[39] This instability has led oil companies to abandon facilities and renounce development of some oil and gas leases. Shell, which blames militant attacks for the majority of its oil spills in 2008, has even suggested that it may cease operations in Nigeria altogether.[40] Nigeria is prepared for this eventuality. Nigeria is negotiating with the Chinese National Offshore Oil Cooperation (CNOO Ltd.), the third largest national oil company in China, to develop onshore oil blocks that other companies consider too dangerous due to militant attacks.[41] This continued development in already unstable areas of the Niger Delta will inevitably lead to further instability and environmental degradation.

C. The Effects of Oil and Gas Development on the Environment

The Niger Delta is one of the world's ecosystems most severely impacted by petroleum pollution.[42] People living in the Niger Delta have to drink, cook with, and wash in polluted water; they eat fish contaminated with oil and other toxins; the land they use for farming is being destroyed and the air they breathe reeks of oil and gas.[43] Oil and gas development harms the environment through oil spills and gas flaring as well as other less well-known effects of exploration and production.

Experts estimate that nearly 546 million gallons of oil have spilled in the Niger Delta, which amounts to approximately

39 Amnesty Int'l, *ibid* note 3, at 13.

40 *Shell Blames Sabotage in Spills*, *ibid* note 23.

41 Benoit Faucon & Spencer Swartz, 'World News: Africa Pressures China's Oil Deals', *WALL ST. J.*, Sept. 29, 2009, at A14.

42. Amnesty Int'l, *ibid* note 3, at 14 (quoting Fed. Ministry of Env't et al., Niger Delta Natural Resources Damage Assessment and Restoration Project Scoping Report 1 (2006)).

43 *Id.* at 21.

eleven million gallons per year.[44] As of 2008, 2,000 sites were identified as needing remediation because of an oil spill, and a number of these sites had experienced multiple spills.[45] Spills result from leaks in the network of dilapidated pipelines that run from oil wells to refineries and from 'blow-outs'- uncontrolled releases of oil from wells.[46] Oil companies have claimed that sabotage undertaken by militants, thieves, or individuals hoping to collect remediation costs are responsible for up to 70% of oil spills.[47] Shell admits that it spilled more than 14,000 tons of crude oil in the Niger Delta in 2009, twice what it spilled in 2008 and more than four times what it spilled in 2007.[48] Shell attributes this increase to social instability in the Niger Delta and claims that the majority of the oil spilled resulted from two incidents in which militants bombed the Trans Escravos pipeline, a twenty-four-inch wide pipeline intended to channel oil across the Sahara Desert.[49]

Though militant activity is undoubtedly responsible for the increasing number of spills, evidence suggests that oil companies regularly claim sabotage when the spills result from equipment or operational failures.[50]

Fifty years of oil spills have caused massive pollution of the water and land of the Niger Delta. Spills on land destroy crops and damage the long term productivity of the soil.[51] Oil contamination of topsoil reduces the availability of nutrients and

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44 Nossiter, *ibid* note 1.

45 Amnesty Int'l,, *ibid* note 3, at 16.

46 Koriambanya S.A. Carew, 'David and Goliath: Giving the Indigenous People of the Niger Delta a Smooth Pebble - Environmental Law: Human Rights and Re-Defining the Value of Life', 7 *Drake J. Agric. L.* 493, 500 (2002).

47 Amnesty Int'l, *ibid* note 3, at 17.

48 *Shell Blames Sabotage in Spills*, *ibid* note 1.

49 *Id.*

50 Amnesty Int'l, *ibid* note 3 at 17.

51 *Id.* at 14.

increases the toxins in the soil.[52] Heavily contaminated soils remain unusable for agriculture for several years. Spills in the water damage fisheries and contaminate drinking and bathing water.[53] Fish that ingest spilled crude oil become unpalatable or even poisonous for human consumption.[54] Epidemiological studies have also shown a correlation between exposure to oil pollution and cancer, increased malaria outbreaks, respiratory-tract infections, dermatitis, and other symptoms.[55] The Niger Delta residents have experienced an incredible increase in cancer, and researchers have noted a proliferation of skin rashes among Niger Delta inhabitants.[56]

On the other hand, natural gas is produced as a by-product of the oil extraction process. Although gas can be captured and used to meet local energy needs or reinjected into the ground, it requires less infrastructure investment for a company to simply ignite it. Nigeria originally fixed 1985 as the deadline for the end of gas flaring, but the process continues to this day.[57] Over 70% of natural gas is still flared in the Niger Delta, and Nigeria is the site of 25% of the gas flared in the world.[58] In many places, gas flaring has occurred 24 hours a day for over 35 years.'[59]

The flaring of natural gas has been the most consistent cause of adverse environmental consequences in the Niger Delta. Natural gas flares release greenhouse gases into the

52 Kaniye S.A. Ebeku, *ibid* note 4 at 141.
53 Amnesty Int'l, *ibid* note 3 at 14.
54 Kaniye S.A. Ebeku, *ibid* note 4 at 142.
55 *Id.* at 144 -45.
56 *Id.* at 145.
57 D.S.P. Alamieyeseigha, 'The Environmental Challenge of Developing the Niger Delta', in Augustine A. Ikein, Diepreye S. P. Alamieyeseigha, Steve S. Azaiki's *Oil, Democracy, and True Federalism*,University Press of America, Jan 1, 2008, p.1 at 248, 254.
58 *Id.*
59 Kaniye S.A. Ebeku, *ibid* note 4 at 150 (quoting D. Robinson, *Ogoni: The Struggle Continues*, 28 (1996)).

atmosphere and cause acid rain. Much of the vented gas is released as methane, a gas with particularly adverse consequences for global warming.[60] The flares are often located near residential homes and produce intense heat and deafening noise.[61] Gas flaring has been linked to reduced crop yields, disruption of nocturnal animals, contamination of rain water, and corrosion of tin roofs.[62]

During the normal course of operations, the oil industry in the Niger Delta negatively impacts the environment through seismic surveys, dredging, and improper waste disposal. Exploration and extraction leases grant oil companies the right to construct roads and lay seismic lines without regard for the local communities or ecosystem. This construction is particularly damaging to the mangroves, which can take more than thirty years to recover from the laying of seismic lines.[63] The hydrology of mangroves is also disrupted by the construction of roads that interrupt the proper flow of water and destroy fish breeding grounds.[64] The mangrove and riverine systems of the Niger Delta are damaged further by dredging operations. The dredging process removes sediment, soil creek banks, and vegetation and deposits it alongside the new channel.[65] This agitation releases the accumulated toxins from the remaining soil in the channel and the dredged material.[66] The toxins and loosened sediment flow into and disrupt the aquatic system.

60 *Id.* at 148–49 (citing D. Moffat & O. Linden, 'Perception and Reality: Assessing Priorities for Sustainable Development in the Niger Delta', 24 *AMBIO* 527, 533 (1995)).

61 *Id.* at 150.

62 *Id.* at 151.

63 *Id.* at 153.

64 Amnesty Int'l, *ibid* note 3 at 18–19.

65 *Id.* at 153.

66 *Id.*

Additional waste material is generated by oil drilling, extraction, refining, and spill cleanup. All of these processes can produce solid and liquid wastes that contain materials such as grease, phenolic compounds, cyanide, sulphide, suspended solids, chromium, and biological oxygen-demanding organic matter.[67] This waste is commonly dumped directly onto the land or into the waterways or held in open pits that frequently overflow.[68] Oil-spill waste is often ignited at the site of the spill, damaging not only the land and water in the immediate vicinity but also the air through the release of toxins.[69] Many of these environmental harms are caused by the careless operations of oil companies in the Niger Delta.

There are serious threats to the livelihood of the coastal communities by the operations of multinational oil corporations in the Niger Delta region of Nigeria. The Niger Delta Ecosystem is destroyed by acid rain due to gas flaring, oil spills and hydrocarbon left after 'cleanups'; and poor waste disposal by the oil companies. The long-term effect of oil pollution cannot be over emphasised. Destruction of habitats, loss of biodiversity and water pollution has extensive implications on the people's livelihood.

Gas flaring constitutes one of the monstrous human rights abuses in relation to human and environmental abuse. In an interview conducted by a U.S. Non-Governmental Delegation to Nigeria, Grace Ekanem reported:

Acid rain not only deprives people drinkable rain water and stuns crop growth (as we found in Eket and other communities of Akwa Ibom State), it is also affecting people's homes.[70]

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67 Kaniye S.A. Ebeku, *ibid* note 4 at 154.

68 *Id.* at 154-55 (citing Y. Osibanjo, Industrial Pollution Management in Nigeria, *in Environmental Consciousness for Nigerian National Development*, 95, 97 (E.O.A. Aina & N.O. Adedipe, eds., 1992)).

69. *Id.* at 155.

70. Essential Action and Global Exchange, 'Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger

The zinc roofing which formerly lasts for years is now destroyed just in 10 years by acid rain. The people now resort to asbestos roofing and imported Cameroon zincs which are more resistant but more expensive. Research has shown that people who live near flares are exposed to cocktail of toxins which threaten their health and livelihood.

It has been reported that Niger Delta residents suffer respiratory problems which are linked to environmental pollution. Such problems include coughing up blood, skin rashes, tumours, gastrointestinal problems, different forms of cancer, and malnourishment. Many children suffer from protein-deficiency syndrome which is directly linked to shortfall in fish catch and agriculture due to oil generated water pollution and land degradation.[71]

A researcher from the institute of Oceanography, University of Calabar, indicated that rain water samples at Ekpene Obo town of Esit Eket Local government area, contained high levels of acidity resulting in corrosion of corrugated roofs. The study revealed that;

An acid rain of pH 5.4 was measured in a sample from Eket. A comparison roof rainfall showed a marked drop in chloride content from 1,050 mg/l in the direct rain water to 28.4 mg/l in the roof rainwater. This drop is attributed to the reaction between HCL in rain and zinc in roofing material. The main source of these acids in rain water at Eket is the Exxon Mobil gas flaring operations at onshore and offshore locations. During the wet season, flare gases are carried inland through Eket and its environs by South West Trade winds leading to

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Delta'; 4 (2000), available at <http://www.essentialaction.org/shell/Final_Report.pdf . Accessed 30 May 2014.

71 *Id.*

persistent acidic rain in these communities with attendant infrastructural damages.[72]

The U.S. government's Energy Information Administration also supports the conclusion that gas flaring causes acid rain. It states that the continued process of gas flaring has not only meant that potential energy source – and source of revenue – has gone up in smoke, but it is also a major contributor to air pollution and acid rain.[73]

In conclusion at this part of the article, the research finds that the oil industry in Nigeria is operated by six-joint venture operations between Nigeria and the Trans-National Corporations: Shell (Netherlands/UK), Exxon Mobil (US) Chevron-Texaco (US), AGIP (Italy), and Elf-Aquitaine (France)[74] The Nigerian Constitution[75] provides that oil is the property of the federal government. The Nigerian government under the auspices of the Nigerian National Petroleum Company (NNPC) operates in partnership with these multinational companies. The petroleum Act[76] determines the structural operations of oil exploration in Nigeria. There are other relevant legislative mechanisms[77] which are promulgated

72 Akpan, E.R. 'Acidic Precipitation and Infrastructural Deterioration in Oil Producing Communities of Akwa Ibom State: A Case Study of Eket, South Eastern Nigeria,' *Global Journal of Environmental Sciences*, 2003, 2(1): 47-42.

73 Available at http://www.eia.doe.gov/emeu/cabs/nigeny.pdf. Accessed 29 May 2014.

74 Nigeria Oil and Gas, <http://www.nigerianoil-gas.com/upstream/index.htm> accessed 29 May 2014.

75 The Nigerian Constitution, Ch. IV (Fundamental Rights), pt. 44, sections 3 (1999) (Nigeria) provides that 'Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

76 Petroleum Decree No. 51 (1969) (Nigeria).

77 The oil in Navigable Waters Act Decree No. 34 (1968) (Nigeria), the Oil Pipelines Act Decree No.36 (1956) (Nigeria), the Associated Gas Act (1979)

by the Nigerian government to give directions on how oil exploration could be safely conducted.

In 1991 the Department of Petroleum Resources (DPR) issued Environmental Guidelines and standards for Petroleum operatives in Nigeria. The question is; are these legal mechanisms effectively monitored or robust enough to meet with the challenges and needs of the people of the Niger Delta. Can we therefore rely on international Human Rights law? The problem that often arises is that these multinational companies are not signatories to these international instruments and are therefore not liable for environmental pollution and ecological degradation or associated human rights abuses under the current international human rights law.

Ninety percent of Nigerian earning is from oil and gas which comes from the Niger Delta region. It also accounts for oil reserves of about 30 billion barrels. The Niger delta is ranked one of the most poverty-ridden in the world despite its abundance of natural resources. In addition to poverty, the Niger Delta people have continued to live with a range of environmental problems resulting from oil exploration, ranging from health problems to lack of safe water and disintegration of its fertile land.

The consequence is that despite enormous potential for economic development and sustainable growth, Niger Delta is fuelled with broken promises and poor relationship with oil companies resulting in heavy handedness by states security service amounting to serious abuses of human rights.

Again, there have been reports that the inhabitants of the Niger Delta region experience respiratory problems, skin rashes, tumours, gastrointestinal problems, cancers and

(Nigeria) and the Petroleum (Drilling and Production) Regulations (1969) (Nigeria), the Environmental Protection Agency Act Decree No. 58 (1988).

malnourishment.[78] Many children have been observed with distended bellies and light hair, which are evidence of kwashiorkor, a protein deficiency syndrome. The spread of kwashiorkor in these communities are attributed to decline in fish catch and reduced agricultural productivity as a result of the pollution of rivers, ponds, sea waters and land by oil industry operations.[79] The resultant increase in the cost of living brings serious imbalance between the oil company workers and the rest of the people in the community. Their subsistence lifestyle cannot be sustained because of this oil generated environmental damage and the inability to meet up with the means to feed herself because there are no other alternative economic sustenance resulting in hunger, malnutrition and even death.

THE RIGHT TO ENVIRONMENT AND THE LAW: ARE WE THERE YET?

A difficulty with evolving norms is that it is difficult to offer definitive descriptions. The Ksentini Report offers what may be the broadest definition, or better still, components, of environmental rights. It suggests that the possible components of substantive human rights or perhaps several environmental rights can be seen in one source which sets out no less than fifteen rights relative to environmental quality.[80] These include:

a) freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development;

78 Nigerian Environmental Study/Action Team, Nigeria's Threatened Environment: A National Profile 87-88 (1991).

79. Oil for Nothing, *ibid* note 70.

80. Human Rights and the Environment: Final Report of Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9, (1994) ('the Ksentini Report'), 74.

b) protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems;
c) the highest attainable standards of health;
d) safe and healthy food, water and working environment;
e) adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment;
f) ecologically sound access to nature and the conservation and the use of nature and natural resources;
g) preservation of unique sites; and
h) enjoyment of traditional life and subsistence for indigenous peoples.

The definition of the environmental rights may also be viewed through the lenses of the growing body of international, regional and national decisions/awards, sizeable number of conventions and proposals of academic writers (including draft treaties and model codes), as well as contributions from other areas of law (including international human rights law, and international labour law), that have contributed to the philosophy and jurisprudence of clean, healthy and decent environment. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters[81] views environmental rights as strengthening the role of members of the public and environmental organizations in protecting and improving the environment for the benefit of future generations. The Convention recognizes citizens' environmental rights to information, participation and justice and it aims to promote greater accountability and transparency

81. More popularly referred to as the Aarhus Convention after the Danish city where it was adopted in June 1998.

in environmental matters.[82] The South African Constitution guarantees the right to a healthy environment to its citizenry by its Article 24, which states:

Everyone has the right:

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

Finally, Myriam Lorenzen describes environmental rights as inclusive of many rights; the right to a clean and safe environment is the most basic one, while others include the right to act to protect the environment as well as the right to information, to access to justice, and to participate in environmental decision-making.[83]

One may conclude that environmental rights may be broadly categorized into two: substantive and procedural rights. Of the substantive rights, the right to a clean and safe

82 10 Press Release, United Nations Economic Commission for Europe, 'Environmental Rights Not a Luxury', October 29, 2001. Available at http://www.unece.org/env/pp/press.releases/ 01env15e.html. Accessed 01 June 2013.

83. M. Lorenzen, 'Background Paper on the Project Environmental Human Rights'. Available at http://www.anped.org/docs/background%20document.doc. Accessed 02 June 2014. This definition is supported by the International Institute for Environment and Development ('IIED'). *See generally*, IIED, *Environment and Human Rights: A New Approach to Sustainable Development*, 2001, available at http://www.capacity.org.uk/downloads/IIED_Human_Rights.pdf. Accessed 02 June 2014.

Nigeria had generated over US$340 billion since the commercial exploitation of the resource.[86]

The economic importance of the resource has redefined the power dialectics of the country.[87] Political power and control of oil resources and revenues are concentrated in the central government despite the federal structure defined by the Constitution.[88] The over-centralization of power in the federal government is a legacy of military incursion into the political arena that was driven in part by the political economy of oil. That said, it is noteworthy that the legality of the federal government's control of oil resources and revenues is hardly questionable as the Constitution[89] and other subsidiary legislations including the Petroleum Act,[90] Exclusive Economic

86. I. Gray and T. Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor*, 25 (2003).

87. See generally, K. Soremekun, 'Oil and the Military' in *The Impacts of Military Rule on Nigeria's Administration* (1987); A. Atofarati, 'The Nigerian Civil War: Causes, Strategies, And Lessons Learnt', available at http://www.globalsecurity.org/military/library/report/1992/index.html. Accessed 27 May 2014; B. Nnamen, 'Oil-producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People', 1995, 33 *Journal of Commonwealth and Comparative Politics*, 1, 46-78.

88. See generally, K. Soremekun, 'Oil and the Democratic Imperative in Nigeria', in *Governance and Democratization in Nigeria*, 1995; B. Nannen, 'The Political Economy of Oil and Violence in the Niger Delta', (2004) 68 *ACAS Bulletin* 4-9; E. Osaghe, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State', (1995) 94 *African Affairs*, 376, 325-344.

89 Constitution of the Federal Republic of Nigeria (CFRN), 1999, section 44(3) states: Notwithstanding the foregoing provisions of this section [providing against compulsory acquisition of property without the payment of adequate compensation] the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and Exclusive Economic Zone of Nigeria shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly. All previous CFRNs and draft CFRNs had similar provisions. See e.g. section158 (1) of the 1963 CFRN and section 40 (3) of the 1979 CFRN.

90. Laws of the Federation of Nigeria, 2004, Chapter P10.

Zone Act[91] and the Land Use Act 1978[92] clearly assert this position.

Most of Nigeria's onshore oil activities take place in the Niger Delta region.[93] The resource is exploited by oil-multinationals in partnership with the Federal Government of Nigeria (FGN) through the national oil company, the Nigeria National Petroleum Corporation (NNPC). Despite the divergence in the description of the region, it is indisputable that it is made up of a complex system of wetlands and drylands and is one of the largest deltas in the world. The Niger River, which has the ninth largest drainage area of the world's rivers and the third largest in Africa, – 2.23 million cubic Km – drains into the Niger Delta[94] making the area one of the world's largest wetlands, encompassing over 20,000 cubic Km in southern Nigeria. The delta is a vast floodplain built up by the accumulation of sedimentary deposits washed down the Niger and Benue rivers and is composed of at least three ecological zones.[95]

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91. *Id.*, Chapter E17.
92. *Id.*, Chapter L5.
93. These include Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States. See the Niger Delta Development Commission (NDDC) Act, 2004,Chapter N68.
94. R. Rangeley, B.C. Thiam, R.A. Andersen, & C. Lyle, 'International River Basin Organizations in Subsaharan Africa', (*World Bank Technical Paper*, No. 264, Forestry Series, 1994), available at http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1995/04/01/000009265_3970311122927/Rendered/PDF/multi_page.pdf. Accessed 02 June 2014.
95. See generally B. L. Nyananyo, 'The Land and People of Bayelsa State: Central Niger Delta', *Vegetation*, 44-51 (1999); Nzewunwa & Nwanna, 'The Niger Delta Pre-Historic Economic and Culture' in *Cambridge Monographs in African Archaeology 1-6: An Annotated Bibliography*, 1(1980). (Nyananyo identified three ecological zones while Nzenwunna identified four ecological sub-zones). The World Bank identified five zones including coastal barrier islands, mangroves, freshwaters, swamp forests, and lowland rain forest. See,

The mangrove forests of Nigeria are the third largest in the world and the largest in Africa while the fresh water swamp forests of the delta – about 11,700 square Km – are the most extensive in the west and central Africa.[96] Expectedly, the region has the high biodiversity, characteristic of extensive swamp and forests areas, with many unique species of plants and animals.[97] The importance of revealing the environmental qualities of the oil-rich Niger Delta region is to highlight why it is extremely important to protect the environment even in the face of economically rewarding oil exploitation. In this day and age, when species are endangered and global biodiversity balance is an issue, it is important that regions such as the Niger Delta be protected from unrestricted destruction which would invariably affect the world's environmental balance.

The requirement of land for all the stages of oil exploration and production activities places immense pressure on the Niger Delta. To give an insight on the use of land on the region, it is noteworthy that Shell Petroleum Development Company (SPDC), the largest oil operator in Nigeria has oil mining leases covering 31,103 square Km, a little less than half of the 70,000-square Km Niger Delta.[98] Interestingly, the oil industry has unlimited access to land in the region as the Land Use Act permits the Governor of a state to revoke land for oil related purposes.[99] During the exploration process which begins with seismic operations when the oil firms seek to identify oil and gas reserves, vegetation is cut back to ensure that the holes for

World Bank, Defining an Environmental Development Strategy for the Niger Delta, (Vols. I & II) (1995).

96 David Moffat and Olof Linden, 'Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta', 24 *AMBIO* 1995, NO 7-8.

97. *Human Rights Watch*, 'The Price of Oil: Corporate Social Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, 53 (1999)

98. *Ibid.*

99 Land Use Act, 2004 (Laws of the Federation of Nigeria), section 28.

the dynamite are sited in a straight line referred to as 'seismic lines'.[100] Although the seismic lines are only needed temporarily and growth regenerates quickly in the drylands and freshwater areas, mangrove forests have a very slow regeneration rate with trees that have had their roots cut taking up to 30 years to fully recover from line cutting.[101] During seismic operations, detonators, including dynamite, are sometimes used and evidence suggests that these are sometimes close to residential areas.[102] This affects human settlements in the region of these activities and their homes which are sometimes destroyed by the blasts. When seismic investigations are carried out in riverine areas, small boats or barges are used, equipped with air-guns towed in water behind a boat which release compressed air into the water surface.

The returning reflections are recorded on detectors contained in plastic tubes called streamers behind the boat.[103] The aquatic lives of species are affected by the release of

100 Shell Publicity Booklet, Oil (1990).

101 J. Frynas, 'A Socio-Legal Approach to Natural Resource Conflicts – Environmental Impact of Oil Operations on Village Communities in Nigeria', Paper presented at the African Environments: Past and Present, 1999. SPDC estimated in 1993 that since it had started operations onshore, 60,000 km of seismic lines had been cut, of which 39,000 km were through mangrove. SPDC has stated that the forthcoming three-dimensional surveys planned would entail the company to cut a further 31,380 km, of which 17,400 km were to be through mangrove.

102 Human Rights Watch visited several villages in Nigeria where dynamiting had taken place very close to human habitations, in some cases reportedly causing cracks in the walls of houses nearly. For example, at Ozoro, Isoko North Local Government Authority, Delta State, where a survey by Seismographic Services Limited for SPDC was said to have caused cracks in the walls of a house visited by Human Rights Watch on July 21, 1997. See Human Rights Watch, 'The Price of Oil: Corporate Social Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities', 69-70 (1999).

103 N. Hyne, Nontechnical Guide to Petroleum Geology, Exploration, Drilling and Production 243 (1995).

chemicals into the system while regular fishing activities are disturbed. Though the release of chemicals during seismic surveys is thought to be rather insignificant, this statement cannot be ascertained, as the long-term ecological effects of surveys are largely unexplored.[104]

The next stage in the process is drilling of exploration wells which begin by clearing the vegetation and building access roads and canals. If drilling reveals that there is no oil in commercial quantity, the so-called 'dry hole' is plugged and abandoned. If the field is to be commercially exploited, some of these appraisal wells may later be used as development wells for oil production.[105] In producing oil wells, gas and water are located in a petroleum trap together with the oil which flow to the surface at the beginning of production. If the pressure in the reservoir is not enough to force the oil out, the oil is brought to the surface with the use of pumps or other methods. Once the natural reservoir drive is finished, water is injected into the earth's crust to force some of the remaining oil to flow to the surface.[106] Chemicals and sludge generated in the oil production process include oily residues, tank bottom sludge and obsolete chemicals which if not properly treated and disposed of, carry a high-pollution and health risk, disturbance to economic activities and physical environmental qualities. For instance, in *Shell v. Ambah*,[107] dredging activities on Shell's property led to the destruction of property on the adjacent land belonging to the Wesewese family. Mud dredged from Shell's land reportedly covered and destroyed 16 fish ponds as well as various fish channels and fish lakes.

Oil production is characterized by oil spills and gas flaring. Data released by the Nigeria National Petroleum Corporation

104 *Ibid.*
105 *Ibid*, 225-389.
106 *Ibid*, 3-10.
107 *Shell v. Ambah*, (1999) 3 NWLR 1, 432.

(NNPC), based on the quantities reported by the operating companies' suggests that approximately 2,300 cubic metres of oil are spilled in 300 separate incidents annually. While the figures released by the Department of Petroleum Resources (the government body that supervises the oil industry)[108] and oil industry sources[109] differ,[110] Moffat and Linden aver that it can be safely assumed that, due to under-reporting, the real figure is substantially higher; possibly up to ten times higher.[111] The adverse effects of oil spills on the environment include contamination of water sources and arable land as well as the destruction of economic produce including fish ponds, crops and trees. In *Shell* v. *Tiebo VII*,[112] the plaintiffs sued Shell on behalf of the Peremabiri community for damage from an oil spill. The spill reportedly covered much of the River Nun, a tributary of the Niger, which flows through the plaintiffs' community and provides a source of drinking water. As a result, drinking water was contaminated, raffia palms were destroyed and fishing activities were severely damaged, amongst other damages.

Gas flaring from a scientific point of view contributes more significantly to green house effect and air pollution, which

108 The DPR estimates that between 1976 and 1996 a total of 4,835 incidents resulted in the spillage of at least 2,446,322 barrels of which an estimated 1,896,930 barrels (about 77 percent) were lost to the environment. See, Environmental Resources Managers Ltd., *Niger Delta Environmental Survey Final Report*, 249.

109. This source claims that 1.07 million barrels (45 million U. S. gallons) of oil were spilled in Nigeria from 1960 to 1997. This figure is unsurprisingly lower than that calculated by the DPR. See, Oil Spill Intelligence Report (Arlington, Massachusetts), 1 White Paper Series, November 1997.

110 P. Nwilo and T. Badejo, 'Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas', available at < http://www.fig.net/pub/figpub/pub36/chapters/chapter_8.pdf.> accessed 01 May 2014.

111. *Ibid* at 532.

112 *Shell v. Tiebo VII*, (1996) 4 NWLR (Pt. 445) 657.

affects society at large rather than to specific damage to communities, which tend to be limited.[113] Nigeria flares about 2.2 billion standard cubic feet of associated gas daily[114] and is the globe's highest flarer of gas in absolute and proportionate terms.[115] The heat, noise and vibration associated with the flaring of gas disturb the host-communities' normal flow of life resulting in health hazards. Although the actual dangers and impacts of this activity are more difficult to evaluate than oil spills, it is unquestionable that the flaring gas is a major source of air pollution as huge amounts of smoke, carbon dioxide, and methane are emitted in the process. Putting this in proper perspective, there are over 100 flow-stations in the Niger Delta region where associated gas has been continually flared for over three decades. The flaring of gas is believed to be responsible for acid rains that have dire consequences for the ecology, particularly agricultural lands and water resources.[116]

In a nutshell, the exploration and exploitation of oil resources in the Niger Delta have deleterious impacts on its rich and bio-diverse environment. While there are other sources of environmental pollution in the Niger Delta including the direct and indirect effects of a rising urban population, flooding and salt water incursion (especially in the rainy season), it appears that oil-induced pollution is the major contributor as evidenced by the figures highlighted above.

113 J. Van Dessel, 'The Environmental Situation in the Niger Delta, Nigeria', *Internal Position Paper*, 23 (1995).

114 B. Omiyi, 'Shell Nigeria Corporate Strategy for Ending Gas Flaring', Paper presented at a seminar in Norway, June 18-19, 2001. Available at http://www-static.shell.com/static/nigeria/. Accessed 04 June 2014.

115 Environmental Rights Action, Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity, 13 (2005).

116 *Id.*

B. *The Right to Environment in Nigeria*

As noted previously, Nigeria's Constitution does not contain provisions on the right to a healthy environment. The closest reference to environmental protection in the Constitution is contained in section 20 which stipulates that the government should 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.' This section is contained in Chapter II of the Constitution[117] titled 'Fundamental Objectives and Directive Principles of State Policy' which is meant to be read in conjunction with section 6(6)(c) of the Constitution to the effect that the provisions of the Chapter are unenforceable against the State. In other words, the State's 'constitutional' responsibility to protect the environment cannot be judicially enforced. That notwithstanding, it is evident that Nigeria has imbibed the substantive right to a healthy environment provided for under Article 24[118] of the African Charter on Human and Peoples' Rights by the domestication of the same.[119]

Indeed, the long title of the Act as well as the provision of the first section cast no doubts as to the effect of the ratification Act. The long title is: 'An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January, 1981 and for purposes connected therewith'. Section 1 states:

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117 Constitution of the Federal Republic of Nigeria, 1999 section 6 (6) (c): The judicial powers vested in accordance with the foregoing provisions of this section – shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

118. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Art. 24:'All peoples shall have the right to a general satisfactory environment favorable to their development.'

119 *Id.*, Chapter A9.

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

The status of the African Charter was considered extensively in *General Sani Abacha and Others v. Chief Gani Fawehinmi*.[120] The Supreme Court held that the African Charter is part of the laws of Nigeria and like all other laws the courts must uphold it. In the Supreme Court's opinion, the Charter gives to citizens of member states of the Organisation of African Unity (now the African Union) rights and obligations, which rights and obligations are to be enforced by our Courts, if they must have any meaning. In other words, if the substantive right to a healthy environment is to have any meaning, it must be judicially enforceable.

African regional court systems, including the African Commission on Human and
Peoples' Rights and the Community Court of Justice of the Economic Community of West African States (ECOWAS), have also decided cases based on the status, enforceability and impact of the provisions of the African Charter on Human and People's Rights. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights* (SERAP) *v. Nigeria*[121] heard by the African Commission, the question of Ogoni peoples' rights to enjoy a healthy environment (including housing, health and human rights) were in issue. The plaintiff, a socioeconomic rights' Non-Governmental Organization (NGO) alleged on behalf of the Ogonis, that the Federal Government of

120 *General Sani Abacha and Others v. Chief Gani Fawehinmi*, SC 45/1997.
121 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v. Nigeria, Communication No. 155/96.

Nigeria (FGN) and its partner oil multinationals operating in the Niger Delta region had infringed on the above rights in the process of oil exploration and production activities. The Commission took cognisance of the fact that the Federal Republic of Nigeria had incorporated the African Charter into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the plaintiff. The Commission noted that the State is obliged to protect right holders against other subjects by legislation and provision of effective remedies and by taking measures to ensure that there is an effective interplay of laws and regulations that enable individuals to realize their rights and freedoms.[122]It noted that even though Nigeria had the right to develop natural resources in the oil-rich region, Article 24 imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.[123]

It is important to note that the African Commission also noted that collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa.[124] It is noteworthy that SERAP instituted proceedings against the Nigerian State and oil industry at the Community Court of Justice of the Economic Community of West African States (ECOWAS). The plaintiff alleges that oil operations in the Niger Delta constitute 'violations of the right to an adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment, and to economic and social

122. *Ibid.*
123. *Ibid.*
124. *ibid.*

development."[125] Initial objections raised by the defendants included the issue of *locus standi* of the plaintiff. The defendants argued that SERAP is not a legal person under Nigerian law and as such does not have the capacity to sue. They also argued the issue of the Court's jurisdiction. The ECOWAS Court of Justice had delivered its judgment had been hailed as a key moment in 'holding governments and companies to account for pollution'. In the case, the Court unanimously found the Nigerian government responsible for abuses by oil companies and makes it clear that the government must hold the companies and other perpetrators to account. The Court also found that Nigeria violated articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples' Rights by failing to protect the Niger Delta and its people from the operations of oil companies that have for many years devastated the region. According to the Court, the right to food and social life of the people of Niger Delta was violated by destroying their environment, and thus destroying their opportunity to earn a living and enjoy a healthy and adequate standard of living. The Court also said that both the government and the oil companies violate the human and cultural rights of the people in the region. The Court ruled that the government's failure to enact effective laws and establish effective institutions to regulate the activities of the companies coupled with its failure to bring perpetrators of pollution 'to book' amount to a breach of Nigeria's international human rights obligations and commitments.

The Court emphasized that 'the quality of life of people is determined by the quality of the environment. But the government has failed in its duty to maintain a general satisfactory environment conducive to the development of the Niger Delta region'.

125 *SERAP v Oil Firms*, Suit No. ECW/CCJ/APP/08/09 dated 25 July 2009.

This judgment confirms the persistent failure of the Nigerian government to punish properly and effectively oil companies that have caused pollution and perpetrated serious human rights abuses, and is an important step towards accountability for government and oil companies that continue to prioritise profit-making over and above the well-being of the people of the region. This is a crucial precedent that vindicates the human right to a healthy environment and affirms the human right of the Nigerian people to live a life free from pollution. It also makes it clear that the government must hold the oil companies to account. The judgment makes it clear that the Nigerian government has failed to prevent the oil companies causing pollution. It is a major step forward in holding the government and oil companies accountable for years of devastation and deprivation. The court affirmed that the government must now move swiftly to fully implement the judgment and restore the dignity and humanity of the people of the region. The judgment has also come at a time when oil is being discovered in the majority of the member states of the ECOWAS. It is vital that other states take heed of this judgment, which has laid down minimum standards of operations for government and oil companies involved in the exploitation of oil and gas in the region. This paper notes that the time has come for the Nigerian government to stand up to powerful oil companies that have abused the human rights of the people of the Niger Delta with impunity for decades.

As stated earlier, the case was filed against the Federal Government and six oil companies over alleged violation of human rights and associated oil pollution in the Niger Delta. Specifically, the plaintiff alleged: 'Violations of the right to an adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development –

as a consequence of: the impact of oil-related pollution and environmental damage on agriculture and fisheries.' SERAP also alleged 'oil spills and waste materials polluting water used for drinking and other domestic purposes; failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws and regulations to protect the environment and prevent pollution.' The Court dismissed the government's objections that SERAP had no locus standi to institute the case; that the ECOWAS Court had no jurisdiction to entertain it; and that the case was statute-barred. The Court also rejected efforts by the government to exclude a 2009 Amnesty International report on oil pollution from being considered. The report was based on an in-depth investigation into pollution caused by the international oil companies, in particular Shell, and the failure of the government of Nigeria to prevent pollution or sanction the companies. The judgment was delivered by a panel of six judges: Justice Awa Nana Daboya, Justice Benefeito Mosso Ramos, Justice Hansine Donli, Justice Alfred Benin, Justice Clotilde Medegan and Justice Eliam Potey. Article 15(4) of the ECOWAS Treaty makes the Judgment of the Court binding on Member States, including Nigeria. Also, Article 19(2) of the 1991 Protocol provides that the decisions of the Court shall be final and immediately enforceable. Furthermore, non-compliance with the judgment of the Court can be sanctioned under Article 24 of the Supplementary Protocol of the ECOWAS Court of Justice, and Article 77 of the ECOWAS Treaty.

It is also instructive to note that the Court had previously held that the right to education was justiciable in Nigeria even though the right, like the right to protection of the environment, is contained in section 6 of the Constitution that is believed to be unenforceable against the State.[126] On the issue of *locus*, the

126 *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No*

Court held that SERAP had standing and cited the doctrine of *actio popularis* that allows any person or entity to challenge the violation of a public right. The Court also relied on comparative jurisprudence from India, Pakistan, Ireland, the UK, USA and elsewhere while adding that in public interest litigation, all that is required is that the plaintiff establish that there is a public right worthy of protection which has been allegedly breached and that the matter in question is justiciable. On the issue of jurisdiction, the Court held that the Article 9(4) of the Supplementary Protocol to the treaty establishing the court and Article 4(g) of the Revised Treaty of ECOWAS granted it jurisdiction.

Despite regional progress in the recognition of Nigerians' right to enjoy a healthy environment, it appears that the country's judiciary is still circumspect with regard to interpreting extant legal provisions. This is not unconnected with what a former Chief Justice of Nigeria referred to as the 'judicial posture' of Nigerian judges in environmental cases[127] especially when it is oil related.

Indeed, the influence of the political-economy of oil seeps into judicial decisions whether expressly or implicitly. In *Allan Irou* v. *Shell BP*,[128] for e.g., the judge refused to grant an injunction in favor of the plaintiff whose land, fish pond and creek had been polluted by the activities of the defendant because in his opinion, nothing should be done to disturb the

ECW/CCJ/APP/0808. See also, Amnesty International Press Releases, *'Ground-breaking ECOWAS Court judgment orders government to punish oil companies over pollution', 12 December 2012. Available at* ***www.amnesty.org/.../ground-breaking-ecowas-court-judgment-orders-g.*** *accessed 14 December, 2014.*

127 M. Uwais, 'Recent Development in Nigeria Strengthening Legal and Institutional Framework for Promoting Environmental Management' in *Global Judges Symposium on Sustainable Development and the Role of Law*, (2002).

128 *Allan Irou v. Shell BP*, Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

operation of trade (i.e. mineral oil), which is the main source of Nigeria's revenue. Several other cases, though not so blatantly decided, have tended to follow the unwritten rule that economic considerations should be prioritized over environmental concerns[129] and judges have often exhibited their reluctance to grant injunctions against oil-companies even where oil operations have been discovered to have adversely affected host communities and their environment.[130] Even the oil companies have acknowledged the hitherto favourable judicial dispensation with Shell's legal manager averring in 1988, regarding injunctions in favour of oil companies that 'the law is on our side because in the case of a dispute, we do not have to stop operations'.[131]

Indeed, even though some recent decisions have deviated from this sort of restricted reasoning, there still remains uncertainty in the judicial system in relation to oil-related environmental litigation.[132] Frynas opines that the recent decisions including *Shell Petroleum Development Company Ltd. v. Councillor F. Farah and 7 others.*[133] *Edise & Others v. William International Limited,*[134] *Elf (Nigeria) Limited v. Sillo;*[135] and *Shell Petroleum Development Company Ltd. v.*

129 A. Ekpu, 'Environmental Impact of Oil on Water: A Comparative Overview of Law and Policy in the United States and Nigeria', (1995) 4 *Denver Journal of International Law* 214. See also, *Chinda & Ors v Shell-BP*, (1974) 2 RSLR 1.

130 *ibid* at 122-123.

131 *Id*

132. K. Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria', *RECIEL* 12 (2) 2003, 199-208. See also A. Adedeji & R. Ako, 'Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta', 5 *UNIZIK Law Journal* 420- 422 (2005).

133 *Shell Petroleum Development Company Ltd v. Councillor F. Farah and 7 others*, (1995) 3 NWLR (pt 387) P. 148.

134 *Elf (Nigeria) Limited v. Sillo*, (1994) 6 NWLR pt. 350.

135 *Shell Petroleum Development Company Ltd v. Tiebo*, (1996) 4 NWLR pt. 445, 657.

Tiebo[136] indicate that the 'judicial posture' of Nigerian judges has changed. It is suggested that Frynas' opinion is perhaps overly optimistic especially when the judicial attitude is considered against the backdrop of environmental rights litigation. Litigants from the Niger Delta remain reluctant to base their lawsuits on alleged infringements of their environmental rights despite acknowledgement of the existence of these rights as contained in the African Charter.

Thus far, there is only one decided case where the right to environment has been expressly pleaded in the country. In *Gbemre v. Shell*,[137] the plaintiff filed a suit on July 20, 2005 on behalf of himself and Iwherekan community against Shell, the Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation, to end gas flaring in the community. The plaintiff argued that gas flaring violated their right to enjoy a healthy environment as provided by Article 24 of the African Charter and the constitutional guarantee of the right to life and dignity of persons provided for in sections 33 and 34 of the 1999 Constitution. The High Court decided that the alleged flaring of gas in the community affected the inhabitants' right to a healthy environment as articulated in the African Charter. The Court also affirmed that the constitutionally guaranteed rights to life and dignity of persons inevitably includes the rights to a clean, poison-free and healthy environment and the actions of the defendants in continuing gas flaring was a violation of the rights.[138] The Court ordered the Attorney-General of the Federation to immediately set in motion, after due consultation with the Federal Executive Council, necessary processes for the enactment of a bill for an

136 J. Frynas, 'Legal Change in Africa: Evidence from Oil related Litigation in Nigeria', (1999) 43 *Journal of African Law* 2, 121-150.

137 *Gbemre v. Shell*, Heard in the Federal High Court of Nigeria, Benin Judicial Division, Suit No. FHC/B/C/153/05 delivered on 14 November, 2005.

138 *Id.*

Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Regulation Act and the Regulations made thereunder to quickly bring them in line with the provision of Chapter IV of the Constitution, especially in view of the fact that the Associated Gas Regulation Act even by itself makes the said continuous gas flaring a crime having prescribed penalties in respect thereof.[139] While this decision is currently being appealed by Shell, it is instructive to note that the Federal Government has not carried out any of the orders made by the High Court.[140]

Recently, the law on gas flaring was amended to extend the flare-out date from December 31, 2008 till December 31, 2012. The salient point to note here is that the Court has no means of enforcing its decision. Furthermore, as Ebeku noted, since this case was determined by a High Court, it is by no means 'the law' as the decision may be overturned on appeal.[141] Indeed, the case is on appeal, though it appears that the appellants are in no hurry to have the case determined.[142]

Another relevant case, *Ijaw Aborigines of Bayelsa State v. Shell I*,[143] is still going through appeal. The plaintiffs sought an order of the Federal High Court to enforce a payment of US $1.5 billion that Nigeria's Parliament ordered the company to pay as damages for pollution caused to the plaintiffs. The Court held that Shell was bound to pay the sum and ordered that the company deposit the judgment sum of US $1.5 billion with the Central Bank of Nigeria in the name of the Chief Registrar of

139 *Supra*.

140 A. Yusuf, 'Gas Flare - Oil Majors in Race to Beat 2012 Deadline', *Daily Independent* (Nigeria), May 24, 2010.

141 K. Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell Revisited*', (2007) 16 *RECIEL* 3, 319.

142 *Id.*

143 *Ijaw Aborigines of Bayelsa State v. Shell I*, Unreported case, judgment delivered by Justice Okechukwu Okeke, Federal High Court Port-Harcourt, Rivers State on 24 February 2006.

the Federal High Court. The company appealed the judgment and sought an unconditional stay of execution of the judgment and orders of the lower court pending final determination of the appellant's appeal. While the Appellate Court found in favour of the appellant and set aside the order of the lower court, the substantive issue for determination, i.e. whether Shell is bound by the National Assembly's order to pay US $1.5 billion, remains to be determined.

Indeed, the salient point in issue is whether the Appellate Court will confirm the veracity of the award thereby giving recognition to the oil-communities' right to a clean, pollution-free environment, an important subset of the evolving third generation human rights. As Yusuf points out, the case is a test case for Nigeria's otherwise conservative appellate judiciary to pronounce on the justiciability of economic, social and cultural rights and to give effect to its decision (should it decide the company is liable to pay damages).[144]

Government influence in oil-related environmental cases is also apparent. In the *Ghemre case* for instance, certain occurrences after the High Court delivered its decision ostensibly orchestrated to frustrate the plaintiffs can only be adduced to state interference. First, after the expiration of the 'stay of execution' ordered by Justice Nwokire of the Federal High Court, the plaintiffs appeared in Court but none of the defendants or their representatives showed up.

It was discovered then that the judge had been removed from the case having been transferred to another court in Katsina and the court file was not available.[145] Similarly, at the

144. H. 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* 1, 95.

145. Friends of the Earth International Press Briefing. 'Shell fails to obey gas flaring court order', May 2, 2007.

Court of Appeal's hearing on Shell and NNPC's jurisdiction appeal, it was discovered that the case had been wrongly adjourned by court staff without any notice to the applicant or his lawyers. Although the leading judge said that the reason for this would be investigated and the person responsible disciplined,[146] nothing further has been publicly heard. Reacting to the above incidences, Roderick, Co-Chairman of the Climate Justice Programme that is taking an active role in pursuing the case said:

> *The fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in purported democracy acting under the rule of law.*[147]

Another case that suggests government interference in the enforcement of environmental rights in oil-related litigation is *Oronto Douglas* v. *Shell Petroleum Development Company Limited I*.[148] The plaintiff in this case alleged that the mandatory provisions of the Environmental Impact Assessment Act, 1992 ('EIA Act') had not been complied with by the Nigeria Liquefied Natural Gas whose project was about to be commissioned. The project was a multi-billion dollar investment owned by the Federal Republic of Nigeria, represented by the NNPC, which owns 49% of its shares and other oil-multinationals including Shell, Totalfina Elf, and Agip.

Available at http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html. accessed 03 June 2014.

146 G. Enogholase, 'Benin Court Registrar Under Investigation', *Vanguard Newspapers* (Lagos), September 27, 2006.

147 *ibid* note 166.

148. *Oronto Douglas v. Shell Petroleum Development Company Limited I*, Suit No. FHC/2CS/.

The plaintiff sought an action seeking declaratory and injunctive relief that the first to fourth defendants cannot lawfully commission or carry out or operate their project at Bonny without complying strictly with the provisions of the EIA Act which mandates that for such intending projects, an environmental impact assessment must be carried out. The plaintiff also sought to restrain the defendants from carrying out or commissioning their project until an environmental impact assessment was carried out with the active public participation among those to be affected. The Court struck out the suit on the ground *inter alia* that the plaintiff had no standing to institute the suit. This decision was reached despite the fact that the plaintiff is a native of one of the projects' host-communities and a well-known environmentalist. One would expect that these considerations would satisfy the *locus standi* requirement given the widened scope of the concept in Nigeria.[149] Despite the uncertainty in the application of the rule,[150] Frynas opined that the changing interpretation of *locus standi* seems to have resulted in a greater number of individual's capacity to sue oil companies. Apparently, this was not to be in Douglas' case at the Federal High Court. It is worthy of note that the Court of Appeal set aside this decision and ordered a retrial before a different judge on the grounds that the Federal High Court had breached a number of procedural rules.[151] However, the retrial did not proceed as ordered by the Appellate Court because the project had been completed by the time the Appellate Court

149. See generally *Adediran v. Interland Transport*, (1991) 9 NWLR (Pt. 214) 155.

150 See *Abraham Adesanya v. President of the Federal Republic of Nigeria*, (1981) 2 NCLR 358; AG *Kaduna State v. Hassan*, (1985) 2 NWLR (Pt 8) 483 at 521 per Oputa JSC; *NNPC v. Fawehinmi* (1998) 7 NWLR (pt. 559) 598 at 612. *Owodunni v. Registered Trustees of Celestial Church & Ors.* (2000) 10 NWLR (Pt. 675) 315. See also, T. Ogowewo, 'The Problem with Standing to Sue in Nigeria', 39 *Journal of African law* 1, 18.

151 *Douglas v Shell*, Unreported Suit No. CA/L/143/97 in the Court of Appeal.

delivered its decision. The government's economic interest became manifest when after problems arose, it became actively assisted the conclusion of a memorandum of understanding between the NLNG and the community so .that the first shipment of LNG would not be delayed.[152]

While the economic value of the project in the *Douglas* case is obvious, the implication of a decision in favor of the respondent in the appeal lodged by Shell following the decision in *Gbemre's case* may not be. A closer analysis of the case however reveals that a decision that affirms the 'local' recognition of the right to a healthy environment of the inhabitants of the Niger Delta will lead to an avalanche of cases that will result in huge compensation payouts that will be detrimental to the Federal Government and its partner oil-multinationals from an economic standpoint. Consequently, it is unsurprising that the case is stuck in the appeal process. There is no gainsaying the fact that, clearly, economic considerations still influence judicial decisions in oil-related litigation.[153] As Frynas notes rather ruefully, the barriers that oil-litigants face include the attitude of Nigerian judges and statutory provisions regulating the oil-industry that are biased in favour of the oil-companies.[154]

C. *Environmental Rights in India*

India is notably one of the most progressive countries in terms of judicial awareness and application of contemporary concepts

152 E. Emeseh, 'The 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 and Natural Resources Law* 4, 574-606.

153. See generally J. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', (1997) 15 *Boston University International Law Journal* 261, 291.

154 It states that it will be the duty of every citizen to protect and improve the natural environment of the country and to have compassion for living creatures.

including environmental rights and notions of sustainable development.[155] Ironically, India's constitutional provisions on the environment and human rights are similar to Nigeria's. Article 48A[156] which contains environmental protection provisions and Article 51A[157] on the fundamental duties of the State are both principles of state policy.

However, Indian courts have breathed life into the above provisions by linking and enforcing these (and related) issues to the constitutionally guaranteed right to life contained in Article 21.[158] Indeed, since the 1990s, the Supreme Court has stated that 'issues of environment must and shall receive the highest attention from this Court'.[159] A few cases are discussed to highlight how the courts have given effect to these principles that would otherwise have been deemed unenforceable because they are principles of state policy.

In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*,[160] one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance, the petitioner alleged that unauthorised mining in the Dehra Dun area adversely affected the ecology and environment. The Supreme Court upholding the right to live in a healthy environment issued an order to cease mining operations despite the amount of money and time the company had invested. Similar decisions were reached in *Subhash Kumar v. State of*

155. M. Anderson, 'Environmental Protection in India', in *Human Rights Approaches to Environmental Protection*, 199 (1996).

156 This Article provides that the State shall endeavor to protect the environment and to safeguard the forest and wildlife.

157 *Ibid* note 155.

158 *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746.

159 It states that it will be the duty of every citizen to protect and improve the natural environment of the country and to have compassion for living creatures.

160 *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652.

Bihar,[161] where the Court observed that "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life" and in *Mathur v. Union of India*,[162] where the Supreme Court, once again, used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution. With regard to the duties of the State regarding the environment, the case of *Kinkri Devi and Another v. State of Himachal Pradesh and Others*,[163] is illustrative. The petitioners sought an order to have a mining lease cancelled, to restrain the respondents from operating the mines covered by the lease in such a manner as to pose a danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, environment and the inhabitants of the area, and for compensation for the damage caused by the uncontrolled quarrying of the limestone. The Court held that operations from the mines should stop pending the government's proper determination of the balance between development and environment from mining operations and submission of the report to the Court. It also held that no lease for mining of limestone was to be granted or neither renewed nor temporary permits issued till the report of the committee is received and further orders were made by the Court. The Court reasoned that Articles 48A and 51A(g) placed a constitutional duty on the State and citizens to protect and improve the environment and that it was left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions in furtherance of this. The Supreme Court had to consider the development/environment dilemma in *Rural Litigation and Entitlement Kendra v. Union of India (Doon*

161 *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

162 *Mathur v. Union of India*, (1996) 1 SCC 119.

163. *Kinkri Devi and Another v. State of Himachal Pradesh and Others*, AIR 1988 HP 4.

Valley Limestone Quarrying Case -II).[164] Following a public interest petition addressed to the Supreme Court by the Rural Litigation and Entitlement Kendra of Dehra Dun in the State of Uttar Pradesh, the Court directed that all fresh quarrying in the Himalayan region of the Dehra Dun District be stopped. Subsequently, the mines were ordered to be closed based on reports of the Bandyopadhyay Committee and a three-man expert committee, both of which were appointed by the Court.

The lessees of the mines thereafter submitted a scheme for limestone quarrying to the Bandyopadhyay Committee that was rejected. The lessees challenged the decision of the committee in the Supreme Court. The real issue before the Court was to determine the conflict between the environmental consequences of the commercial exploitation and the economic benefits of the activity. The Court was of the opinion that the environmental considerations outweighed the economic benefits of the project and thus approved the decision of the Bandyopadhyay Committee. It also held that workmen affected by the closure of the mines should, as far as possible and in the shortest time, be employed in the reforestation and soil conservation programmes to be undertaken in the area.

Similarly, in *M.C. Mehta v. Union of India*,[165] a public interest case was brought against government administrators as well as the tanneries whose effluents polluted the River Ganga. The petitioner claimed in his petition, *inter alia*, for the issue of a writ/order/direction in the nature of mandamus to the respondents restraining them from letting out the trade effluents into the River Ganga until they put up necessary treatment plants for treating the effluents in order to arrest the pollution of the river. While the pollution of the river by the effluents was

164 *Rural Litigation and Entitlement Kendra v. Union of India (Doon Valley Limestone Quarrying Case -II)*, AIR 1985 SC 652.

165 *M.C. Mehta v. Union of India*, (1996) 4 SCC 351.

not contested, the companies argued in defence that they lacked the physical facilities, technical competence and funds to install adequate treatment facilities. While some of the tanneries pleaded for time to install pre-treatment plants, all of them claimed that they could not install secondary systems for treating waste water due to the costs. The Court held that it was the fundamental duty of every citizen to protect and improve the natural environment just as it was a duty of the State to protect and improve the quality of the environment. The Court held *inter alia* that a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence particularly as the possible impacts of continued effluent discharge into the River Ganga would outweigh the inconveniences caused to the management and labour employed by it on account of the closure of the tanneries.

It is important to note that although India is generally hailed as a progressive country with regard to the recognition and enforcement of contemporary notions of sustainable development generally and environmental rights in particular, this is not without criticism. Rajamani, for instance, criticizes the Court as being perceived as consisting of middle class intellectuals that are more receptive to issues that affect their contemporaries.[166] In a nutshell, based on the analysis of the decisions in *M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case)*[167] and *Almitra Patel v. Union of India (Municipal Solid Waste Management Case)*,[168] Rajamani argues that the courts are more receptive to 'certain social and value preferences (for instance, the right to a clean environment rather

166 L. Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability', (2007) 19 *Journal of Environmental Law* 3, 293-321.

167 *M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case)*, Writ Petition Number 13029 of 1985.

168 *Almitra Patel v Union of India (Municipal Solid Waste Management Case)*, Writ Petition Number 888 of 1996.

than the right to livelihood), and certain modes of argumentation over others (technical rather than social) resulting in the deep restriction of participation. While recognizing the exemplary work of the courts, the fundamental questions raised are with regards to access, participation, effectiveness and sustainability in public interest environmental jurisdiction. The feeling expressed by Rajamani is that 'the courts are unlikely to be moved by or on behalf of the poor on 'urban poverty', or 'livelihood' issues, for the outcomes are predictable and unfavourable'.[169]

D. Comparative Analysis

This foregoing portion of the paper has analysed the judiciary's role in environmental protection in Nigeria and India. The two countries share several similarities including their political history: both being British colonies before independence; economic development: both being emerging economies and constitutional framework, visà- vis environmental protection: both contained in the chapters on Fundamental Objectives and Directive Principles, believed to be unenforceable against the State. The structure of Nigeria's oil industry was highlighted as was the importance of the resource to the economy. The negative impacts of oil exploration and production activities were discussed after the environmental qualities of the Niger Delta region were highlighted to provide an understanding of the environment/ development dilemma in the oil-rich region. Although India is not an oil-rich country, it hosts mining activities that have some environmental consequences similar to oil extraction. This section will compare the cases discussed in previous sections to determine the respective judiciaries' roles in the recognition of the human rights angle to environmental

169 *Ibid* note 168, 302.

protection in the two countries, as well as the limitations and prospects for the future.

The most significant difference between the countries appears to be the role of the State in economic activities. In Nigeria, the federal government through the national oil company (NNPC) is the major shareholder in joint-venture agreements with foreign oil-multinationals that operate the oil industry.

Consequently, State economic interests are in direct conflict with public interests including environmental protection in the course of oil exploration and exploitation. The courts face a quandary in cases where the environment/development dilemma are in issue because decisions against the oil companies are considered to be (as they, in fact, are) decisions against the State. Historically, Nigerian courts have considered the State's economic sustenance which extensively relies on oil revenues a priority over environmental protection, especially in the Niger Delta region.[170] Clearly, the decisions in more recent oil-related environmental cases indicate that the courts now take better cognisance of the environmental impacts of the oil industry. A salient point to note in this regard is that the courts still shy away from asserting that the inhabitants of the region have the right to enjoy a healthy environment. While this may be implied from the decisions, one may argue that the decisions in fact are more about increasing the hitherto appalling compensation paid to claimants[171] than the recognition of their right to enjoy a healthy environment. As noted, within the Nigerian judiciary, only the *Gbemre case* made an express reference to the existence of a right to a healthy environment in Nigeria with reference to oil-communities. Since this case was decided by a

170. *Alfan Irou v. Shell BP*, Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

171. Commenting on the impact of the *Farah case*, Frynas noted that the case is 'an important judicial precedent regarding the quantum of compensation for damage'.

High Court and it is on appeal, the authority of this case is limited. In the Indian cases cited which deal with the economic/environment debate, the State's interest was limited to its regulatory responsibility. This situation frees the courts from the additional burden of executive pressure on their decisions which is faced by Nigerian courts as evidenced by the aftermath of *Gbemre* case.[172] While this is not suggestive that the Indian courts would reach different decisions if this were the case, it simply highlights the fact that the judiciary in Nigeria is under additional pressures. This is more so because the judiciary's independence was stifled by the different military interregna that ruled Nigeria for 30 of its 54 post-independent years.

The other fundamental difference between the two countries lies in the recognition of public interest in environmental matters. While the Constitutional provisions are similar, the Indian courts have clear rules on *locus standi* that recognize and enforce the fundamental duty of every citizen to protect and improve the natural environment.[173] Conversely, Nigeria's rules regarding the standing to sue remain vague and applied pragmatically by the courts. Even the new Fundamental Human Rights Enforcement Procedure Rules 2009 has done little to remove legal blocks *locus* for litigants. A major consequence of this in oil-related environmental cases is that the courts may deny a claimant the right to sue even where it appears apparent that such claimant has standing as evidenced in *Douglas'* case. The uncertainty in the rules results in denying claimants and entire communities their right to access justice and the consequences may jeopardize their environment and means of livelihood. The lack of clarity regarding the rules and procedures with respects to *locus standi* hinders access to

172 *ibid* note 127.
173 *ibid*

justice especially in oil-related instances because in the poverty-stricken oil communities, it is often considered not worth the risk of litigation where unclear rules are likely to be interpreted in favour of the influential oil-industry.[174]

Thirdly, the decision-making process and enforcement of judicial decisions differ significantly in both countries. In Nigeria, it appears the jurisprudence on the recognition of the right to environment is very thin. For instance in *Gbemre* case, the judge failed to seize the opportunity to explore the growing jurisprudence on the right to environment internationally and use this as one of the bases for his judgment. As Ebeku noted, despite the judgment being a landmark one as it 'marks a sharp departure from the well-known rigid attitude of Nigerian judges and is in accord with established principles in other jurisdictions – it has a lot of weaknesses...'[175] These weaknesses include the judge's failure to specifically resolve conflicting affidavit evidence as required by law and make specific findings to be considered persuasive and/or cite persuasive authorities in his judgment, to invite other learned counsel to address arguments to him as *amici curiae* in furtherance of the established practice of the Supreme Court of Nigeria in important cases, especially those that establish new principles like the case in issue purportedly did.[176] Ebeku avers, and rightly so, that these deficiencies may render the decision in this case vulnerable on appeal. With regard to the enforcement of courts' decisions in Nigeria, the aftermath of *Gbemre* case where none of the orders of the High Court Judge were taken seriously once more exemplifies how such decisions are ignored by relevant parties for reasons attributable to the State's interest in the case.

The Indian cases, on the other hand, often contain rich references to the international precepts upon which the right to a

174 *ibid* note 127, 415-439.
175 *ibid* note 127.
176 *Id.*

healthy environment are founded and refer to the growing jurisprudence on these issues in the decisions which solidifies the content. Furthermore, the Indian courts do not shy away from consulting widely with relevant authorities and consider practical consequences of its decisions. The Supreme Court has the power to, and does, refer scientific and technical aspects for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act, 1997 and the power to direct the Central Government to determine and recover the cost of remedial measures from the polluter under section 3 of the Environment (Protection) Act, 1986.[177]

Furthermore, the Indian judiciary is noted for its enforced judgments on polluters.[178] It is important to address the critics of the Indian Supreme Court such as Rajamani whose stance is that the Court springs to life when the claimant is, or has issues, that appeal to their middle-class sensibilities and that there is need for improved access to the courts for issues that affect the poor. Rajamani is by no means criticising the pro-activeness of the Supreme Court and the positive impacts its decisions have had on the society including improved governance and delivery of public services, and enhanced accountability of public servants.[179] The main criticisms have to do with access which can be resolved as Rajamani suggests by the evolution of 'a set

177 R. Sharma, 'Green Courts in India: Strengthening Environmental Governance?', (2008) 4 *Law, Environment and Development Journal*, 1, 5. The author engages in an in-depth discussion of the processes the court goes through to reach decisions in two cases - *M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case)* Writ Petition Number 13029 of 1985, *Almitra Patel v. Union of India (Municipal Solid Waste Management Case)* Writ Petition Number 888 of 1996).

178 A. Jasrotia, 'Environmental Odyssey in India: People's Response and Judicial Vigilance – An Estimate', (2002) 44 *Panjab University Law Review* 132.

179 *Id*, 319.

of guidelines for restrained and responsible PIL'[180] to avoid the pitfalls that may otherwise be associated with these PILs that 'have emerged as the most potent tool in the hands of Indian judiciary'.[181]

In conclusion, irrespective of the similarities that both countries share, India clearly has a more developed jurisprudence on the right to environment. This is despite the fact that Nigeria's legal framework expressly recognizes the substantive right to enjoy a healthy environment. As the paper revealed, Nigeria's sluggishness to embrace environmental rights is not unconnected with the overarching importance placed on the economic importance of oil and the government's active participation in the exploitation of the resource. The paper also revealed that despite the accolades that are generally bestowed on the Indian Supreme Court for its innovativeness in recognizing and protecting environmental rights, it still faces genuine challenges that it must strive to overcome to justify it being the 'last resort for the oppressed and bewildered'.[182]

CONCLUSION AND RECOMMENDATION

It very clear from the above discussions that oil exploration exposes the people of Niger delta to various environmental hazards which threatens their health, livelihood and stability. There is culmination of both psychological and physical effects as well as environmental damage suffered by the people of the Niger Delta. There is a gross lack of avenues to inform the people of what is happening to their environment and their livelihood due to oil exploration. These matters constitute violations of human rights which need to be addressed.

180 *Id.* 321.
181 *Ibid.*
182 *State of Rajasthan v. Union of India*, (1979) 3 SCC 634, 670 (*per* Goswami J.).

The Nigerian Government has relied on oil as its main source of revenue since 1974[183] which holds 60% share of the joint venture interest with the translational oil companies[184]. Although the application and enforcement of environmental regulations by Nigeria is in the best interest of the citizens especially those of the oil producing communities, it is not always practicable. The Nigerian government has designed and promulgated a comprehensive system of environmental regulation and protection.[185]

However, these regulations and policies are rarely enforced, in most cases, they are blatantly ignored due to fears that tough environmental regulations to curb the activities of the oil companies would cause reduction in profit and these companies may flee Nigeria.[186] I regard this approach as very unfortunate as the State is taking such a presumed approach at the expense of its citizenry. While it is possible for other countries to successfully regulate impact to their environment,[187] it a high time that Nigeria embraces a real change of approach in order to ensure respect to its laws and citizens. To achieve this, Nigeria must first of all improve its relationship among the people of the oil producing communities and the translational oil companies. There must be honesty, equity and social justice in relation to environmental regulations.

The Federal Government of Nigeria has made several efforts since independence to address poverty in the Niger Delta; first through Niger Delta Development Board, Oil

183. *Ibid.*

184. Centre for Petroleum Information, available at http://www.petroinfonigeria.com/faq.html. Accessed 29 May 2014..

185 Joshua P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and Human Rights to Healthy Environment', 15 *B.U. INT'L L.J.* 261, 297 (1997).

186 *Id* Eaton.

187. Andrew Rowell, *Greenpeace International*, 'Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria', (1994).

Minerals Producing and Development Commission (OMPADEC), the Niger Delta Development Commission, Niger Delta Amnesty Programme and the Ministry of the Niger Delta. Despite attempt by Obasanbjo's administration to champion the cause of united Nigeria, not enough has been achieved for the Niger Delta people. Shortly before his exit from office, Obasanjo unveiled what he called the 'New Marshall Plan' for the people of the Niger Delta.[188] According to the then Nigeria National Petroleum Corporation (NNPC) Group Managing Director, Mr. Funso Kupoklokun, the cost of developing the Delta region will run in the region of N20 trillion. Speaking at the inauguration of the Consolidated Council on Social and Economic Development of the Coaster States of the Niger Delta in Abuja, President Obasanjo stressed collaboration between Niger Delta Development Commission (NNDC) and the various state governments in order to realise these dreams. He stated that the Marshal Plan would involve massive job creation for the people of the coastal region especially in the Nigerian armed forces and the police. Road building and rural electrification were not left out, schools are earmarked for upgrading to universities[189] and the National Oil Spill Detection and Response Agency to eliminate water pollution. These and other promises constitute what the government termed the 9 – point development agenda of the Coastal Region.

The two most relevant questions the people of the Niger Delta should ask are 1. Are these and other promises of the federal government providing the needed changes in the Delta region? 2. Are these measures good enough to breach the imbalance in the system, properly address the core issues of true political marginalisation, federalism, resource allocation and

188. Report by Charles Ozoemena, published in Nigerian Vanguard
189. Petroleum Training Institute (PTI), Effurun, Warri to be upgraded to a degree awarding institution.

resource control? Denial of the minority rights of the people of the Niger Delta constitute abuse of their human rights and needs to be addressed properly.

The United Nations Charter gave birth to the modern international human rights law, wherein the Universal Declaration of Human Rights ('UDHR') which is not legally binding was structured from[190]. Though not legally binding, some argue that subsequent state practice has transformed it into a document considered by many to be a statement of customary international law[191] The Universal Declaration of Human Rights provides that the responsibility to prevent human right violation is that of the nation states. However, a state can be held accountable for human rights violations committed by private actors if it fails in its duty to properly investigate or bring them to justice.

The Nigerian system should be made to encourage proper monitoring of the activities of the oil companies. Nigeria is a signatory to the International Convention on Civil and Political Rights ('ICCPR')[192] and the International Convention on Economic, Social and Cultural Rights ('ICESCR')[193]. The ICCPR guarantees the protection of civil rights and the ICESCR guarantees the right to health and an adequate standard of living including food and housing. The Nigerian government owes a duty to ensure that the basic elements of these covenants are respected and not contravening the covenants to which it is a party.

190. Universal Declaration of Human Rights, G. A. Res. 217A, U.N. GAOR, 3d sess., 1st Plen. Meeting U.N. Doc. A/810 (Dec. 12, 1948).

191. Prudence E. Taylor, 'From Environmental to Ecological Human Right: A New Dynamic in International Law'? 10 *GEO. INT'L ENVL*> REV. 309, 350 (1990)

192. International Convention on Civil and Political Rights, G.A. Res. 2200A (XX1), art. 6(1), U.N. GAOR Supp. (No. 16) at 52.

193. International Convention on Economic, Social and Cultural Rights, G.A. Res. 2200A (XX1), U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1996)

The Nigerian system should not be dissuaded by the greater power of the transnational corporations; they must be made to bear the responsibility for the human rights they have impacted albeit attributing international human rights directly to corporations are issues which remain unresolved.[194]

There is an overriding responsibility by the Nigerian government to its citizens. The citizens of Nigeria must be seen as true citizens and not as subjects. The Nigerian social contract must be redefined. A true federalism must be addressed to make democracy meaningful to common Nigerians. The political, civic and social rights of the people must be clearly documented and made enforceable. Community involvement right from the grassroots would empower the people and encourage them to participate in public affairs and indeed matters that affect their environment and sustainable development.

The youths must be mobilised right from the 'wards', political parties, clans, local government and at state level. There should be a clear structure of information pathway and engagement process, a real political and shared responsibility. Each Local government area in the oil producing community should have a separate department which deals with citizenship rights with reference to the impact of oil exploration on their community. The government should make it easy for oil companies to establish an engagement process with the communities in which they operate. The community through youth organisation in collaboration with the elders in each community should be consulted on new projects and there should be impact assessment jointly conducted by the community leaders, the government and the community. By so doing, the intra and inter-community violence associated with

194. John Gerald Ruggie, 'Business and Human Rights: The Evolving International Agenda', *American Society of International Law*, October 2007, Vol. 101, Number 4

oil exploration can be reduced to barest minimum. There must be legally recognisable mediation process to address the conflicts between the oil companies and the Niger Delta communities. The people must be well informed of their rights and expectations.

The activities of governmental organisations must be encouraged and respected in the Nigerian polity. In modern Nigeria, there should be a place for community groups at home and in Diaspora, student bodies, youth organisations, women groups and church leaders to mention but a few, to be actively involve in the discussion and consultations on issues that affects their rights as citizens. These civil society organisations should be involve in the engagement with all stakeholders in monitoring the activities of oil companies regarding oil-generated environmental degradation and concomitant human rights abuses.

The department of information in the state in collaboration with the oil companies should hold annual lectures in order to discuss freely all relevant issues in the petroleum industry as it affects the people's environment and ways of life. This would provide a forum for the government, the companies and the community to engage in meaningful dialogue regarding promises, risk assessments and their relationship.

All levels of government must get closer to the Citizens. People should be able to work into the Local Government area and consult with the local Counsellors, meet with their House of Assembly member or able to meet with senators at the constituency/senatorial offices.

The use of force by the security officials against the people must be addressed. The police must be orientated about their approach to the civil society either in terms of breaking up conflict or dealing with protest. The various levels of

government must live up to the expectation of protecting life and property through due process.

The oil companies must be made to publish their development plans for the community which they operate and provide avenues for public comments on their operations.

The federal government, the State government and the Local governments must show greater commitment to developing the non-oil sector particularly by promoting manufacturing and agricultural development. The growths of these non-oil sectors will create low-skilled workforce and boast rural income.

The direct impact of oil exploration in the region has been felt by everyone living in the area. Some of these issues include ecological degradation, environmental pollution, associated human rights abuses, high inflation and loss of livelihood. It could only be fair if these groups of people are appropriately compensated.

We argue that these issues constitute human rights issues as entrenched in the Universal Declaration of the Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and peoples' Rights.

International Human Rights law does not address explicit right to a healthy environment; while this area of law is still being developed, environmental injustice of the Niger Delta region can be addressed using the fundamental human rights such as the right to life, the right to health, and the right to adequate standard of living.

Lastly, the proposal for healthy community engagement with the government and oil companies and through recognised community groups and non-governmental organisations would bring about effective monitoring of the activities of these companies and good relationship. Provision of information to

the public in environmental issues and oil exploration would not only give the people awareness of what is happening to their environment but also to help them make informed choices.

PRISON CONDITIONS AND THE RIGHTS OF INMATE: AN APPRAISAL

BY

DR. JOEL BARDE*

ABSTRACT

The condition of Nigerian Prisons is in deplorable state. The main purpose of establishing the prisons institution is to rehabilitate and reform those who have violated the Laws of their society. However, in Nigeria, the living condition of the inmates is horrible as they are often subjected to inhuman and degrading treatments, in total violation of the human rights provisions enshrined in the 1999 constitution, the prisons Act, the prisons regulation and relevant international conventions[1]. The prisons have become houses of horror where inmates die often as a result of inadequate facilities[2]. Although not afforded all the privileges of a free citizen, a prisoner is assured certain minimal rights such as right to dignity[3], right to medical treatment[4], right to food.[5] right to remission of sentence[6], etcetera. Against this back drop, the work recommended inter-alia, trial within reasonable time so that detainees should not stay in custody infinitely, the provision of adequate funding to improve the living condition of prisoners and taking of measures to ensure that prisoners are kept in sanitary and humane conditions.

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1. "The third Convention on Prisoners' Right Intonation Law " *Commons. Wikimedia.Org. accessed* 19th September 2013.
2. Ayuk, A et al, "The Impact of Prison Reforms on the Welfare of the Inmates; A case study of Afokang Prison Calabar Cross River State, Nigeria" *Global Journal of Human Social Science Sociology and culture vol. 13 Issue 2 version 1.02013.*
3. Andrew, C. "Prisons and Human dignity; are they compatible?" *A paper delivered at the 6th world wide conference of the international prison chaplains association stock hold 21 August 201.*
4. Section 118 Prisons Act cap 29 LFN 2004.
5. *Ibid* section 22.
6. *Ibid* section 54.

INTRODUCTION

Imprisonment is considered as the most appropriate means of inflicting pain on individuals who are accused and convicted of violating the criminal law of the state[7]. The mission of the Nigerian prisons service is to keep in custody all those legally interned and detainees awaiting trial.They are segregated from the outside world, kept under constant scrutiny and surveillance, and forced to obey a strict code of official rules to avoid facing formal sanctions, they must conform to institutional dress.[8] These individuals, are known as prisoners or inmates and are kept in custody. The more serious the offence, the longer the prison term imposed. The prison community with its distinct culture and way of life epitomizes a complete design capable of changing the attitudes of individual members for good or bad depending on the individual inmate.

Deducing from the constitutional function of the prison, the main aim of establishing the institution in all parts of the globe, Nigeria inclusive, is to provide a rehabilitation and correctional facility for those who are found wanting of the laws of their society.[9] However, Emeka observed, and rightly in our opinion, that the extent to which this maxim is true in practice has been a subject of controversy because instances abound where prisons have become a training ground for criminals instead of rehabilitation home in Nigeria. The prisons system has not been able to live up to its expected role in Nigeria as the conditions of the prisons remained harsh and life threatening. Basic

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7. "Nigeria: Criminal Justice system utterly failing Nigeria Majority of Inmates not convicted of any crime people" *http:// www. Amnesty.org*

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8. Senna, J.J. and Siegel, T.J. 1981. *Introduction to Criminal Justice.* New York: West Publishing Co.

9. Ohuoba, E.E, "Challenges and Reforms in the Nigerian Prisons System". *Journal of Social Science, 27(2): 95-109 (2011)-P. 96*

facilities are absent in most prisons across Nigeria[10]. There is also the problem of over-crowding[11] and it is fast becoming an embarrassment and a national scandal.

By their very nature, prisons are created with the objectives of curtailing the freedom of movement and certain other rights of individuals that are sent thereby the Courts of the land.[12] This certainly does not mean that a person in detention legally forfeits all his rights merely because of his status as a prisoner. It should be borne in mind that prisoners and indeed awaiting trial inmates are human beings who may have lost their liberties by coming into conflict with the law, and although they have lost their liberties and other rights by being in custody, there are some very basic inalienable rights they must enjoy even in custody as these rights are guaranteed in law.

This work examines in some detail the current situation and conditions of the Nigerian prison system and the rights of inmates. Essentially, the work discussed the historical evolution of Nigeria prisons, purpose of imprisonment, the deplorable conditions of the prisons, and considered in greater detail the various rights available to prisoners. The writer observed that prisoners have not been enjoying the rights provided for them by law.

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10. Ayuk, A. *Loc Cit*
11. Overcrowding in Nigeria Prisons occurs where the numbers of prisoners exceeds prison capacity to an extent inmates cannot be housed in a humane, healthy and psychological manner. Prison overpopulation in Nigeria is linked to the steady rise in the figure of inmates. By July 1990, the average monthly inmate population was 54,000 while the total prison capacity was only 31,000, resulting in an overcrowding figure of 74.2 person. As at November 2014, the total prisons population in Nigeria stands at 56,785 inmates with 38,734 of them awaiting trial. For prisons meant for 28,000 inmates. See Evolution of Imprisonment in Nigeria. *martinslibrarybloggspot.com.*
12. Ajomo, M.A. and Okagbue, I. *Human Rights and the Administration of Criminal Justice in Nigeria.* Lagos: Nigeria Institute of Advanced Legal Studies 1991 P. 175.

DEFINITION OF TERMS

At the outset, a clear understanding of some basic terms pertaining to the subject matter of our discussion is desirable.

Prison: Prison according to Mc Corkle and Korn[13] is a physical structure in a geographical location where a number of people live under highly specialized conditions, utilized the resources and adjust to the alternatives presented to them by a unique kind of social environment that is different from the larger society in so many ways. In the same way the Black's Law Dictionary defines "prison" as

> A public building or other place for the confinement of persons, whether as punishment imposed by the law or otherwise in the course of the administration of justice.[14]

The definitions above do not distinguish prison from jail, and this is borne out of the fact that most people do not realize that there is a difference between jail and prison and use the words interchangeably.

In our opinion, a prison is a place where people are confined for a period of time such as months and years as a punishment for crimes they may have committed and having been convicted by a court of competent jurisdiction. The commitment is physical but some other privileges that are available in the outside world are removed from that society for additional punishment and safety reasons.[15] Those in prisons are kept under constant surveillance.

Jail on the other hand is a place of detention, a place where a person suspected of a crime is detained.[16] The most notable

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13. Mc Corkle, L. & Korn R. (1954) "Resocialization within Walls" *The Annuals of American Academy of Political Science, 293 (i): 88-98* quoted in Obioha, E.E. "Changes and Reforms in the Nigerian Prisons System". *J.Soc. Sci, 27(2): 95-109 (2011).*
14. Garner B.A. Black Law Dictionary U.S.A. St. Paul Minn West Publishing Co. 2009
15. "What is a prison? "*http://www.ask.com* accessed 20th/10/2013.
16. "Jail Vs Prison" *http://www.diffen.com* Accessed 21/10/2013.

difference is that prison inmates have been tried and convicted of crimes, while those in jail may be awaiting trial especially those charged with capital offences and those who failed to meet up with their bail conditions. Therefore, those whose trials are in progress and those whose trials have been decided should not ordinarily cohabit in the same facilities. In Nigeria, the same correctional facilities are used both as jails and prisons in the country. There is no categorization, as those undergoing trial, convicts and those already condemned to death are treated equally.[17]

Prisoner: A prisoner is a person who is deprived of liberty against his or her will. This can be by confinement, captivity, or by forcible restraint.[18] The World English Dictionary defines a prisoner as "a person deprived of liberty and kept in prison or some other form of custody as a punishment for a crime, while awaiting trial, or for some other reasons.[19] Similarly section 19 of the Prisons Act defines a prisoner to mean any person lawfully committed to custody.[20]

The above three definitions although elaborate do not represent the true meaning of a "prisoner" as they failed to differentiate between a convict and an awaiting trial person or a detainee. It is inferred from the definitions that if someone is lawfully committed to prison custody whether as a convict or detainee then he or she is a prisoner. Although, a person whose judicial fate has been decided and whose trial is in progress are kept in the same facilities in Nigeria, there is the need to differentiate between the two (that is a prisoner and detainee).

In our opinion, a prisoner is anyone who is deprived of personal liberty against his or her will following conviction of a

17. "Photos of How Nigerian Prisoners Sleep and Enjoy their life – politics (5) – Nairaland" *http://www.nairaland.com.* Accessed 24/9/2013
18. "Prisoner" *http://www.thefreedictionary.com. Accessed 20/10/2013*
19. "Prisoner" *http://dictionary.reference.com. Accessed 22/10/2013*
20. Prisons Act Cap. P. 29 Laws of the Federation of Nigeria 2004. Vol. 13.

crime. A detainee on the other hand is an individual who is kept in jail even though he or she has not yet been convicted of a crime.[21] A majority of detainees are individuals who are unable to meet up with the conditions of their bail and therefore cannot be released from jail pending a trial on the criminal charges.

Right: The Osborn's concise Law Dictionary defines right as: An interest recognized and protected by the law, respect for which is a duty, and disregard of which is a wrong. A capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.[22]

It can therefore be inferred from the above definition that each legal right that an individual possess relates to a corresponding legal duty imposed on another. For instance, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home. It follows therefore that rights bestow on a prisoner must be respected by all, the violation of which could attract legal sanction.

HISTORICAL DEVELOPMENT OF PRISON IN NIGERIA

It is a fact that the establishment of prisons ante dates the advent of colonialism in Nigeria. For instance, different communities had their own legitimate methods of dealing with deviant members of their societies[23]. It is on record that prisons were

21. "Prisoners' Rights" *www.Dictionaryboss.com. Accessed 23/10/2013.*
22. Bird, R. Osborn's *Concise Law Dictionary*, 7th edition London: Sweet and Maxwell, 1983 P. 293.
23. Orakwe, I.W "The origin of Prisons in Nigeria" *www.prisons.gov.ng Accessed 22nd September, 2013.*

difference is that prison inmates have been tried and convicted of crimes, while those in jail may be awaiting trial especially those charged with capital offences and those who failed to meet up with their bail conditions. Therefore, those whose trials are in progress and those whose trials have been decided should not ordinarily cohabit in the same facilities. In Nigeria, the same correctional facilities are used both as jails and prisons in the country. There is no categorization, as those undergoing trial, convicts and those already condemned to death are treated equally.[17]

Prisoner: A prisoner is a person who is deprived of liberty against his or her will. This can be by confinement, captivity, or by forcible restraint.[18] The World English Dictionary defines a prisoner as "a person deprived of liberty and kept in prison or some other form of custody as a punishment for a crime, while awaiting trial, or for some other reasons.[19] Similarly section 19 of the Prisons Act defines a prisoner to mean any person lawfully committed to custody.[20]

The above three definitions although elaborate do not represent the true meaning of a "prisoner" as they failed to differentiate between a convict and an awaiting trial person or a detainee. It is inferred from the definitions that if someone is lawfully committed to prison custody whether as a convict or detainee then he or she is a prisoner. Although, a person whose judicial fate has been decided and whose trial is in progress are kept in the same facilities in Nigeria, there is the need to differentiate between the two (that is a prisoner and detainee).

In our opinion, a prisoner is anyone who is deprived of personal liberty against his or her will following conviction of a

17. "Photos of How Nigerian Prisoners Sleep and Enjoy their life - politics (5) Nairaland" *http://www.nairaland.com.* Accessed 24/9/2013
18. "Prisoner" *http://www.thefreedictionary.com. Accessed 20/10/2013*
19. "Prisoner" *http://dictionary.reference.com. Accessed 22/10/2013*
20. Prisons Act Cap. P. 29 Laws of the Federation of Nigeria 2004 Vol. 13.

crime. A detainee on the other hand is an individual who is kept in jail even though he or she has not yet been convicted of a crime.[21] A majority of detainees are individuals who are unable to meet up with the conditions of their bail and therefore cannot be released from jail pending a trial on the criminal charges.

Right: The Osborn's concise Law Dictionary defines right as: An interest recognized and protected by the law, respect for which is a duty, and disregard of which is a wrong. A capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.[22]

It can therefore be inferred from the above definition that each legal right that an individual possess relates to a corresponding legal duty imposed on another. For instance, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home. It follows therefore that rights bestow on a prisoner must be respected by all, the violation of which could attract legal sanction.

HISTORICAL DEVELOPMENT OF PRISON IN NIGERIA

It is a fact that the establishment of prisons ante dates the advent of colonialism in Nigeria. For instance, different communities had their own legitimate methods of dealing with deviant members of their societies[23]. It is on record that prisons were

21. "Prisoners' Rights" *www.Dictionarybase.com Accessed 23/10/2013.*
22. Bird, R. Osborn's *Concise Law Dictionary*, 7th edition London: Sweet and Maxwell, 1983 P. 293.
23. Orakwe, I.W "The origin of Prisons in Nigeria" *www.prisons.gov.ng Accessed 22nd September, 2013.*

built in Benin by Oba Ewedo in the 13th century.[24] There is also the evidence that some pre-colonial societies as the Tiv, the Yorubas, the Edo and the Fulani had places of confinements of those who committed certain offences tabooed or forbidden by custom until certain fines or compensations were paid.[25]
Imprisonment in its modern form was introduced by colonial power when the British Government assumed responsibility for the administration of Lagos in 1861. Consequently, the first English type prison in the country was established in 1872 at the Broad Street, Lagos designed to accommodate 300 prisoners.[26] The system was modeled along that of the British. As British administration expanded, so also more prisons were built as a necessary complement. By 1901, prisons were built in Calabar, Degema, Onitsha, Benin City, Sapele[27] and also in Idah, the headquarters of Igala Kingdom.[28] All of them were prototype of the one in Broad Street, Lagos.

In 1914, Lord Lugard succeeded in amalgamating the Northern and Southern protectorates into present day Nigeria. Following the amalgamation, the prison ordinance of 1916, and prison Regulations of 1917 were promulgated as a positive step

24. Obaseki. A.O. (1991) *Causes of Congestion in Prisons and Proposals for Solution.* Lagos: M. J. Publications. P. 289.
25. Awe, B. "The History of the Prison System in Nigeria" in Elias T.O. (ed) *The Nigerian Prisons System Lagos 1968* University of Lagos P. 1 see also Egu, M. A. *History of the Nigerian Prison Service: An Insider Account* Abuja 1990 Garkida Press Ltd. P. 1
26. Olusegun, A.J. Nigeria Prisons and the Dispensation of Justice *An International Journal of Arts and Humanities 2012* Vol. (3), August 208 233.
27. *Ibid*
28. Ani, S (2013) "Behold Nigeria's Oldest Prison" *http://sunnewsonline.com* Accessed 23/10/2013. One of the oldest Prison in Nigeria, is traced to the Attah of Igala, located in ancient Idah, the headquarters of Igala Kingdom in Kogi State, North – Central Nigeria built in 1901 by the British Colonialist. Investigation revealed that it used to be a detention centre situated within the Attah's place where dissidents and deviants were kept to do menial jobs for a period before then regained their freedom.

aimed at establishing the needed uniform standard of prison administration[29].

Nigeria ran a dual prison system for over 50 years until the consolidation of Federal and Local Prisons in 1968[30] and the prisons Decree No. 9 of 1972 was promulgated.[31] The unification of the Prison system was justified on the ground that political parties in control of government, used the native police and the Native Authority prison to repress opposition parties and generally curtail the liberty and freedom of the citizenry. Another reason that led to the unification was that the prisons were overcrowded and dirty, while underfeeding of the prisoners was the order of the day, leading to instances of rioting and or of breakdown of law and order in the early sixties.[32]

It must be stated that the merger has not done away with the problems identified above particularly the second leg of the problems. Today, more than ever before, the prisons have been seriously over populated, the problems of underfeeding and of poor sanitary conditions are sadly ever present. Therefore the unification has not achieved the desired aim.

The Nigerian prison service was a department under the Ministry of Internal Affairs with headquarters in Lagos. It was headed by a director responsible for the administration of nearly 400 facilities including regular prisons, special penal institutions and lock ups.[33] Prison facilities, however, came under federal control in 1975 with each state having its headquarters under the

29 Omoyibo, K. et al (2010) "prisons and correctional Institutions in Nigeria" NOUN COURSE material CSS 674. P 2

30 Nwezeh, K Nigerian prison's Rising Population

31 Uchegbe N.C. "Prison Inmates Reformation Rehabilitation: The lawyers Perspective being a paper presented at a round table organization by Center of Excellence for literacy education on 15th October 2001 at the Ife-City Hall, Ile-Efe Osun State.

32 Egu. Op.cit at 22-23

33 Nwezeh *Loc. Cit.*

supervision of assistant directors of prisons. The prisons, depending on size and type was headed by chief superintendents, superintendents or assistant superintendents.[34] Today the prison is the third arm of the criminal justice system after the police and courts and is under the supervision and control of the Ministry of Interior headed by the Controller General of Prisons.[35]

PURPOSE OF IMPRISONMENT

Imprisonment serves several purposes, including the protection of society, retribution, deterrence, reformation and rehabilitation of the convicted prisoners. The prison also plays the following roles.[36]

* Keep convicted offenders for safe custody.
* Keep awaiting trial inmates in custody, and to produce them in Courts as and when due.
* Identify the causes of their anti-social behaviour.
* Set in motion mechanisms for their treatment and training for eventual reintegration into society as normal law abiding citizens on discharge.[37]

Inferring from the above, reformation and rehabilitation are the main aims of establishing the prison institution in all parts of the world including Nigeria for those who have violated the rules and regulations of their society.

It is pertinent to briefly discuss rehabilitation and reformation as the two summarize the functions of the Nigerian prisons.

34 *Ibid*

35 "Prison Service Information/Ministry of Interior" *http://interior.gov.ng.* Accessed 25/10/2013.

36 Olusegun *Op. Cit* at 13.

37 Adetula G.A. et al, "The prison subsystem culture: Its Attitudinal Effects on Operatives, Convicts and the Free Society" *If Physcologia 18(1): 232-251.*

Rehabilitation: This has to do with encouraging the prisoner to abstain from criminal behaviour by providing him with social, education or vocational activities to such an extent as to enable him confirm to the social pattern of life outside the prisons.[38] This is in line with the United Nation Rule 58 on the purpose and justification of imprisonment. Rule 77(1) deals with the education of all prisoners and Rule 77(2) recommends that the education of inmates should be integrated with the educational system to the extend that this is possible in order to allow them continue their education without difficulty after release.

It is unfortunate, that Nigerian prison lacks the basic facilities and necessary qualified man-power to train and educate prison inmates.[39] They are therefore far from being trained towards rehabilitation owing to lack of sufficient funding which is a major obstacle to the realization of this laudable objectives. The prisons system in Nigeria is grossly neglected and under-funded by the Federal Government.[40] The necessary facilities and logistics required for effective rehabilitation are not provided.[41] Only a negligible few of the inmates live a normal live on discharge, particularly those who spent longer period in the prison. Other factor such as stigmatization could be responsible for this problem.

Reformation: this is effected by inculcating in the minds of the prisoners a sense of responsibility and service to the community as well as bring a measure of interest, stability and discipline into their lives and by further inculcating habits of industry, self-respect, and self-control through manual labour, games and

38 Ladan *Op. Cit* at 139

39 "Evolution of imprisonment in Nigeria" *Maruns library blogspot.com Accessed 30th October, 2010*

40 Aduba, J.N "overcrowding in Nigeria Prisons; A critical Appraisal " *Journal of Criminal Justice Vol. 21 Issue 2 (1993) PP 185-191. See also Ayuk, A. Loc Cit*

41 Daniel, I. et al. Op. Cit at 4.

mental education.[42] The prison also has the responsibility of training inmates in trade that will make them useful to themselves and the society at large.

It can therefore be inferred from the above, that the philosophy and practice of correctional institutions is to meteout less punishment on criminals and improve their souls. However, a situation where prisoners in Nigeria are exposed to inhuman conditions, with many of them wasting away without trials, the stated objectives cannot be realized and it is also an affront on human dignity. Therefore, we believe that when the true essence of the prison is abused or neglected, it loses its objective of reforming errant citizens and sanitizing the polity. Today, we are faced with a situation where people convicted and jailed for simple offences come out hardened, ready and willing to commit more heinous crimes against fellow citizens.[43]

Poor maintenance is the bane of Nigeria prisons and this is largely due to poor funding as stated above. Since the prison is a place of reformation and not a hell of eternal damnation, we opine that the prison should be made to be truly reformatory by ensuring that the prisons are adequately funded.

THE DEPLORABLE CONDITIONS OF THE PRISONS

The word prison is not a very pleasant term to conceive. It is even less pleasant to utter as it is the very antithesis of the concept of freedom.[44] Although a prison is not expected to be exactly a bed of roses as the inmates are there for penal purposes, but neither is it also supposed to be a bed of thorns and thistles meant to snuff life out of the occupants. The plight of those in prison must therefore give cause for concern to all

42 Uchegbue Op. Cit at 7.

43 "ANPP Decries Condition of Prison Inmates in Nigeria", *http://www.nannagroniine.com*. Accessed 25/10/2013.

44 Osinbajo, Y and Awa U.K. (causes of Congestion in prisons and proposals for solution" *in Law Development and Administration in Nigeria* Ibadan: In tec. Printers Ltd, 1990. P. 290.

because of the horrible living condition in the prison. It dehumanizes the inmates that pass through it and destroy their health. It has been enormously characterized by some problems such as; lack of facilities,[45] unimaginable rate of congestion,[46] neglect of welfare of inmates.[47] Worse still, our prisons have over the years become houses of horror where inmates die daily due to poor health care, starvation, poor sanitary conditions and outbreak of epidemics.[48] These have been the reasons for the inadequacies of the system as a corrective institution. The conditions in the prisons as enumerated above often leave the prisoners in a mentally brutalized manner with broken body and spirit, which destroys the individuals. We shall briefly discuss some of the problems mentioned above.

Most prisons in Nigeria have little or no toilet facilities, and cells lack water. A visit by a Nigerian researcher for Amnesty International to ten prisons in the states of Enugu, Kano, Lagos and in the Federal Capital Territory at the end of July 2007 and recently revealed that 200 inmates had only two toilets, often overflowing by the end of each day thereby exposes the inmates to health hazards[49]

In some prisons where toilet facilities are nonexistent, buckets or other containers are often placed in one corner of an overcrowded cell, where inmates go to do in the public glare and to the hearing of all present for an activities usually done in private.[50] According to Ajomo, inmates do not take their bath regularly and when they do, they do it with water that appears

45 "Mohammed, A. Nigeria Prisons holds over 56,000 Inmates, over 30,000 Awaiting trial" *www.premiumtimesng .com. Accessed 25th October, 2013.*

46 "Evolution of Imprisonment in Nigeria" *Ibid*

47 *Ibid*

48 Tabin, M. *Towards a Humane Prison System.* (Abuja. NHRC 1997. P. 64

49 "Penal Reform Digest" *www.penalreform.org.* Aug. 2007 Accessed 27/10/2013.

50 Ajomo, M.A. *Human Rights and the Administration of Criminal Justice in Nigeria.* Lagos: NIALS 1991 P. 201. See also *Nigeria: Prisoners' Rights Systematically Flouted* London: Amnesty International, 2008.P. 25.

not very clean, and that in a large number of cases without soap. We observed during our visit on prisons decongestion some times in October, 2011 at Jos prisons in Plateau State that inmates particularly those awaiting trial, were often filthy and stinking and their presence produced no evidence of regular bathing.

The sanitary situation is frighteningly demeaning and exposes the inmates to health hazards. The standard minimum Rules require that sanitary installations be "adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner".[51] Conditions in almost all prisons in Nigeria fall far short of those standards. Diseases are widespread in our prisons. Crime Guard visited three prisons in Kirikiri area of Lagos comprising the maximum, medium and female security prisons in March 2013 and noted that the common ailment among inmates is malaria, high blood pressure, tuberculosis, fever, cholera, skin infections such as scabies and fungal infections.[52] In Abakaliki (Ebonyi State), the prison clinic attends to about 60 inmates daily for cholera and malaria. When serious illness occurs, requiring specialized treatment that a prisoner's relatives are not able to afford, the prisoner is likely to die.[53] Even more disturbing is the fact that hundreds of these prisoners in Nigeria have never been proven guilty of any crime.

Many Nigerian prisons have a small clinic, and most of the bigger prisons have a hospital.[54] Most of these clinics and hospital do not have mosquito nets to protect the ill prisoner from malaria. Inmates suffering from TB, are, where possible quarantined in special cells, but these facilities are absent in

51 SMR, Rules 12-14

52. "Nigerian Prison: Inmates Open upon Travails," *http://www.vanguardngr.com.* 22nd March, 2013. Accessed 28/10/2013

53 Iyizoba, C. Nigeria's Citadel of Injustice" *http://nigeria.prisoner's*

54 *Rights Systematically Flouted* London: Amnesty International, 2008 P. 26.

smaller prisons.[55] Most of the ill inmates we interviewed during our prison's visit also suffered from mental illness, diabetes, asthma or lice. Some have HIV/AIDS. As a result of the appalling sanitary conditions in the cells, it is very easy for inmates to infect each other. Many of the clinics in the prisons lack medicines and in many instances, prisons inmates have to provide for their own medicines. Health personnel are also in short supply.

There have also been complaints on the feeding conditions in the prisons.[56]Apart from the poor quality of the food it is also inadequate in terms of quantity. Portions are small and the quality of the food is, according to an inmate in one of the prisons visited by Amnesty International, of a very poor standard. It is not good for the health. Even the rice is not good – it's stone rice" The food we eat is not the food that a human being will eat'? Even a dog cannot eat the food"[57]

Also narrating her experience, Joy James (20 years old) at the Kirikiri Female prison said the food they are served with "is most times inedible, with no extra nutrition from things like fruits and vegetables."[58] Accordingly, some inmates ask their families to bring in food.

Prison overcrowding has also been identified as one of the main problems of the prison system. The greatest contribution to the problem of overcrowding is the remand population. The circumstances under which the Nigerian government locks up its inmates are appalling. Many inmates are left for years awaiting trial in filthy overcrowded cells with children and adult often held together. Some prisoners are called forgotten inmates as they never go to court and nobody knows how longer their

55. *Ibid.*
56. *Ibid*
57. *Nigeria: Prisons' Rights Systematically Flarted"* London: Amnesty International, 2008. P. 27
58. "Tales from Nigerian Prisons you'd never heard" http://www.ngrguardiannews.comAccessed 30/9/2013

detention will last, simply because their case files are lost or inadequate transportation and or the inability to bribe the prison officers. Narrating her tale of trouble, Joy James, a prison inmate at the Kirikiri Female Prison said that:

Sometimes when my case comes up in court, the Warden ask for money to fuel the vehicle and since I have no money, there is nothing I can do but remain here (in prison) and pray.[59]

The number of awaiting inmates in different prisons across the country is alarming. Amnesty International, Abuja in their prison system report of 26th February 2008[60] said that the Nigerian prisons are filled with people whose human rights are systematically violated. The report noted that approximately 65 percent of the inmates are awaiting trial most of whom have been awaiting for their trial for up to ten years. Some have even remained in prison for up to 14years without going to court.[61]

As at March 2013, a total number of 52,754 persons are reportedly in prison across Nigeria. Out of this number, over 34,000 are awaiting trial.[62] With the foregoing, it is observed that the major factor militating against efforts by the Nigerian prisons to efficiently carryout their constitutional responsibility is the issue of congestion owing to the increasing number of Awaiting Trial persons. Speaking at a summit on the reform of criminal justice administration in the country, the comptroller general of prisons (Olusola Ogundipe) noted that Contrary to prisons catering for convicts, they now use 90 percent of the allocation to cater for people on remand.[63] There is the absence

59. *Ibid*
60. "Nigeria: Prison System Report" http://www.africa.upenn26th February, 2008 Accessed 28/10/2013
61. "Nigeria: Tens of thousand languishing in Prison Awaiting Trial" http://www.facebook.com. Accessed 29/10/2013
62. "Nigerian prison: Inmates Open upon Travails, Triumphs" *http://www.vanguardngr.com* 2nd March 2013. Accessed 27/10/2013.
63. Ogbozor E.N. et al "From Hell to Hell the Travails of Ex-Prisoners in Nigeria" Paper presented at the 11th International Conference on Penal Abolition, held in Tasmania, Australia, February – 11 2006.

of classification of prisoners as in young and old, pre-trial detainees, first time offenders and suspects who committed minor offences as they share the prison facilities with dangerous criminals or second time offenders. This is as a result.of over-crowding and in the bid to accommodate everybody. Regrettably, this process lead to recidivism, indoctrination of minor offenders: they come out more hardened, worse than they were before being taken to the prison.

Conditions such as overcrowding, poor sanitation, shortage of food and medicines fall short of U.N. standards for the treatment of prisoners.[64] In many Nigerian prisons, inmates sleep on the floor in filthy cells. During the researcher visit in Kano, Kaduna and Jos prisons, in almost every cell, people were sleeping on the floor. Many inmates do have a bed, but don't have a mattress. Also, at the time of the Amnesty International visit, one cell at Kuje prison housed 219 men who shared 50 bunk beds and just two toilets. Inmates slept on the floor and underneath the beds.[65] Another account has it that prisoners lay on their back with legs slightly apart while another sleeps in between the legs with the head on the tummy or chest of the person he is sleeping on. He too has his legs apart for the next person.[66]This condition certainly affects the health of inmates. It may also lead to infectious skin diseases or even an outbreak of epidemic.

The long detention of awaiting trial inmates continues to generate a spiral of crisis for the prison system resulting often in riots and jail break attempts. They are angry with the society for incarcerating them for years for nothing, many with minor offences are waiting for trial. It is indeed worrisome that several awaiting trial prisoners are held in prisons for long period of

64 Thomas, P. "Impact Assessment of Justice Sector Reform in three Nigerian States – 2002 – 2007".

65. Kuje Prison: Degrading Treatment Despite Exemplary Facilities at……

66 Photos of How Nigerian Prisoners Sleep and Enjoy their Life-Politics (5) – Nairaland" *http://www.nairaland.com*. 9th Oct, 2013. Accessed 30/10/2013.

years, sometimes beyond the prison-terms, which the crimes alleged against them attract under the law.

The deliberate physical, psychological mistreatment of inmates by prison officials is also a persistent and pervasive issue of concern. These abuses occur in detention centers.[67] Some inmates are locked up in cell for extended periods of time without allowing them out.[68] Some are shackled inside cell. In some prisons, inmates are punished by doing frog jumps.[69] The memory of torture or ill-punishment has long lasting damaging effect on the prisoner. It can hinder the effective reintegration of the prisoner in the society. It was reported by Amnesty International that at Kano central prison prisoners complained about the harsh-treatment by the guards saying: "warders beat, humiliate and abuse the inmates".[70]

The conditions of Nigerian prisons discussed so far run contrary to what the prison experience is meant to accomplish in the lives of those who transit through them. Prisons are essentially correctional and reformatory; they are not institutions for the dehumanization of the incarcerated. The condition of the Nigerian prisons is equally begging for attention. It is disheartening that in Nigeria, prisons are death traps. Inmates of our prisons are always subjected to inhuman and degrading treatments, in violation of the human rights provisions enshrined in the nation's constitution and in line with relevant international conventions and agreements.

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67 "Stop Prison Abuse" *stopprison abuse. OrgAccessed* 20th October, 2013

68 "Prison Abuse Logs" *hrcoalition.org.com Accessed 20th October, 2013. See also "your right to be from assault by prison guards and other prisons" Columbia Human Right Law review ninth editions 2011.*

69. *Nigeria: Prisoners' Rights Systematically Flouted,* London: Amnesty International, 2008 P. 34.

70 *Ibid.*

PRISONERS RIGHTS

Although not afforded all the privileges of a free citizen, a prisoner is assured certain minimal rights. There are various statutes such as the prison Act 2004, the prisons regulation[71] and the Constitution of the Federal Republic of Nigeria, 1999 and various precedents which have been laid down in landmark cases which provide for the rights which prisoners are entitled to. Thus, a prisoner, whether awaiting trial or convict, does not legally forfeits all his rights merely because of his or her status as a prisoner. The Court of Appeal, per Justice Uwaifo J.C.A. (as he then was), in *Peter Nemi V. Attorney-General of Lagos State and ors*,[72] stated that prisoners still have their rights intact, except those deprived them by law.[73] Even a condemned prisoner awaiting execution still has his rights until properly executed by the due process of law.

The minimum rights prisoners are entitled to are, right to dignity, right to receive visitors, right to medical treatment, right to food, right to be tried within a reasonable time, right to worship, right to visitors, right not to be tortured or subjected to cruel, inhuman punishment, etcetera.[74] However, the problem today lies not in the availability of these rights but in the implementation of these rights. We shall consider some of the rights in brief.

Right to Dignity: Since prisoners are human beings, they have the right to life and dignity. Section 33 of the 1999 constitution states:-

Every person has a right to life and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of a criminal offence for which he has been

71 No. 49 of 1955

72 (1996) 5NWLR (Pt. 452) 42.

73 Sees also the case of *Barrowa Vs The State (1996)7 NWLR PT 460 P.302*

74 See Sections 22, 26, 28-32, 42-46, and 54-60 of Prisons Regulation L.F.N 2004

found guilty in Nigeria". Section 34 of the same constitution provides "Every individual is entitled to respect for the dignity of his person and accordingly (a) no person shall be subjected to torture or inhuman or degrading treatment.

The right to dignity is the central theme of prisoners right, a cardinal compliment of the right to life. The right to dignity abhors inhuman or degrading treatment.[75] Inmates have an absolute right to be free from any physical or corporal punishment. Beating is a clear violation of the right not to be tortured or subjected to cruel, inhuman treatment or punishment. Other physical punishment can also violate this prohibition. Prolonged solitary confinement or reduced sensory stimulation can amount to cruel, inhuman or degrading treatment or punishment.

Inspite of the constitutional provisions against torture or inhuman treatment, torture is still a routine practice in prisons across Nigeria. A good example is the case of a young man who was severely beaten and tortured in the cell, to the extent that he sustained injuries in his genitals that eventually made him sexually impotent on release from prison.[76] An insider account in one of the prisons narrated thus.[77] "As I was lead to the cell, I saw a warder repeatedly slapping him (detainee) in the face and spurring verbal assaults at him.[78] It is undisputed that brutal attacks on prisoners and detainees occurred frequently in the prisons.[79] Prisoners should be treated with dignity because just as the prison official has right to be protected, the prisoners also have the right to be protected.

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75 "The Prisoners' Right to Dignity" *http://www.pinigeria.org.* Accessed 30/10/2013

76 *Ibid*

77 Ogbozor, Odoemena & Obi *Op Cit* at 6

78 Famuyiwa, O.O., "Management of Torture", *Awareness Manual for Professionals, Prisoners Rehabilitation and Welfare Action, PRAWA*, 2001 P.5.

79 *Ibid*

Right to Visitors: The law has recognized the importance of visitation rights, because such rights aid the prisoner's eventual transition back into the community by keeping the individual in touch with society. They are also entitled to receive and write letters.[80]

However, there are limitations regarding the free flow of written correspondence of an inmate and to withhold or censor the mails if he feels it is necessary.[81] Often, inmates are not informed that their communication has been withheld or censored, and they are thus denied any opportunity to challenge these actions.[82]

These restrictions generally include limiting the number of people with whom inmates may correspond and the reason in our view has to do with security. For instance, contraband must be intercepted, escape plans must be detected, and material that may incite the inmate population in some way must be excluded. Prisons have also used the goal of rehabilitation to justify certain restrictions on inmate correspondence.[83]

It is our candid opinion that prison officials cannot unreasonably restrict or censor a prisoner's incoming and outgoing mail except for the reasons stated above. They must offer good reasons for such restriction since it is the prisoner's right to communicate with the outside world. Therefore, a vague allegation that a mail or material is likely to stir up trouble is inadequate to justify broad censorship. In 1974, the Supreme Court of the United States in *Procunier V. Martine*[84] ruled that the California Department of corrections could not censor the direct personal correspondence of prisoners unless such

80 Section 42, Prisons Regulations. CAP 29 LFN 2004.
81 Section 44 *Ibid*
82. *Ibid*
83 Inciardi, J.A. *Criminal Justice*. 7th edition New York: Oxford University Press P. 564.
84 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2nd 224.

censorship was necessary to further important interests of the government in security order, and rehabilitation.

A procedure must therefore be established to determine that censorship, when appropriate, is neither arbitrary nor unduly burdensome.

Regarding prison visit, the visitor must first apply to the comptroller of prisons asking for permission to visit the prisoner.[85] The comptroller or his officers may deny any visitor access to the prison. It is however our opinion that restrictions on visitation must be reasonable and related only to security needs and good order. The issue of the right of a prisoner to communicate and see visitors becomes more significant when the proposed visitor is a legal practitioner who will represent him in Court. The importance of a legal practitioner in the conduct of criminal trial to determine the innocence or otherwise of the accused cannot be under estimated. This is particularly when the prisoner is awaiting trial.[86] He is presumed innocent until proved guilty. The position is that he is an innocent person only been restricted before one matter of his guilt or innocent is being determined.

Prisoners do not have a right to engage in sexual relations or conjugal visit with a visitor. Indeed, at present, a right to such visit is not acknowledged under the Prisons Act or regulation. This is deducible from the provision of section 42 of the prisons regulation which requires all visits to be in the presence of a prison officer, thereby making it difficult if not impossible for the prisoner and his or her visitor to engage in sexual intercourse. The consequence of the denial of a right to intimate visits seems to be that prisoners cannot enjoy the human right to found a family either. The justifications for the restriction of a prisoner to engage in sexual relation and to found a family was aptly stated by the European Court of Human Rights in the case

85 Section 46, Prison Regulations Cap. P. 29 LFN 2004.
86 Section 45 ibid

of *Dickson V the United Kingdom.*[87] They offered three principles as an explanation. First, losing the opportunity to beget children is part and parcel of the deprivation of liberty and an ordinary consequence of imprisonment. Secondly, public confidence in the prison system will be undermined if the punitive and deterrent elements of a sentence were to be circumvented by allowing prisoners to conceive children. Thirdly, the inevitable absence of one parent, including that parent's financial and other support, for a long period has adverse consequences for the child and for society as a whole. I subscribe to the idea that prisoners should not be allowed to beget children while in detention because such children will not received the care that is needed for proper upbringing.

Right to Health and Cleanliness: Every prisoner is entitled to be kept in a homely, clean and comfortable environment to safeguard his heath and well being. This can be gleaned from the provision of section 28 of the Prison Regulation. The inmates are also entitled to be provided with suitable bedding[88] and are also entitled to take exercises in the open air.[89] They are also required to take their bath daily and keep themselves clean.[90] Despite these laudable provisions, prisoners still sleep on bare floors, and they are never freely given bathing soap and other disinfectants, and couple with the appalling sanitary conditions in the cells, it is very easy for inmates to develop skin problems, and other ailments and infect each other. The prison authorities simply cannot guarantee cleanliness inside the cells due to inadequate funding. Therefore, most Nigerian prisons do not uphold the right to health. In *Robinson Wabah & 2ors V COP & 3ors.*[91] it was held that "to detain a person under

87 EC+HR (GC), Judgment of 4 December 2007 APPL. 44362/04, Para 65-66
88 Section 26&27, Prisons Regulation LFN 2004.
89 Section 29 *Ibid.*
90 Section 31 *Ibid.*
91 (1985) 6 NCLR.

deplorable prison conditions constitute an infringement of the fundamental right of every man to respect for the dignity of his person". These rights however have continued to elude the prisoners in spite of many years of governmental promises for improvement.

Right to Medical Care: The general rule is that inmates have a right to be provided with medical care and attention as needed to treat both short-term conditions and long-term illness. The medical care provided must be adequate.[92] A duty to offer health care is in conformity with the duty to ensure the safety of prisoners. The obligation rests primarily on the fact that the state has brought someone into a situation in which he cannot provide for his own health or safety as well as he generally would be able to in free society. It is therefore perfectly in line with the minimum basic principle that authorities are obligated actively to provide measures of healthcare as acompensation for the Unintended consequences of imprisonment.[93] In this regard, inmates who need medical care are entitled to receive that treatment in a manner that is appropriate under the circumstances. So a prison official's refusal to provide medical treatment to a seriously ill inmate violates his right to life and not to be subjected to cruel and unusual punishment.[94] For instance, the Human Rights Committee found a violation of the right to life in the case of *Lantsova v. Russia*[95] in which the son of the applicant died in prison because the authorities had not taken appropriate medical measures when his health deteriorated dangerously.

92 See Sections 7&8 of the Prisons Act and 118-136 of the Prisons Regulation which deal with the General duties of the medical officer and the dispenser of Prisons.

93 Kempen. P.H. V "Positive Obligations to ensure the Human Rights of Prisoners".

94 Estelle V Gamble. 429 U.S. 97,97 S. (285, 50L. Ed. 2d 251 (1976).

95 HRC, view of 26 March 2002, Comm. 763/1997, Para 7.7.

It must be clearly stated that the right to medical treatment does not guarantee that an inmate will be free from or cured of all real or imagined medical problems while in custody. Thus, although prison officials cannot deny medical aid, inmates cannot expect perfect medical services because the prisons is grossly underfunded.

Inspite of the elaborate provisions in the Prisons Act and Regulations on medical care, inmates in Nigerian Prisons do not enjoy the right to healthcare due to lack of adequate medical and psychiatric care. Prisoners receive such grossly inadequate medical attention that they are in grave danger of suffering serious and preventable sickness or injury and even death. Most prisons in Nigeria have small clinics which lack medicine, and in many prisons inmates have to pay for their own medicines.

Right to Food: Every prisoner is entitled to food in amounts adequate to sustain an average person.Section 22 of the prisons Regulation States: "Every prisoner shall be allowed a sufficient of plain and whole some food, regard being had to the nature of the labour to be performed by him,..."
Also the Standard Minimum Rules states that.

> *Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. Drinking water shall be available to every prisoner whenever he needs it.*[96]

Even though the law makes provision for adequate diet and rations, there has been a lot of complaints on the feeding conditions in the prisons in recent time. The complaints range not only from the poor quality of the food but also the

96 SMR, Rule 20

inadequacy of the quantity. The food served is always tasteless, cold, not well cooked, and uninviting. Accordingly, some inmates ask their families to bring in food. The prison officials therefore do not interfere in the provision of food by private arrangement by each prisoner.[97]

Right to Worship: Prisoners are entitled to practice their religion, obtain and keep written religions materials with the permission of the superintendent of the prison, see or communicate with a religious leader, and obey the rules of their religion that do not endanger order and security in the prison[98] in addition, wherever possible, formal religious observance for groups of inmates must be allowed on a regular basis. Prisoners can have access to religions programs broadcast on radio and television. Different religions within a particular prison must be given equal treatment.

Remission of Sentence: Prisoners serving different jail sentence are entitled to a reduction on their sentences. This is provided for by Regulation 54 made pursuant to section 15 of the Prisons Act Cap. P 29 Laws of the Federation 2004. The section states "Every convicted prisoner undergoing a sentence of imprisonment for a period exceeding one calendar month may earn remission of sentence as the reward for industry accompanied by good conduct" Regulation 55 of the same Act States that "The maximum remission which may thus be earned shall be one – third of the sentence. It therefore means that 8 months make one calendar year for the purpose of remission. This is called a prison year. The point must be made clear that except the prisoner is found wanting for any offence(s) against prison discipline under Regulation 48, remission of sentence is

97 Aina. K et al Courts and Justice Administration in Nigeria – A course manual of the National open University of Nigeria (NOUN) P. 115

98 See sections 39 – 41 of the prisons Regulations

hisor her legal right insofar as the prisoner is serving a sentence exceeding one calendar month.

Notice of Rights: The law has recognized the right of inmates to receive adequate advance notice concerning the kind of conduct that will result in discipline and/or punishment.[99] Consequently, every prisoner on admission shall be provided with written information about the regulations governing the treatment of the prisoners of his category, the disciplinary requirements of the institution; the authorized methods of seeking information and making complaints and all such other matters as are necessary to enable him to understand both his rights and his obligations to adapt himself to the life of the institution.[100]

Right to Use Available Procedures for Review of Complaints: Prisoners have a right to use available administrative procedures for review of their complaints. For example, the Prisons Act provides for an internal review of the complaints registered by inmates.[101]Prisoners also have the right to challenge prison conditions and make their grievances known to the Superintendent in charge of the prison[102] and to seek redress in court[103]

Right to be Trial Within a Reasonable Time: The Nigerian constitution guarantees the right of every citizen accused of criminal offence to be brought before a court within a

99 "Basic Rights of inmates in correctional Institutions"

100 Tabin, M *Human Rights and Prison system in Nigeria* Lagos. NHRC. 1998. P. 90

101 See Section 47 of the Prisons Regulation LFN 2004

102 Section 47(2) and 101 of Prisons Regulation.

103 *Barrowa v. the State* (1996)7 NELR PT. 406. P. 302

reasonable time.[104] The judiciary system has failed in its obligations to ensuring that rights of inmates are respected as Nigerian prisons are filled with people whose human rights are systematically abused and violated. Roughly 80 percent of the inmates are on awaiting trial, most of whom have been waiting for their trials for 15years.[105] It is regretful that some awaiting persons are victims of circumstances and they deserve to be given fair trial within reasonable time, otherwise, it would be a case of human right violation. The judiciary therefore needs to guarantee inmates a fair and speedy trial and offer proper legal representation and address the living conditions in the prison when there is proper legal representation for accused persons (practically Awaiting Trial Inmate) there will be expeditious hearing of their cases and those deserving to be set free will be released from jail there by decongesting the prisons leading to fewer person in prisons and this will improve their living condition. A fair and speedy trial is not a privilege but a right. This right is also at the instance of convicted prisoners who have filed an appeal against their sentence.[106]

Remedies Available to Prisoners

Prisoners who seek to protect their right are entitled to complain, but they are required to pursue whatever procedures that exist within the prisons before taking the case to court[107]

A prisoner who is unlawfully detain in penal institution can file a writ of habeas corpus for his release. A writ of habeas corpus is a legal document ordering anyone who is officially holding the petitioner to bring him into court to determine whether the

104 See section 36(1) 5(4 of the 1999 constitution of the Federal Republic of Nigeria.

105 Ibemere, E. "Hell in Nigerian Prisons: Lagos based Right Activist blames police, lawyers, judges others for congestion in prisons". *http://equilizer4god.blogspot.com* Accessed 2/11/2013

106 Section 36(a) of the 1999 constitution

107 Section 47, Prison Regulation

detention is unlawful.[108] The writ of habeas corpus is a writ available in the High court in all cases of wrongful detention or deprivation of personal liberty as guaranteed under the constitution.[109]

In the United States of America, a writ of habeas corpus was granted only for the purpose of ordering an immediate release of a prisoner from all restraints. However, the scope was expanded in the 1970s and early 1980s, entitling prisoners to the writ even if they were legally in custody but the conditions of the confinement violated their constitution rights.[110] It was earlier decided in the case of *Coffin V Richard*[111] that:

> *A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits.*

A victorious habeas petitioner on ground of prison conditions can win injunctive relief–a court order directing prison officials to improve conditions or to stop enforcing unlawful policies.[112] This change in the law led to the improvement of prison conditions in the United States.

We opine that prisoners in Nigeria can effectively use this remedy of habeas corpus to challenge the conditions of their confinement. This will to a greater extent help in improving the dilapidating conditions of Nigerian prisons. In the alternative, they can use the writ to demand for their release from custody if

108 "Prisoner Rights" *www.DictionaryBoss.com* Accessed 23/10/2013
109 Section 35(1) of the 1999 constitution
110 Incirdi, op.cit at 559
111 (d.1555) of Portledge.
112 *Ibid*

the government is not willing to improve their living conditions as required by law.

Non Governmental Organizations (NGO) and civil society with states can also come in to salvage the situation through visits to the prisons. They can help create a well-functioning prison visiting system that does not need more finances or manpower from the state.[113] It is widely accepted that one of the best safeguards against torture and ill treatment is for places of detention to be as transparent as possible. Therefore regular and periodic visits by independent monitoring groups are central to protecting the rights of detainees.[114]

CONCLUSION

Conditions of prisons in Nigeria are an affront to human rights and must end. No human being should be held under the deplorable conditions we have described so far for prolonged periods, even decades. This amounts to cruel, in human and degrading conditions. A prison which is supposed to be a reforming center turned out to hardening the heart of inmates, due to the dehumanizing condition of the prisons.

Prisoners enjoy all the same human rights as individuals in the community save the right to liberty, and the authorities have an obligation to actually secure those human rights in prison. Unfortunately, prisoners have not been enjoying these rights as the writer found out that the prisons are grossly underfunded resulting in inadequate infrastructures, delayed trial culminating in high number of awaiting trial inmates, lack of proper training of prisons officials to appreciate the human rights of prisoners. To worsen matters, sentencing alternative to imprisonment has not been effectively utilized by the courts which contributes immensely to prisons overcrowding.

113 Kaggwa S. Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa.

114 *Ibid.*

RECOMMENDATIONS

A penal institution is designed to heal the prisoner rather than harm him and to generate hope instead of despair. Justice for society demands that people we release from prison should be less likely to cause further harm or distress to others, and better equipped to live as law abiding citizens.[115] It is against this backdrop that we propose the following recommendations.

1. Justice delayed is justice denied. A situation where poor detainees stay in custody indefinitely without trial due to the in-action of the prosecution or court is a breach of their right to freedom and this need a serious and urgent action. We are therefore calling on the government to systematically review the files of all inmates awaiting trial in Nigerian prisons and detention centers, and ensure that their right to a fair trial within reasonable time is guaranteed.
2. The government should as a matter of urgency provide adequate resources, including funding to improve living conditions and access to health care in Nigerian prisons. Adequate funding of the prison will also enable it expands the existing prison infrastructures which are inherited from the colonial masters. The Nigerian prison service should take immediate measures to ensure that prisoners are kept in sanitary and humane conditions, which ensure the physical integrity of all inmates in prisons and detention centers. The conditions in Nigerian prisons should be brought up to the level required by international standards, including the Universal Declaration of Human Rights and United Nation Standard Minimum Rules for the treatment of prisoners.
3. The government should ensure that inmates are allowed to take proceedings before an independent court to challenge

115. "Want to go to prison? Choose Norway" *http://www.punching.com* 13th March 2013. Accessed 6/11/2013

the lawfulness of their detention. Prisoners' rights are guaranteed and should be enforced. Prison authorities as agents of the state, should know the regional and international instruments that guarantee the rights of prisoners. In this regard, prison directors should ensure that staff maintain and improve their skills by offering them opportunities to attend courses on human rights.

4. The judiciary should strive to ensure that the human rights of prisoners and detainees are safeguarded at all times by timely entertaining cases of human rights abuse emanating from inmates. This is because improving the situation of inmates in the Nigerian prisons requires an effective and functioning judiciary.
5. It is our recommendation that there should be alternative to imprisonment which includes community sentencing, suspended sentences, probation. These sentencing options are desirable alterative in Nigeria because they anchored mainly on reformation and rehabilitation of the offender. They will also help in decongesting the prisons thereby reducing overcrowding. Although, probation and suspended sentences are in our statute books, particularly in the Criminal Procedure Act (CPA) but does not exist in practical terms.
6. There should be frequent visits by heads of governments, the chief judges of the states to ascertain those who have no business remaining in prison. This will enable government to appreciate the terrible dilapidated state of prison infrastructure, the overstretched facilities and inmates deserving to benefit from jail delivery sessions.
7. There should be establish prisoners welfare board. The main function of the board would be to oversight prisons authorities as a way of ensuring strictly compliance with extant rules and regulations concerning prisoners welfare and rights.

8. Prisons should be essentially reformatory so that when freed, the ex-convict would be re-integrated into the larger society as a human person with dignity. A situation where first offenders are so maltreated that they turn into hardened criminals is not good for our society, and this arises from the inhuman conditions which characterize Nigerian prisons.

Addressing the malady of prison conditions and inmate rights therefore requires comprehensive overhaul of the country's criminal justice system, judicial reform and executive action, all geared towards enhancing the state and condition of our prisons which will in turn guarantee prisoners' rights.

EMERGENCY POWERS AS SWORD OF DAMOCLES: SCRUTINIZING FREQUENT FEDERAL THREATS AND DECLARATIONS OF STATE OF EMERGENCY IN NIGERIA SINCE 1999

BY

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Law in times of crisis is the most misunderstood aspect of law. It is rarely discussed in academic circles and in published treatise. It rarely comes up for adjudication; as such its jurisprudence remains exotic, abstract, inaccessible and confusing. Yet emergencies have always been with humankind from time immemorial, and have been subjected to varied uses, both abusive and protective of the security of nations and the rights of individuals.

A recent monumental book by Oren Gross and Fionula Ni Aolain strikingly titled: "Law in Times of Crisis: Emergency Powers in Theory and Practice", agrees largely with the foregoing propositions.[1] According to these scholars, prior to the attack on New York, Washington, and Pennsylvania, violent crises and their implications for legal systems had not attracted much attention in legal scholarship.[2]

Much earlier, Ian Brownlie, writing in 1972, had observed that: "Books on constitutional law find little to say about emergency powers."[3] This observation still applies with as much relevance

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1 Gross, O., and Aolain, F.N., "Law in Times of Crisis: Emergency Power in Theory and Practice."Cambridge University Press, (2006), p.2.

2 Ibid.

3 Cited in Ibid, p.2

in many jurisdictions today. Before 9/11, discussions of emergency powers in general, and counter-terrorism measures in particular, had been relegated to a mere few pages at most, in American constitutional law texts, even though, successive American leaders have for a long time governed under what amounts to perpetual emergencies engendered by continuous global and sometimes even internal threats to its national security and strategic interests.[4] The situation has not been different in other countries.

In Nigeria, books written by renowned authorities on constitutional law, such as Professor Ben Nwabueze, have been restricted to description of the constitutional provisions on emergencies, making only perfunctory reference to the theory or philosophy of emergency powers[5]; other authors make no such reference at all.[6] This is probably because emergencies have been conceptualized in liberal constitutionalism as aberrations, rare and uninteresting exceptions to the otherwise ordinary or normal state of affairs.[7] As Federick Schauer suggests in

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[4] Ackerman, B., "The Emergency Constitution", Yale Law Journal Vol. 113: (2004), PP.1029-91, at p..1078-79. See also, Lobel, J., "Emergency Power and the Decline of Liberalism", Yale Law Journal, Vol. 98, (1988-1989), pp.1385-1433

[5] Nwabueze, B., "The Presidential Constitution of Nigeria." C. Hurst & Company, London, with Nwamife Publishers, Enugu and Lagos .(1982), pp. 69-70, 95-102, 151-2, 233-4, 180-3, 250-4, 284-8, 319-21, 336-7, 250-4, 353-6,

[6] Mowoe, K.M., Constitutional Law in Nigeria. Malhouse Press, Jos. (2008), p.243.

[7] Lobel, J., "Emergency Power and the Decline of Liberalism", Yale Law Journal, Vol. 98, (1988-1989), pp. 1385-1433.

another context, the exception has been "an invisible topic in legal theory".[8]

In the context of Nigeria, as pointed out earlier, the concept of emergency hardly features as a subject of discourse in constitutional theory; consequently, it is widely misunderstood. Thus whenever the concept is brought to the table for political debate, response has been highly emotional and irrational rather than objective and patriotic. Many participants in such debates neither recognize nor understand the wide and complex ramifications of the concept of emergency in law. They hardly distinguish between the more narrowly tailored concepts of emergency entrenched in most national constitutions such as Section 305 of the 1999 Constitution of Nigeria[9], as well as in international human rights instruments[10] and the wider concept of emergency recognized in general constitutional law usage, as any event that was not contemplated by the constitution makers but which now poses a challenge in the implementation of the constitution, hence the tendency to attribute pejorative connotations to the concept by politicians in Nigeria and to reject it as an instrument of public policy in preventive security administration.

This paper sets out to examine the jurisprudence of the concept of state of emergency under international and Nigerian constitutional law. It has examined the challenges in the implementation of the constitutional principles of emergency in a number of crisis situations in some States of Nigeria, namely, Plateau and Ekiti States and more recently, in some fifteen local governments areas, scattered over Plateau, Borno, Niger, and Yobe States, in reaction to the surging terrorist attacks and

[8] Shauer, F., "Exceptions" *University of Chicago Law Review No 58 (1991)*871 at 872.

[9] See Section 305 of the 1999 Constitution of Nigeria.

[10] See Section 4 of ICCPR

threats posed by the Islamist group popularly called Boko Haram.

The Nigerian constitution, lays down in specific terms the elements that constitute states of emergency and the conditions under which a state of emergency may be legitimately proclaimed in any part of Nigeria or over the whole country.[11] Since independence, Nigeria has experienced many crises ranging from boundary conflicts, to inter-ethnic conflicts and ethno-religious conflicts as well as religious conflicts parse. The most serious of these crises was the thirty-month civil war which resulted in much destruction of lives and property and almost violently tore the nation into pieces. Additionally, Nigeria has experienced several natural and man-made disasters, including severe economic crises, floods, drought, bush fires and accidental detonation of bombs from an armoury at the Ikeja Army Cantonment in Lagos State.

Added to the above are the more recent militant sabotage of oil installations in the Niger Delta and indiscriminate terrorist bombings of strategic public institutions resulting in considerable civilian casualty which sole purpose is to intimidate the government and the society in general. The question may then be asked: What is the validity of the frequent threats of declarations of states of emergency in states where these crises are perceived to be endemic as well as the declaration of states of emergency in some states of the country since 1999?

Since the restoration of democratic governance in Nigeria in 1999, the executive arm at the federal level has threatened to use the declaration of emergency provisions of the constitution

[11] Section 305 of the 1999 Constitution of Nigeria.

several times.[12] It has in fact enforced declarations of emergency powers in two States, Plateau[13] and Ekiti,[14]and more recently, in some selected 14 Local Government Areas in Plateau, Yobe, Niger and Borno States. This paper also examines the legal basis of these threats and actual declarations of emergency and their implications for federal-state relations and the security and stability of the nation.

HISTORICAL OVERVIEW OF SECURITY CHALLENGES IN NIGERIA SINCE 1999

The present democratic experiment in Nigeria, from its outset in 1999, was a child of emergency. It was born out of the heroic struggles of Nigerians at home and in exile who acted in concert or individually to resist prolonged military rule and the illegal nullification of the widely acclaimed "freest and fairest

[12] Olaifa, K., and Anyika, L. "No Thanks to Senate for a Hasty Gift: Emergency Power Act: The Politics and the Likely Harvest of Chaos." Now: The Weekly Reference Point, No.7, November 20, 2000.

[13] Idowu , A. A.,"Emergency Powers Under the Nigerian Constitution: The Plateau State Experience of Year 2004 Revisited",European Journal of Scientific Research, Vol.21 No.1 (2008), pp.22-36 http://www.eurojournals.com/ejsr.htm , Accessed Feb. 29. March 1, 2012 at 4.30 pm.

[14] Aluko, M.E. "The State of Emergency in Ekiti State and the Nebuchadnezzar Non-Option." http://www.dawodu.com/aluko149.htm. Accessed March 2, 2012 at5.30 pm. See Aturu, B, "Emergency Rule in Ekiti as the 1999 Constitution Holds." http://www.dawodu.com/aturu1.htm. Accessed March 2 2012 at 5.30 am

elections" in Nigeria's history, by military dictator, General Ibrahim Badamasi Babangida, in 1993.[15]

These struggles manifested in open, violent contests between the military regimes of both General Babangida and General Sani Abacha and the democratic forces in Nigeria. The presidential ticket had been won for the first time on a uniquely "Muslim-Muslim" ticket in a country usually sharply divided between Muslims and non-Muslims. That presidential ticket was made up of Chief M.K.O Abiola from the South West of Nigeria and Ambassador Baba Kingibe from North Eastern Nigeria, both Muslims. Not only was the election nullified, Chief M.K.O Abiola, the acclaimed winner, was subsequently arrested after he had unilaterally declared himself President in defiance of the military authorities. He later died in mysterious circumstances while under administrative custody. [16]

The nullification of the election was condemned throughout the world and strongly opposed throughout the country, but organized resistance soon petered into one prosecuted largely by the Yoruba in the South West of Nigeria, the home base of M.K.O. Abiola. A very viral platform, the National Democratic

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[15] Ogunmade, O., "Babangida: The Real Reason I Annulled June 12", This Day, 2 May 2009 http://www.thisdayonline.com/nview.php?id. Accessed on 27 Feb. 2012 @ 1.30 pm.

[16] **Matthew, K, andUghegbe, L.,** "How they killed Abiola, by Zadok:His security officer in custody"Vanguard **Friday, 20th July, 2001.http://www.nigeriamasterweb.com/nmwpg1abioladeath.html. Accessed 27 Feb. 2012 at 2.00, See Also** "Lest we Forget MKO Abiola: Tragic Exit of a Democrat", Nigeria TribuneMonday Feb. 27, 2012. Accessed at 2.10 pm.

Coalition (NADECO), was formed to fight that course, both by Nigerians at home and in exile. That struggle was reinforced by the emergence of a violent youth militia group, the O'odua People's Congress (O.P.C), made up mainly of Yoruba youth, who fought for the secession of Yoruba land from the Nigerian state and targeted public institutions especially the Nigeria Police in guerrilla attacks.

This resulted in considerable lawlessness in the South-West of Nigeria, especially as the federal government deployed its security forces after the chieftains of NADECO, and the O.P.C. as counter-insurgency measures. Similar militant militia emerged in Northern Nigeria, the Arewa Peoples Congress (APC), and the Bakasi Boys and the Movement for the Survival of Biafra (MASOP) in the South-East. There has also been the intensification of the activities of the Movement for the Emancipation of the Niger Delta in the South-South geo-political zone.[17]

The choice of General Olusegun Obansanjo as the candidate of the Peoples Democratic Party (PDP), the dominant political party at the inception of the current democratic dispensation in 1999, it is believed in many quarters, was informed by the desire of the national elite in that party to appease the Yoruba nation, for the perceived moral and material loss incurred by the Yoruba Nation as a result of the nullification of the election.

For the records, it is noteworthy to recall that twice between May 20th 1999 and November 20th 2000, President Olusegun Obasanjo was prodded by the National Assembly into invoking the emergency powers vested in his office, to douse the rising violence caused by the O'dua People's Congress (OPC) and the

[17] Special Publication: Research Reports on Conflict and Integration in Nigeria, National Institute for Policy an
Strategic Studies, Kuru, Plateau State, Nigeria.

South-East of Nigeria by the "Bakasi" boys, but he elected to tread other paths. It is, therefore, not surprising that when he was offered the opportunity for the third and fourth times in Plateau[18] and Ekiti States, he confidently railroaded a willing National Assembly into supporting what were clearly unconstitutional proclamations of states of emergency.[19] The more recent Proclamations of states of emergency by President Goodluck Ebele Jonathan, in selected fourteen local government areas in Plateau, Yobe and Borno and Niger States, were approved by the National Assembly with similar haste and absence of rigorous debate. The recent transformation of what begun in 2002, in Yobe State, as a militant Islamist organization, self-styled the "Taliban", into a terrorist organization provided the impetus to the recent imposition of state of emergency in these states by the Goodluck Jonnathan administration. The group took the appellation, "Taliban", as its first name from the ultra conservative Islamic movement that governed Afghanistant prior to its being attacked by the US in the wake of 9/11. Since then, as result of frequent confrontation with security forces and the government, the Islamist militants have assumed very violent posture towards the security forces, public property, and innocent civilians such that they have acquired the status of a terrorist organization and are being called as such in the country. The recent gruesome attacks on strategic locations in the country such as the UN office and the Police Headquarters in Abuja and churches during warship sessions as well as many public places including the offices of

[18] Akinyemi, A.B. The Emergency in Plateau State: The Unlearned Lesson. http://www.google.com.ng.

Accessed on 22 Feb. 2012 at 3.30 am.

[19] Olaifa, K., and Anyika, L. O. op.cit, p.6.

security organizations only confirm the terrorist tendency of the organization.

DEFINING STATE OF EMERGENCY

There are a variety of situations encompassed by and different from the political circumstances under which a declaration of emergency could be made, hence it is very difficult to define clearly what constitutes a state of emergency. The African Conference on Rule of Law admits this much when it says that "there is no way of defining a state of emergency or of reducing it to any criteria."[20] The meaning gets further clouded by the tendency of states to use the ordinary law-making procedures to pass "quasi" emergency laws in the shape of wide ranging security legislation such as the Public Order Act of Nigeria[21] and various laws of countries permitting administrative detention or detention without trial, such as the Administrative Detention Act of Israel.

The African Conference concluded that it is only possible to specify certain circumstances or conditions without which a state of emergency cannot be proclaimed. One of the main conditions, when it is appropriate to declare a state of emergency, according to the conference, is when "the regular operations of authority are impossible."[22] The Conference contended that "so long as a situation exists where the authorities can operate and the problems arising can be overcome, a state of emergency may not be declared."[23]

The Black's Law Dictionary, defines emergency as:

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[20] " African Conference on the Rule of Law 1961:A Report of the Proceedings of the Conference", Lagos, Nigeria. January 3-7, (1961) p.162

[21] Public Order Act, CAP. P. 42, Laws of the Federation, 2004.

[22] African Conference on the Rule of Law, op.cit. p.165.

[23] Ibid.

A sudden unexpected happening; an unforeseen occurrence or condition; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action without time for full deliberations.[24]

These definitions tell us about what emergencies are without defining their contents or legal scope.

O' Boyle lists six main types of emergencies, namely, war, economic recession, natural disaster, secession, insurrection, and subversion.[25] They all threaten the continued stability of the state and require the adoption of extraordinary powers to surmount. The political rationale of emergencies is self defence, embodied in the maxim, *salus populi, suprema lex esto*.[26]"[E]very government when driven to the wall by a rebellion will trample down on a constitution before it would allow itself to be destroyed. This may not be constitutional law but it is a fact."[27]

The legal justification of an emergency stems from the dilemma faced by a government in an emergency. It rests on the concept of necessity. The dilemma is between protecting human rights while watching the state being destroyed and violating human rights in the process of saving the state.[28] In the final analysis the concept of necessity involves a choice of a lesser evil or as Glanvill Williams has put it, it requires "A judgment of value,

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[24] Black, H.C., Black Law Dictionary (Sixth Edition). St. Paul, MINN. West Publishing Co. (1990). pp.522-523.

[25] O'Boyle, M.P., "Human Rights in Emergencies", Northern Ireland Legal Quartely No.2 (Summer 1977), p.161

[26] Ibid

[27] Ibid, Citing Abraham Lincoln.

[28] Ibid

and adjudication between 'competing goods' and a sacrifice of one to the other"' [29]

Hatchard, J., adopting a more practical approach, identifies five substantive situations which can justifiably give rise to states of emergency.[30] Quoting him extensively, these are:

A state of war or preparation to meet its imminent outbreak. Here extremely wide powers are required and these will almost inevitably affect most facets of national life.

Armed internal rebellion. This situation is sometimes unlike (i) above but does not necessarily require the taking of such wide-ranging powers concerning for example external relations, restrictions on non-nationals;

Civil unrest on a localized scale. Here additional law and order provisions, applicable only to areas affected by the unrest, are all that are commonly required to deal with the threat;

An economic emergency, notably one relating to problems of underdevelopment. Here the parlous state of the national economy may require taking of emergency power aimed at preventing the economic collapse of the country. These necessary powers are different from the ones discussed above.

Natural disasters (force majeure). Here the government may need to take immediate steps to counter the problem, for example by requisitioning transportation. Specific types of powers are necessary and these will almost certainly be of a temporary nature.[31]

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[29] Williams, G., "The Defence of Necessity" (1953) 6 C.L.P. 216

[30] Hatchrd J. Individual Freedom and State Security in Afican Context: The Case of Zimbabwe (1993: Baobab Books: Harare), p.1-50

[31] Ibid, p.1

According to Scheppele, K.L.,[32] "[t]hough [state of emergency] ... has gone by different names over time – state of exception or [reason of sate], or state of emergency, or etat de siege – [it] has referred to the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justified in normal times, given the working principles of that state."[33] The state of emergency "uses justifications that only work in extremes, when the state is facing challenges so severe that it must violate its own principles to save itself."[34] On the other hand, a state of emergency "is dangerous because it is susceptible to easy abuse."[35] This is so because the decision as to which situation deserves to be called a state of emergency is based on subjective considerations. It often permits the suspension of some of the principles of state, but cannot prevent all of them from being suspended in a crisis. There is also the problem of how the normal situation can be restored when the state of emergency is over.

The above definitions show that the exercise of state of emergency powers by a state is concerned with remedial measures to disrupt and bring to an end large scale disturbances (natural and instigated), or war, that pose serious danger to national security. Emergency powers may be used where preventive action has proven insufficient to avert the threat to national security and the paramount question has become how to control and bring to an end an actual disturbance.

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[32] Scheppele, K.L. "Law in a Time of Emergency: State of Exception and the Temptation of September 9/11."
Journal of Constitutional Law Vol. 6, March 5, (2004), pp1001-1083

[33] Ibid., p.1004

[34] Ibid.

[35] Ibid.

Emergencies in this paper would also include lesser gradations of disturbances. Additionally emergency situations include wild forest fires, epidemics, earth quakes, tsunamis, hurricanes cyclones, volcanic eruptions, flood disasters or air disasters.

CONSTITUTIONAL THEORIES OF STATES OF EMERGENCY

It has been observed that "mortal threats to the political community have been around since the origin of complex political communities" and that as a result, "both politicians and political theorists have always had to confront the justifiable limits of the normal state of governance."[36] The predominant forms of government during early times were largely despotic monarchies. Today, constitutional governments seem to encounter a different dilemma of justification, precisely because "executives in constitutional democracies are supposed to be accountable to and removable by electorates, and also because modern constitutions embrace both separation of powers and justiciable systems of rights."[37] Schepelle, K.L., points out that:

For an executive to seize power and suspend rights under a democratic government is an entirely different matter, normatively speaking, than for a monarch (even a constitutional monarch) to do so. In a modern constitutional democracy, the suspension of separation of powers and of substantial bodies of rights to cope with an emergency requires justification in terms of both the viability and accountability of government and the long term respect for rights in the constitutional order. Thus, while monarchies generally possess some residual elements of unaccountability and of extra-ordinary executive powers, republican governments attempt to purge both. State of

[36] Schepelle, K. L. op.cit., p.4
[37] Schepelle, K.L., Ibid, p.5

emergency, then, poses more difficult problems of justification in republics than in monarchies.[38]

Schepelle also observes that; "Written constitutions before the twentieth century did not typically attempt to regulate state of exception (emergencies) in detail. He cites the United States Constitution as an example. He further states that European constitutions of the eighteenth and nineteen centuries only "tentatively began to elaborate the idea of a constitutional state of emergency, but typically left all important details to statutes."[39] Schepelle points out that, in much of nineteen century Europe,

...even when constitutions did try to establish separation of powers and respect for the rights of citizens; they typically broke down under stress, and had to be re-written when the crises were over. The invocation of emergency provisions typically spelled the end of the constitutional order itself. The period between breakdown and reconstruction were simply non-constitutional moments.[40]

Schepelle, however, acknowledges that one constitution that tried harder than other constitutions of the period to ensure that constitutional failure in time of emergency did not occur was the Weimar Constitution of the Republic of Germany, which was drawn up in the shadow of the First World War. Article 48 of that Constitution gave the President sole power in times of emergency: "Article 48 gave the president extraordinary powers to cope with extraordinary threats to the system, up to and including both the suspension of a particular and limited set of

[38] Ibid. p.5

[39] Ibid.

[40] Ibid, p.6

rights as well as the use of armed forces to quell domestic disturbances."[41] However, the abuse of Article 48 effectively neutralized the democratic institutions of the Weimar constitution such as federalism, independence of the courts, and parliament which finally led to the collapse of the Weimar Republic and the emergence of Adolf Hitler as Chancellor of the Third Reich in 1933.[42] "In the thirteen years that the Weimar Constitution limped along before being simply suspended, Article 48 was invoked more than 250 times, 130 times in the first few years of the constitutional order alone."[43]The well known collapse of the Weimar constitution provides lessons that great caution must be taken in drawing up the emergency provisions of modern constitutions to be able to cope with crisis situations.

Carl Schmidt[44] a German scholar is well known for developing the theoretical justifications for states of emergency in a system of democratically accountable, representative, and rights respecting government during the Weimar period. His influential and controversial theories of the "state of exception" were published in two books: *Dictatorship* in 1921 and *Political Theology* in 1922. For Schmidt, a "dictatorship" is a situation where a particular constitutional order has either been abrogated or has fallen into what he calls a "state of exception." It resembles a situation where the previously existing constitutional order had been dismissed as illegitimate, yet a new constitutional order has yet to be established. Under this circumstance, a sovereign dictatorship emerges and functions to represent the will of this formless and disorganized state of

[41] Ibid, p.7
[42] Ibid, p.8
[43] Ibid, p.7
[44] Schmidt, K., "Stanford Encyclopedia of Philosophy", http://plato.stanford.edu/entries/schmitt/. Accessed 22 January, 2012 at 2.30 am.

affairs and to create the external conditions which permit the realization of the popular will in the form of a new political or constitutional system. Theoretically a sovereign dictator is merely a transition, lasting only until the new order has been established.[45]

In *Political Theology* Schmidt was of the view that the maintenance of basic order preceded constitutional norms and legal formalities. To him, there is no constitution or law if there is chaos. The important question to Schmidt then is: Who is to decide when an emergency situation exists? To him, the "sovereign is he who decides on the exception." For Schmidt, the defining feature of a political sovereign is his ability to operate outside the judicial "normality." The possession of such power enables the sovereign to deal effectively with the unexpected nature of emergencies.

Under Weimar, the constitution did not provide a concrete guidance for determining when a situation had reached the point of being constitutionally ungovernable, since its only check on presidential power of emergency was relatively easy to undermine. All that the president need do whenever he believed that an emergency need was imminent was to suspend many ordinary constitutional rules of operation and dissolved Parliament when he deemed it necessary.

Although various approaches have been adopted by states to avoid the Schmidtian pitfall, fundamental tensions still exist in

[45] Levinsont, S., Balkinft, J.K., "Constitutional Dictatorship. Its Dangers and its Design." Minnesota Law Review,
Vol. 94. (2009-2010) , p.
1789http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article. Accessed 22 January, 2012 at 5.0 am. See Schepelle, K.L. op. cit. pp.7-20

virtually all modern constitutional orders between the basic premise of government constrained by law and the perceived need for unfettered discretionary power to confront emergencies.

Lobel, writing with the American experience in mind, proffers three frameworks for resolving the tension between law and necessity or emergency under a liberal constitution, namely the absolutist, the relativist, and the liberal frameworks.[46] The absolutist model permits no power of emergency to deal with crisis other than what has been provided by the constitution. The relativist framework adopts a flexible attitude and argues that the constitution is a flexible document that permits the President to take whatever measures are necessary in crisis situations.

As Hamilton observes, the constitutional power of the federal government to provide for national defence *"ought to exist without limitation because it is impossible to foresee or define the extent and variety of national exigencies or the corresponding extent and variety of the means which may be necessary to satisfy them."*[47](Emphasis supplied). The constitution here recognizes emergencies and leaves the door wide open for the executive to deal with it as it pleases. A presumption of an inherent presidential emergency power, thus, exists.

The third framework, liberal constitutionalism, insists on a clear dichotomy between normal and emergency power. It separates and protects the normal constitutional order from the dark world of emergency governance. Emergency and normal orders are opposed to one another and possess separate legal regimes.

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[46] Lobel, J. "Emergency Power and the Decline of Liberalism." The Yale Law Journal, Vol. 96 (1989) p.1386.

[47] The Federalist No. 23, at 147 (A Hamilton, J. Cooke (eds), (1961).

While normalcy permits government based on constitutionalism, emergencies require strong executive rule, based not on law and human rights but on discretion to take a wide range of actions to preserve the government; something akin to prerogative power under the English common law. American presidents, under the liberal approach, are required to act illegally or unconstitutionally when exercising emergency power, often at the risk of penal sanctions against themselves, but could be indemnified by the legislature subsequently.[48] According to this approach, emergency power is an unconstitutional exercise of power by the executive.

Indeed, Locke's liberal theory of emergency relies on the doctrine of prerogative to address the unforeseen. In his view, "necessity" is where the law-making power "was either too numerous" or "too slow for the dispatch requisite to execution." In such cases, he argues, "it is fit that the laws themselves give way ... to executive power or to this fundamental law of nature and government that all members of society are to be preserved."[49] Thus, prerogative power is dictated by necessity.

According to the liberal framework, the constitution does not grant the executive any general, inherent constitutional emergency authority. Rather it requires the executive knowingly to act illegally or unconstitutionally when utilizing emergency power under the pain of censure including, personal liability or even impeachment. The legislature may subsequently indemnify him if it is satisfied that his actions were really justified by

[48] Lobel, J., op.cit. p.1389

[49] Locke, J. Second Treatise of Civil Government John, CHAP. XIV. Of Prerogative. (1690), Sect. 160.

extreme necessity, hence the primary assumption that emergency is not a norm under liberal constitutionalism.[50] Lobel, summarizes the liberal approach in these words:

Classical liberal theory thus, divides executive action into two spheres: normal constitutional conduct, inhabited by law, universal rules and reasonable discourse; and a realm where universal rules are inadequate to meet the particular emergency situation and where law must be replaced with discretion and politics. The recognition of emergency power evidences an awareness of those universal rules in a particular emergency situation. The classical liberal answer is not to weaken the universal rules by providing exceptions, for special emergency situations, because creating a plethora of legal exceptions or inherent executive constitutional powers to meet every conceivable emergency would undermine the distinction between emergency and non-emergency actions. Rather, liberalism seeks to separate emergency rule from the normal constitutional order, thereby providing the executive with the power, but not legal authority, to act in an emergency.[51]

Traditionally, American presidents have adopted the [illegible] framework in dealing with emergencies. The actions of American Presidents are restricted to only constitutional ones. The American constitution acknowledges that emergency powers are unlawful, requiring public ratification by Congress. In other words when the president has need "to act firmly and swiftly in the national interest, he had done so even without a previous or special sanction of the law and thereafter seek the approval of the legislature."[52] This is so because, as Thomas Jefferson argues, "strict observance of the written laws is doubtless one of the high duty of a good citizen but it is not the

[50] Lobel, J. op. cit. pp.1389-1390.
[51] Ibid. p.1390.
[52] Cited in ibid, p. 1393.

highest." Rather, "the laws of necessity, of self-preservation, of saving our country when in danger, are the higher obligations." Losing one's country due to rigid adherence to the law, he stresses, would surely result in losing "the law itself, with life, liberty, property, and those who are enjoying them with us absolutely." [53]

The American approach is radically different in many respects from that of the Weimer Republic. Nigeria, by going into great lengths to make clear provisions in the 1999 Constitution, defining what amounts to elements of emergencies, how to commence and end emergencies and the powers of the executive and the legislature in emergencies, appears to have adopt the absolute approach to emergencies. Emergencies under the Nigerian constitution from this perspective are not exceptions outside the constitution but are part of the rules and norms of the constitution. But wherein lies the doctrine of necessity under our constitutional jurisprudence? It has been successfully invoked several times since independence. It would seem correct to conclude that while the reigning approach is the absolute model, Nigeria has as well adopted at different times the relativist approach to emergencies.

PROVISIONS ON STATE OF EMERGENCY UNDER THE 1999 CONSTITUTION OF NIGERIA (AS AMENDED)

Section 305 of the Nigerian Constitution, read with Section 11(4) (5), deals with the issue of the declaration of a state of emergency. Section 305 provides:

[53] Cited in ibid.

305(1) Subject to the provisions of this Constitution, the President may by instrument published in the Official Gazette of the Government of the Federation issue a Proclamation of state of emergency in the Federation or any part thereof.

(2) The President shall immediately after the publication, transmit copies of the Official Gazette of Government of the Federation containing the Proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.

Subsection (3) (a-g) lists the elements of state of emergency to include: a state of war; when the Federation is in imminent danger of invasion or involvement in a state of war; breakdown of public order and public safety in the Federation or any part thereof which requires extraordinary measures to restore peace and security; there is a clear and present danger of breakdown of public order and public safety requiring extraordinary measures to avert such danger; there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; there is any other public danger which clearly constitutes a threat to the existence of the Federation; or the President has received a request from a State Governor under subsection (4) to issue a Proclamation of a state of emergency in that State, where the situations specified in subsection (3) (c),(d) and (e) occur exclusively within the boundary of that State. But if the governor fails to invite the President to issue a Proclamation within a reasonable time where these situations exist, the President may issue a Proclamation; otherwise he shall not issue any Proclamation.

Subsection (6) (a) (b) (c) (d) makes clear provisions on how to prevent a Proclamation or terminate a state of emergency already proclaimed by the President. Under these provisions the Proclamation shall cease to have effect: if the President revokes it by an Official Gazette; if within two days when the National Assembly is in session or ten days when it is not in session, after the publication of the Proclamation, and there is no resolution supported by two-thirds majority of all the members of each House of the National Assembly; after a period of six months has elapsed since it came into force subject to renewal before such expiration for a further six months from time to time; or when each House of the National Assembly revokes the Proclamation by a simple majority of all the members of each House.

The 1999 Constitution also protects the tenure of democratic institutions during the period of emergency. Section 11(1)-(5) deals with serious issues of legislation during emergencies, such as when public order and security have broken down including war or are under serious threat of being disrupted by natural or human causes or both. During such occurrences the National Assembly is authorized to make laws for the peace, order and good government of the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List. The provision, however, only permits the National Assembly to take over the law making powers of the state legislature where the emergency is so disruptive as to affect the normal sitting of the state legislature. Section 11—(5) provides that: "For the purpose of subsection (4) of this section, a House of Assembly shall not be deemed to be unable to perform its functions so long as the House of Assembly can hold a meeting and transact business." The State Assembly is at liberty to resume its law making functions as soon the situation of emergency prevailing

in the state ceases. The Proviso to section 11(4) prohibits the National Assembly from removing the Governor or Deputy Governor of a State from office during the subsistence of a state of emergency.

The Nigerian Constitution, like most modern constitutions, has avoided the pitfalls of Article 48 of the Weimar Constitution and the liberal frameworks of the American constitution, on states of emergency. It has made very clear provisions respecting the declaration of emergency and how it should be brought to an end. The Nigerian Constitution under Section 305, read with Section 11(4) (5), makes the declaration of state of emergency the joint responsibility of the president and the National Assembly. These provisions, according to Professor Ben Nwabueze, in a recent Television discussion, are among the clearest provisions on state of emergency in any constitution in the world. Speaking from the privileged position of someone who participated in the drafting of the 1979 constitution and the subsequent Constituent Assembly debates that led to the enactment of that constitution, he explained that great care was taken in drafting the provisions of Section 305 to avoid a repeat of the abuse of similar but porous provisions on state of emergency under the 1960 Constitution of the Federal Republic of Nigeria. The abuse of those provisions in 1962 threw the nation into the turmoil of a civil war that lasted thirty months.

It is clear that the founding fathers of the 1979 Constitution clearly avoided the Schmidtian idea that it is the "sovereign who decides the exception." Even the "dictators" in ancient Greece, as reported by Aristotle, were given established procedures for dealing with emergencies. The Nigerian Constitution, in laying down clear guidelines for the exercise of emergency powers by the president not only rejected the Schmidtian doctrine but also avoided adopting specifically any of the three liberal

frameworks examined above; instead a combination of the absolutist and the relativist approaches has been deployed.

While, like the relativist framework examined above, the Nigerian Constitution vests the president with emergency powers, unlike that framework, it does not leave the door wide open for the president to deal with emergencies as he pleases. It is only when the specific emergency provisions of the constitution fails him that he may resort to the doctrine of necessity to preserve the life of the constitution and the nation. The emergency powers conferred on the Nigerian president, apart from being shared with the legislature, are carefully and deliberately circumscribed. He or she has no prerogative powers or uncontrollable discretion to act as he or she pleases.

SCRUTINIZING FREQUENT THREATS AND DECLARATIONS OF STATES OF EMERGENCY IN SOME STATES IN NIGERIA SINCE 1999

Threats of Invocation of Emergency Power as Sword of Damocles

We had earlier discussed the eruption of communal, ethno-religious, and religious as well as the outbreaks of violent youth militia in parts of Nigeria, that illegally usurped police powers and unleashed violence and mayhem on innocent citizens and residents. In reaction to these developments, the Federal Government threatened to clamp down states of emergency on States or areas that had been identified as "hot spots" of conflict. In two cases the Federal Government did not have to wait for a formal declaration of a state of emergency; it simply deployed the armed forces to bombard the target communities. These military deployments were for all intents and purposes revenge missions rather than normal internal security

operations. Such were the sad experiences of Zaki Biam in Benue Sate[54] and Odi in Bayelsa State.[55] On many occasions and in exasperation, the Federal Government ordered its troops to shoot trouble makers at sight.

The heat, both verbally and in writing, was soon turned on Lagos State, which the Federal Government perceived, rightly or wrongly, as responsible for harbouring and/or supporting or neglecting to control the increasingly violent activities of the O'odua Peoples' Congress, (OPC). The mindset of Olusegun Obasanjo, then President of Nigeria, backed by his legal advisers, was that the declaration of a state of emergency entailed the dismantling of all democratic structures and their replacement by a Sole Administrator appointed at the pleasure of the President. This made the president feel that he had enormous, almost limitless powers to straighten errant governors. It was the President's perception of what a state of emergency entailed that made the democratically elected officials of the States, from the governor to the cabinet, uneasy and led them to use all the resources at their disposal to resist the prospects of such imposition.

That perception of state of emergency was eminently reflected in the bitter exchanges that took place between the People's Democratic Party's President Olusegun Obasanjo and Alliance for Democracy's Bola Tinubu.[56] After engaging one another in

[54] "Zaki Biam 10 Years After: We Still Mourn our Fate" Vanguard, October 29, 2011.
http://www.vanguardngr.com/2011/10/zaki-biam-invasion-10-years-after. Accessed Feb 29,2012 at 6.00 am.

See "Military Revenge in Benue: A Population under Attack." Human Rights Watch, Vol. 18, No. 2 (A) – April
2002. http://books.google.com.ng/books? Accessed March 3, 2012 at3.30 am

[55] "Chop Fine-Human Rights Watch." http://books.google.com.ng/books?. Accessed March 1,2012 at 5.00 pm.

[56] Olaifa, K., and Anyika, L. "No Thanks to Senate for a Hasty Gift: Emergency Power Act: The Politics and the Likely

verbal fireworks, President Olusegun Obasanjo, in a letter to Governor Bola Tinubu, dated Thursday, January 13, 2000, accused the latter of inability to "control...the security situation in Lagos." Hence there was "evidence of increasing disorder, loss of lives, and property and a general sense of fear among the citizens of Lagos." The President reminded Governor Tinubu that he had, at least, on four occasions, verbally and in writing, drawn his attention to his constitutional responsibility to the security of Lagos State and to take appropriate steps to stop the wanton destruction of lives and property, looting, and other forms of criminal actions perpetrated by the illegal organization which calls itself OPC. [57]

The President went on to remind Governor Bola Tinubu: "That as Chief Executive Officer of the State, the onus of the protection of lives and property of your State lies squarely on your shoulders." He further states that: "Normally, outside the establishment of federal law enforcement agents, the Federal Government has no reason to intervene with the matter of law and order in any State." Then the President throws the bomb shell. He declares: "when, either by his utterance, action, or indeed inaction, a chief executive shows a loss of control in the maintenance of law and order in his State, it becomes incumbent on the Federal Government to take appropriate action to arrest the situation, usually in the form of imposition of a state of emergency."[58]

It was this last clause of the communication that finally snapped what was left of the hitherto warm relationship between the two

Harvest of Chaos." Now: The Weekly Reference Point, No.7, November 20, 2000.

[57] Ibid.

[58] Ibid.

government officials. Governor Bola Tinubu denied the accusation that he had made "unguarded" utterances supporting the O'odua People's Congress (OPC). He told the President that he was fully aware of his constitutional responsibilities which made him as the chief security officer of his State chiefly responsible for the safety and security of lives and property under his jurisdiction. Governor Bola Tinubu was, however, quick to mention that he had consistently pointed out the constitutional lacuna which merely confers on him, as State Governor, "the empty status of chief security officer" but "effectively denies him the wherewithal to function as such." He argued that the only way to remove this lacuna is to allow for the creation of a state police. He further contended that if he had control of the federal security forces or had a state police, the security situation would not have deteriorated so badly. The governor, therefore, concluded that the situation in Lagos State did not warrant the declaration of a state of emergency. "Those conditions do not exist in Lagos and they will not exist if all of us faithfully live up to our responsibilities", the Governor said emphatically.[59]

At various points, similar threats of proclamation of emergencies were directed at Kano, Borno, and Bauchi States which were experiencing incessant ethno-religious conflict. Often times the political elites in those states, depending on their political interests, would be sharply divided, with some calling for the declaration of state of emergency while others would vehemently oppose the idea. Averting the federal threat has depended more on the level of political influence of the lobby from the different states.

The intensification of these centrifugal forces led many Nigerians to openly question the wisdom of the continued

[59] Ibid.

existence of the country as a corporate entity. There were growing voices of people from different parts of the country, calling for the restoration of true federalism, or the restructuring of the country into a confederacy or even outright secession. There were also calls for the establishment of state police and resource control. In short there was so much discontent with the Nigerian state that many sections of the Nigerian society felt vulnerable and had to turn to more traditional forms of solidarity such as ethnicity, religion and regionalism for assurance about their security and livelihoods. People were now more inclined to look up to their religious, ethnic or geo-political identities for refuge rather than to the Nigerian state. [60]

Since 1999, the mantra of the declaration of state of emergency assumed the function of the sword of Damocles over the heads of state Governors in Nigeria, particularly those who have fallen into disfavor with the ruling political power or some powerful faction of the elite or some hegemonic political, or regional or sectarian or ethnic majority or a combination of these forces. Consequently, the threat of the declaration of state of emergency on perceived errant governors has become the veritable instrument used by the federal government to whip them back to order and keep them under the firm control of the dominant ruling and governing political classes.

Hence the fear of the declaration of state of emergency has become the veritable source of political wisdom for the

[60] Onyeweakwu, O., Ejiofor I.,"Only Sovereign National Conference can save Nigeria from Collapse" http://bizhallmark.com/index.php/permalink/6580.html. Accessed March 1, 2012 at 6.00 pm. See "National Coference must Comply with the Constitution - Senate." http://www.punching.com/news. Accessed Feb.29, 2012 at 6.40 pm.

Governors of Nigeria. Most Governors believe that there has been a deliberate displacement of the actual meaning of state of emergency from what has been provided in the 1999 Constitution, to one devised by the dominant ruling and governing class to serve their parochial political self-interests as against genuine national interest. To survive they must tread through the mine field with steady circumspection.

The idea of the declaration of state of emergency has become suspect and highly politicized, because of the tendency of the executive branch of government to wield it as a whip against opposition politicians or "undependable" Governors in States controlled by the ruling party. Properly used, it should be reserved for moments when the survival of the nation is genuinely at risk. However, as will be shown below, the falling back on the spent emergency mechanisms under the 1960 Constitution, by President Olusegun Obasanjo, in proclaiming states of emergency in Plateau and Ekiti States, was both dubious and preposterous.

Proclamation of State of Emergency in Plateau State in 2004[61]

The Proclamation of state of emergency in Plateau State by President Olusegun Obasanjo, on Tuesday, May 18, 2004 brought to the consciousness of Nigerians, especially the governing and ruling political classes, the enormous emergency powers vested on the President by the 1999 Constitution of the Federal Republic of Nigeria and the limitless opportunities opened to a despotic president to abuse them. The entire process of the Proclamation of the state of emergency came so swiftly

[61]Declaration of Emergency Rule in Plateau State of Nigeria by President Olusegun Obasanjo, Urhobo Historical Society.http://www.waado.org/nigerdelta/FedGovt/Federalism/emergency_rule/plateau_obasanjo.html. Accessed 29/2/12

and forcefully that no room was left for consultations and debates even in the relevant legislative houses at the national or state levels. There was no opportunity to acquaint both the public and the incumbent governing officials of what was really going on. A willing National Assembly, which should have acted as the true representatives of the ordinary people, and subjected the President's request for the Proclamation of state of emergency in the state to serious scrutiny through enlightened and dispassionate debates, caved in to a tempestuous presidential will, by cheaply abdicating this important democratic role. In the final analysis, the National Assembly, simply rubber stamped the executive proposal, without debating the legal issues involved or putting up any attempt of a respectable dissent.[62]

The summary of the facts in respect of the developments in Plateau State were that the State had experienced sporadic but escalating ethno-religious conflicts that started during the military era in 1994 between Hausa/Fulani who are mostly Muslims and are regarded as "settlers" and the indigenes made up of the Berom, Anaguta and the Afizere who are largely Christians. By 2001 the conflict had greatly escalated and had assumed sectarian dimensions, sacking in other Muslims and Christians on either side. Between 2001 and 2004, the conflict had spread like wild fire from the Northern Senatorial Zone, through the Central Senatorial Zone and coming to a head in 2004, at Yelwan Shendam, in the Southern Senatorial zone,

[62] Ologbondiyan, K, Okenwa, L and Ogbu ,A. "Plateau: Obasanjo Seeks Emergency Powers." ThisDay News, Biafra World News. Available at http://news.biafranigeriaworld.com/archive/2004/may/26/013.html. Accessed on March 3, 2012 at 2.00am

were attacks, reprisal attacks and counter-reprisal attacks along sectarian lines, led to high death toll and wanton destruction of property.

It is submitted that the destruction of lives and property were heinous enough to invite extra-ordinary action on the part of the Nigerian state which is charged by the constitution with the security and welfare of the people. There is no denying the fact that there was actual breakdown of public order and public safety in those parts of Plateau State, especially Yelwan Shendam, requiring extra-ordinary measures to restore peace and security.

Thus, the President had constitutional power under such circumstance to issue a Proclamation of emergency. The President also acted constitutionally when he published the Proclamation in a gazette and transmitted same to the two houses of the National Assembly for approval by a resolution of two-thirds of the majority of the members. The constitution vests discretionary power on the National Assembly to consider the situation and decide whether or not to pass the resolution approving the Proclamation.

In exercising this power the National Assembly is required to consider the circumstances listed in section 305 (a-g) of the 1999 constitution as conducing the Proclamation of a state of emergency. However, the National Assembly rather than exercise its discretion in the interest of democracy and the ordinary citizens, allowed its discretion to be fettered by a dictatorial President and were simply railroaded into approving the Proclamation without scrutinizing the legality of the instrument. Consequently, they might have been oblivious of the fact that the extant Attorney General supported the

Proclamation with a spent legislation, the Emergency Act of Nigeria of 1961.[63]

This gave the President a wide open door to engage in illegalities that seriously violated the constitutional provisions on state of emergency. These illegalities include:

The suspension of the Governor and members of the State House of Assembly.

President Obasanjo appointed a Sole Administrator to replace these democratic institutions contrary to section 11 (4) of the 1999 Constitution.

There was also failure on the part of the National Assembly to exercise its discretionary power judicially and judiciously. They would have discovered that an expired legislation had been used and that it was unconstitutional to suspend democratic institutions contrary to the letter and spirit of the constitution.

It is, therefore, unfortunate that the Supreme Court, in the case of Plateau State Government and another v. Attorney General of the Federation,[64] missed the golden opportunity to correct these illegalities when it was seised of the matter for constitutional interpretation. This vacuum remains unfilled till this day. In preposterous self-restrain, the Supreme Court struck out the claim of the Plateau State Government on the ground that it was

[63] In 2004 when states of emergency were slammed on Plateau and Ekiti States, the Emergency Powers Act,
1961 and the Emergency Powers (General Regulations) 1961, made under section 65 of the 1960 Constitutio
were no longer existing laws in Nigeria. In fact the index to the Laws of the Federation, 1990, categorically stated
that the Emergency Powers Act 1961 had been "omitted" and "spent."

[64] (2006) ALL FWLR pt. 305

not authorized by the Sole Administrator who was himself a respondent in the matter. Professor Ben Nwabueze who jointly wrote the brief with Chief Rotimi Williams and had argued the matter before the Supreme Court has rightly condemned the action of the Supreme Court as "denial of truth, and justice out of fear of a dictator"[65], referring to President Olusegun Obasanjo.

Proclamation of State Emergency in Ekiti State in 2004

In the case of Ekiti, there was a serious constitutional crisis, creating a clear and present danger of actual breakdown of public order and safety in the State. There were sporadic actual breakdown of public order and safety in some parts of the State particularly in Ekiti, the capital of the State.

The Governor and Deputy Governor were impeached in controversial circumstances, allegedly masterminded by the Economic and Financial Crime Commission (EFCC). They were charged with operating foreign accounts and corruption, and illegal diversion or transferring government funds and receipt of illegal gifts.

The EFCC allegedly abducted the members of the legislature to a secluded location and coerced them to sign the impeachment notice. The panel set up by the Chief Judge to investigate the charges was rejected by the Legislators because they were thought to be loyal to the Governor. The Speaker requested the Chief Judge to constitute a fresh panel and when the request was turned down, he (the Chief Judge was suspended) and replaced by another Chief Judge appointed by the Speaker. The new Chief Judge constituted another panel. The Panel constituted by

[65] Nwabueze, B. "Judicialism and Good Governance in Africa." Nigerian Institute of Advanced Legal Studies.
Abuja,2009.

the suspended Chief Judge ironically found the Governor and his Deputy guilty, while the panel constituted by newly appointed Chief Judge cleared them, thereby resulting in a fiasco.

A situation was created where the Governor and his Deputy continued to claim they were still lawful holders of their respective offices while the Speaker who had been sworn in by the "acting Chief Judge" claimed and functioned in the same capacity. It was this fiasco that led to the Proclamation of a state of emergency in Ekiti State and the appointment of a Sole Administrator to run the State in the interim.

Like in Plateau State, a spent legislation was illegally deployed by the President as a legal basis for the Proclamation. Consequently, the Governor and Deputy Governor of Ekiti were suspended and replaced by Sole Administrators; the members of the legislative houses were also suspended without remunerations and the freedoms of the citizens of the States were restricted.

The question of the legality or otherwise of the actions of the President generated intense debates among politicians, jurists, lawyers and academics. Meanwhile, the Governors of the two States and members of their State Houses of Assembly were left dazed, confused and helpless. It took some time before they could gather themselves together and begun to ask the relevant questions before seeking legal redress.

Proclamation of state of emergency in Western Region of Nigeria in 1962

For the avoidance of doubt, the recent declaration of states of emergency in Plateau and Ekiti States were not new in Nigeria.

The first time a state of emergency was declared in Nigeria was in 1962, in the Western Region on May 29, 1962. The Prime Minister of Nigeria, Sir Abubakar Tafawa Balewa, brought a motion in the House of Representatives declaring a state of emergency on the Western Region pursuant to the Emergency Powers Act of Nigeria, 1961 and Section 65 of the 1960 Constitution of Nigeria. According to the Prime Minister, "A political crisis developed within the Action Group, which was the party in control of the government of Western Nigeria. Following the crisis the national executive of the party deposed Chief Akintola as deputy leader and asked him to resign his appointment as premier of Western Nigeria."

All efforts by the Prime Minister to get the impasse resolved constitutionally failed until he was removed by the Prime Minister and replaced by another premier. Two unsuccessful attempts were made to hold meetings of the Western House of Assembly, but the first one ended in a violent uproar and disorder. An attempt to hold another meeting under police protection resulted in a far greater uproar and commotion than the earlier one. As a result the police cleared the legislative chambers and locked it up. A state of emergency was slammed on the Western Region, the premier was removed and the State House of Assembly was dissolved. A Sole Administrator was appointed to govern the region in the interim by regulations made by the Prime Minister and approved by the National Assembly. Various rights of citizens of the Western Region were violated by these regulations.

It was to avoid such misuse of emergency powers by the executive that the makers of the 1979 Constitution included important safeguards in the constitution to prevent a repeat of the abuses of the 1961 Emergency Powers Act in 1962. Section 305 of the 1999 Constitution shares the powers of the declaration of a state of emergency between the President and

the Legislature, with some residual power to a governor to voluntarily invite the President to proclaim a state of emergency in his state or part thereof if he/she deems it necessary.

Section 11(4) prohibits the dissolution of democratic institutions including the executive and the legislature. So long as conditions do not prevent the State legislature from meeting to carry out their legislative functions, they would continue to carry out such functions during the state of emergency. But if this is not possible, the National Assembly would take over the law making functions of the state legislature. The Governor will continue to function albeit under conditions of restricted powers. Considerable restrictions will be imposed on the democratic freedoms of citizens under the supervision of the military posted to contain the situation.

The Recent Proclamation of States of Emergency in Parts of Plateau, Yobe, Borno and Niger States

Recently, the over three decades of ethno-religious conflicts in Northern Nigeria escalated into full blown terrorist attacks of security structures by a militant Islamist sect popularly called Boko Haram in, among others, Borno, Yobe, Bauchi and Kano States. Additionally, the sect has attacked security personnel; religious sites, especially churches and innocent citizens; it has recently stepped up its warfare by increasingly deploying suicide bombers to make these attacks more lethal and dramatic. The recent attacks by suicide bombers at the Catholic Church Madalla in Niger State, the Church of Christ in Nations and St. Finbarr Catholic Church in Jos and earlier on the United Nations Regional complex in Abuja, as well the devastating detonation of Improvised Explosive Device and indiscriminate attacks on civilians and security establishments in Kano city, sent a strong message to Government about the magnitude and

seriousness of the threat posed by the militant Islamist group to the continued existence of the nation.

On December 11, 2011, President Ebele Jonathan Goodluck declared states of emergency in 14 local governments in the troubled four states, Borno, Yobe, Plateau and Niger "to rescue public order, peace and security in the Federation"[66] It remains inexplicable why Bauchi and Kano States were left out despite their historically established reputation for violent religious conflicts.

President Jonathan took a different approach to President Obasanjo's when he declared a State of Emergency on Plateau and Ekiti States. Instead of declaring it over the entire states, he restricted it to specific local governments considered the epicentres.[67] He left the democratic institutions intact. In other words, he did not suspend the Governors and their deputies as well as members of the State Houses of Assembly in the affected States. He also left the Chairmen of the affected Local Governments intact. President Jonathan also urged the political leadership of the affected areas to give maximum cooperation to law enforcement agencies deployed to the affected communities to ensure that the situation is brought under control within the shortest possible time. On the whole the proclamation of state of

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[66] (i) Borno State : a) Maiduguri Metropolitan LGA b) Gamboru Ngala LGA c) Banki Bama LGA d) Biu LGA e) Jere LGA (ii) Yobe State a) Damaturu LGA b) Geidam LGA c) Potiskum LGA d) Buniyadi-Gujba LGA e) Gasua-Bade LGA (iii) Plateau State a) Jos North LGA b) Jos South LGA c) Barkin-Ladi LGA d) Riyom LGA (iv) Niger State a) Suleja LGA. See "Boko Haram: Read Jonathan's Declaration of State of Emergency Address" http://www.vanguardngr.com/2011/12/boko-haram. Vanguard December 11, 2011. Accessed on Feb.28, 2012 at 5.00am

[67] "The implications of Declaration of Emergency on Plateau state." http://hemessengerservice.com Accessed February, 10, 2012

emergency by Goodluck Jonathan was better received by Nigerians than the earlier one by Olusegun Obasanjo.

CONCLUSION

Although the concept of emergency has not been given the attention it deserves in the constitutional jurisprudence and academic discourses of many countries, emergencies have always been existential to all community life. Emergencies are always occurring and posing fundamental dilemmas to normal constitutional operations of many countries.

The history of the exercise of emergency powers in Nigeria reveals two issues; the inadequacies of the succeeding provisions on emergency powers and the efforts during each constitutional moment, since independence, by Nigerians to improve these provisions by furnishing more safeguards against violation of the rights of individuals.

These efforts notwithstanding, the executive branch of government has persistently politicized the exercise of emergency powers and used it to whip errant State Governors into line, to the extent that emergency powers have lost their real meaning. Today, emergency powers are perceived particularly by politicians of the opposition and "errant" governors of all shades of opinion as instruments of repression and domination

This should not be so. Properly understood and applied, emergency powers should be accepted as useful mechanisms for reinforcing constitutional principles to ensure the survival of the nation and the constitution itself. Emergency powers should serve as tools of preventive security policy-making and

management. This calls on scholars to accord adequate attention to the examination, documentation and publication of this important phenomenon of constitutional governance. They should endeavour to examine the nature, meaning, scope and impact of emergency powers on constitutional jurisprudence and provide clear and implementable guidelines for the proper regulation of the exercise of emergency powers in Nigeria.'

TOWARDS THE PROMOTION OF CHILDREN'S RIGHTS TO EDUCATION AND DEVELOPMENT IN NORTHERN NIGERIA: THE ALMAJIRI INSTITUTION IN PERSPECTIVE

BY

SALIM BASHIR MAGASHI*

ABSTRACT

The child is a very important member of any society -civilised or otherwise. Therefore, the development of the child is a responsibility not only of government but also of the entire global community. In Nigeria, an otherwise good practice of the almajiri has turned into a social milieu that is bugging the mind of every well-meaning Nigerian and indeed the global community. The practice, which hitherto promoted the child's right to education, now promotes denial of other basic rights like shelter, food, health care and love as well as the very right the practice tends to promote. In light of the above, the paper advocates the reformation of the almajiri practice particularly in the northern part of the country where the practice is most prevalent.

KEYWORDS: '*Almajiri*', 'right to development'; 'Child rights'; 'Nigeria', 'international law'

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INTRODUCTION

Once again, Nigeria is at a crossroad. The promises of democratisation have heightened individual hopes for a better life and overall societal development. However, illiteracy is on the rise, population is increasing significantly, poverty is deepening, unemployment is pervasive, and the corresponding socio-economic crises are plunging the country into a complex quagmire. Consequently, children have been relegated to the background. For the past fifty-four years of independence, the rights of children have suffered massive disregard and neglect with child prostitution, street hawking, child labour, destitution, malnutrition, child abuse and exploitation becoming common practices in the major cities of the country. A key child right issue reflecting years of neglect in Nigeria today is the rights of children to education for a promising and meaningful future. Of particular concern is the peculiarity of the northern region in terms of religious and cultural homogeneity where an overwhelming majority of the people of the region are Hausa-Fulani and Kanuri Muslims whose historical experiences have always come to the fore in most key national debates on the political future of the country. Since the 15th century, the Hausa-Fulanis have remained predominantly Muslims with their unique cultural and religious practices in respect of learning and education. Their method of learning is characterised by general Islamic teaching methodologies with much flexibility and freedom to travel far and wide for the purpose of acquiring religious knowledge. Colonialism had significantly changed the socio-cultural and economic bases of this region. With its imbued individualism and disregard for religious education, colonialism engineered the adulteration, discontentment with and dislocation of this system of education. Since independence, religious education has been rendered unimportant in the

government's scheme of things and few administrations have struggled to control and 'modernise' this system of education. The recent of such efforts was the Federal Government policy of building *almajiri* model schools to ensure the integration of this system of education into the Western oriented system of education and eliminate the obnoxious or objectionable aspects of the *almajiri* system.

This paper examines this new policy in the light of general right to education of the *almajiri* child as provided under both international and national human rights instruments. It identifies the objectionable aspects of this system of education and examines how the duty bearers are faring in reality with regard to the actualisation of the right to education. It finally examines the official responses and weighs their general effectiveness in light of the experiences and efforts designed to eliminate the objectionable aspects of this system of education. The paper argues that several legal instruments provide the legal basis for the protection of the child. The central question of the paper therefore is: could the objectionable aspects of the *almajiri* system be brought to a complete end through existing human rights framework on the rights of the child in Nigeria? If so, what should be the suitable, convenient and most effective approach to the issue?

The paper first traces the system of the *almajiri* and its impact on our collective existence. Secondly, the paper examines the legal framework for the protection of the child, which is against the horrific aspects of the *almajiri* practice. The third aspect of the paper illustrates the way and manner of salvaging the *almajiri* practice using the child's human right (to development) approach as a basis. Fourthly, the paper identifies potential problems that could militate against effective realisation of the human rights approach and at the same time identifying measures that could deal with them.

ALMAJIRI SYSTEM OF EDUCATION: TRACING ITS RELIGIOUS, POLITICAL AND ECONOMIC DYNAMICS IN NORTHERN NIGERIA

The word '*almajiri*' is a Hausa term that denotes different things depending upon the context and perspective. Originally, it was derived from the Arabic term '*almuhajir*', which means a migrant.[1] In the Nigerian context, it could mean a boarding student of Islamic studies; a student learning the science of the Quran (revealed Book of Almighty God) while committing it to memory; or a small child sent to an itinerant teacher to learn not just the Islamic religion but also to pursue a means of livelihood for himself, his teacher and family; or even, to many uninformed Nigerians, a beggar.[2] In Hausa language, *almajiri* means the child student; *almajirai* is the plural of *almajiri* and *almajiranci* is the process or practice of learning, travelling and all that come with it. The school itself is called *makarantar allo or tsangaya* in Hausa language. Historically, it was rooted out of the religious obligations on Muslims to learn the Quran and acquire knowledge for this world and the hereafter. The Almighty God said "this is a blessed Scripture We have sent

1. M.A.Yusha'u, A.K. Tsafe, S.I. Babangida & N.I. Lawal "Problems and Prospects of Integrated Almajiri Education in Northern Nigeria" Scientific Journal of Pure and Applied Sciences (2013) 2(3) 125-134; M.T. Aluaigba "Circumventing or Superimposing Poverty on the African Child? The Almajiri Syndrome in Northern Nigeria" Childhood in Africa (2009) 1(1) 19-24; A.F. Fada *Factors Perpetuating the Almajiri System of Education in Northern Nigeria: A Case Study of Zaria and Environs, Kaduna State* (Unpublished Thesis) Ahmadu Bello University, Zaria. http://196.220.64.8:8080/jspui/bitstream/123456789/2665/1/Factors%20Perpetuating%20the%20Almajiri%20System%20of%20Education%20in%20Northern%20Nigeria_%20A%20Case%20Study%20of%20Zaria%20and%20Environs,%20Kaduna%20State..pdf (accessed 10/10/2013)

2 *Ibid.*

down to thee in order to be mediated upon".[3] The prophet was reported to have said:

> *"If anyone travels on a road in search of knowledge, God will cause him to travel on one of the roads of Paradise. The angels will lower their wings in their great pleasure with one who seeks knowledge. The inhabitants of the heavens and the Earth and (even) the fish in the deep waters will ask forgiveness for the learned man. The superiority of the learned over the devout is like that of the moon, on the night when it is full, over the rest of the stars. The learned are the heirs of the Prophets, and the Prophets leave (no monetary inheritance), they leave only knowledge, and he who takes it takes an abundant portion"*[4]

The prophet sent out his companions to teach the followers the Quran and other religious prescriptions. There was an intimate attachment between the teacher and his students and the mosques served as centres of learning. There were no specific curricula and the teachers received no payment for their services because it was a religious service and their rewards were with God. Because of the increasing number of students, the later successors of the prophet (Caliphs) introduced salaries to the teachers paid out of the public and endowment funds. In the words of Kabiru[5]:

> *"the schools survived largely because the teachers were following the steps of the*

3 Quran 38:29.

4 Abu-Dawood, Hadith 3631.

5 I Kabiru "Policy on Almajirai System of School: Improvement or Control" in A.H. Yadudu (ed.) *The Conception and Implementation of Social Policy in Kano State* (1990) pp.86.

> *Prophet and his companions by not requesting or accepting compensation for teaching the Quran but rather used the gains and wealth in their possession and taught for the sake of Divine rewards."*

According to Ibn Khaldum "travelling to acquire knowledge and meet eminent scholars is an essential project for the student".[6] In keeping with this tradition, many Muslim countries retain this Islamic teaching method in the form of Madrasa, Kuttab or Maktab. These Islamic schools focus on learning the Quran. Al-Saud[7] argues that:

> *"from his tender years the Muslim child begins his education by knowing how to read, then to understand and to commit to memory the holy text. All the other facet of the curricula of that Islamic education are based upon the knowledge of the Quran as the core, pivot and gateway of learning."*

A key feature of this system of education is the unity of knowledge, theory and practice because one of the aims of Islamic education is "the full realisation of the numerous potentialities of the individual."[8]

Therefore, *almajiranci* is a similar version of this Islamic education system, which is predominant in Northern Nigeria. It is an informal Islamic system of education exclusively for male

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6 *Ibid* pp.87.

7 *Ibid* pp.84

8 Suleiman, M.D. (1990) "Towards a New Social Order in Kano: A Re-examination of the Almajiranci System" in A.H.Yaludu (ed.) (1990) *The Conception and Implementation of Social Policy in Kano State*. (1990) pp.89.

children, which started with the coming of Islam into Northern Nigeria, i.e. before the coming of European powers (or western education).[9] In the 16th century, the Songhai rule over Hausa land influenced the development and expansion of Islamic education system. As documented by Suleiman "the gradual expansion of the international connection of the Hausa people with the Muslim world –the Sudanese states (Mali, Songhais and Borno) and later North Africa represented various stages in the development of Islamic education among other things."[10]

The Jihadists of the 18th and 19th centuries maintained and encouraged this learning tradition. In fact, it also "survived and retained its comprehensive character despite colonial onslaught on the socio-economic structures of the people."[11] Lord Lugard asserted that, as at 1914 there were over 24,000 *almajiri* schools in Northern Nigeria. As noted earlier, an *almajiri* is legally speaking a child as contemplated by existing national and international instruments applicable and enforceable in Nigeria. This applies to the various nomenclatures or classes whether as *Kolo* (infant) normally between the ages of 5-11, *Titibiri* (adolescent) between the ages of 11 and 15 or to older ones up to the age of 17 known as *gardi* (Adult).[12]

As noted above, Islam as a religion encourages people to travel or migrate 'far and wide' to amongst other things, seek for useful knowledge. Conventionally, there is wisdom and experience in travelling wide for knowledge. The prophet Muhammad (PBUH) admonished his followers to seek knowledge as far as possible. In a report, the Prophet Muhammad (PBUH) said, "seek knowledge as far as China"

9 A.B. Fafunwa *History of Education in Nigeria* London: George Allen and Unwin Ltd. (1974).

10 Suleiman Op cit note 9 pp.91.

11 *Ibid* pp.90.

12 Yushau op cit note 1 & Fada op cit note 1

(being the farthest distance from them then).[13] The Muslim community based on this and other similar admonitions on the usefulness of knowledge adopted travelling and migration outside their native homes in search of knowledge. Northern Nigeria based on this philosophy and being predominantly, a Muslim delineation practiced and institutionalised this system before it was adulterated and transformed into something different. The practice was at its pinnacle between 1804 and 1903 under the Sokoto Caliphate because then, the Caliphate unlike our modern governments was able to support learning through *Zakkah* (tithe).[14] The Jihad era was the first time in Hausa land when those at the helm of public affairs took interests and measures aimed at the education of the people.[15]

It is important to emphasise that originally, *almajiranci* started only as a process designed for acquisition of knowledge rather than seeking for or a means of livelihood through begging. Parents took their children to distant places and handed them over to 'learned' persons called *Mallam* (in Arabic *Mu'allim*) to learn how to read, write and apply the Quran. The communities where the children are taken in their ordinary African communal sense acted as hosts to such migrant children, providing them shelter and feeding free of charge, because as the African adage goes, 'it takes the village to raise a child' and that 'a child belongs to everyone'. These are

13. The authenticity of this narration is doubtful See http://www.sunnah.org/sources/hadith_ctlub_jlm.htm. (accessed 9th October 2013)

14 Fada op cit note 14 A. Sule-Kano, A. "The Almajiri Phenomenon SAP and Population Issues in Northern Nigeria", A Study of Quranic School Pupils in Sokoto and Talata Mafara (Unpublished) (1997).

15 M.D. Suleiman"Towards a New Social Order in Kano: A Re-examination of the Almajiranci System" in A.H. Yadudu (ed.) *The Conception and Implementation of Social Policy in Kano State* (1990).

however, relics of bygone days because as the society became more individualistic, towing away from the traditional African communal order, people became wary of charity. This was another consequence of colonial domination.[16] The *almajiri* who relied on those communities for food and shelter as charitable endeavours was no longer enjoying from such largesse. The *Mallam* who presumably acted and still acts in *loco parentis* to the children was himself and still is sustained through charity and could take care of neither himself nor the kids under his care. In practice, the senior *almajirai* (aged 16 and above) hardly engaged in begging for alms (*bara*) but often engage in other jobs such as pedicure, knit caps, sew dresses, cobbling, etc. But those under 16 years often engage in begging for food or alms and perform some menial jobs. This clearly brought out the economic capitalism in the system. In the words of Suleiman[17]:

> *"in general they provide a very cheap source of labour and therefore constitute an economic category. Whereas in the early period of industrialization in Britain children of this age bracket were among those who were thoroughly exploited and dehumanised in the name technological revolution, here ...a dependent neo-colonial capitalist economy has brought the same phenomenon of child labour and exploitation all over the country in different forms. So although the almajirai may constitute a nuisance(!), their existence can be explained by the logic of capital- the need for cheap labour, rural proletarianisation and increasing poverty which are the direct*

16. *Ibid.*
17. *Ibid* pp 94-95.

> *result of capitalist development policies...children migration from rural to urban centre was never part of the feature of Islamic education in the pre-colonial period...the problem is a historical one."*

Any reform that is oblivious of this socio-economic reality is bound to fail.

THE VULNERABILITY OF CHILDREN: IDENTIFYING THE PROBLEMS

From the above narration, it is clear that the child having been deprived of parental care and love from early childhood and sent into the wilderness to seek knowledge became savagely and desperately in need of survival. The *almajiri's* only option was to go from door to door and later to take unto the streets to beg for food and money (alms). While begging, the *almajiri* usually in a group of two or more uses heart-softening words that tend to appeal to the conscience of his audience.[18] For example, the *almajiri* would remind the audience of their moral obligation to help in order to gain God's blessings, after all God ordains charity as precondition to worldly and heavenly reward. The Prophet Muhammad (PBUH) said at separate times that, "the believer's shade on the Day of Resurrection will be his charity"[19] and that "every act of goodness is charity".[20] In other cases, the *almajiri* would show how hungry he is and how

18 LM Usman "Assessing the universal basic education primary and Koranic schools' synergy for Almajiri street boys in Nigeria" *International Journal of Educational Management* (2008) 22 *(1)* 62-73

19 Al-Tirmidhi, Hadith 604.

20 Suhih Muslim, Hadith 496.

willing and available he is to perform the oddest menial job available just to survive.

The paradox however, is that as indicated above in those early days, in addition to learning, the *almajiri* learnt trade as he grew into manhood. Thus, the *almajiri* rendered menial jobs and in fact virtually all labouring jobs and provision of services such as cobbling, barbing, building, sinking of wells, Hyde and skin, nail cutting, trading etc. Some of them became famous and rich surpassing even the original inhabitants of the host communities. Unarguably, migrants such as the *almajiri* have contributed positively to the development of cities not only in Northern Nigeria but also in other parts of the country. This is because this category of people has the desire, guts and perseverance to migrate 'far and wide' for 'legitimate economic reasons'. Out of despicable circumstances, they have been involved in the provision of various services wherever they go.

The resounding question is what has made this practice to continue unabated. Generally, the prime cause of this degeneration has been neglect by both parents and governments. On the part of the former, the reason could be two fold: positive and negative. On the positive side, there is genuine intention on the part of parents to send their children to seek for knowledge. On the negative fold however, the practice could be associated with poverty, ignorance and bandwagon following. Poverty has however been identified as the major reason why parents send their children to become *almajirai*.[21] Moreover, the system

21 S. Abubakar "Almajiri: Some Home Truths" Dailytrust Newspaper http://dailytrust.info/index.php/columns/tuesday-columns/9209-almajiri-some-home-truths-i (accessed 10/10/2013); See also Yushau et al op cit note 1; D.Thorsen "Children Begging for Qur'ānic School Masters" *UNICEF* (2012) www.unicef.org/wcaro/english/overview_6585.html. (accessed 12th October 2013)

I.G. Ifejeh & I.J. James "Provision Of Formal Education to Almajiris: The Role of Libraries"European Scientific Journal (2012) 8 (15) 98-108; L.M. Usman "Assessing the universal basic education primary and Koranic schools'

seldom takes care of the primary needs of the people especially those of the children. This places heavy burden on them to provide virtually every human need for their families with little or no governmental intervention. There are other issues involved. For instance, northern Nigeria is one of the parts of the world where polygamy is unregulated and practiced without much caution. Although Allah permits His servants to marry up to a maximum of four wives, ideally, certain preconditions need to be satisfied first.[22] For instance, the man should be able to provide the basics of life such as food, shelter, health, sanitation, security etc. There is a presumption that polygamy presupposes more children, thus the husband should make provisions for them as they come. Most importantly, Allah enjoins that for His servants to engage in polygamy they must be predisposed to act justly at all times amongst the wives.[23] Elsewhere Allah (SWT) says that:

> *"You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them so as to leave the other hanging. And if you do justice, and do all that is right and fear Allah, by keeping away from all that is wrong, then Allah is Ever Oft-Forgiving, Most Merciful."*[24]

synergy for Almajiri street boys in Nigeria" *International Journal of Educational Management* (2008)22 (1) 62-73; & A Sule-Kano "Destitution and Almajirai in Northern Nigeria", Part 1, *New Nigerian* on Sunday, February 22nd, 1998 11 – 13.

22 Qur'an 4:3

23 Quran 4:3

24 Qur'an 4:129

Poverty therefore is a major cause of *almajiranci*. Sule-Kano suggests that Structural Adjustment Programme (SAP) further worsened the economic condition of Nigerians during the 1980s.[25] This was because the policy adversely affected jobs and subsidies enjoyed in health, education and other services enjoyed by Nigerians.[26] Traditionally, African societies cherished large families. Africans consider children as assets. Historically the progress of an agrarian family depended on its large size because in reality paid labour was not recognised. As a duty, every member of the family participated in large numbers to toil family farmlands and even helped other members of the community as a neighbourly gesture. For this reason, men married as many wives as is permissible in order to procreate. However, as noted above, the society became capitalist and individualistic owing to external penetrations. Western civilisation and its attendant characteristics such as the use of money as the medium to get goods and services affected the erstwhile communal and egalitarian setting known to traditional African societies. The size of the family became a burden to the family heads that must provide the necessaries of life to the entire household. This was indeed a herculean task and there was need to take care of the situation. One possible way was to reduce the amount of responsibility by pushing it elsewhere. Hence, parents took their children/wards to other places ostensibly to seek knowledge. Nevertheless, beneath this knowledge escapade was an opportunity for them to reduce familial responsibilities. Of course, this was convenient to less privileged members of the society and the *almajirai* come from this group. Children/wards of the affluent and royal families rarely leave the comfort of their homes for this purpose. Whenever they did, they made proper arrangements for the welfare of their kids.

25 Sule-Kano *op cit* note 16.
26 Fada *op cit* note 1.

Thus, related to poverty is ignorance and bandwagon following. Because most people in the rural areas are not in a privileged position to acquire filtered knowledge and therefore rely on archaic and mundane sources of information, they continue to fall victims of this practice. Family A would want to join Family B in sending their child away to become an *almajiri* as means to reduce poverty, follow along and conveniently fulfil the (perceived) compulsory requirement of educating their children.[27] It must be noted however that, in Islam (as well as other religions) the primary legal and moral duty of parents is to take care of the welfare of their children –"to provide food, shelter, security, health, education, as well as moral and professional training to their kids to the best of their abilities".[28]

Thus, memorisation of the Qur'an, which is largely what the *almajiri* does, is a desirable (*Mustahab*) act only. It is not compulsory for every Muslim to memorise the Quran, even though this is encouraged. But because of bandwagon following (and of course poverty), most parents would rather trade their compulsory duty (*wajib*) for a desirable one (*mustahab*).

With the influence of colonialism and its subsequent entrenchment of western education together with the watering down of the existing educational *almajiri* system, the system underwent a paradigm shift. It degenerated into a lowly, degrading and inhuman practice of street begging. In the words of Okoye and Yau[29]:

> *"instead of educating their pupils and giving them skills and knowledge necessary for*

27 Fada Op cit note 1; Sule-Kano (1997) op cit note 23.

28 Abubakar *op cit* note 9 pp 23

29 F Okoye & Y.Z. Ya'u "The Condition of Almajirai in the Northwest Zone of Nigeria, Kaduna" (1999) *Human Right Monitor* 14.

> *functioning effectively in society as they used to. Koranic schools have deteriorated to the extent that many people regard them as no more than a breeding ground for street beggars."*

In extreme cases, most of the *almajiri* graduate into criminals of all grades and some unlucky ones become victims of crimes, rituals and trafficking. Some of them became bigots, armed robbers, pimps or tools for all sorts of social delinquencies.[30] Some scholars have rightly opined that most followers of the *Maitastine* (Marwa) uprising which violently and tragically took the lives of many and rendered others homeless in parts of Northern Nigeria between 1980-1983 were in fact *almajirai*.[31] The *almajiri* system has been adulterated or corrupted such that it becomes an undignified system. The reality today is that most *almajirai* are no longer interested in seeking for knowledge but in making money through menial jobs and street hawking. The *almajiri* thus becomes synonymous with 'street begging'. The corrupted version consists of not only children but also the vagrant and lazy persons, the disabled and unfortunate women. To many uninformed, *almajiri* signifies street begging only without understanding its origin as a system of education.

SANKALP opines that apart from poverty, which is considered the greatest threat to the survival of the child, other hurdles include:

> *"unconquered childhood diseases; restricted access and opportunities to quality childhood and primary education; distressed living conditions (including denial of safe drinking water and hygienic sanitation facilities); acute lack of access to*

30 Fada *op cit* note 1.

31 Fada *op cit* note 1; Sule-Kano (1997) op cit note 17.

> *basic social services; and widely prevalent violence, exploitation, abuse and discrimination."*[32]

The *almajiri* suffers even worse because at a very early stage of his development he is denied parental love and care even while his parents are alive and able to provide them. This is a seminal encapsulation of what the *almajiri* child suffers in northern Nigeria. Arguably, the situation is horrific, inhuman, tragic and unacceptable. While some Nigerians live in affluence, vulnerable children between the ages of 5 and 15 live on the streets facing unending suffering, scavenging for food and shelter in the name of seeking knowledge.[33]

REFORM EFFORTS

However, despite the corruption and misconception of the system in recent times, the *almajiri* practice has continued until this day. So far, several attempts have been made to modernise the *almajiri* system. This ranges from peoples personal efforts to government intervention. For instance, the *Sunni (Izala)* Muslims who view the practice (the method and not the teaching) as anti-Islamic (*bid'a*) for dehumanising the child established *Islamiyya* schools where they teach both conventional western education and Islamic education simultaneously.[34] However, these Islamiyya schools are elitist in character and rarely appeal to rural dwellers. *Islamiyya* schools are commonly situated in urban areas. Again, *islamiyya* schools

32 SANKALP (2013) http://www.sankalp.org/childdevelopment (accessed 07th October 2013).

33 Usman *op cit* note 23

34 R. Loimeier "Boko Haram: The Development of a Militant Religious Movement in Nigeria" *Africa Spectrum* (2012) 2(3) 137-155.

unlike the *almajiri/tsangaya* or *makarantar allo* are organised as conventional schools and are majorly day schools. The pupils continue to enjoy the comfort of their daily lives from their homes as against the *almajiri* system which is mainly a boarding setup enjoying the patronage of few neighbouring families. *Fityan al-Islam* organisation has also helped in the proliferation of *Islamiyya* schools in northern Nigeria with the first one opened in 1972.[35] The numbers grew geometrically and by 2000 in Kano State alone, they had 2,881 schools and over 300,000 students across northern Nigeria.[36]

Various government administrations have endeavoured to chip in the little they can so far into reforming the system. The first effort was made in 1959 when the Kano Native Authority warned parents against abandoning their children in the name of Islamic education and the teachers were directed to refuse any *almajiri*.[37] This was unsuccessful. In 1985, the then military government enacted an Edict to control Koranic Schools. The thrust of the law is to regulate Koranic schools and the unrestricted movements of the teachers and students to certain urban centres. However, like the previous measure, the law was ineffective because most of the teachers and the students were completely unaware of its existence.[38] This had generated many criticisms. For instance, Suleiman[39] (1990) argues that "using a standard –western standard – which is very weak because it emphasises individualism, careerism and materialism" is an approach that is bound to fail. In his characteristic socialist tone, he maintains thus:

> *"if all the almajirai who roam the streets of our cities to beg for alms, are children of the poor and if the latter act is neither*

35 Thorsen *op cit* note 23
36 *Ibid.*
37 Yushau et al op cit note 1; & Suleiman op cit note 7
38 *Ibid*
39 Suleiman *op cit* note 39

> *sanctioned by religion or culture then the cause of bara and rural-urban migration must be located in the production system."*[40]

Indabawa[41] made another idcological criticism against the law in the following words:

> *"the question of social relations in agricultural production, the land tenure system, the menace of large scale farming, etc have to be tackled. But tackling them entails, not merely improvement in economic life, but is a serious political question. Thus, the educational reforms are of little value in this direction...controlling the movements and registrations of pupils are in themselves diversionary and amount to a cover up of the real problems behind the problem... since the development of capitalism stands to profit from the rural –urban migrations, large scale farming, speculation in agricultural lands, etc. it also stands to profit from the ideological justifications for bara by manipulating Quranic injunctions."*

Another scholar takes a critical stance against such government measures thus:

> *"The system is part of the overall socio-economic situation of the mother society. The question is why is it that despite the 'ills' of the Almajiranci majority of people*

40 *Ibid* 98.
41 1990 pp.78

in the population still prefer to give their children to the 'malams' than send them to primary school?[42]

In reality, the law remained a mere 'paper tiger'. Between 2003 and 2011, the Kano State Government unsuccessfully tried to rehabilitate and improve the system by providing free feeding to the students and to pay the *Mallams* monthly salaries as well as provide them with cattle for farming.[43] In addition, the Federal Government of Nigeria has entered the reform province recently. The administration of President Goodluck Jonathan has gone ahead to build 1000 almajiri schools across Northern Nigeria. The beneficiaries and the system are however yet to feel the effect and implications of these endeavours thus far. In reality, it is incapable of addressing the problem because nearly everywhere in northern Nigeria is full of street beggars most of who are children. Arguably, in the end, these efforts would remain ineffective in ending the current *almajiri* imbroglio. All the same, another perspective founded on human rights jurisprudence could be offered. As discussed hereunder, the rights of the child to education, parental love and care, health, sanitation, work etc. cannot be bargained away without legal consequences.

Good governance is at the heart of the solution. Successive governments have largely remained irresponsible and evasive to their duty to checkmate the practice and to provide the necessary services they ought to provide to the people. Bad governance, corruption and improper planning have enmeshed

42 Kabiru *op cit* note 7 pp 85

43 J.A. Bambale "Almajiranchi and the problem of begging in Kano State: The role of the Shekarau Administration" Paper presented at the 7th Ben Africa Annual Conference (2007) 1 – 12.

successive administrations in the country.[44] Although at the initial stage, when the going was good, the *almajiri* system did not pose any security, environmental or social challenge to the society, as soon as it did, government ought to have lived up to its responsibilities. Section 14(1) (b) of the Nigerian Constitution[45] provides to the effect that the primary purpose of government is to take care of the security and welfare of the people. As the paper argues hereunder, 'security' and 'welfare' are broad terminologies capable of covering the entire gamut of the child's basic human needs.

THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE CHILD AGAINST THE *ALMAJIRI* PRACTICE IN NORTHERN NIGERIA

In addition to moral recognition which religion and culture have given to the child, law at both domestic and international levels have restated the significance of the child in the society. Although some of the available international instruments do not have universal acceptability due to cultural relativism, their philosophical and moral undertones have remained unshakable. Foremost, at the global level, the 1989 Convention on the Rights of the Child (CRC)[46] recognises the need for the child to grow up in a family environment where he/she may find love, happiness, and understanding to actualise his/her harmonious

44 M.T. Aluaigba "Circumventing or Superimposing Poverty on the African Child? The Almajiri Syndrome in Northern Nigeria" (2008) *Childhood in Africa1(1)* 19-24

45 Constitution of the Federal Republic of Nigeria 1999 (as ammended).

46 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html [accessed 21 October 2013] (CRC)

development.[47] Prior to this Convention, other instruments have equally recognised the dignity of the child as well as his/her right to develop within the parameters of human dignity. They include the Geneva Declaration of the .Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights[48], the International Covenant on Economic, Social and Cultural Rights[49]. These are all instruments with global relevance.

Other laws include the African Charter on the Rights and Welfare of the Child (ACRWC)[50]. Nigeria has domesticated these two international instruments, which are central to the Child's survival and development as the Child Rights Act (CRA), 2003[51]. This is in consonance with section 12 of the Nigerian Constitution, which requires that for any treaty to be binding in Nigeria, the National Assembly must legislate upon it and pass it into. law. It is unarguable therefore, that these international instruments are legally enforceable in the country. The CRA is in *parimateria* with the two international treaties but with further elaboration to suit local circumstances and peculiarities.

In addition to these legal instruments, global and regional institutions recognise and participate actively in the development of the rights of the child. Importantly, the United Nations Children Fund (UNICEF) works across the globe initiating programmes that would ensure the realisation of the

47 CRC preamble 6

48 ICCPR articles 23 and 24

49 ICESCR article 10

50 Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: http://www.refworld.org/docid/3ae6b38c18.html [accessed 28 November 2013]

51 Child Rights Act, 2003 (CRA).

child's rights to develop in a peaceful and conducive environment.[52] In the same vein, the African Union[53] has been proactive towards the realisation of a healthy and conducive environment for the effective development of the child.

At the policy level, goals 1, 2, 4 and 7 of the United Nations Millennium Development Goals (MDGs)[54] encapsulate important policy goals on the right to development of the child having direct bearing on the *almajiri* system. Goal 1 seeks to eradicate extreme poverty and hunger while Goal 2 seeks to ensure universal primary education for all. Goals 4 and 7 seek to reduce child mortality and ensure environmental sustainability respectively. The *almajiri* system as practiced today exposes the child to extreme hunger and lays foundation for a life of perpetual poverty since the *almajiri* does not have the opportunity to determine and pursue a dignified life. As it is today, the *almajiri* does not have the opportunity to pursue a meaningful life or even get educated in line with modern realities. Although he is out to seek for knowledge and to an extent learn a trade, the extremely hard and difficult conditions he finds himself makes this somehow impossible. Only some of them actually get the Islamic and the Western oriented educated. In few cases, some lucky, ambitious and wise ones among them excel to the greatest heights in life. They acquire both the Koranic and western education and become useful and

52 On the activities of UNICEF visit http://www.unicef.org/ (accessed 17 March 2013)

53. Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, available at: http://www.refworld.org/docid/4937e0142.html (accessed 18 March 2014)

54 UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2, available at: http://www.refworld.org/docid/3b00f4ea3.html (accessed 18 March 2014)

important members of the society albeit through strife, sacrifice and perseverance. However, most of the *almajirai* are exposed to life threatening dangers and most often lose their lives in their early ages because of diseases, hunger, poverty, lack of care and malnutrition and as victims of crimes and other disasters. Often times they constitute nuisance to the society and are treated as common criminals and destitute in their own fatherland. The system is also a conduit pipe for cross border emigration, which for countries like Nigeria with porous borders, becomes difficult to surmount hence resulting in social, political and religious crisis.

However, as highlighted above, cultural relativism plays a significant role in the domestication of the laws by the federating units in the country. The Constitution of Nigeria places issues relating to the child in the concurrent legislative list thereby empowering each federating unit to legislate on such matters. Most of the States in northern Nigeria[55], where Muslims are in the majority have been unwilling or refused to domesticate the Child Rights Act in their respective states.[56] Again, section 274 of the CRA repeals all existing laws on children, adoption, fostering, guardianship and ward ship as well as all institutions or matters relating to the child already contained in the Act. In essence, the Act supersedes existing laws in the country dealing with the child.

It is important for the Act to have wide coverage particularly because the States that have refused to give effect to it are those that would benefit most from its utility as far as the *almajiri* system is concerned. Sections 1 to 20 of the Act covers diverse aspects of the child's welfare and development

55 Only 24 out of 36 States have domesticated the Act. The States that have not are Enugu, Kaduna, Kano, Sokoto, Kebbi, Borno, Yobe, Gombe, Adamawa, Bauchi, Katsina, and Zamfara.

56 (UNICEF, 2011, Daily Times, 2013) See also UNICEF 2011. http://www.unicef.org/nigeria/Child_rights_legislation_in_Nigeria.pdf Accessed 17 November 2013);

including his/her right to survival and development, freedoms from discrimination, thought, conscience and religion, harmful social and cultural practices, separation from parents, child abuse and torture amongst others. Similarly, the Act imposes the responsibility upon states to ensure that the child receives and enjoys his/her right to education, health and health services and protection of the family. A close look at these rights shows that, if States were to domesticate the Act then it will enjoy effective enforcement thereby reducing or eliminating the plight of the *almajiri* child in the country. The whole essence of the various provisions of the CRA is to give priority to the child's best interest.[57] Article 27 of the Child Rights Convention is to the effect that a child shall have the right to a standard of living *adequate for the child's physical, mental, spiritual moral and social development.* Evidently, this is an all-encompassing provision, covering myriad of important aspects of a child's development.[58] This is because the duty bearers under the Act, which are the State and parents, would have to ensure that no aspects of the childs development are neglected.

So far, statistics have shown that there is an estimated 10.5 million *almajirai* in Nigeria.[59] The number could be more or less if Nigeria as a country has a comprehensive data capturing system. As it is, the veracity of the numbers is doubtful. That notwithstanding, anecdotal evidence shows that indeed, there is a staggering number of *almajirai* that suffer from constant neglect in the country.

57 CRA section 1

58 L Holmstrom & L Karlbrink (eds. 1998), *United Nations Human Rights Fact Sheets* no 1-25 6th edition (Lund: Raoul Wallenberg Institute) (1998); D Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* (2002) 10 127-136.

59 Leadership Newspaper www.leadership.ng (accessed 09/09/2013.

In addition to the CRA and MDGs, the Universal Basic Education Act[60] is another important piece of legislation that provides for the right of a child to basic education in Nigeria. This Act, like the African Charter on Human and Peoples Rights (African Charter)[61] and the CRA, are enforceable in Nigeria. However, these laws are enforceable to the extent that they do not conflict with the provision of section 6(6) (c) of the Constitution dealing Chapter II of the Constitution. Under Section 6(6) (c), no court in Nigeria has the jurisdiction to determine any matter arising out of Chapter II of the Constitution dealing with the fundamental objectives and directive principles of State Policy. By implication therefore, the rights to education, health, parental care and love, etc. of the *almajiri* are ordinarily non-justiciable under the law. The Supreme Court of Nigeria in *Okogie v The Attorney General of Lagos State*[62]confirmed the non-justiciability of Chapter II of the Constitution.

However, as Duru observes rightly, by virtue of Item 60(a) of the second schedule, part I of the Constitution, section 6(6) (c) is subject to the legislative competence of the National Assembly.[63] The National Assembly (NASS) has the power to establish and regulate authorities for the federation or any part thereof for the promotion and enforcement of fundamental objectives and directive principles of State policy following from this provision. Hence, if the National Assembly establishes

60 Universal Basic Education Act, 2004.

61 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html (accessed 18 March 2014) See also African Charter For Human and Peoples' Rights (Ratification and Enforcement Act) 1983 Cap 10 LFN 1990.

62 *Okogie v The Attorney General of Lagos State* (1981) 2 NCLR 337 SC.

63 O. Duru "The Justiciability of the Fundamental Objectives and Directive Principles of State Policy Under Nigerian Law" (2012) " Available at SSRN 2140361.

UBEC in furtherance of the objective principles of Chapter II and funds it with taxpayers' money, then its failure to ensure the right to education in Nigeria should be enforceable in a competent court. This is in tandem with the decision of the Supreme Court in AG Ondo V. AG Federation[64] when it held thus:

> *"no court can enforce the provisions of chapter ii until the NASS has enacted specific laws for their enforcement as has been done in respect of this s.15(5). They remain mere declarations, they cannot be enforced by legal process but would be seen as failure of duty and responsibility of state organs if they acted in clear disregard of them. We need not seek uncertain ways of enforcing them... the constitution itself has placed the entire chapter ii under the ELL [Exclusive Legislative List]. By this, they need not remain mere or pious declarations. It is for the executive and the legislature, working together to give expression to them through enactment. Thus they can be made justiciable through legislation."*

Since the NASS has enacted the UBEC Act, then the rights of the *almajiri* contained therein become justiciable notwithstanding section 6(6) (c). In addition, former Chief Justice of Nigeria, Uwais[65] explains the importance of this when he stated that:

64 *AG Ondo v. AG Federation* (2002) 9 NWLR (Pt.772) 222 SC.

65 M.L. Uwais "Fundamental Objectives and Directive Principles of State Policy in Modern Constitutions: Possibilities and Prospects" in C. C. Nwaeze (ed.),

> *"This is definitely one avenue that could be meaningfully exploited by the legislature to assure the betterment of the lives of the masses of Nigeria, whose hope for survival and developments in today's Nigeria have remained bleak, and are continuously diminishing. The utilisation of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected in our society. It would also provide a unique and potent opportunity to our legislators to monitor and regulate the functions of these bodies, where the Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of Chapter II, and by extension, the welfare of Nigerians."*

Another perspective is to consider the interrelationship between rights under Chapter two with those under Chapter IV, which are justiciable.[66] Clearly, the rights of the *almajiri* that are constantly being violated are all encompassing rights. The trajectory of them all being the *almajiri's* right of survival and development, which has direct nexus with his right to life and discrimination etc.[67] The High Court of Lagos State (in Nigeria) adopted this approach to uphold the right to eradicate illiteracy under Chapter two by tying it to the right to freedom of expression through the establishment of schools in the case of *Adewole v Alhaji Jakande*.[68] The Supreme Court of India is also

Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezeonu JCA (Enugu: Fourth Dimension Publishers, (2002).

66 Duru *op cit* note 65

67 CRA section 3; CFRN section 34, 39 and 42.

68 Adewole v Alhaji Jakande (1981)1 NCLR 262 HC (Lagos).

notable in this regard where Justice Bagwati relates socio-economic rights to the right to life in the case of *Minerva Mills v Union of India.*[69] Another approach would be to amend the Constitution to pave way for enforceable socio-economic rights as is the case with the South African (1996) and Kenyan (2010) Constitutions by expunging section 6(6) (c).

Returning to the substantive rights under the UBEC Act, section 2 provides that every child has a right to free, basic and compulsory, universal basic education at primary and junior secondary levels. This is in consonance with Article 13 of the International Covenant on Economic Social and Cultural Rights, which emphasises free education for all. Section 4 of the UBEC Act places the duty to educate a child on the parent and section 2 (4) goes further to criminalise any attempt by parents to deny their children/wards the right and opportunity to enjoy from this compulsory, universal basic education.[70] In addition to these, the Act establishes the Universal Basic Education Commission[71], the States Universal Basic Education Boards[72], as well as the Local Government Education Authority[73]. By virtue of these provisions, every child including the *almajiri* is entitled to compulsory, free basic education. But the problem is that the almajiri system is not strictly considered as the equivalence of primary and secondary education under the Act.

According to the United Nations Committee on Economic Social and Cultural Rights (ESCR committee)[74], basic primary

69 Minerva Mills v Union of India (1978) AIR 1789 SC.
70 *Ibid*
71 UBEC Act S.7
72 UBEC Act S 12
73 UBEC Act S 13
74 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at:

education in addition to being free and compulsory must be capable of achieving the 4-As of availability, accessibility, acceptability and adaptability.[75] Availability presupposes that the education must be sufficiently available within the States jurisdiction. It must also be capable of taking care of all the basic requirements for effective and efficient learning outcomes "such as buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on".[76] Accessibility entails that "educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party".[77] Accessibility is three dimensional -non-discrimination, physical and economic accessibility. Thus, in addition to making primary education free for all, institutions must be situated within reach and must have the requisite things that would simplify learning. Similarly, education must be acceptable to the people taking into consideration, culture, religion and other considerations. Finally, education must be adaptable to changing circumstances and cultural setup of the people.

The Economic Community Court of the ECOWAS had cause to restate the significance of the right to education in the case of *Registered Trustees of Socio Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Another.*[78] Although, the basis for determination in that case was the interpretation of the right to education under both the

http://www.refworld.org/docid/4538838c22.html (accessed 18 March 2014) (General Comments 13)

75 General comments 13 Article 6.

76 *Ibid* 6 (a).

77 *Ibid* 6 (b).

78 *Registered Trustees of Socio Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Another* SUIT NO ECW/CJ/APP/08/08, 2009 Found at www.ecrj.net

African Charter and the UBEC Act, the Community Court found that it was not competent to determine rights provided-for under domestic law (UBEC Act). It however held in favour of the applicants that the right to education is a right under the African Charter for Human and Peoples Rights (Ratification and Enforcement) Act, which coincidentally is both an international obligation and an enforceable domestic legislation in Nigeria.[79]

SALVAGING THE *ALMAJIRI* PRACTICE

From the above, there is no gainsaying that there is plethora of legal frameworks for protecting the dignity of the child as a member of the human family. What remains is the immediate implementation and judicial/social activism to curb the menace of *almajiranci* in Northern Nigeria. This is not only an urgent moral duty but also a legal one. Recently, the ECOWAS community court in the case of SERAC observed in addition to the legal framework discussed above that education is a right in Nigeria as required under the African Charter and other extant laws. Education is one of the propelling aspects of the right to development. As put forward by the ESCR Committee:

> *Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and*

79 SERAP Supra paragraphs 14 & 20.

> *hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments available to States, but the importance of education is not just practical and instrumental. A well-stocked, enlightened and active mind, able to range freely and widely, is one of the joys and rewards of human existence.*[80]

The right to development (RTD) is a right, which Sengupta[81] calls a vector of all human rights. Donnelly[82] considers the RTD as a synthesis of all existing rights. Hence, the right to education is an important aspect of the right to development.[83] This position has been reiterated in various legal instruments where the right to survival and development of the child is provided for.[84] Unarguably, education is a precondition to any civilised existence the absence of which renders human beings and particularly the child useless, helpless, jobless and hopeless.

The *almajiri* practice seems also to be prevalent in few parts of the world particularly in Northern Nigeria. Therefore, it calls for particular special attention because unfortunately, it has

80 General Comments 13 Article 1.

81 A Sengupta "The Human Right to Development" in BA Andreassen & P Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimension* (2nd edn 2008) Intersentia Antwerp 13-44.

82 J Donnelly *Universal human rights in theory and practice* (2013) Cornell University Press.

83 SAD Kamga Realising the right to primary education in Cameroon *African Human Rights Law Journal* (2011) 11171-193.

84 See for example Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: http://www.refworld.org/docid/3ae6b38c18.html (accessed 18 March 2014)

acclimatised to form part of the cultural practices of the inhabitants of that region. Although a common practice, many people across the region chastise and reject it. Therefore, the right to development paradigm as used here seeks to advocate how to salvage the *almajiri* practice in Northern Nigeria. Although, the RTD approach is adopted it is argued that an effective edifice is only possible if legal backing is given to it. As noted above, the current imbroglio is a manifestation of general neglect by government as well as ignorance and carelessness of parents. Additionally, religious scholars that promote this practice are also to blame for deceiving and teaching their followers archaic and moribund traditions, which our current existing societal superstructures and sensibility no longer support. The paradigm is looked at from governmental, familial and societal levels. The latter includes religious practice in Nigeria while applying the 4-As highlighted above.

It is important at this point to emphasise the federal government effort in building almajiri model schools across the North to deal with the situation. Indeed, this is a welcome development. So far, government has built, through the Education Trust Fund, model schools that are designed to cater for *almajirai*. The scope and coverage of this endeavour as noted above is yet to be meaningfully felt by the populace. In view of this, this paper puts forward some additional impetus that could further aid the realisation of a better society for all, free from the *almajiranci* syndrome.

Firstly, there is need to situate parental responsibility over children through the law. The Kano State Koranic Edict of 1988 cited earlier gives village and district heads the duty to supervise and register Koranic schools within their jurisdictions. Thus, no *Mallam* may operate within their jurisdiction unless and until he registers his school and a certificate of registration

issued. Similarly, before accepting children or wards into the schools the law requires that every parent or guardian must sign a consent form. Importantly also is the supervisory role the law gives the Commissioner in charge of local governments at any given time for this purpose. However, the law does not give primary responsibility to parents over their children. This is a fundamental omission in the law. The CRA, the UBEC Act as well as other international legal instruments, to which Nigeria is party, places the duty of educating the child on the parents. This is in line with Islamic injunctions highlighted earlier. The CRA further makes the general welfare of the child a responsibility of the parents. In view of this, the State (federal, State or Local government) must begin to enforce these hallowed provisions. The State could go further to criminalise any act or omission on the part of parents that seeks to neglect the welfare of children. In developed climes, parents are careful in taking care of their children to avoid the situation where government would step in to take over their children from them for neglecting their welfare. Nigeria should not be different.

This brings us to the second point. The State as a secondary duty bearer on child protection must be able and willing to take up this responsibility unconditionally. However, under international law, the state is both a protector and a violator of human rights.[85] Similarly, it is required under the doctrine of *pacta sunt servanda* (good faith) to honour all its obligations under international law, which includes the duty to protect the dignity and right to education of the child.[86] Based on this, the State has taken up the responsibility to educate the child under the UBEC Act and other obligations for his/her welfare. Therefore, the State should rollout a plan that would take away children from the streets and educate them with dignity, honour and respect, as are the children of the well to do since

85 Donnelly *op cit* note 83.

86 See J O'Brien *International Law* Cavendish (2002).

apparently, most households cannot fully and independently take care of the rights of their children/wards due to poverty. The State needs to first enact and thoroughly enforce a law that will ask every wanderer, child street beggar, dissident and destitute persons to return to their places of origin (homes). In the case of children, their parents or *Mallams* must return them to such destinations. Where a child fails to locate his place of origin, the State automatically appoints *guardian ad litem* for them. A timeline must be determined for achieving this. While this is on-going, the State in consonance with the Accessibility requirement of the 4-As, must build enough schools that can cater for the teeming number of pupils and students across the State and in every nook and cranny of the State. This will also require an updated data collection and documentation system that determines the beneficiaries.

Upon clearing the streets and ensuring that every child has been reintegrated to his/her family, parents should be given the opportunity, based on the acceptability requirement above, to choose where they want their children/wards to school i.e. whether within their local community or outside of it. The administrative authority as the case may be would then allocate and post every child to a school across the State. These schools will cater for the feeding, clothing, accommodation and other costs of the child. The curriculum of the schools should contain both Islamic and western education to ensure acceptability and adaptability. The State should also provide Islamic stream for those that insist on it for their children/wards. However, regardless of stream choice, the curriculum must consist of vocational training like plumbing, entrepreneurial skills, mechanics, masons, poultry farmers, sportsmen, tailors, agriculturists, drivers, cobblers, welders, electricians, artisans etc. in order to prepare the child for the future. From among

these children also, some would proceed to the universities to train as civil servants and white-collar job employees. The whole idea is to make every child self-sufficient and not dependent on government or the private sector for employment.

CONCLUSION: CHALLENGES AND PROSPECTS

This paper argued that for the right to survival and development of the *almajiri* child to be achieved, law and human rights mechanisms must be utilised to the fullest. Law and of course, human rights are important safeguards in ensuring social cohesion and harmony. This is even more so if the rule of law and its basic components are applied without fear or favour. In essence, the *almajiri* practice is a moribund one and needs immediate reformation through effective legislation, people centred policies and an elaborate participation by well-meaning Nigerians. The time of lamentation should be over and an inclusive people centred development edifice pursued. Government must put children in its priority list and save them from a hopeless future. The end beneficiaries will be the society itself. Islam does not support the current *almajiri* practice; it is thus an aberration of the true teachings of the religion, the effect of which has been highlighted above. Already, there are laws that need only to be enforced in order to save the destitute *almajiri*'s plight and to educate and care for them with the dignity and respect they deserve. This however must be a firm and focused decision that may require the use of both force and diplomacy. Force in the enforcement of laws and diplomacy in the creation of awareness as well as provision of the necessary environment to benefit from a reformed, available, affordable, acceptable and in some cases compulsory system of education for all. The government of Kano State will most likely lead the way with the current bill before the State Assembly for the prohibition of *almajiranci* in the State. It is our pray that in the nearest future our streets will be cleared of innocent kids

scattered around because someone somewhere is not doing the job he/she is voted to do.

As ambitious as this practical solution may seem it is likely to be bogged down by some factors that could hinder the effective elimination of *almajiri* menace. Some of them include proper data collection and documentation; designing legal preconditions to polygamy; provision of transportation for the pupils and students to and from school during resumptions and vacations; employment of qualified teaching (academic and western), administrative, vocational and support staff; and proper planning and prudent utilisation of available resources; dealing with issues of dogmatism and creating awareness. Other challenges that could debilitate against this endeavour include political will, legislation, ignorance and lack of awareness, cultural and religious dogmatism, corruption etc. Clearly, resource availability touches on all these. However, Nigeria is undoubtedly a rich country with enormous human and material resources. If these resources are properly harnessed and utilised, then these challenges may be sidestepped. There is the urgent need to fast track the integration process so that marginalisation of the *almajiri* system could be addressed so that children will not be shut out of the abundant opportunities in the country.

The use of "et.seq." indicates that the issue concerned continues in subsequent pages. The use of "passim" after a number indicates that the subject is referred to in various pages.

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