

A Proposal of Reforms for Effective Environmental Management in Nigeria

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In the many laws that deal with the natural environment, society implements its ideas on how humans ought to interact with the land. By probing these laws and unravelling their strands, we can gain a new sense of how we have, as a people, interpreted the value of nonhuman nature and sought to acknowledge that value in our communal lives.¹

Abstract

It cannot be overemphasized that the existing legal and institutional frameworks of environmental protection in Nigeria are bereft of effectiveness. This accentuated the assertion that it is not in the multiplicity of laws that the environment is protected; but in the quality of the laws through effective enforcement mechanisms. It is against this premise that this paper will address the existing loopholes (proposing general and particular approaches) in the current frameworks with a view to moving Nigeria towards achieving Sustainable Development.

1. Introduction

Generally, the sources of Nigerian law are the 1999 Constitution, other Nigerian Legislations (statutes, ordinances, Acts, Laws, Decrees, Edicts and subsidiary legislations), English Law (consisting of received English Law which was introduced into Nigerian law by the Nigerian Legislature, and consists of Common Law, Doctrines of Equity, Statutes of General Application in force in England on January 1, 1900 and statutes of subsidiary legislations on specified matters; and English Law made before October 1, 1960), customary law and Judicial precedents.² The sources of Nigerian environmental law particularly, are international law (Treaties, Conventions and Protocols which

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¹ Freyfogle, E, 'The Ethical Strands of Environmental Law', (1994) *U Ill L Rev* 819, 819-820.

² See Obilade, A, *Nigerian Legal System* (Sweet and Maxwell, 1979) ch 1; Dada, T, *General Principles of Law* (2nd Ed, T. O. Dada & Co 1998) ch. 5.

Nigeria is a party to, and has enacted into her law) the 1999 Federal Constitution, Statutes, Customary Law, and English Common law.³

Nigeria was initially not committed to environmental protection between the 1960s and 1970s because even though a few environmental-protection statutes existed, these laws were not the result of any unified public-policy initiative, thus they were not made for the direct protection of the environment.⁴ However, in 1988, the discovery of an illicit toxic-waste dump in Koko, southern Nigeria, jolted the country from its apathy. In June 1988, about 4,000 tons of toxic waste were dumped in an area of Delta State (known as Koko) under a deal arranged between an Italian trader and a Nigerian national for a fee of one hundred dollars (\$ 100) a month. As a result of the dump, there were numerous records of deaths, wreckage of businesses, and loss of flora and fauna.⁵ As a result of the incident, the government organized an international workshop that eventually led to the publication of the National Policy on the Environment in 1989 which committed Nigeria to sustainable development.⁶

Nigeria also passed the Federal Environmental Protection Agency Act (FEPA Act) in 1988, establishing the country's first agency responsible for the protection and management of the environment. The FEPA Act was repealed in 2007 by the National Environmental Standards and Regulations Enforcement Agency

³ Atsegbua, L, Akpotaire, V, and Dimowo, F, *Environmental Law in Nigeria: Theory and Practice* (Ambik Press, 2010) 16.

⁴ Osibanjo, Y, 'Industrial Pollution Monitoring in Nigeria' in E. Aina and N. Adedipe (eds), *Environmental Consciousness for Nigerian National Development* (FEPA 1992) 95, 97.

⁵ See Johnston, R, "Koko Radiological Accident" 1987 <http://www.johnstonsarchive.net/nuclear/radvents/1987NIGI.html> accessed 11 January, 2016.

⁶ Ebeku, K, *Oil and The Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues* (Ridger Koppe, 2006) 189. This policy was revised in 1999 to account for developments in environmental protection.

(Establishment) Act (NESREA Act).⁷ The NESREA Act and the other environmental statutes form the backbone of Nigeria's environmental law, which works in conjunction with constitutional provisions. The objective of this paper is not to analyse the existing laws, but to propose reforms (general and specific) to the loopholes in the laws which can be summarized as follows: key constitutional environmental provisions are non-justiciable;⁸ the oil and gas sector which is the major source of environmental degradation in the Niger Delta Region is excluded from the control of the Flag ship Environmental Enforcement Agency;⁹ some criminal sanctions are so weak as to lack deterrent effect - criminal liability statutes comprise the Criminal Code Act 1916¹⁰, Criminal Justice Act 1997¹¹, Oil in Navigable Waters Act 1968¹², Associated Gas Re Injection Act 1979¹³, Harmful Waste (Special Criminal Provisions) Act 1992¹⁴, Environmental Impact Assessment Act 1992¹⁵, Sea Fisheries Act, 1992¹⁶ and Endangered Species Act 1985¹⁷. Also, some common law remedies have deficiencies mainly in terms of proof and compensation.¹⁸ These challenges have also not been helped by actions under the United States Alien

⁷ National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) (2007) 94:92 O.G., A635 (Nigeria) [hereinafter NESREA Act].

See the effect of Section 6(6) (c) on section 20 of the Constitution of the Federal Republic of Nigeria (hereinafter CFRN 1999).

⁹ See Sections 7,8,24,29,30 of the NESREA Act, 2007, Cap. N.64, LFN 2010.

¹⁰ Cap C38 LFN 2010.

¹¹ Cap C39 LFN 2010.

¹² Cap O6 LFN 2010.

¹³ Cap A20 LFN 2010.

¹⁴ Cap H1 LFN 2010.

¹⁵ Cap E12 LFN 2010.

¹⁶ Cap S4 LFN 2010.

¹⁷ Cap E9 LFN 2010.

¹⁸ Specifically, actions in Nuisance, Negligence, Trespass and the rule in *Rylands v Fletcher* [1868] UKHL 1.

Tort Claims Act 1789 as demonstrated in *Wiwa v Royal Dutch Petroleum Company*.¹⁹

This paper will therefore focus on the way forward in the achievement of effective management of the Nigerian environment. It will achieve this by proposing two types of reforms – particular and general.

2. Particular Reforms

These reforms are with particular reference to specific environmental laws, touching, particularly on the nature of the law(s) in question. Reforms under this subhead will address justiciability for environmental matters, fines, compensation, ownership of resources, proof of causation and foreign environmental litigations.

(a) *Adopting a Justiciable Constitutional Environmental Right in Nigeria*

It is important for environmental matters to be moved from chapter II (Fundamental Objectives and Directive Principles of State Policy) of the Constitution to Chapter IV (Fundamental Rights), and section 6(6)(c) of the Constitution be excluded from applying to environmental matters. Consequently, individuals will be able to freely challenge violations to their environmental rights under the Constitution. An enforceable environmental right has increasingly been identified to be an effective way of responding to national environmental challenges.²⁰

(b) *Reversing Inadequate Punishment/ Deterrence*

Classic deterrence theory holds that, to achieve maximum deterrence, an enforcement program must demonstrate three

¹⁹ No. 96 Civ. 8386 (KMW) (HBP) at 17-32 S.D.N.Y March 16, 2009) Available at <[http://ccrjustice.org/files/3.16.09%205th%20 Amended%20 complaint.pdf](http://ccrjustice.org/files/3.16.09%205th%20Amended%20complaint.pdf)> accessed 03 February 2016.

²⁰ May, J, 'Constituting Fundamental Environmental Rights Worldwide' (2005-2006) 23 *PELR* 113,137; See also Okon, E, 'The Environmental Perspective in the 1999 Nigerian Constitution' [2003] 5(4) *Env L Rev* 256, 264; Okpara, C, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle' (2012) 5 (1) *JPL* 3,5.

principles.²¹ First, detection and penalty must be *certain* if the illegal conduct is undertaken. Second, the *severity* of penalties must exceed the benefit resulting from the illegal conduct. Third, penalties must be swiftly applied, a factor termed *celerity*. The classical theory assumes that a would-be violator must perceive these risks associated with the illegal conduct and react in a rational manner. The severity of the offence is reflected in some instances by the severity of the sanction. The nature of the offender may also influence the severity of the sanction.²² Also, the speed at which a penalty arrives after a violation occurs creates an important link between the violation and the perception of risk. If the penalty takes a long time to arrive, the violator and others tend to disassociate the violation from the penalty.²³

The penalties created under some of the laws examined in chapter three were shown to be a mockery of the offences themselves, making it possible for the offenders to even pay in advance for future offences under this Act. The legislature appears to have imposed rather lenient fines for such far-reaching breaches. Breaches that do not only endanger the environment which can be used for other sources of revenue (like agriculture), but also endanger the lives of the Nigerian citizenry.²⁴ For example, under

²¹ Beccaria, C, 'On Crimes and Punishment' (D Young Tr, first published 1764, Hackett Publishing 1986) 7-8; Ebeku, K, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country' (2004) 16 *JEL* 361, 374; 2003).

²² Rosseau, S, 'Empirical Analysis of Sanctions for Offences' (2009) 3 *IRERE* 161, 162.

²³ See Beccaria, C (n 21) 14-15; see also Imevbore, A and Okorodudu-Fubara, M, 'Review of Laws and Statements on the Environment in Nigeria' in Aina, E and Adedipe, N, *The Making of the Nigerian Environmental Policy* (Ibadan Press 1991) 35; Salu, A 'Can Laws Protect The Environment in Nigeria?' (1998) 2 (2) *MPJFIL* 153, 159.

²⁴ See Uchegbu, A, 'The Legal Regulations of Environmental Protection and Enforcement in Nigeria' (1988) 8 *JPPL* 57; Imevbore, A and Okorodudu-Fubara, M, 'Review of Laws and Statements on the Environment in Nigeria' in Aina, E and Adedipe, N, *The Making of the Nigerian Environmental Policy* (Ibadan Press 1991) 35; Salu, A, 'Can Laws Protect The Environment in Nigeria?' (1998) 2 (2) *MPJFIL* 153, 159 Ojo, G and

the Oil in Navigable Waters Act, a person who fails to keep a record of spills or escape of oil caused by a desire to save life, vessel or cargo or resulting from damage to ship or leakage shall be penalised with a fine not exceeding two thousand naira (₦2,000). Where such a person deliberately falsified an entry, he is liable to a fine of one thousand naira (₦1,000) or imprisonment for six months or both.²⁵ Failure to report intentional discharges, accidental discharges from vessel or land results in a fine upon conviction of one thousand naira (₦1,000).

The NESREA Act amply demonstrates awareness on the part of government of the dangers of environmental pollution in general. However, there is no specific reference to ‘oil polluters’ in the Act. There ought to be such a provision imposing an additional liability for ‘spillers’, making them responsible for the cost of removal of such pollutants or reimburse the government for costs incurred where the pollutants were removed by the government or any of its agencies. They should also be made to pay the costs of restoration or replacement of natural resources damaged or destroyed as a result of the discharge.

Also, the exclusionary clauses under sections 7, 8, 24, 29 and 30 of the Act which permits the agency to carry out its activities on the environment and other related activities other than in the Oil and Gas sectors²⁶ should be expunged owing to the fact that the major oil spillages in Nigeria are from the oil and gas sectors.

Again, it is suggested that only minimum penalties should be provided for, and not a range;²⁷ that is, the penalties should be left open to be able to be applied in cases where the wealth of the offender will be taken into consideration. Also, the Act should provide for administrative penalties like suspension or forfeiture of

Gaskiya, J, *Environmental Laws of Nigeria: A Critical Review* (Environmental Rights Action/Friends of the Earth 2003).

²⁵ S 7 (1) and (2).

²⁶ Specifically in ss 8(k), (l), (m), (n) and (s).

²⁷ The maximum penalty under the Act is ₦2,000,000; that is approximately £7,692.

license, community service, share issue, environmental audit and so on.

(C) Formulation of Compensation Guidelines

Compensation might include payments for medical care and health monitoring, and any kind of loss that the victims of environmental degradation face, including a rehabilitation program to bring their community back to its original state, insofar as possible. However, civil liability laws in Nigeria do not have a standard for calculating fair and adequate compensation.²⁸

Moreover, compensation for medical care, loss of earnings, loss of future opportunities, and so on is not enough to compensate for the health damages from pollution. The serious clinical symptoms of pollution related diseases take a long period of time to develop.²⁹ Furthermore, pollution-related diseases are always difficult to diagnose. Therefore, what a fair compensation system should look like is a big question for all stakeholders - the victims, lawyers, the government, and the society in general. It is not yet clear what kind of system would be fair and how it would work but basically the compensation system should at least cover all real damages. To find a suitable system, there needs to be further interdisciplinary research done with cooperation from lawyers, doctors, economists, and experts from other fields.³⁰

The civil statutes in Nigeria should be able to provide guidelines for determining the compensation to be granted to victims of environmental degradation instead of leaving the entire responsibility to the courts. Ironically, however, the guide provided by the court in *Shell Petroleum Development Company v Farah*³¹ will be a good starting point for the legislature as far as

²⁸ Westra, L, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Routledge 2012) ch. 8.

²⁹ See Cranor, C, *Toxic Torts: Science, Law and the Possibility of Justice* (CUP 2006) 13-15.

³⁰ See Garrord, G and Willis, K, *Economic Valuation of the Environment: Methods and Case Studies* (Edward Elgar 1999) 10-12.

³¹ [1995] 3 *NWLR* (Pt 382), 148,192. This case arose from a blow out at Shell's Bomu II oil well in Tai/Gokana local government areas in Ogoni in 1970, though the case was not commenced until 1989.

damage to property is concerned. In that case, the Court of Appeal, basing its judgment on English and Nigerian case law, stated that compensation should restore the person suffering the loss as far as money can do that to the position he was before the loss or would have been but for the loss. The court further held that the amount payable in compensation is the current market value of the property damaged, including interests and loss of earnings and use.³² There is however a lot of work to be done by the legislature as far as compensation for health damage is concerned.

(d) Decentralization of Ownership of Natural Resources

The all-inclusive sharing formula for oil and gas revenue in Brazil is recommended for the resolution of the resource control agitation in Nigeria.

The provisions of Brazilian law on sharing of revenue from oil and gas operations are encompassing, ensuring that all interested parties are taken on board.³³ For example, article 52 of the Brazilian Petroleum Law³⁴ specifically provides that the concessionaire must set aside 0.5 -1 per cent of the value of total production from all land based fields as special royalties to be paid to the landowners in Brazilian currency on a monthly basis.³⁵ The concessionaire is required to show proof of this payment to Brazil's National Agency of Petroleum, Natural Gas and Biofuels (ANP) on a monthly basis, and where the owner of the land is not known, or the ownership is in dispute, such payments are required to be made into court.³⁶ The concessionaire and the landowner are to enter into a separate agreement detailing the manner of determining the value of production, the conditions for the payment, and the penalties to the concessionaire for failure to pay

³² See also *Shell v Isaiah* (1997) 6 *NWLR* (Pt 508) 236.

³³ 'Brazil's Oil and Gas Exploration and Production Regimes: An Overview' <<http://www.mayerbrown.com/publications/Brazils-Oil-and-Gas-Exploration-and-Production-Regimes-An-Overview-03-23-2012/>> accessed 16 August, 2012. The phrase 'all interested parties' includes landowners.

³⁴ Brazilian Petroleum Law, as amended by Law No. 7990 of 28.

³⁵ See art 3 para 1 of the ANP Ordinance No. 43 of 1998.

³⁶ *Ibid.*

as agreed, or to the landowner for failure to inform the concessionaire of any change in the ownership of the land after the agreement is entered into.³⁷

The various interest groups in the oil revenue, ranging from the individual and family landowners, to the communities, through the local government areas to the states and the Federal Government need to be adequately taken care of in allocating the revenue from oil and gas, and by extension, other mineral resources.³⁸

A comprehensive formula which encompasses all these interest groups and is adequately monitored to ensure strict compliance will help to reduce agitation and improve the relationship between communities and oil and gas companies. In advocating this approach, a number of bottlenecks and challenges exist in the terrain in Nigeria which need to be highlighted and addressed. First, the provision of the Land Use Act which vests title to all lands in a state in the governor of the state and reduces the individuals on the land to the status of occupiers, will provide an obstacle, as it would lead to arguments that the occupier, not being the owner, cannot claim any long term benefits from operations on the land.

This law will therefore need to be repealed or amended to restore the freehold interest of landowners in their property, which subsisted in most parts of Nigeria before the introduction of the law in 1978. Secondly, the complex land tenure system in most of the Niger Delta area where land is owned by individuals, families and communities will make it difficult to ascertain ownership of land for payment of royalties, and could exacerbate land disputes and intra and inter communal rivalry, at least in the short term. An effective mechanism for managing this situation will therefore

³⁷ Art 3, para 2 of the ANP Ordinance No. 43 of 1998.

³⁸ Sagay, I, 'Nigerian Constitutions, Operation of Federalism and the South South Zone' (A Keynote Address at the All Niger Peoples' Conference 2006 held at Grand Hyatt, DFW Dallas, Texas, USA 24-27 August 2006, 3); see also Dafinone, D, 'Resource Control: The Economic and Political Dimensions' (2001) available at <http://www.waado.org/NigerDelta/Essays/ResourceControl/Dafinone.htm> accessed 20 January, 2016

need to be developed, with strict rules for payment of royalties from disputed lands into escrow accounts, in order to ensure that such disputes do not create another source of disruption of oil and gas production activities. Finally, there is an urgent need to diversify the revenue base of Nigeria from its current mono cultural state, to ensure that undue attention is not paid to oil and gas revenue, which increases the arguments around how the revenue is to be distributed.³⁹ Unlike Nigeria where oil and gas accounts for most of government revenue, the percentage of oil and gas in Brazil's GDP is not more than 4 per cent, and so the distribution of revenue from this source does not generate the sort of controversy it does in Nigeria.

If the Land Use Act is amended in such a way as to vest the right of ownership of land through which oil pipelines pass in the communities along with the other stakeholders (Federal, State and Local Government and oil Companies or other Licensees), it becomes one sure way of ending cases of oil pipelines vandalism as the community's joint ownership interest will be safeguarded while the environment stands better protected for the present and future generations.⁴⁰

It is encouraging that the Federal Government of Nigeria has considered it imperative to call for a fairly comprehensive review of the Act by sending 14 amendment clauses⁴¹ to the National Assembly for this purpose. The proposed bill seeks to vest ownership of land in the hands of those with customary right of ownership and also enable farmers to use land as collateral for

³⁹ Akintoya, I and Onayemi, S, 'Diversifying the Productive Base of Nigeria: an Econometric Approach to the Assessment of Non-Oil Export Promotion Strategies' (2009) 24 *IRJFE* 209.

⁴⁰ See Banire, M, *Land Management in Nigeria: Towards a New Legal Framework* (Ecowatch Publication 2006); Adefulu, A and Esionye, N, 'Nigeria: An Overview of Nigeria's Land Use Amendment Bill' <http://www.mondaq.com/article.asp?article_id=81844&signup=true> accessed 16 January, 2016; Akogu, K and Soniyi, T 'Constitution Review: Immunity, Land Use Act May Go' *This Day* (Nigeria, 7 May 2012)<<http://www.thisdaylive.com/articles/constitution-review-immunity-land-use-act-may-go/115308/>> accessed 16 January, 2016.

⁴¹ Titled: Land Use (Amendment) Bill, 2009.

loans for commercial farming to boost food production in the country. The bill also seeks to restrict the requirement of the Governor's consent to assignment only,⁴² which will render such consent unnecessary for mortgages, subleases and other land transfer forms in order to make transaction in land less cumbersome and facilitate economic development. It is however hoped that the National Assembly will expedite action on the passage of the bill after thorough examination and that the amendment would attract the required number of endorsements in the State Houses of Assembly.

There is no gainsaying that every government has the right to acquire land for public purposes; however, those affected should have the right to voice opposition to the acquisition, to challenge it before an impartial court, and to obtain adequate compensation.⁴³

(e) Amending the Laws on Proof of Causation

Even where the plaintiff successfully establishes that the defendant owes him a duty of care under the tort of negligence, and further proves the defendant's breach of duty, this will not guarantee the award of damages, in his favour, against the defendant. There is the additional burden of proving that the damage suffered by him was wholly and exclusively caused by the negligent conduct of the defendants.

To circumvent the problem of proof inherent in toxic tort litigations the following is recommended in line with Professor Berger's proposal that liability in negligence should be imposed for failure to provide substantial information relating to risk and proof that the failure caused plaintiff's injury would not be required.⁴⁴ Thus defendants would be relieved of liability for

⁴² Ss 21 and 22 of the Act provide for the requirement of a Governor's consent for the alienation of customary and statutory rights of occupancy, the procurement of which is usually characterized by long and frustrating delay.

⁴³ See Viitanen, K, 'Just Compensation for Expropriation?' (Paper presented at XXII International Congress Washington DC, USA, 19-26 April 2002).

⁴⁴ Berger, M, 'Eliminating General Causation: Notes Towards a New Theory of justice and Toxic Torts' (1997) 97 *Colum L Rev* 2117.

injuries caused by exposure to their products, provided that they had met the required standard of care for developing and disseminating information relevant to risk. The idea would be to create a new tort that conditions culpability on the failure to develop and disseminate significant data needed for risk assessment. Zipurski and Goldberg have followed this line of reasoning when they asserted that negligence law should be viewed as a reasonably coherent body of rules and principles articulating a particular kind of legal wrong, namely, the wrong of breaching an obligation to take care toward another person, thereby injuring her.⁴⁵

The above proposals are most laudable in the sense that in order to minimize risk in the face of uncertain knowledge, the law ought to concentrate on developing the required standard of care regarding a company's duty to keep itself reasonably informed about the dangers of its activities. If a company fails to exercise the appropriate level of due care, it should be held liable to those put at risk by its action. This strict liability system would ease the plaintiff's burden of proof by providing the plaintiff with rebuttable presumptions after the plaintiff showed basic causation facts. Once granted, the rebuttable presumption would shift the burden of causation proof to the defendant. The defendants in oil-related litigations should be culpable if they have acted without taking into account the interests of those who will be affected by their conduct.

In the event of the plaintiff suffering damage in an environment, where there is the likelihood of multiple polluters, strict adherence to the principle of causation (requiring proof by the plaintiff of which of the multiple polluters caused the damage suffered) may result in injustice to the plaintiff.

Having been confronted with similar problems, certain jurisdictions have devised various rules aimed at tackling the problems of proof in environmental litigations-whether by multiple

⁴⁵ Zipurski, B and Goldberg, J, 'The Restatement (third) and the Place of Duty in Negligence Law' (April 1 2001) *Va L Rev* [serial online]www.highbeam.com²⁴, accessed 16 January, 2016.

polluters or otherwise. The Chinese, American and English jurisdictions are good examples, among others.

On December 6, 2001, the Supreme People's Court of China adopted the several provisions on the Evidence of Civil Litigation.⁴⁶ With respect to the burden of proof for compensation, article 4 provides that if the litigation of environmental damage is based on environmental pollution, then the injurer shall bear the burden of proof of the statutory exemptions and the fact that there is no causation between his act and the damages. According to this provision, after the injured party brings an action against a polluter, the polluter shall bear liability if he can prove causation between the damage and his polluting act. The injured party, however, must only prove an injury and resulting damages caused by the polluter's action, or inaction.⁴⁷

The American Restatement (third) of Torts 1997⁴⁸, provides unequivocally that where the conduct of two or more actors is tortious and it is proved that the harm has been caused to the plaintiff by any of them, but there is uncertainty as to which one of them has caused it, the burden is upon each of such actor to prove that he has not caused the harm.

The British Parliament has also lightened the burden of plaintiffs by including in the Compensation Act 2006 a section about apportioning damages for mesothelioma which results from exposure to asbestos at work. Section 3 of the Compensation Act 2006 provides that a defendant is liable in respect of the whole of the damage caused to the victim by mesothelioma, jointly and severally with other employers. Thus any solvent employer is responsible in full for the entirety of the victim's claim and has to

⁴⁶ See generally Zhang, M, and Zwier, P, 'Burden of Proof: Development in Modern Chinese Evidence Rules' (2003) 10 *Tulsa J Comp & Intl L* 419-471

⁴⁷ Canfa, W, 'Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms' (2006-2007) 8 *VJEL*<<http://www.vjel.org/journal/VJEL10058.html>> accessed 16 January, 2016

⁴⁸ Art 433 (b) (3)

rely on its right to claim a contribution from other negligent parties.⁴⁹

The thread that runs through these three jurisdictions – the removal of the burden from the plaintiffs is a system that is worth adopting by the Nigerian legislature especially with respect to oil pollution related matters.

(f) Expanding Claims in Environmental Litigations under Foreign Laws

So far, all attempts to use the Alien Tort Claims Act for environmental torts have failed. Although this is generally the case, plaintiffs can improve their chances of success by linking the environmental damage caused with a subsequent damage to human life or health.

It is foreseeable that environmental harms would be able to be successfully justiciable under the ATCA when states develop international instruments that expressly recognise the duty of states to protect the Right to a Healthy Environment, as well as specific measures to accomplish its effective protection.⁵⁰ Also, until environmental matters are recognized under the ‘laws of nations’, it is suggested that plaintiffs should use remedies available for human rights claims as proxies for their environmental claims.⁵¹ Thus, at present, a claim which alleges a violation of customary international environmental law, is unlikely to succeed at trial. However, plaintiffs may succeed if they can establish a violation of the plaintiff’s international human rights based on the environmental damage.

⁴⁹ The latest case in this line is *Karen Sienkiewicz v Greif (UK) Ltd* [2009] EWCA Civ 1159.

⁵⁰ Romero, R, ‘Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment’ (2005) <<https://www.dundee.ac.uk/cemplp/journal/html/vol16/vol167.pdf>> accessed 12 January, 2016; see also Stewart, S, ‘A Limited Future: The Alien Tort Claims Act Impacting Environmental Rights: Reconciling Past Possibilities With Future Limitations’ (2006-2007) 31 *Am Indian L Rev* 743, 759.

⁵¹ Bridgeman, N, ‘Human Rights Litigation Under ATCA as a Proxy for Environmental Claims’ (2003) 6 *Yale Hum Rts & Dev L J* 1, 42.

While it is difficult for plaintiffs to meet the threshold to succeed in an ATCA action, the cost to petroleum and mining corporations in resources and adverse publicity is significant. It is not difficult to imagine the impact on a mining or petroleum corporation from a claim that alleges that the corporation instigated large scale egregious environmental abuses and was involved in serious violations of International human rights, including torture and genocide. Even where the case has been dismissed, considerable damage in reputation would have been done.⁵²

(3) General Reforms

These reforms comprise proposals for the enhancement of the environmental law enforcement in Nigeria generally. They include the need for good governance, consolidation of laws, judicial reforms, institutional reforms and more use of hybrid enforcement mechanisms.

(a) The Imperative of Good Governance

‘Governance’ is the process of decision making and the process by which decisions are implemented.⁵³ Abdellatif⁵⁴ argues that governance is not just about ‘organs’, it is about the quality of governance which expresses itself through certain elements and dimensions. He asserts that good governance is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. Thus, good governance symbolizes the ‘paradigm shift of the role of governments’.⁵⁵

It should be noted that good governance is an ideal which may be difficult to achieve in its totality. However, to ensure

⁵² Little, P, ‘What are the Consequences of the Alien Tort Claims Act (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region’ (2003) 22 *AREJ* 211, 230.

⁵³ See Hasnat, A, *Governance: South Asian Perspective* (OUP 2001) 1.

⁵⁴ Abdellatif, A, ‘Good Governance and its Relationship to Democracy and Economic Development’ (paper delivered at Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul, May 20-31 2003) 3.

⁵⁵ Marc, H and Byong-Joon, K, *Building good Governance: Reforms in Seoul* (National Center for Public Productivity 2002) Preface.

sustainable human development, actions must be taken to work towards this ideal with the aim of making it a reality.

The concept of good governance has been clarified by the work of the United Nations Commission on Human Rights. The Commission has linked good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights.⁵⁶

Good governance is discussed from the perspectives of public awareness/participation and management of corruption.

(i) Improving Public Awareness /Participation

Public awareness of environmental matters is essential to prevention of damage to the environment and to the prosecution of environmental law violations.

Popovic argues that environmental education is the cornerstone of effective participation in environmental decision making, because it furnishes the public with knowledge and information about the environment's importance and its vulnerability to degradation; and also that education can equip the public to analyse and understand proposals, options, alternatives and explanations put before it with respect to a given environmental effect.⁵⁷ It can also discourage 'traditional' practices detrimental to the environment for example fishing with explosives, destroying fish habitat, and so on.

It is only a person who is aware that can effectively participate in environmental decision making. If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper.⁵⁸

⁵⁶ In its resolution 2000/64.

⁵⁷ Popovic, N, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10(2) *PELR* 683 at 692; Takahashi, M, 'Education, Public Awareness and Training' <www.eolss.net/Sample-Chapters/C16/E1-57-35-00.pdf> accessed 26 January 2016.

⁵⁸ Casey-Lefkowitz, S, Futrell, J, Austin, J and Bass, S, 'The Evolving Role of Citizens in Environmental Enforcement' Paper delivered at the Fourth International Conference on Environmental Compliance and

Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make Nigeria's environmental protection goals a reality.

The two past International Conferences on Environmental Enforcement in Budapest, Hungary in 1992 and Oaxaca, Mexico in 1994 established the principle that citizen participation is an important supplement to government enforcement efforts.⁵⁹ Citizen enforcement plays a valuable role in promoting environmental compliance, spurring agency enforcement efforts and providing an important deterrent to non compliance when government agencies fail to act because of lack of resources or political will.

According to Casey-Lefkowitz et al, citizens know the country's land and natural attributes more intimately than a government ever will; their number makes them more pervasive than the largest government agency; and seeing citizens as part of the enforcement team helps shield an agency from isolation and builds broad-based popular support for what can be controversial enforcement actions.⁶⁰

Thus, in order to achieve a balanced environmental law enforcement system, Nigerian legislations, for example, the Environmental Impact Assessment Act, 1992 should first promote environmental awareness and encourage public and environmental NGO participation.⁶¹ Public participation, particularly for non-governmental organization plays a crucial role in the implementation of and compliance with environmental laws.⁶² Governments often prefer not to publicly disclose information

Enforcement, available at <http://www.inece.org/4thvol1/futrell.pdf> accessed 6 January, 2016.

⁵⁹ See 'INECE-Publication List' www.inece.org/publicationlist.html accessed 28 August 2012; For an overview of access to justice under Aarhus Convention, see *Handbook on Access to Justice under the Aarhus Convention* (REC 2003).

⁶⁰ Casey-Lefkowitz, S and others (n 58) 2.

⁶¹ Olokesusi, F 'Environmental Impact Assessment in Nigeria: Current Situation and Directions for the Future' (1992) 35 (3) *JEM* 163.

⁶² Weiss, M and Roberts, L, 'Toxic Torts, Public Interest law and Environmental Justice: Evidence From Louisiana' (April 2004) 26 (2) *Law & Policy* 259, 284.

concerning compliance with environmental laws. Such information, however, is often essential for successful monitoring. As a result, NGOs often put pressure on governments, directly or indirectly, to release compliance information and provide the public with information on environmental problems. Additionally, NGOs mobilize public opinion, set political agenda, and communicate with other NGOs worldwide.⁶³

Another crucial aspect of public participation especially and its impact on the enforcement of effective environmental laws in Nigeria is the involvement of indigenous peoples in environmental decision making. Understanding of indigenous knowledge, values and practices may provide an opportunity for using them to complement the current strategies seeking to address the conservation problems such as resource overexploitation, conflicts and limited budget for law enforcement.⁶⁴

The Convention on Biological Diversity recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and Article 8(j) of the Convention aims to respect, preserve, and promote such traditional knowledge, thereby recognizing the interdependence of indigenous and local communities and biodiversity.⁶⁵ Environmental conservation planning should therefore take into account both the rights and traditional knowledge of indigenous and local communities. The main strategy for achieving this is through the effective

⁶³ Ladan, M, 'Enhancing Access to Justice on Environmental Matters: - Public Participation in Decision-making and Access to information'(A paper presented at a Judicial training workshop on Environmental Law in Nigeria Organized by the National Judicial Institute, Abuja, 6-10 Feb 2006). See also R Rangarajan, 'Lessons From a Model of Public Participation in Environmental Enforcement in India – Local Area Environmental Committees' (A Research Report from Centre for Development Finance, June 2010).

⁶⁴ See discussion on the relationship between indigenous people and nature in para 6 of section 4.4.1 below; see also Sobrevila, C, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (World Bank 2008) 10-16.

⁶⁵ See also Principle 8 (b) of the Earth Charter 2000.

participation of indigenous peoples and local stakeholders in decision-making and governance processes, on the basis of free, prior and informed consent to any projects, plans or changes that affect their communities, traditional lifestyles, and environment. This should also include education and awareness-raising, indigenous to indigenous transfer of knowledge, and capacity building.⁶⁶

(ii) Managing Corruption

This section will demonstrate that, corruption, a major impediment to the enforcement of environmental laws in Nigeria can effectively be tackled when legal and social reforms are employed.

Indeed, there are many unresolved problems in Nigeria, but the issue of the upsurge of corruption is troubling. And the damages it has done to the polity are astronomical.⁶⁷

The Nigerian system, the product of more than fifty years of mismanagement, ethnic strife, military misrule, and political instability, provided a conducive setting for corruption to flourish. Control mechanisms were ineffective, and prospects of detection and prosecution were weak.⁶⁸ The government's control and near domination of the economic sphere provided limitless opportunities for Nigerians who operate without any sense of accountability to seek rents with impunity. Corruption flourished in Nigeria mainly because no government credibly and honestly committed itself to fighting it. Neither civilian nor military regimes could stop corruption because each administration, in differing ways and to varying degrees, exemplified the pervading culture of public service: an amoral obsession with using public office for private gain.⁶⁹

⁶⁶ See Redford, K and Painter, M, 'Natural Alliances between Conservationists and Indigenous Peoples (World Conservation Society Working Paper no 25, New York, 2006) 12-14.

⁶⁷ See Odinakalu, A, 'Corruption and Governance in Africa: How do we Break the Cycle in Nigeria' in CLEEN Foundation, *Corruption and Governance Challenges in Nigeria: Conference Proceedings* (CLEEN Foundation 2010) 14-42.

⁶⁸ Ibid 18.

⁶⁹ Ibid.

After several decades of military rule, Nigeria's democratic institutions had become weak and ineffective. A major challenge that faced the Obasanjo Administration was how best to ensure genuine restoration of democracy and good governance in Nigeria and eradication of corruption.⁷⁰ Weak and battered institutions, poor culture of accountability and transparency, abuse of human rights and the neglect of the majority of the population created an environment in which reforms had been difficult. Faced with the tragic consequences of underdevelopment, which was propelled and sustained by dictatorial regimes and inept civilian governments, the country was challenged to induce qualitative transformation of the Nigerian economy and society.

Corruption has the potential to be a significant hindrance to the effective enforcement of environmental laws in Nigeria. Corruption has caused the police, government officials and judges to overlook environmental law violations.⁷¹ In the field of environmental management, corruption can lead to (deliberate) design and implementation of environmentally damaging practices to enrich individuals. Environmental corruption also means trafficking in wildlife, hazardous waste, and natural resources, often through bribery during permitting or inspection.

Besides being rooted in the lack of transparency and accountability, corruption is commonly nurtured by weak institutions, low salaries, a high level of bureaucracy, and low professionalism. It touches all levels of management. In view of this, an effective remedy will be to enact civil service laws that will be backed up by criminal sanctions.⁷²

⁷⁰ Dike, V, 'The Philosophy of Transforming Nigeria into a Corruption-Free Society: Are the Probes the Solution?' <<http://www.Nigeriaworld.com/feature/article/corruption.html>> accessed 16 January, 2016.

⁷¹ For more discussions on this, see Akindele, S, 'A Critical Analysis of Corruption and its Problems in Nigeria'(2005) 7(1) *Anthropologist* 7; Olu-Olu, O'Corruption and the Problem of Development in Nigeria (2006) 1(3) *The Social Sciences* 183-186.

⁷² Rose, G, *Gaps in the Implementation of Environmental Law at the National, Regional and Global Level* (first preparatory meeting of the World Congress on Justice, Governance and the Law of Environmental

Former Nigerian president, Olusegun Obasanjo took steps towards tackling corruption head on through the enactment of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act 2000 and the Economic and Financial Crimes Commission (EFCC) Act 2004. However, since the establishment of these anti-corruption agencies, their expected impacts are yet to be seen.⁷³

It is arguable that for Nigeria's efforts truly to be effective in the long-term, more attention should focus on helping people to understand that engaging in corrupt practices violates a deeper sense of right versus wrong. No amount of legislation or proposed legislation will render effective results in combating **corruption** if most of the government officials refuse to remediate their behavior.⁷⁴ As such, initiatives need to be aimed at addressing cultural ideas that perpetuate corrupt practices. This, Ocheje⁷⁵ has referred to as 'restructuring the social environment of Nigeria'. Kivutha et al graphically illustrate the point on behavioural (cultural) revamping as follows:

The structure of the dwelling conditions the life of the occupants, but the occupants can change the structure if they wish. If the structure begins to leak and all the occupants resign themselves to it, blaming it on the

Sustainability, Malaysia, 12-13 October, 2011) 8
<http://www.unep.org/...FormattedGapsEL.pdf> accessed 14 January 2016

⁷³ For further discussion on the failures of the Corruption initiatives, see Inokoba, P, and Ibegu, W, 'Economic and Financial Crimes Commission (EFCC) and Political Corruption: Implications for the Consolidation of Democracy in Nigeria' (2001) 13(4) *Anthropologist* 283; Enweremadu, D and Okafor, E (eds), *Anti-Corruption Reforms in Nigeria Since 1999: Issues, Challenges And The Way Forward* (vol 3, IFRA 2009); Dike, V, 'Corruption in Nigeria: A New Paradigm for Effective Control' <<http://www.africaeconomicanalysis.org/articles/gen/corruptiondikehtm.html>> accessed 16 January 2016

⁷⁴ Dike, V, (n 70)

⁷⁵ See Ocheje, P, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 (2) *JAL* 173

structure, the structure will continue to leak. In this case the explanation still lies with the occupants who do not wish to repair the structure. Something non-human cannot be held responsible for something human. The structuralist explanation for **corruption** shifts the focus of responsibility from the human actor to factors external to the actor. These external factors are significant in understanding the extent and manifestation of the phenomenon, but they are not the terminal point of the explanation. The terminal point is the nature of man.⁷⁶

Professor Oyewo⁷⁷ has also argued that the roots of corruption are deeply embedded in the Nigerian society; thus uprooting it will require the application of all the available mechanisms of the constitution, good governance and international support. Combating and preventing corruption, has become indispensable for Nigeria's development, otherwise the Constitution and the government will become meaningless to the existence of the Nigerian citizenry. He further argues that corruption has become a cancerous growth that has gone from being benign to malignant in the Nigerian society, 'it is therefore necessary to rethink the boundary of our constitutional and governmental practices to evolve means to effectively contain, curtail and control corruption, so that it will not terminate the development and existence of the Nigerian nation state'.⁷⁸

(iii) Consolidation of Laws

⁷⁶ Kibwana, K, Wanjala, S, and Owiti O, (eds), *Anatomy of Corruption in Kenya: Legal, Political, and Socio-Economic Perspectives* (Claripress 1996) 42; see also N Goodling, 'Nigeria's Crisis of Corruption- Can The UN Global Programme Hope to Resolve This Dilemma?' (1 May 2003) *Vanderbilt J Transnatl L* [<http://www.highbeam.com>] accessed 16 January, 2016.

⁷⁷ Oyewo, O, 'Constitution, Good Governance and Corruption: Challenges and Prospects for Nigeria' <[http://www.enelsyn.gr/papers/w16/paper by prof oyelowo oyewo.pdf](http://www.enelsyn.gr/papers/w16/paper%20by%20prof%20oyelowo%20oyewo.pdf)> accessed 8 January, 2016.

⁷⁸ Ibid.

The consolidation of environmental protection laws in the Nigeria should be consolidated to avoid the ineffectiveness that comes from the haphazard nature of the laws.

Local statutes on environmental protection comprise laws that are both incidental to environmental protection in Nigeria and those that were deliberately enacted after 1988. Thus provisions in one of the incidental laws may punish the same offense that a more deliberate law will punish, but with different fines. For example the Harmful Waste Act 1992, Oil in Navigable Waters Act 1968 and the Criminal Code Act 1958 all punish the emission of poisonous substances into the atmosphere with different sanctions – life imprisonment, ₦ 400 and six months imprisonment respectively. Also, civil law and criminal law should work together in addressing damage to the environment. For example, a violator can be made to pay the requisite fine for an environmental crime under the Criminal Liability section, and at the same time be made to restore the damaged environment under the Civil Liability Section. It is therefore deemed necessary to take the legislative reform a step further by proposing a National Environmental Policy Act made up of consolidated laws on civil and criminal liability for environmental damage.

A satisfactory solution requires not merely a simple criminal prohibition model, but an elaborate scheme of regulation, administered by a state agency empowered to grant, withhold and suspend licenses, following rules designed to promote fairness and efficiency. Imposing civil liability can check a lot of harms for which criminal sanction cannot provide a solution.⁷⁹ The role of criminal law would then be a derivative one-to provide backup sanctions to enforce authoritative and/or administrative orders. Thus the sharp demarcation between criminal and tort law must be transcended if environmental misdeeds by major corporations are to be adequately punished and deterred.⁸⁰ Civil law has the

⁷⁹ Coffee, J, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models –and What Can be done About It' (1991) 101 *YLJ* 1875, 1877.

⁸⁰ Mann, K, 'Punitive Civil Sanctions: The Middle Ground Between Civil and Criminal Law' (1992) 101 (8) *YLJ* 1795, 1816-1830.

advantage of flexibility and its sanctions can be more effectively tailored to the particular situation.⁸¹

This consolidation will make the common law torts of Nuisance, Negligence, Trespass to Land and Strict Liability redundant because the element of these torts can be codified in more specific terms.

(C) Judicial Reforms

Nigerian judges usually have little or no capacity to effectively adjudicate and manage the environmental cases before them. Some of the judges are hardly updated on developments in law, rules and jurisprudence on environmental matters; also, some of the judges have low sensitivity levels in the resolution of environmental disputes.⁸²

In such cases where the courts are not environmentally minded in their analyses of the cases brought before them, the enforcement of environmental law in Nigeria would still leave much to be desired in terms of ensuring fair hearing of prosecuted cases, promoting enforcement, deterring environmental violations and ensuring compliance. Thus, Nigerian judges need to be equipped with enhanced knowledge of the complex environmental legislative and regulatory framework, relevant legal concepts such as strict liability, standing and class action, and environmental principles such as sustainable development,⁸³ the precautionary

⁸¹ Coffee, J, (n 79) 1876.

⁸² See Ajomo, M, and Adewale, O, (eds), *Environmental Law and Sustainable Development in Nigeria* (NIALS 1994) 11-66; Tobi, N, 'Judicial Enforcement of Environmental Laws in Nigeria' in M Ladan (ed), *Law, Human Rights and the Administration of Justice in Nigeria* (ABU Press 2001) 262; Ebeku, K, 'Judicial Attitudes to Redress for Oil Related Damages in Nigeria', (2003) *RECIEL* 12(2) 199, 208; Ladan, M, 'Biodiversity Conservation in Nigeria: - Issues, Problems and Challenges in Implementation' (Paper presented at a 5 day Second African Regional Seminar on Environmental Law, Natural Resources and Poverty Reduction organized by UNEP, Nairobi, Kenya in Collaboration with the Ugandan National Environmental Protection Agency, Entebbe, Uganda, 25-28 September, 2006) [4]accessed on 20 February 2012.

⁸³ Knowledge of this principle will go a long way in addressing the problem of prioritizing economic benefits over environmental protection. The police

principle, and intergenerational equity.⁸⁴ Nigerian Judges are urged 'to equip themselves with commanding armour of the emerging substantive body of environmental law, especially considering the depth and breadth of contemporary environmental issues'⁸⁵.

The power and authority given to the Judiciary to grant redress for the contravention by the State of the fundamental rights enshrined in the Constitution is a most potent weapon in the armory of the law to protect the citizen against violation of his fundamental rights. In order for the Judiciary to perform this important duty in protecting the individual against unconstitutional action by the State it must have the following characteristics:⁸⁶

and other prosecutors also need training on how to investigate environmental law violation.

⁸⁴ Gutto, S, 'Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa' (1998) (4) *Buffalo Hum Rts L Rev* 79, 82; Ebeku, K, 'Judicial Contributions to Sustainable Development in Developing Countries: An Overview' (2003) 15 (3) *ELM* 168.

⁸⁵ Borrowing the words of Justice Puno: See Puno, R, 'Phillipine Environmental Law Practice and the Role of the Courts' 2004 6 (20) *The Phijsa Jud J* 6, 7 ; see also Tacha, D, 'Independence of the Judiciary for the Third Century' (1994-1995) 46 *Mercer L Rev* 645 Markowitz and J Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2011) 29 *PELR* 538, 538-539.

⁸⁶ See Anderson, W, 'Enforcement and Compliance of Environmental Law in National courts: The Role of the Judiciary' (A paper presented to and published in Caribbean Judicial Awareness Symposium on Environmental Law and Sustainable Development, Castries, St. Lucia, 8-10 April 2001); Kurukulasuriya, L, 'The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law' (Paper prepared for global Environmental Governance: The Post-Johannesburg Agenda, Yale Center for Environmental Law and Policy, New Haven, Connecticut, 23-25 October 2003); Greiber (ed), T, *Judges and the Rule of Law- Creating the Links: Environment, Human Rights and Poverty* (papers and Speeches from an IUCN World Conservation Congress held in Bangkok, Thailand, 17-25 November 2004) No. 60; Lavrysen, L, 'The Role of National Judges in Environmental Law' <www.inece.org/newsletter/12/lavrysen.pdf> accessed 25 January, 2016; Stein, J, 'Why Judges are Essential to the Rule of Law and Environmental Protection' in T Greiber (ed), *Judges and the Rule of Law- Creating the Links: Environmental Law, Human Rights and Poverty* (papers and speeches from an IUCN Environmental Law

- (1) The Judiciary must be and must be seen to be impartial and independent of government and of any other centre of financial or social power.
- (2) The Judiciary must be incorruptible by prospects of reward or personal advancement.
- (3) The Judiciary must be fearless in applying the law irrespective of public acclaim or criticism.
- (4) The Judiciary must be competent. It must consist of judges who know the law and its purpose and who are alive to the connection between abstract legal principle and its practical effect.
- (5) The Judiciary must enjoy the confidence of the people. If it loses the public confidence, it loses its authority and as a result loses its ability and credibility to perform its functions.
- (6) The Judiciary must recognize that it stands between the citizen, nature and the State as a bulwark against unconstitutional abuses and excesses by organs of the State and it has a duty to act to protect the rights of individuals and groups.
- (7) The Judiciary must give a liberal interpretation of the Constitution to give effect to the terms and spirit of the Constitution.
- (8) The Judiciary must hear and determine constitutional cases quickly as excessive delays in the hearing and determination of constitutional cases can make the fundamental rights protections in the Constitutions meaningless.

(d) The Appointment of Independent Prosecutors

The creation of independent prosecutors within the already existing flagship agency (NESREA) will have a positive impact on the enforcement of environmental laws in Nigeria.

Programme Side Event at the 3rd IUCN world Conservation Congress (WCC) held in Bangkok, Thailand, 17-25 November 2004) 53-64.

In the light of the nagging problem of access to justice in Nigeria, its manifestation in the problem of proof, and the problem of the ineffective supervision of the Oil and Gas sector, it is recommended that independent prosecutors be attached to the office of the Director General of NESREA and they, in addition to the Director General should be appointed and removed based on constitutional provisions. This will to a large extent secure the independence of the Agency.

The role of the independent prosecutors will be to assist indigent litigators to institute actions and then to ensure that the environmental agencies perform their duties. The role of these prosecutors are similar to the role of the Brazillian *Ministerio Publico*⁸⁷. However, it differs from the Brazilian model to the extent that the proposed prosecutors are officers within the already existing agency as against the *Ministerio Publico* which is a separate ministry. The independent prosecutors which this thesis proposes are preferred because it would discourage multiple overseeing agencies but enhance their effectiveness at the same time. Thus the independent prosecutors will be *in* the agency but not *of* the agency. Just like the *Ministerio Publico*, the independent prosecutors will monitor, find facts and generate evidence regarding the legality of agency decisions and actions, in particular environmental cases. Using their civil and criminal enforcement processes, thus lending significant judicial force to environmental protection laws.

The independent prosecutors may, like the *Ministerio Publico* face problems of lack of accountability and lack of co-operation with other enforcers, but it can however be argued that

⁸⁷ The Brazilian Constitution of 1988, Art 129 provides that one of the *Ministerio Publico*'s institutional functions is to 'ensure that the government and other entities of public relevance respect constitutional rights.' The Administrative Improbability Act of 1992 prohibits acts or omissions relating to corruption and other illegal behavior. The Environmental Crimes Law of 1998 includes a category of "crimes against administration" for which agency officials may be prosecuted. L Mcallister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press, 2008).

no mechanism is devoid of shortfalls;⁸⁸ the *Ministerio Publico* is not an exception. The positive impact of the body appears to overwhelm its downside. However, one sure way of ensuring the optimum efficacy of the independent prosecutors is by avoiding an overtly legalistic enforcement model and thus complementing it with other flexible enforcement models like naming and shaming, environmental taxes, environmental incentives and disincentives, environmental auditing, community service and so on⁸⁹ which will be addressed in the next section.

(e) *Encouraging Hybrid Enforcement Mechanisms*

The primary goal of enforcement cannot be over emphasised – it is to correct violations, and create an atmosphere in which the regulated community is stimulated to comply with established rules.⁹⁰

By integrating a variety of regulatory tools for enforcement – each consciously chosen for its effectiveness in a particular application – an agency can create a system that both pushes and pulls regulated entities toward environmentally protective behaviour. Such a holistic approach can work to decrease direct compliance costs (through information sharing, assistance and incentives), increase direct costs to noncompliance (through penalties and sanctions) and increase the probability that non-complying companies will experience further direct or indirect costs (through customer and community pressure) or additional governmental interventions (through inspections or monitoring). However, determining how and when to use one tool (for example,

⁸⁸ Mcallister, L, (n 87) 142-146.

⁸⁹ See Ayres, I, and Braithwaite, J, *Responsive Regulation: Transcending The Deregulation Debate* (OUP 1992) 3-18; Coglianese, C, and Nash, J, *Leveraging The Private Sector: Management-Based Strategies For Improving Environmental Performance* (RFF 2006) 3-10.

⁹⁰ Wasserman, C, ‘International Conference on Environmental Enforcement’ (Paper presented at the Third International Conference on Environmental Enforcement, Oaxaca, Mexico, 25-28 April 1994) 16; see also Uchegbu, A, ‘The Legal Regulations of Environmental Protection and Enforcement in Nigeria’ (1988) 8 JPPL 57.

inspections) over another tool (for example, technical assistance) has intellectual challenges.⁹¹

Furthermore, reforms of instruments of direct regulation can only be successful if they are closely interconnected. The permitting reform needs to be linked to the revision of environmental quality standards to less stringent, enforceable levels, striking a balance between what is desirable from an environmental point of view and what is feasible from a technical and economic standpoint.⁹²

(4) Conclusion

This paper has proposed detailed (general and specific) reforms on the existing legal and institutional frameworks that are relevant to the achievement of sustainable development in Nigeria. Although the Nigerian Government did not begin a deliberate legislation effort toward achieving sustainable development until after the 'Koko incident' in 1988, all other relevant legal regimes that existed prior to that time which have been retained also count as the Government's steps (howbeit, indirect) to achieving sustainable development in the region.

⁹¹ For details on integrated enforcement, see Hutter, B, 'Variations in Regulatory Enforcement Styles (1989) 11 *Law & policy* 153; I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) ch 1; Hutter, B, *Compliance: Regulation and Enforcement* (Clarendon Press 1997) 20-48; Baldwin, R, Scott, C and Hood, C, (eds), *A Reader on Regulations* (OUP 1998) 3-16; Farmer, A, *Handbook of Environmental Protection and Enforcement: Principles and Practice* (Routledge 2007) chs 1 & 6; M Faure, M Goodwin and Weber, F, 'Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries' (2010) *Virginia J Intl L* 95.

⁹² Farmer, A, (n 91) 46; Heyes, A, 'Making Things Stick: Enforcement and Compliance' (1998) 14 *Oxf Rev Econ Policy* 50; Baldwin, R, and Cave, M, *Understanding Regulations* (OUP 1999) 42-48; Jordan, A, 'Policy Innovation or "Muddling Through" "New" Environmental Policy Instruments in the United Kingdom?' (2003) 12 (1) *Env Politics* 192; Pratt, L, and Mauri, C, 'Environmental Enforcement and Compliance and its Role in Enhancing Competitiveness in Developing Countries' <http://www.inece.org/conference/7/vol2/63_Pratt.pdf> accessed 16 January, 2016.

The 1999 Constitution is the primary environmental protection legislation in the Niger Delta region. The local statutes impose either criminal or civil liability; apart from the local statutes, there are also some relevant customary laws which encourage environmental protection; the institutions (agencies) have supervisory and enforcement roles. These relevant regimes also include common law tort remedies, the Alien Tort Claims Act of 1789 and even the local laws of foreign countries.

This paper has addressed the two types of loopholes in the laws – those that are specific to the character of the legal regime in question and those that apply generally to the enforcement of environmental laws in Nigeria. Under the first group, there are fundamental problems dealing with the justiciability of environmental rights, the inadequacy of some fines to deter offenders, a haphazard compensation scheme, ownership of resources, proof of causation, and slim chances of success under foreign laws. The second group of reforms addresses general enforcement problems like the absence of good governance, the need for judicial reform, the fragmentation of laws and insufficient use of non-legalistic enforcement mechanisms.