

THE JUDICIAL RECOGNITION AND ENFORCEMENT OF THE RIGHT TO ENVIRONMENT: DIFFERING PERSPECTIVES FROM NIGERIA AND INDIA

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*Environmental rights are one of the emerging rights in the arena of international human rights law and international environmental law. This paper analyses the judiciary's roles in advancing the right to a healthy environment in Nigeria and India. These two countries have certain similarities and yet there exists a remarkable difference between the levels of recognition of the right to environment in both countries. The concept of environment rights will be traced by drawing the link between the environment, human rights and sustainable development. Further, the Nigerian oil industry has impacts on the country's political economy and the environment of host-communities. In fact, there are reasons why there are certain peculiarities that Nigerian courts face in deciding oil-related environmental cases. An analysis of legal provisions and statutes of both the countries will be presented to highlight the status of the right to environment.***

I. INTRODUCTION

Environmental rights are one of the emerging rights in the arena of international human rights law and international environmental law. 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.¹ Though the jurisprudence of the right is still evolving it has enjoyed varying degrees of recognition in the national sphere² not the least

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** Abstract supplied by Editorial Board, NUJS Law Review.

¹ There are differing views on the precise ambit of the right but a broad categorization of the purpose of the right includes them.

² Carl Bruch & Wole Coker, *Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa*, available at <http://www.eli.org/pdf/breathinglife.pdf> (Last visited on April 22, 2005). Environmental rights provisions are contained in about 35 African countries. For example, this figure is a remarkable increase from just two countries in the 1980s (Equatorial Guinea and Ethiopia) that had them. This number is likely to increase, as the draft constitution for the Democratic Republic of Congo includes environmental provisions, and other countries (such as Kenya) are contemplating similar provisions.

because of the relationship between the environment and development as espoused by the sustainable development paradigm. This paper analyses the judiciary's roles in advancing the right to a healthy environment in Nigeria and India. These two countries have certain similarities that make this comparative study interesting. First, these countries have similar political histories being former British colonies. Secondly, and more importantly, both countries have similar Constitutional provisions on the protection of the environment contained in the Fundamental Objectives and Directive Principles. Thirdly, the two countries are emerging economies that generally display a low level of environmental rights based on the reasoning that recognition of environmental concerns is antithetical to development. In other words, both countries are expected to have similar levels of environmental rights recognition.

The paper is discussed in six parts including this introduction section. The second section draws the link between the environment, human rights and sustainable development giving rise to the concept of environmental rights. The third section discusses Nigeria's oil industry with emphasis on its impacts on the country's political economy and the environment of host-communities. This section provides the necessary background to understand some of the peculiarities that Nigerian courts face in deciding oil-related environmental cases. The fourth section discusses relevant legal provisions on the right to a healthy environment and cites oil-related environmental cases wherein the judiciary have had the opportunity to make direct pronouncements on the existence (or otherwise) of the right to environment. The fifth section discusses the recognition of the right to environment in India by discussing some cases heard by the country's Supreme Court. The sixth and concluding section draws a comparative analysis between the two countries and proffers some explanations why there is a remarkable difference between the levels of recognition of the right to environment in both countries.

II. THE ENVIRONMENT, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

Generally, the relationship between the environment and development is viewed differently by developing countries on the one hand and developed nations on the other. While the developed countries seem to appreciate the need to integrate environmental concerns into development planning, developing countries are more reluctant to imbibe this practice even when their national legislations and policies suggest that environmental issues be given adequate consideration in development planning. The thinking of this latter group of countries is that 'undue' environmental considerations will stall economic growth which is their national priority. Notwithstanding the differing views between developed and developing countries, the international community has remained steadfast in developing the link between the environment and development.

The 1972 Stockholm Conference which provided the first platform where issues concerning the link between the environment and economic development

were discussed drew a wide range of participants from both developing and developed nations of the world. The Conference laid the foundation for the emergence of the concept of sustainable development as a satisfactory resolution to the environmental versus development dilemma. Consequences of the Conference include the establishment of the United Nations Environment Programme (UNEP), several other national environmental protection agencies and international meetings that culminated in environmental friendly resolutions and instruments.³ An important part of the Declaration adopted at the end of the Conference stated in part:

The natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning or management, and ...the capacity of the earth to produce vital renewable resources must be maintained and wherever practicable, restored or improved.

This declaration laid the foundation for subsequent conferences and international meetings on issues of the environment and development. Notable among these, is the 1983 World Commission on Environment and Development (WCED) that popularized the term 'sustainable development'. The Commission's report, 'Our Common Future', weaved social, environmental and economic issues and provided direction for comprehensive global solutions.⁴

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 development while emphasizing that environmental protection should constitute an integral part of the development process.⁵ Important in this regard is Principle 10 of the Rio Declaration that formulated the link between human rights and environmental protection largely in procedural terms.⁶ It states:

³ Some of these include the United Nations Conference on Desertification, August 29 - September 9, 1977, available at <http://infoserver.ciesin.org/docs/002-478/002-478.html> (Last visited on January 9, 2011); The World Conservation Union, Convention on International Trade in Endangered Species of Flora and Fauna (CITES), 1975, available at <http://www.cites.org/eng/disc/text.shtml> (Last visited on January 11, 2011) and the Worldwatch Institute established in 1975 in the USA to raise public awareness of global environmental threats to the point where it will support effective policy responses (*See generally* <http://www.worldwatch.org/> for more information).

⁴ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

⁵ 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).

⁶ Dinah Shelton, *Background Paper No. 1, Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva.

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.

Indeed, this provision is of utmost importance to this paper which aims to highlight the way the judiciary in Nigeria and India have sought to ensure access to judicial redress including redress and remedy.

The most recent of the global summits, the World Summit on Sustainable Development at Johannesburg (WSSD), strengthened the link between human rights and sustainable development that was enunciated in the 1995 World Summit for Social Development held in Copenhagen. While the Copenhagen Summit noted that sustainable development is not possible unless human rights are protected for all, the Johannesburg Conference focused on the relationship between human beings and the natural environment. The understanding of sustainable development paradigm was broadened and strengthened at the Summit, particularly the important linkages between poverty, the environment and the use of natural resources. The Conference also maintained that sustainable development can be attained through the recognition and the enforcement of the right to a healthy environment.⁷ The WSSD thus shed light on the need to protect human rights, environmental rights and the environment itself especially in the face of natural resource exploitation, which remains one of the highest causes of human rights abuses arising from environmental causes as evident in Nigeria's Delta region.

A. ENVIRONMENTAL RIGHTS

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.⁸ These include: a) freedom from pollution, environmental

⁷ International Institute for Environment and Development (IIED), *Environment and Human Rights: A New Approach to Sustainable Development*, available at http://www.iied.org/docs/wssd/bp_envrights_ftxt.pdf (Last visited on May 21, 2004).

⁸ 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.

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.

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 Matters⁹ 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.¹⁰ 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 well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures
 - 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.

⁹ More popularly referred to as the Aarhus Convention after the Danish city where it was adopted in June 1998.

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> (Last visited on May 21, 2004).

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.¹¹

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 environment is the most basic one and other related rights include the rights to safe drinking water, to clean air, and to safe food. The procedural aspect refers to the processes by which citizens may act to protect the environment. This includes the rights to environmental information, to participation in environmental decision-making and to access to justice. Although both Nigeria and India do not have substantive provisions in their Constitutions that recognize the right to a healthy environment, Nigeria has imbibed the African Charter on Human and Peoples' Rights which expressly recognizes the substantive right and India has read such rights into the Constitution.

III. NIGERIA'S OIL INDUSTRY: THE POLITICAL ECONOMY AND ENVIRONMENTAL IMPACTS

Oil was discovered in commercial quantities in 1958 and since then, it has become central to the economy and politics of the country. Oil exports contributes at least 95 percent of Nigeria's total exports¹² and revenues derived from the resource such as the federal government's participation interests, sale of oil-blocs, concession rents, royalties and profit taxes amongst others, contribute about 85 per cent of government revenues.¹³ In monetary terms, Karl and Gray suggested in 2003 that Nigeria had generated over US\$340 billion since the commercial exploitation of the resource.¹⁴ The economic importance of the resource

¹¹ M. Lorenzen, *Background Paper on the Project Environmental Human Rights*, available at <http://www.anped.org/docs/background%20document.doc> (Last visited on May 1, 2004); 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 (Last visited on January 9, 2011).

¹² The resource constituted 95 per cent of Nigeria's total exports in 1975, 98.5 per cent in 1985, and 97 per cent by 1990. In 2000, Nigeria received 99.6 per cent of its export income from oil making it the world's most oil-dependent country. See, J. IHONVBERE, *NIGERIA: THE POLITICS OF ADJUSTMENT AND DEMOCRACY* 22 (1994); M. Ross, *Nigeria's Oil Sector and the Poor*, available at <http://www.sscnet.ucla.edu/polisci/faculty/ross/NigeriaOil.pdf> (Last visited May 21, 2004); *US Energy Information System*, available at www.eia.doe.gov/cabs/Nigeria/Background.html (Last visited on January 23, 2010).

¹³ This is a phenomenal increase from the 9.5 per cent contribution the resource made to federally-generated revenue in 1966. See generally, J. ONOH, *THE NIGERIAN OIL ECONOMY* 33-37 (1983).

¹⁴ I. GRAY AND T. KARL, *BOTTOM OF THE BARREL: AFRICA'S OIL BOOM AND THE POOR* 25 (2003).

has redefined the power dialectics of the country.¹⁵ Political power and control of oil resources and revenues are concentrated in the central government despite the federal structure defined by the Constitution.¹⁶ 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 Constitution¹⁷ and other subsidiary legislations including the Petroleum Act,¹⁸ Exclusive Economic Zone Act¹⁹ and the Land Use Act 1978²⁰ clearly assert this position.

Most of Nigeria's onshore oil activities take place in the Niger Delta region.²¹ 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 Delta²² 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

¹⁵ 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> (Last visited on June 14, 2005); B. Naanen, *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.

¹⁶ 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.

¹⁷ Constitution of the Federal Republic of Nigeria (CFRN), 1999, §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. §158 (1) of the 1963 CFRN and section 40 (3) of the 1979 CFRN.

¹⁸ Laws of the Federation of Nigeria, 2004, Chapter P10.

¹⁹ *Id.*, Chapter E17.

²⁰ *Id.*, Chapter L5.

²¹ 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.

²² R. RANGELEY, B.C. THIAM, R.A. ANDERSEN, & C. LYLE, INTERNATIONAL RIVER BASIN ORGANIZATIONS IN SUB-SAHARAN 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 (Last visited on January 9, 2011).

deposits washed down the Niger and Benue rivers and is composed of at least three ecological zones.²³ 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.²⁴ Expectedly, the region has the high biodiversity, characteristic of extensive swamp and forests areas, with many unique species of plants and animals.²⁵ 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.²⁶ 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.²⁷ 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 the dynamite are sited in a straight line referred to as 'seismic lines'.²⁸ 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.²⁹ During

²³ See generally B. L. Nyananyo, *Vegetation, THE LAND AND PEOPLE OF BAYELSA STATE: CENTRAL NIGER DELTA*, 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, WORLD BANK, DEFINING AN ENVIRONMENTAL DEVELOPMENT STRATEGY FOR THE NIGER DELTA (VOLS. I & II) (1995).

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

²⁵ HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE SOCIAL RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 53 (1999).

²⁶ See *supra* note 32, 13.

²⁷ Land Use Act, 1990 (Laws of the Federation of Nigeria), § 28.

²⁸ SHELL PUBLICITY BOOKLET, OIL (1990).

²⁹ 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.

seismic operations, detonators, including dynamite, are sometimes used and evidence suggests that these are sometimes close to residential areas.³⁰ 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.³¹ The aquatic lives of species are affected by the release of 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.³²

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.³³ 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.³⁴ 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*,³⁵ 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 (NNPC), based on the

³⁰ 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).

³¹ N. HYNE, NONTECHNICAL GUIDE TO PETROLEUM GEOLOGY, EXPLORATION, DRILLING AND PRODUCTION 243 (1995).

³² *Supra* note 29, 7.

³³ *Supra* note 31, 225-389.

³⁴ *Supra* note 31, 3-10.

³⁵ *Shell v. Ambah*, (1999) 3 NWLR 1.

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)³⁶ and oil industry sources³⁷ differ,³⁸ 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.³⁹ 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*,⁴⁰ 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 affects society at large rather than to specific damage to communities, which tend to be limited.⁴¹ Nigeria flares about 2.2 billion standard cubic feet of associated gas daily⁴² and is the globe's highest flarer of gas in absolute and proportionate terms.⁴³ 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 the 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

³⁶ 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.

³⁷ 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.

³⁸ 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, (Last visited on January 9, 2011).

³⁹ *Supra* note 24, 532.

⁴⁰ *Shell v. Tiebo VII*, (1996) 4 NWLR (Pt. 445) 657.

⁴¹ J. Van Dessel, *The Environmental Situation in the Niger Delta, Nigeria*, Internal Position Paper: The Environmental Situation in the Niger Delta', 23 (1995) .

⁴² B. Omiyi, *Shell Nigeria Corporate Strategy for Ending Gas Flaring*, presented at a seminar in Norway, June 18-19, 2001, available at <http://www-static.shell.com/static/nigeria/downloads/pdfs/corporatendflare.pdf> (Last visited on January 25, 2006).

⁴³ ENVIRONMENTAL RIGHTS ACTION, GAS FLARING IN NIGERIA: A HUMAN RIGHTS, ENVIRONMENTAL AND ECONOMIC MONSTROSITY 13 (2005).

gas is believed to be responsible for acid rains that have dire consequences for the ecology, particularly agricultural lands and water resources.⁴⁴

In a nutshell, the exploration and exploitation of oil resources in the Niger Delta has 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.

IV. 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 §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 titled 'Fundamental Objectives and Directive Principles of State Policy' which is meant to be read in conjunction with §6(6)(c) of the Constitution to the effect that the provisions of the Chapter are unenforceable against the State.⁴⁵ 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 24⁴⁶ of the African Charter on Human and Peoples' Rights by the adoption of the same.⁴⁷ 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: '[A]n 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'. §1 states:

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

⁴⁴ *Id.*, 14.

⁴⁵ See *supra* note 17, § 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.

⁴⁶ 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.'

⁴⁷ *Id.*, Chapter A9.

The status of the African Charter was considered extensively in *General Sani Abacha and Others v. Chief Gani Fawehinmi*.⁴⁸ 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*⁴⁹ 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 socio-economic rights' Non-Governmental Organization (NGO) alleged on behalf of the Ogonis, that the Federal Government of 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.⁵⁰ 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.⁵¹ 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.⁵²

It is noteworthy that SERAP had 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

⁴⁸ General Sani Abacha and Others v. Chief Gani Fawehinmi, In the Supreme Court of Nigeria, SC 45/1997.

⁴⁹ Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v. Nigeria, Communication No. 155/96.

⁵⁰ *Id.*, ¶ 46.

⁵¹ *Supra* note 50.

⁵² *Supra* note 49, ¶ 68.

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".⁵³ 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. While the Court is adjourned till 30 November 2010, it is 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 §6 of the Constitution that is believed to be unenforceable against the State.⁵⁴ On the issue of *locus*, the 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 cases⁵⁵ 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*,⁵⁶ 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 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 concerns⁵⁷ 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.⁵⁸ Even the oil companies have acknowledged the hitherto favourable judicial dispensation with Shell's legal manager averring

⁵³ SERAP v Oil Firms, Suit No. ECW/CCJ/APP/08/09 dated 25 July 2009.

⁵⁴ Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/0808.

⁵⁵ M. Uwais, *Recent Development in Nigerian Strengthening Legal and Institutional Framework for Promoting Environmental Management* in GLOBAL JUDGES SYMPOSIUM ON SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW (2002).

⁵⁶ Allan Irou v. Shell BP, Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

⁵⁷ 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.

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”.⁵⁹ 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.⁶⁰ Flynas opines that the recent decisions including *Shell Petroleum Development Company Ltd. v. Councillor F. Farah and 7 others*,⁶¹ *Edise & Others v. William International Limited*,⁶² *Elf (Nigeria) Limited v. Sillo*,⁶³ and *Shell Petroleum Development Company Ltd. v. Tiebo*⁶⁴ indicate that the ‘judicial posture’ of Nigerian judges has changed.⁶⁵

It is suggested that Flynas’ 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*,⁶⁶ 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 §§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.⁶⁷

The Court ordered the Attorney-General of the Federation to immediately

⁵⁸ *Supra* note 29, 122-123.

⁵⁹ *Id.*

⁶⁰ 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). See also, *supra* note 55.

⁶¹ *Shell Petroleum Development Company Ltd. v. Councillor F. Farah and 7 others*, (1995) 3 NWLR (pt 382) P. 148.

⁶² *Edise & Others v. William International Limited*, (1986) 11 CA 187.

⁶³ *Elf (Nigeria) Limited v. Sillo*, (1994) 6 NWLR pt. 350.

⁶⁴ *Shell Petroleum Development Company Ltd. v. Tiebo*, (1996) 4 NWLR pt. 445, 657.

⁶⁵ *Supra* note 29, 216-224. See also, J. Flynas, *Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria*, (1999) 43 JOURNAL OF AFRICAN LAW 2, 121-150.

⁶⁶ *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.

⁶⁷ *Id.*, 2.

set in motion, after due consultation with the Federal Executive Council, necessary processes for the enactment of a bill for an 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.⁶⁸ 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. Recently, the law on gas flaring was amended to extend the flare-out date from December 31, 2008 till December 31, 2012.⁶⁹ 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.⁷⁰ Indeed, the case is on appeal, though it appears that the appellants are in no hurry to have the case determined.⁷¹

Another relevant case, *Ijaw Aborigines of Bayelsa State v. Shell I*,⁷² 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 the Federal High Court. The company appealed the judgement 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).⁷³

⁶⁸ *Id.*, 3.

⁶⁹ A. Yusuf, *Gas Flare - Oil majors in race to beat 2012 deadline*, Daily Independent (Nigeria), May 24, 2010.

⁷⁰ 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.

⁷¹ *Id.*

⁷² 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.

⁷³ 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.

Government influence in oil-related environmental cases is also apparent. In the *Gbemre 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.⁷⁴ Similarly, at the 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,⁷⁵ 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 a purported democracy acting under the rule of law.⁷⁶

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*.⁷⁷ 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. 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

⁷⁴ Friends of the Earth International Press Briefing, *Shell fails to obey gas flaring court order*, May 2, 2007 available at http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html (Last visited on May 29, 2008).

⁷⁵ G. Enogholase, *Benin Court Registrar Under Investigation*, Vanguard Newspapers (Lagos), September 27, 2006.

⁷⁶ *Supra* note 74.

⁷⁷ *Oronto Douglas v. Shell Petroleum Development Company Limited I*, Suit No. FHC/2CS/573.

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.⁷⁸ Despite the uncertainty in the application of the rule,⁷⁹ 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.⁸⁰ 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.⁸¹ However, the retrial did not proceed as ordered by the Appellate Court because the project had been completed by the time the Appellate Court 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.⁸²

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.⁸³ 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.⁸⁴

⁷⁸ See generally, Adediran v. Interland Transport, (1991) 9 NWLR (Pt. 214) 155.

⁷⁹ 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. Fawehimmi (1998) 7 NWLR (pt. 559) 598 at 612; Owodunmi 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.

⁸⁰ Supra note 66, 136.

⁸¹ Douglas v Shell, Unreported Suit No. CA/L/143/97 in the Court of Appeal.

⁸² E. Emese, *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.

⁸³ See generally, J. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, (1997)15 BOSTON UNIV. INT'L L J 261, 291.

⁸⁴ J FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES, 224 (2000).

V. ENVIRONMENTAL RIGHTS IN INDIA

India is notably one of the most progressive countries in terms of judicial awareness and application of contemporary concepts including environmental rights and notions of sustainable development.⁸⁵ Ironically, India's constitutional provisions on the environment and human rights are similar to Nigeria's. Article 48A⁸⁶ which contains environmental protection provisions and Article 51A⁸⁷ on the fundamental duties of the State are both principles of state policy.⁸⁸ 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 21.⁸⁹ Indeed, since the 1990s, the Supreme Court has stated that "issues of environment must and shall receive the highest attention from this Court".⁹⁰ 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*,⁹¹ 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 Bihar*,⁹² 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*,⁹³ 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*,⁹⁴ 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

⁸⁵ M. Anderson, *Environmental Protection in India*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, 199 (1996).

⁸⁶ This Article provides that the State shall endeavor to protect the environment and to safeguard the forest and wildlife.

⁸⁷ 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.

⁸⁸ *Supra* note 85, 213-214.

⁸⁹ Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746.

⁹⁰ Tarun Bharat Sangh, Alwar v. Union of India, 1992 Supp (2) SCC 448.

⁹¹ Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.

⁹² Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

⁹³ Mathur v. Union of India, (1996) 1 SCC 119.

⁹⁴ Kinkri Devi and Another v. State of Himachal Pradesh and Others, AIR 1988 HP 4.

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 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 Valley Limestone Quarrying Case -II)*.⁹⁵ 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*,⁹⁶ 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 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

⁹⁵ *Rural Litigation and Entitlement Kendra v. Union of India (Doon Valley Limestone Quarrying Case -II)*, AIR 1985 SC 652.

⁹⁶ *M.C. Mehta v. Union of India*, (1996) 4 SCC 351.

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, criticises the Court as being perceived as consisting of middle class intellectuals that are more receptive to issues that affect their contemporaries.⁹⁷ In a nutshell, based on the analysis of the decisions in *M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case)*⁹⁸ and *Almitra Patel v. Union of India (Municipal Solid Waste Management Case)*⁹⁹, Rajamani argues that the courts are more receptive to ‘certain social and value preferences (for instance, the right to a clean environment rather 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.¹⁰⁰ 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”¹⁰¹

VI. CONCLUSION: THE COMPARATIVE ANALYSIS

This 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 vis-à-vis environmental protection: both contained in the chapters on Fundamental Objectives and Directive Principles, believed to be unenforceable against the

⁹⁷ 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.

⁹⁸ M.C. Mehta v. Union of India (Delhi Vehicular Pollution Case), Writ Petition Number 13029 of 1985.

⁹⁹ Almitra Patel v. Union of India (Municipal Solid Waste Management Case), Writ Petition Number 888 of 1996.

¹⁰⁰ *Supra* note 97, 295-296.

¹⁰¹ *Supra* note 97, 302.

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 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.¹⁰² 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 claimants¹⁰³ 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 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.¹⁰⁴ 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 were 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 50 post-independent years.

¹⁰² Allan Irou v. Shell BP, Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

¹⁰³ *Supra* note 65, 138; Commenting on the impact of the *Farah* case, Fynnas noted that the case is 'an important judicial precedent regarding the quantum of compensation for damage'.

¹⁰⁴ *Supra* note 66.

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.¹⁰⁵ Conversely, Nigeria's rules regarding the standing to sue, remain vague and applied pragmatically by the courts. 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 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.¹⁰⁶

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 basis for his judgement. 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..."¹⁰⁷ 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.¹⁰⁸ 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 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

¹⁰⁵ *Supra* note 96.

¹⁰⁶ *Supra* note 60, 415-439.

¹⁰⁷ *Supra* note 70, 319.

¹⁰⁸ *Id.*

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 §3 of the Environment (Protection) Act, 1986.¹⁰⁹ Furthermore, the Indian judiciary is noted for its enforced judgments on polluters.¹¹⁰

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.¹¹¹ 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.¹¹² The main criticisms have to do with access which can be resolved as Rajamani suggests by the evolution of “a set of guidelines for restrained and responsible PIL”¹¹³ 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”.¹¹⁴

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”.¹¹⁵

¹⁰⁹ R. Sharma, *Green Courts in India: Strengthening Environmental Governance?*, (2008) 4 LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 1, 5; *Supra* note 98, 293-321 (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).

¹¹⁰ A. Jasrotia, *Environmental Odyssey in India: People’s Response and Judicial Vigilance – An Estimate*, (2002) 44 PANJAB UNIVERSITY LAW REVIEW 132.

¹¹¹ *Supra* note 97, 293-321.

¹¹² *Id.*, 319.

¹¹³ *Id.*, 321.

¹¹⁴ *Supra* note 109.

¹¹⁵ *State of Rajasthan v. Union of India*, (1979) 3 SCC 634, 670 (*per* Goswami J.).

