Constitutionalising Environmental Rights for Sustainable Environmental Protection in Nigeria's Niger Delta Region

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the award of the degree of Doctor of Philosophy in Law

September 2018

ABSTRACT

This thesis critically analyses the prospects of constitutionalising environmental rights in Nigeria and argues that it has the potential to entrench sustainable ecological protection in the Niger Delta region which suffers from endemic environmental pollution. The thesis seeks to answer the central research question- Should environmental rights be constitutionalized in Nigeria's legal framework? In answering this question, it examines the normative contents of a prospective constitutional environmental right in Nigeria and challenges the entrenched anthropocentric ethics prevalent in existing environmental literature and in constitutions of many countries around the globe.

Utilising a transnational study of environmental constitutionalism and constitutionalization of environmental rights, the thesis argues for the adoption of a *coalesced anthropocentrism* model of environmental rights which protects the tripod interests in the environment- present humans, future generations and Mother Nature. This liberal approach ensures that environmental rights in the constitution are comprehensive and protective of the rights of non-human components of the ecosystem which are often neglected in legislative and judicial considerations of environmental issues. The original contribution of the thesis lies in its development of the *coalesced anthropocentrism* model which is tested by reviewing the constitutions of 196 countries to examine the extent to which this model is reflected in the environmental protection legal framework of countries around the globe.

While constitutionalization of environmental rights is not the panacea to all environmental ills, it creates an enduring fundamental platform from which the environmental problems in the Niger Delta region can be resolutely tackled. Specifically, it has the potential to improve environmental protection in the region in four critical ways - strengthening the country's environmental legal framework, tackling ecological imperialism and the 'full belly' syndrome, improving access to environmental justice and incorporating international environmental law and principles in the legal framework. However, the thesis has wider application beyond the Niger Delta and Nigeria which is used as a case study for other oil producing (mostly developing) countries in similar socio-economic circumstances and facing endemic environmental challenges from oil production activities including a number of Latin American and Sub-Saharan African countries.

Dedicated to Ifemi, my soul mate; Amari, Rissa and Jnr!

Fortune Favours the Bold…

ACKNOWLEDGEMENTS

Special thanks for the successful completion of this thesis goes to my Supervisors, Professor Robert Lee and Dr Onyeka Osuji for their tireless efforts in reviewing my drafts and their insightful inputs and suggestions. I remain eternally grateful for their accommodating responses to my various requests throughout the writing of this thesis.

Immense gratitude also goes to the Commonwealth Scholarship Commission (CSC), UK for their sponsorship of my Doctoral study and their support throughout the period of my study. Their sponsorship of outstanding scholars from developing countries has helped to sustain the dreams of many young, vibrant intellectuals who would otherwise not have the opportunity to study at world-class institutions in the UK. Thanks to the CSC UK for keeping my dreams alive! My scholarship programme officer, Jasmin Osman, also deserves special recognition for the manner she assisted in ensuring I enjoyed all the support and benefits the CSC sponsorship offered in a smooth and timeous way.

My family and friends that have had to endure my periods of absence and non-commitment to other personal and social engagements over the course of this research, I appreciate their endurance and understanding.

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ABBREVIATIONS

ACHPR	African Charter on Human and People's Right
AGRA	Associated Gas Reinjection Act
CFRN	Constitution of the Federal Republic of Nigeria
CRA	Child's Rights Act
DPR	Department of Petroleum Resources
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EITI	Extractive Industries Transparency Initiative
EPA	Environmental Protection Agency of the United States
ETS	Emissions Trading Scheme
EU	European Union
FEPA	Federal Environmental Protection Agency, Nigeria
FEPC	Federal Environmental Protection Council, Nigeria
FREPR	Fundamental Rights Enforcement Procedure Rules 2009
GGFR	Global Gas Flaring Reduction Strategy
HRA	Human Rights Act, UK
ITLOS	International Tribunal on the Law of the Sea
IUCN	International Union for Conservation of Nature
MNC	Multinational Corporations
MOSOP	Movement for the Survival of the Ogoni People
NDDC	Niger Delta Development Commission
NEITI	Nigeria Extractive Industries Transparency Initiative Act
NESREA	National Environmental Standards and Regulations Enforcement Agency

NGOs	Non-Governmental Organisations
NIC	National Industrial Court, Nigeria
NNPC	Nigerian National Petroleum Corporation
NOSDRA	National Oil Spill Detection and Response Agency
OHRC	Office of the High Commissioner for Human Rights (OHRC)
PIB	Petroleum Industry Bill
PIGB	Petroleum Industry Governance Bill
POPs	Persistent Organic Polluters
PPPRA	Petroleum Pump Pricing Regulatory Agency
SDG	Sustainable Development Goals
SPDC	Shell Petroleum Development Company
SSRN	Social Sciences Research Network
UDHR	Universal Declaration of Human Rights
UDRME	Universal Declaration of the Rights of Mother Earth
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNIZIK	Nnamdi Azikiwe University, Awka, Nigeria
US	United States of America
WWF	World Wildlife Fund

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INTRODUCTION

This thesis proposes a shift towards a rights' based approach in tackling the endemic environmental degradation in Nigeria's Niger Delta region in light of the repeated failure of the regulatory and civil liability approaches to solving the problem. This bottom-up approach is a way of empowering the people of the region to take control of their environmental destiny. The thesis argues for the adoption of a *coalesced anthropocentrism* model in formulating the environmental rights in order to engender a shift from the flawed anthropocentric foundation of environmental rights adopted in legal instruments globally to a more inclusive foundation protective of the interests of other important rights' holders in the environment - future generations and nature.

More importantly, the thesis canvasses for this environmental right to be given a fundamental platform by incorporation into the Nigerian constitution as a way of fortifying the protection afforded by the right and removing its susceptibility to political manoeuvring and rollbacks on the basis of other socio-economic and developmental pursuits. In addition, the thesis examines the benefits of adopting a constitutional approach to entrenching environmental rights in Nigeria which includes its role as a counter-majoritarian policy for safeguarding the rights of environmentally degraded minority communities in the Niger Delta; as a safety net for environmental claims that fall through the cracks of environmental regulation; and a potent tool to address the pernicious issues of ecological imperialism and the full-belly syndrome in the Niger Delta Region.

The thesis argues that in view of the global trend towards environmental constitutionalism, adopting this approach in Nigeria will elevate the country's environmental legal framework to international standards and improve the potential for enshrining environmental rule of law under the watchful eyes of the generally conservative Nigerian judiciary that has shown eagerness to protect constitutional rights and principles.

Background

A clean, safe and ecologically healthy and balanced environment is vital to the sustenance of life and enjoyment of basic human rights; yet for the people of the Niger Delta region in Nigeria, this has remained an elusive luxury for the past five decades owing to the degenerative impacts of endemic environmental pollution

arising from oil and gas production in the region. The degradation of the environment in the region affects both human inhabitants, natural ecosystems and future generations of the populace, yet the government's regulatory responses to the problem have remained weak, cosmetic and generally insufficient in tackling the problem.

The persistent failure of the regulatory system to checkmate environmental degradation questions its suitability for entrenched and complex environmental issues and leads to considerations of a rights' based approach which creates a bottom-up system built on embedded rights in individuals enforceable vertically against the government and horizontally against corporate environmental oppressors in the region. These rights assume greater significance when incorporated in a constitutional document wherein they constitute a fundamental legal fortification against rollbacks on environmental protection policies and political manoeuvrings detrimental to environmental protection.

Environmental Protection and Sustainable Development Goals

The inexorable link between human rights and the environment has long been internationally recognized by Principle 1 of the Stockholm Declaration on the Human Environment of 1972[1] which stated that 'man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself'. This declaration was given further impetus by the Brundtland Report of 1987 [2]which emphasised that 'every human being has the right to a clean and safe environment conducive to their health and well-being'. These international instruments encapsulated the growing discussions about the need to ascribe human rights attributes to environmental concerns by linking the same to the human right to life and health. Although the Stockholm Declarations and Brundtland Report are essentially anthropocentric in that they focus only on the instrumental value of the environment to humans, they formed the basis for subsequent expositions of environmental concerns in human rights' contexts.

[1]U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Report of the UN Conference on the Human Environment, 2-7, U.N. Doc. A/Conf.48/14/Rev.1 (1973).

[2] World Commission on Environment and Development Report, 1987 <http://www.un-documents.net/our-common-future.pdf > (last accessed 02 December 2015).

Judicial bodies subsequently began recognizing the inextricable link of environmental protection to the human right to life in the aftermath of the Stockholm Declaration and Brundtland Report. In the same year as the Brundtland report, the Supreme Court of India judicially recognized the link between environmental protection and the enjoyment of the human right to life in *T. Damodhar Rao v. Municipal Corp., Hyderabad*[3] where the court declared that '…the slow poisoning by the polluted atmosphere caused by environmental pollution should also be regarded as amounting to a violation of Article 21 [right to life] of the Constitution'.[4] This decision was based on the prevailing understanding that environmental pollution threatened the life and health of the people affected by it and can, therefore, be classified as a violation of the human right to life of people affected.

The link between human rights and the environment is also rooted in the principle of sustainable development which forms the cornerstone for balancing human rights, economic development and environmental protection. As societies expand and human demands of the environment increases to meet basic survival needs, rights and obligations have progressively been articulated to address the environmental impacts of developmental projects and ensure a balance between the idea of a people's right to development with the need to preserve the environment.[5] The importance of sustainable development was first recognised by the Brundtland Report of 1987 which linked human rights with environmental protection. It defined sustainable development as 'development that meets the need of the present without compromising the ability of future generations to meet their own need' and enjoined nations to 'ensure that the environment and natural resources are conserved and used for the benefit of present and future generations'.[6]

The sustainable development principle has been expanded to cover various areas of human needs with the projection of the Sustainable Development Goals (SDGs) 2015[7] which highlights various aspects of human societal shortcomings that require

[3] 1987 A.I.R. (A.P.) 171.
[4] ibid, 173.
[5] E Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992-1993) 8 *Am U J Intl L & Policy* 19, 23-25.
[6] See World Commission on Environment and Development, *Our Common Future* (OUP 1987) 43.
[7] See UN, 'Sustainable Development Goals 2015', available at <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 14 July, 2018.

to be addressed in other to improve human wellbeing globally. Because the SDGs are interconnected, fulfilling environmental protection as a target within the SDGs can be subsumed within several of the 17 SDGs, with a few particularly more suited to this purpose.[8] For instance, Goal 6 (Clean Water and Sanitation); Goal 7 (Affordable and Clean Energy); Goal 12 (Responsible Consumption and Production); Goal 13 (Climate Action); and Goal 15 (Life on Land) address various aspects of concerns on the spectrum of environmental protection issues. Some of the issues that pose major environmental sustainability problems include pollution of water sources by oil and gas effluents (covered by Goal 6); destruction of the living environments (habitats) of native species and discharge of polluting chemicals and other materials into the environment (covered by Goal 15); emission of greenhouse gases into the atmosphere that can cause climate change (covered by Goal 13); depletion of low cost oil and other fossil fuels due to unsustainable extraction and consumption of high carbon energy materials (covered by Goals 7 and 12). On a whole, therefore, achieving environmental sustainability is premised on promoting the SDGs as a holistic platform for ensuring the various spectres of environmental concerns are addressed within effective legal and constitutional frameworks across the globe.

Achieving sustainable development requires adherence to environmental rule of law as an important feature of environmental constitutionalism. United Nations Environment Programme (UNEP) stated that 'environmental rule of law is central to sustainable development and the success of environmental constitutionalism.'[9] Because environmental rule of law deals with issues such as climate change, species extinction, and toxic pollution that often cause impacts over extended time horizons, as long as centuries, it helps us grapple with uncertainty and risks to future generations weighed against costs to the current generation which is the hallmark of the SDGs.[10] Therefore, the ultimate goal of environmental rule of law is to change behavior onto a course toward sustainability by creating an expectation of

[8] David Griggs, et al 'Policy: Sustainable Development Goals for People and Planet' (2003) 495 *Nature* 305–307.

[9] UNEP, 'New Frontiers in Environmental Constitutionalism' (May 2017)- <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> accesed 11 April 2019.

[10] B Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice' (2017) 34(3) *Netherlands Quarterly of Human Rights* 206-226.

compliance with environmental law coordinated between government, industry, and civil society.[11]

While environmental constitutionalism focuses on the implementation and effectiveness of incorporating environmental rights, procedures, and policies into constitutions around the globe, environmental rule of law focuses on ensuring compliance with and enforcement of environmental laws because without such effective enforcement, the constitutional incorporation of these constitutional environmental rights will merely have paper values.[12] Consequently, adopting a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections and a corresponding strong impetus to achieving the SDGs.

The focus of this thesis on a rights' based approach to improving environmental protection in the Niger Delta is, therefore, contextualised within the overall ambition of promoting sustainable development in the region with environmental constitutionalism and environmental rule of law used as the platform from which most of the other SDG goals can be addressed in the region. Extreme poverty (Goal 1), hunger (Goal 2), poor health services (Goal 3), quality education (Goal 4) and gender inequality (Goal 5) are other SDGs that touch on sensitive areas of shortcomings in the region and which require urgent attention. However, a significant part of these problems have their roots in the environmental situation in the region. For instance, poverty, hunger and poor health prevalent in the region are largely linked to the deteriorating environment from oil and gas pollution which destroy the livelihood of the people leading to poverty and hunger; and the poor health arises from the deleterious effects of the pollutants in the environment. Effectively addressing the environmental challenges in the region will, therefore, lay a strong foundation for achieving the other SDGs within the region.

[11] UNEP, 'Environmental Rule of Law: First Global Report' January 2019 <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y > accessed 09 May 2019.

[12] Ibid, 25.

Constitutionalization of Environmental Rights - The Global Trend

In a bid to strengthen environmental rights and improve its impact on environmental protection, there is a growing trend across many countries to elevate environmental rights to a higher, fundamental level where they are not subjugated to other socio-economic rights and are also not subject to political manoeuvrings, lobbying and short-term planning. This is achieved by constitutionalizing environmental rights in the form of explicit constitutional provisions. Currently, more than 150 countries[13] have constitutional environmental provisions of some kind and in at least 88 countries, these take the form of explicit constitutional environmental rights.[14] Recent constitutions in all cases make reference to environmental principles, and many older constitutions are being amended to include them.[15]This depicts the increasing recognition of environmental right as not just a socio-economic right to be progressively attained, but as an inviolable fundamental right without which the other basic human rights cannot be reasonably enjoyed. In Latin American countries, Ecuador[16], Brazil[17] and Bolivia[18] lead the way in constitutionalization of environmental rights while South Africa[19] and Kenya[20] are among over 30 African countries with environmental rights enshrined in their constitutions.

Kysar[21] argues that the concept of environmental constitutionalism (also known as Green Constitutionalism) in which certain needs and interests of present and future generations, the global community, and other forms of life are given foundational legal importance in a country's constitution, would help to restore conceptual

[13]The tally includes 88 countries with constitutions enshrining a right to a healthy environment and 62 additional countries that have other environmental provisions that are not explicitly rights, for a total of 150 countries.

[14]See UNEP, 'Environmental Rule of Law: First Global Report' January 2019; See also T. Hayward, 'Constitutional Environmental Rights: A Case for Political Analysis' (2000) 48 *Political Studies* 558-572.

[15] See Chapter 4 and the Appendix for a breakdown of countries with explicit constitutional environmental rights.

[16] Constitution of Ecuador 2008, art 71 – 74 < http://www.wipo.int/wipolex/en/details.jsp?id=5507> accessed 15 January 2016.

[17] Constitution of Bolivia 2008, art 33, 34 <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> accessed 15 January 2016.

[18]Constitution of the Federal Republic of Brazil 2010, art 225 <http://english.tse.jus.br/arquivos/federalconstitution> accessed 15 January 2016.

[19] Constitution of South Africa 1996, art 24 <http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf> accessed 15 January 2016.

[20] Constitution of Kenya 2010 <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf> accessed 15 January 2016.

[21]D. Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) 1 *Transnational Environmental Law* 83-94.

coherence and normative priority to the subjects of environmental law. Boyd[22] also asserts that the rise in constitutionalization of environmental rights raises the hope that the wanton polluting ways of the past are gradually giving way to a new era of environmental stewardship spurred on by fundamental constitutional obligations on government enforceable by the citizens across jurisdictions.

However, enshrining environmental rights in constitutional forms must be supported by the practice of environmental rule of law to achieve any meaningful environmental goals. As David Boyd, UN Special Rapporteur on Human Rights and the Environment stated, 'unless the environmental rule of law is strengthened, even seemingly rigorous rules are destined to fail and the fundamental human right to a healthy environment will go unfulfilled.'[23] As a result, there is a growing recognition of the importance of environmental rule of law by policy makers and other environmental stakeholders focusing attention on addressing the gap between environmental laws on the books and in practice and the particularly worrying trend of the growing resistance to environmental laws, which has been most evident in the harassment, arbitrary arrests threats, and killing of environmental defenders.[24] This also extends to the role that civil society plays in ensuring environmental law is implemented and enforced fairly and transparently.The concept of environmental rule of law has continued to gain momentum in international environmental law and amongst international environmental institutions with the first United Nations Environment Assembly in 2014 adopting resolution 1/13 calling upon countries 'to work for the strengthening of environmental rule of law at the international, regional and national levels' and the first World Environmental Law Congress, co-sponsored by the International Union for Conservation of Nature (IUCN) and UN Environment in 2016 adopting the 'IUCN World Declaration on the Environmental Rule of Law' which outlines 13 principles to serve as the foundation for developing and implementing solutions for ecologically sustainable development. These international efforts are laying the groundwork for better collaboration amongst countries to strengthen the environmental enforcement programme within domestic jurisdictions.

[22] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 3.
[23] UNEP, 'Environmental Rule of Law: First Global Report' January 2019, 5.
[24] D Farber, 'The Implementation Gap in Environmental Law' (2016) 16 *Journal of Korean Law* 3-32.

Nevertheless, while the global trend towards constitutionalization of environmental rights and environmental constitutionalism holds prospects for improved environmental protection, the normative contents of a constitutional environmental right are more important than the mere act of its constitutionalization. In this vein, the two predominant philosophies on environmental rights – anthropocentric and eco-centric approach- come into focus. Although an overwhelming majority of countries with constitutional environmental rights have such rights framed in purely anthropocentric views, the constitutions of Ecuador[25] and Bolivia[26] are examples of eco-centric entrenchment of environmental rights and have drawn attention to the need to reconsider the drafting of the normative contents of constitutional environmental rights in purely anthropocentric terms.

The UN Global Pact for the Environment 2017[27] attempts to harmonise the normative contents of constitutional environmental rights by propounding principles that should be enshrined in environmental instruments including the right to an ecologically sound environment, duty to take care of the environment, intergenerational equity and procedural environmental rights such as access to information, participation and access to justice.

Constitutionalization of Environmental Rights- The Nigerian Experience

This global trend towards the constitutionalization of environmental rights has so far eluded Nigeria which has continued to rely on the regulatory model of environmental protection with its short and long-term deficiencies. Although the African Charter on Human and Peoples' Rights (ACHPR) 1981[28] (ratified and applicable in Nigeria) sets out the right of people to a decent environment favourable to their development, its provision is largely ignored in environmental regulation debates and is unsupported by the general environmental law framework in the country. The

[25] Constitution of Ecuador.
[26] Constitution of Bolivia.
[27] Draft Global Pact for the Environment, Paris, 24th June 2017 <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pactfor-the-environment.pdf> accessed 08 May 2019.
[28] African Charter on Human and Peoples' Rights, (done at Banjul, June 26, 1981; entered into force, Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reproduced in 21 I.L.M. 59 (1982), art. 24.

Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)[29] does not recognize any form of environmental right of the citizens and merely imposes a non-enforceable obligation on the government to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'.[30] By declaring this obligation non-justiciable,[31] the Nigerian Constitution effectively renders the citizens powerless to hold the Nigerian government accountable for environmental degradation and its failure to take proactive steps to prevent it. Environmental protection in Nigeria is, therefore, essentially government-reliant as there is the absence of any legal framework to support a rights' based approach to environmental protection.

Consequently, efforts by the Niger Delta inhabitants to protect the environment has over the years been focused on a two-pronged approach - seeking judicial accountability of Multinational Corporations (MNCs) operating in the region through tort law and civil liability suits, and seeking government intervention through stronger regulation of the MNCs operating in the region. Both approaches have achieved very limited successes as the MNCs consider resulting environmental pollutions as mere negative externalities of oil and gas exploration. The MNCs readily monetize such pollution by paying compensations awarded by the courts to the communities without any significant steps to reduce or curtail continuous environmental pollution or even clean up the affected environment.[32] Another shortcoming of this approach is that the reliance on compensation mechanisms under the civil liability approach fails to address the root causes of pollution and lacks inbuilt preventative mechanisms to halt, reduce or significantly deter continuous pollution by the MNCs. Government regulation of the MNCs is also significantly weak and lacking in any effectiveness.

The failure of government regulation to curb environmental pollution in the region arises from a myriad of factors plaguing the system. These factors include the absence of an adequate legal framework for maintaining environmental sustainability and poor environmental governance system in the country and the

[29] CFRN 1999 <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed 15 June 2016.
[30] CFRN 1999, s 20.
[31] CFRN 1999, s 6(6)(6)(c).
[32] In Bodo Community & Others v. The Shell Petroleum Development Company (2014) EWHC 1973 TCC, the Respondent settled a claim for widespread oil pollution of an entire community's farmland for £55 million and thereafter took no further step to clean up the affected environment.

dual-capacity role of the Nigerian government in environmental regulation which sees the government act as both a regulator and an active player in the oil and gas industry. In addition, Nigeria's peculiar socio-economic reliance on oil and gas revenues which limits the extent to which the government can sanction polluting Multinational Oil Companies (MNCs) without jeopardizing Nigeria's economic fortunes is an important explanation for the lax regulatory stance of the government.

In light of the failure of government regulation and the civil liability approaches in curbing environmental pollution in Nigeria, it has become imperative to consider the paradigm shift across the globe from the regulatory model of environmental protection towards the adoption of a rights' model for protecting the environment. In essence, a 'bottom-up' approach of utilizing a recognized and enforceable 'right' to a clean environment as an environmental protection tool is gradually replacing the 'top-down' approach of depending on government's regulatory and other policies to protect the environment. An environmental rights approach is a 'bottom-up' approach as it utilizes the peoples' right to a clean environment enforceable vertically upwards against the government, MNCs and other state actors to protect the environment as a substitute for the 'top-down' regulatory approach which relies on the imposition of government-prescribed regulatory policies, measures and standards vertically downwards for protecting the environment.

It is, therefore, imperative to explore the feasibility of adopting a rights' based approach to environmental protection in Nigeria and expand the debate on whether constitutionalizing environmental rights has cognizable prospects for improving environmental protection in the country. Issues surrounding the normative contents of a constitutionalized environmental right and whether an anthropocentric or eco-centric approach should be adopted in framing a constitutionalized environmental right in Nigeria will also form a substantial part of this study.

Research Problems

The failure of the regulatory and civil liability approaches stem from deep-seated problems that have produced a defective and unsustainable environmental protection framework in Nigeria. These fundamental problems exist at the local, national and international levels of environmental protection in the region.

The local level stems from the blind pursuit of a 'full-belly' by the inhabitants of the region to the detriment of the sanctity of their environment and the lack of access to environmental justice for people of the region.

The national level arises from the weak environmental legal framework and ecological imperialism by the other regions determined to keep the Niger Delta people environmentally subjugated in a bid to continue unbridled exploitation of the natural resources of the region.

The international level stems from the domestic inapplicability of various international environmental treaties that Nigeria has ratified owing to the restriction imposed by Section 12 of the Nigerian Constitution[33] which require such treaties to be domestically enacted by Parliament before they can be enforceable.

These research problems and their impact on environmental degradation in the Niger Delta region are extensively discussed in Chapter 1.4 of this thesis.

Research Questions

This thesis seeks to answer one central question with two sub-questions -

1. Should environmental rights be constitutionalized in Nigeria's environmental legal framework?

    a. Will constitutionalising environmental rights address the key problems of environmental degradation in the Niger Delta region?

    b. How should the constitutionalised environmental rights be normatively framed to achieve the desired objectives?

The primary question focuses on the necessity of introducing constitutional environmental rights in Nigeria to address the key problems of the weak environmental rights legal framework in Nigeria, ecological imperialism and environmental injustice in the Niger Delta region of Nigeria. The first subsidiary question analyses the benefits that can be derived from constitutionalizing this right and whether those benefits are sufficiently weighty to warrant a constitutional

[33] Constitution of the Federal Republic of Nigeria 1999 (as amended).

amendment to achieve this objective. The question also considers alternative solutions such as reliance on international environmental law and private property law rights through tort claims and examines why these alternatives are insufficient to address the problem.

The second subsidiary question expands the debate by analysing the normative contents of a potential constitutional environmental right, focusing on the divide between the anthropocentric and ecocentric approach to environmental rights and discussing the benefits of implementing a *coalesced anthropocentrism* approach which embeds the environmental interests of humans, nature and future generation in a single normative framework.

Research Objectives

This thesis analyses the concept of environmental rights within Nigeria's environmental legal framework and argue for the constitutionalization of environmental rights as a sustainable way of ensuring better environmental protection in the country and enshrining civic environmentalism amongst the people of the host communities in the Niger Delta.

The thematic discussions regarding the jurisprudential meaning of rights, their application in an environmental context and the opposing philosophies on whether humans should be the centre of environmental rights' models or whether nature, non-living beings and animals within the ecosystem should be given equal treatment with humans in defining an environmental rights system is analysed in this research with the aim of determining the extent to which they can be reflected within Nigeria's environmental law framework. Environmental rights are either normatively framed in an anthropocentric or ecocentric model or sometimes a mixture of both in a form of '*dilute anthropocentrism*'[34] which incorporates protection of the environment for humans as well as nature's intrinsic value. Determining which approach should be adopted in Nigeria's environmental law framework is imperative as it shapes the debate on whether the focus of environmental protection in the Niger Delta should be on the people of the host communities and the impact of pollution on their lives

[34] C. Redgwell, 'Life, the Universe and Everything: a Critique of Anthropocentric Rights' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

and livelihoods or whether damage to the natural components of the ecosystem should be included in framing normative environmental rights for the region.

In this regard, this thesis proposes and conceptualises the *coalesced anthropocentrism* model as an environmental rights' paradigm which protects the relevant interests in the environment and best represents a non-anthropocentric perspective of environmental rights which have been so dominant in environmental instruments around the globe in a manner that can be considered anthropocentric chauvinism.

This thesis also analyses the extent to which constitutionalising environmental rights can make a difference in the environmental situation in the Niger Delta where various regulatory models have failed to yield results. Particularly, the unique socio-political and geographic circumstances prevailing in Nigeria which is unfavourably tilted against the people of the Niger Delta leading to a form of 'ecological imperialism' and producing the 'full-belly' syndrome as a side effect are some of the key subjects analysed in this research. This thesis examines how constitutionalizing environmental rights can tackle this lopsided distribution of environmental burdens between the core and periphery regions in Nigeria which unfairly prejudices the environmental interests of the Niger Delta inhabitants.

The thesis supplies a normative context to the discussions above by providing a structured highlight of how constitutionalization of environmental rights can be carried out within Nigeria's present legal framework. The location of the rights within the constitution, justiciability, hierarchy within the rights' structure in the constitution and enforceability by the judiciary will be discussed. This will require specific discussions of relevant provisions of Nigeria's constitution and how they can be altered, substituted or interpreted to embed environmental rights in the Constitution.

Although this thesis focuses heavily on Nigeria and the Niger Delta, it has wider application beyond Nigeria, as the environmental issues faced in the Niger Delta (and Nigeria) are replicated in similar ways in many oil-rich developing countries in Africa and Latin America. The socio-economic contexts of these environmental challenges in these developing countries are also similar to those within the Niger Delta, making the analysis in this thesis applicable to these countries. Although a significant number of these developing countries in Latin America and Africa have constitutionalised environmental rights, these are mostly expressed in purely

anthropocentric normative structures (with the exception of Ecuador and Bolivia) which this thesis argues undermines the effectiveness of a constitutional environmental protection framework. The *coalesced anthropocentrism* model of constitutional environmental rights propounded in this thesis will, therefore, be relevant in future reviews of the constitutional environmental rights framework in many of these countries.

Significance of the Research

The significance of this research and its original contribution to knowledge derives from four major achievements. First, it links the environmental problems in the Niger Delta to the fundamental issues of ecological imperialism and the 'full-belly' syndrome which have not been considered by any literature on the subject (of which there are a lot). Existing literature on the subject[35] focus on the government and Multinational Oil Corporations (MNCs) as the responsible parties for the environmental pollution in the region. This thesis breaks away from this linear reasoning and identifies the role that individuals in the region (through the 'full-belly' syndrome) and individuals from the other geopolitical regions (through ecological imperialism) play in the environmental crisis in the region.

Second, (and more importantly), flowing from the above, this thesis proposes a solution not considered in the existing literature on the subject - using constitutional rights to address the underlying fundamental environmental challenges in the region. Existing literary focus is on improving governmental regulatory controls and judicial accountability of oil corporations through stiffer penalties imposed in civil liability suits, approaches which this thesis shows to be inherently flawed and ineffective.

Third, this thesis develops the *coalesced anthropocentrism* model which challenges the entrenched anthropocentric models (and available variations such as weak anthropocentrism) prevalent in environmental discussions and legal systems globally. Redgwell's *dilute anthropocentrism* approach[36] and Nickel's

[35] See Chapter 1 of this thesis for a discussion of the plethora of literature studies on the Niger Delta environmental situation.

[36] C. Redgwell, 'Life, the Universe and Everything: a Critique of Anthropocentric Rights' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

accommodationist approach[37] initiated a shift away from anthropocentric thinking in environmental literature, but do not go far enough to consider the normative incorporation of nature's intrinsic rights in statutory and constitutional environmental protection. This thesis fills the gap by establishing the theoretical and normative foundations upon which nature-centric environmental interests can be incorporated into statutory and constitutional environmental rights protection. The *coalesced anthropocentrism* model developed in this thesis establishes a benchmark against which countries can assess the compliance of their environmental legal framework with a contemporary understanding of environmental rights that are liberal and inclusive of nature-centric interests.

Finally, the thesis undertakes a comprehensive global review of the constitutions of all 196 countries in the world and assesses their compliance with the yardsticks established in the core values of the *coalesced anthropocentrism* model, thereby providing a quick glance for determining the extent to which anthropocentric chauvinism is deeply entrenched globally and the need for an overhaul of such approach for improved ecosystem protection. Boyd's global constitution study[38] which analysed environmental rights provision in the constitution of all 196 countries in the world utilised unsatisfactory and misleading indicators in assessing the extent of environmental rights incorporation in constitutions. The UNEP First Global 2019[39] also utilised similar indicators in categorising the incorporation of environmental rights in national constitutions. This resulted in the finding of constitutional environmental rights in countries like Nigeria, Ghana and Malawi where only a non-enforceable governmental obligation to protect the environment exists. This thesis fills this gap by undertaking a more comprehensive, segmental analysis of global constitutions looking beyond the nominal mention of environmental protection to a focus on the actual normative incorporation of enforceable environmental rights (See Chapter 4 and the Appendix). The findings, shown in the Appendix, further analyses the extent to which these constitutions protect the rights of future generations and Mother Nature, critical elements in the *coalesced anthropocentrism* model developed in this thesis.

[37] J. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification' (1993) 18 *YALE J INT'L L* 281–85.
[38] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, *supra,* n 17.
[39] UNEP, 'Environmental Rule of Law: First Global Report' January 2019.

Research Methodology

The methodology employed in this thesis is a transnational study of constitutional provisions of all 196 countries of the world, examining the extent of the incorporation of substantive and procedural environmental rights in these constitutions and how the constitutional provisions influence environmental protection within these jurisdictions. Transnational research has been defined as 'comparative research between populations of two or more countries; and the use of literature across populations in formulating the research problem and drawing implications'[40]

Being a form of comparative research, transnational research utilises qualitative and quantitative comparisons of policies in a specific sector across a range of countries with emphasis on the qualitative impacts of these policies on social, environmental or economic sectors in these countries.[41] The qualitative aspect of transnational research focuses on a normative comparisons of laws, policies and content analysis of legal or constitutional instruments while the quantitative aspects focuses on comparisons including meta-analysis, comparing social indicators, comparing responses to a common stimulus, comparisons against a standard, and fitting a statistical model to two or more countries with a view to aggregating the finding in support of a proposed hypothesis.[42]

This thesis adopts the qualitative and quantitative aspects of transnational research in examining the contents of national constitutions and environmental laws within several jurisdictions and comparing the responses in these jurisdictions to environmental protection. It aggregates the findings of the study across the 196 countries and fits it into a statistical model to support the hypothesis that, with few outliers, countries with constitutional environmental rights respond better to environmental protection issues than countries lacking explicit constitutional protection of the environment. The quantitative transnational study of environmental rights provisions in countries around the globe also supports the findings that

[40]T Tripodi, M Potocky-Tripodi, 'Transnational Research' in T Tripodi and M Potocky-Tripodi, *International Social Work Research: Issues and Prospects* (Oxford Scholarship Online, 2009) 1.

[41] V Mazzucato, Bridging boundaries with a transnational research approach: a simultaneous matched-sample methodology Paper presented at Diaspora and Transnationalism Conceptual, Theoretical and Methodological Challenges 10-11 April 2008.

[42]R O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) *Transnational Environmental Law* 435-462.

constitutional environmental rights strengthens the environmental law framework within countries, improves the chances of success of environmental litigation, positively impacts on the ecological carbon footprint of countries and prevents rollbacks on environmental protection policies as detailed in Chapters 4 and 5 of the thesis.

The data supporting the analysis in chapters 4 and 5 was gathered through an examination of all 196 national constitutions for the inclusion of a range of terms (earth, environm*, ecology, ecosystem, conservation, future generations, intergenerational, natur*, sustainab*). Where a term was present in the constitutional document but referred to elements outside the core features of environmental rights and constitutionalism (such as provisions in constitutions referring to 'ownership of natural resources', 'resource allocation', 'conservation of wildlife' or the use of 'environment' in other contexts outside of its ecological meaning, e.g 'environment' used to refer to premises, surroundings or within other sectors), it was disregarded. For those constitutions that contain one or more of the researched terms, the focus was on the term that most closely reflected the core features of environmental constitutionalism.

In categorising the dataset, a distinction was drawn between the 'rights' and 'duty' paradigms in environmental constitutionalism, segregating constitutional provisions with enforceable individual rights (both substantive and procedural rights) from provisions merely providing for government's duty to protect the environment. The former reflects 'environmental rights' within the context of the discussion in this thesis while the latter encapsulates the constitutional foundation of environmental regulation with its weaknesses highlighted in this thesis.

A dataset was created on the basis of the extent of the incorporation of the three constituents of the *coalesced anthropocentrism model* developed in this thesis. Each state was categorized under one of the three broad headings (environmental human rights, future generations and nature) guided by the analysis of the constituents of *coalesced anthropocentrism* in chapter 2. The result of this categorisation is reflected in Appendix I showing the extent to which constitutionalization of environmental rights is overwhelmingly anthropocentric with only Ecuador, Boliva and Norway breaking away from this trend of anthropocentric chauvinism to constitutionally recognise nature's environmental interests.

The database for obtaining the constitutions of all 196 countries were sourced from three main online platforms – Constitute Project, FAOLEX and ECOLEX. Constitution Project[43] was the primary source of the constitution database as it provided up-to-date copies of the constitutions of all 193 countries with national constitutions (excluding the United Kingdom, New Zealand and Israel that have no national Constitutions). The copies of the national constitutions in the database of Constitute Project included the relevant latest amendments of such constitutions and, therefore, provided a contemporary database of the latest constitutional developments in all 193 countries.

FAOLEX (the Legal database of the Food and Agricultural Organisation of the United Nations)[44] provided useful copies of national constitutions and was a useful source for comparing the findings from Constitute Project. It provided a searchable database for transnational searching of specific terms within national constitutions, presenting the results with a highlight of all national constitutions providing such terms. It, therefore, provided an important way to quickly cross-reference the availability of specific terms across national constitutions, although in terms of the availability of copies of national constitutions, it was slightly less comprehensive than Constitute Project which provided detailed copies of all national constitutions. Also, FAOLEX database did not always contain the latest amendments to the national constitutions and were sometimes dated and the Constitute Project database was, therefore, the primary and more reliable database utilised for the transnational study of constitutions in this thesis.

ECOLEX (an information service on environmental law, operated jointly by FAO, IUCN and UNEP)[45] was also an important online database of not just national constitutions, but environmental legislation and other environmental legal instruments of most countries in the world, providing a useful reference for examing the development of the environmental legal framework prior to and in the aftermath of constitutionalization of environmental rights. This was useful in analysing global environmental constitutionalism by studying the development of the environmental legal framework in countries with explicit constitutional environmental rights.

[43] Constitution Project database <https://constitutionproject.org/> last accessed on 15 May 2019.
[44] FAOLEX database <http://www.fao.org/legal/databases/faolex/en/> last accessed on 15 May 2019.
[45] ECOLEX Legislation database <https://www.ecolex.org/result/?type=legislation> last accessed on 15 May 2019.

The latest 2019 data on environmental constitutionalism by the First Global Report on Environmental Rule of Law by UNEP[46] indicates that 150 countries have constitutional environmental provisions of some kind and in at least 88 countries, these take the form of explicit constitutional environmental rights leaving 46 countries without any form of constitutional protection of the environment. A comprehensive review of the national constitutions of all 193 countries with constitutions using the databases of Constitute Project, FAOLEX and ECOLEX, however, reveals that only 81 of the 88 countries provide explicit constitutional environmental rights that are immediately judicially enforceable as 7 countries – South Korea, Spain, Turkey, Netherlands, Belgium, Gabon and Gambia - have constitutional rights in manners that are either based on progressive implementation, or require legislative instruments to be enforceable.

The thesis also engages in theoretical discussions of environmental rights models, environmental rule of law, environmental constitutionalism and other subjects of the research utilising library-based materials, review of latest literature in the field and relevant international environmental instruments and declarations by international environmental institutions such as UNEP, UN Environment, Office of the High Commissioner for Human Rights (OHRC) and IUCN.. In discussing the state of environmental degradation in the Niger Delta in Chapter 1, the thesis relies on existing scientific data/graphics laying out the extent of destruction of the ecosystem in the region by continuous oil pollution and other available empirical studies on the socio-economic impacts of environmental degradation on the lives of people of the region, particularly studies by United Nations Environment Programme (UNEP) and other environmental advocacy groups. The extent of degradation of the environment in the Niger Delta is well documented in the global and domestic arena as it has been a subject of a plethora of scientific and empirical studies.[47] Therefore, this research does not seek to investigate the extent of degradation but rather builds on

[46] UNEP, 'Environmental Rule of Law: First Global Report' January 2019.

[47] See UNEP Report, 'Environmental Assessment of Ogoniland' (2011) Climate Justice Programme/Environmental Rights Association**,** **'**Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity', (2008) **<**www.foe.co.uk/resource/reports/gas_flaring_nigeria.pdf> (accessed 17 August 2015); Joseph Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *B U Int'l L J* 26; T. Ologunorisa, 'A Review of the Effects of Gas Flaring on the Niger Delta Environment', (2010) 8**(**3) *Int'l J of Sust Devpt & World Ecology* 12

these available empirical studies to argue for constitutional environmental protection and canvas for a paradigm shift from the existing regulatory model framework.

Structure of the Thesis

In addition to this introduction, the argument in this thesis is developed across seven substantive chapters and the conclusion. A summary of the chapter contents is provided below.

Chapter one establishes the foundation of the research focusing on the endemic environmental pollution in the Niger Delta, the socio-economic impacts of pollution on their lives and livelihoods and the problem of ecological imperialism suffered by the people of the region. The chapter examines the underlying root causes of the environmental degradation which lie far away from the oil tanks, pipelines and gas flaring pipes that produce polluting effluents. It discusses ecological imperialism, the 'full-belly' syndrome, a lack of access to environmental justice and inapplicability of international environmental law as the non-governmental, non-corporate factors that account for the perpetuation of pollution in the region contrary to the focus of most literature on the government and corporate oil producers as the main causes of pollution in the region. The analysis in this chapter is doctrinal, relying on empirical scientific studies on the extent of pollution in the region.

Chapter two utilises a doctrinal approach to establish the theoretical framework for environmental rights and dualist models of environmental protection. It discusses the jurisprudential meaning of rights and its application in an environmental context; the philosophical dualism in environmental rights' debate based on the anthropocentric and ecocentric approaches to environmental protection; and examines how this dualism influences the normative contents of environmental rights in legal drafting, especially at the constitutional level. It argues for the adoption of *coalesced anthropocentrism* model as an environmental rights paradigm providing a comprehensive and effective protection for the tripod environmental interests of humans, nature and future generations. This chapter aims to identify the competing environmental rights models in the contemporary environmental literature, the shortcomings of these models and the core values of the *coalesce anthropocentrism* model which make it better suited to environmental protection than the pre-existing models.

Chapter three proposes and examines one of the general premises on which this thesis is based - that a rights' based approach to environmental protection is more effective than a) the regulatory approach and, b) the private law (torts law) civil liability approach in enshrining an effective framework for environmental accountability. The chapter sequentially analyses the advantages of a rights' based approach over the regulatory and civil liability approaches and discusses how the triumph of rights over socio-economic and development goals ensures that environmental protection is not subjected to governmental policy prevarications. The chapter argues that a rights' based approach removes environmental protection from the realm of policy objectives of government to an established enforceable cause of action for citizens, and obviates the monetisation of environmental damages that is the bedrock of the civil liability approach. The chapter also examines the concept of environmental constitutionalism, environmental rule of law and the role of the judiciary in advancing environmental protection through constitutional environmental rights provisions.

Chapter four elevates the discussions on environmental rights to a constitutional platform by focusing on constitutionalization of environmental rights. The chapter discusses the theories of constitutionalization of rights, the increasing adoption of constitutionalized environmental rights in many states around the world and the impact of constitutionalization of rights on ecosystem protection. Utilising a comparative methodology, this chapter undertakes a global study of constitutions and provides a statistical breakdown and graphical representations of the extent to which environmental rights are protected in constitutions around the world. Based on the findings of this global study revealing the prevalence of anthropocentric chauvinism in a majority of constitutions with environmental rights, the chapter argues that the case for constitutionalising environmental rights should be non-anthropocentric, hinged on the inherent fundamental nature of the environment as a life-sustaining system and not merely from the perspective that humans have a fundamental right to a clean environment. It proposes a normative structure of constitutional environmental rights which embodies the *coalesced anthropocentrism* model for adoption by countries.

Chapter five establishes the second general premise of this thesis- that constitutionalising environmental rights have potentially transformative effects on environmental protection within a country. The chapter examines the noticeable

effects of constitutionalising environmental rights by looking at how it influences the environmental law framework and environmental litigation outlook within jurisdictions that have introduced these rights. The chapter also argues that while there are no definite methodological means of establishing a direct link between constitutionalising environmental rights and an improvement in environmental protection, the available evidence from a study of environmental legislation and litigation post-constitutionalization around the globe makes a strong case in support of the view that constitutionalising environmental rights is a landmark step in the direction of improved ecosystem protection within a jurisdiction.

Chapter six applies the analysis in the preceding chapter to the Niger Delta situation and reviews the impact constitutionalizing environmental rights will have on the environmental legal framework in Nigeria. It examines the various unsuccessful regulatory approaches the Nigerian government have implemented over the past four decades to halt continuous environmental pollution in the Niger Delta and the reasons behind their failures. It proposes and critically examines the normative contents and structures of potential constitutional environmental rights in Nigeria and how best these rights can be framed to maximise their potential impacts.

Chapter seven critically assesses the validity of the hypothesis of this study – that constitutionalising environmental rights in Nigeria will address the unique underlying environmental challenges responsible for the perpetuation of the endemic degradation in the Niger Delta. It sequentially establishes how constitutionalization of environmental rights can potentially address the five underlying environmental challenges identified in chapter one and why this approach will be effective where others have failed.

The conclusion brings together the premises and hypothesis of the work, summarises the arguments, establish the links between these arguments and how they answer the research questions set out at the beginning of the work. The conclusion establishes that a shift to a rights' based approach to environmental protection (proposed in chapters 2 and 3) when conferred with constitutional protection (chapters 4 and 5) will potentially address the environmental challenges in the Niger Delta identified in chapter 1 in significant ways discussed in chapters 6 and 7. Consequently, constitutional environmental rights will create an enduring legal framework for the people of the Niger Delta to protect their environment from despoliation and continued degradation.

CHAPTER ONE

ENVIRONMENTAL CHALLENGES IN THE NIGER DELTA

> *"If you want to go fishing, you have to paddle for about four hours through several rivers before you can get to where you can catch fish and the [oil] spill is lesser … some of the fishes we catch, when you open the stomach, it smells of crude oil…"*[1]

1.0 Introduction

Environmental pollution is the foremost problem facing the people of the Niger Delta region of Nigeria as they grapple with the constant degradation of their environment in the course of oil and gas exploration. Oil pollution contaminates their farmlands, crippling their agricultural activities (which is their main form of subsistence); pollutes the rivers and ground waters, crippling their fishing lifestyle (as all the fishes and marine foods are either dead or soiled with oil pollutants);[2] and present health challenges due to the noxious smells of these pollutants and contamination of basic foodstuffs.[3]

Nevertheless, while oil pollution is the immediate cause of the environmental situation in the region, it is merely a product or symptom of much deeper, fundamental issues plaguing the region and resulting in the environmental degradation. The failure to identify and address these fundamental issues is responsible for the seemingly intractable nature of the degradation for more than five decades.

This chapter sets the scene for the analysis in this thesis by identifying and discussing the root causes of environmental degradation in the region. They extend beyond mere government's regulatory failure and corporate disregard for the

[1] Interview with local fisherman reported in Centre for Environment, Human Rights and Development (CEHRD)'s Report on the state of human rights abuses and violence in the Niger Delta region of Nigeria, 2008, < https://grupos.es.amnesty.org/uploads/media/Vertidos_de_petroleo_de_la_empresa_Shell_en_el_Delta_del_Niger.pdf> 7, accessed 17 June 2017.

[2] ibid.

[3] J. Baird, 'Oil's Shame in Africa' (2010) 156 (4) *Newsweek* 115.

environment, to self-inflicted damages by the inhabitants in search of their 'full-belly' and includes ecological oppression by the other geopolitical regions in the country. The fundamental nature of these issues requires instituting a fundamental legal platform through constitutionalization of environmental rights discussed in chapters 4 and 5 of this thesis and the specific ways this addresses the fundamental challenges are analysed in chapter 7.

1.1 Perspectives to the Niger Delta Environmental Conflict

In empirical environmental terms, the Niger Delta is one of the clearest illustrations of the bio-degenerative consequences of anthropocentric activities in the extractive industry. It represents an unpleasant example of the ills of unmitigated and un-managed oil and gas exploration and production activities. The region constitutes the bedrock of Nigeria's oil and gas revenues and has remained vital to the nation's economic survival for decades as revenues from oil and gas exploration activities in the region account for over 80% of government earnings and 90% of the country's foreign reserves.[4]

Since the discovery of oil in commercial quantity in the region at Oloibiri in 1956, the environmental landscape of the region has been negatively transformed into a tale of unending environmental conflicts and pollution. These conflicts have become a recurring theme in national and international discourse, largely owing to the seeming intractability of the conflict with its evolving dimensions from a resource control struggle to an environmental struggle, and later to political agitations for the secession of the region from the rest of the country.[5] Significantly, the overwhelming perception of the Niger Delta conflict, as derived from existing literature on the subject[6] and participant studies[7], is that environmental pollution

[4] World Bank 2007, 'Nigeria Country Brief', Washington, available at - <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,menuPK:368906~pagePK:141132~piPK:141107~theSitePK:36889 6,00.html> accessed June 15, 2016.

[5] E. Chukwuemeka, N. Ewuim, D. Amobi and L Okechukwu, 'Niger Delta Crisis – A Study of Evwerem and Otu- Jeremi Communities: Implications For Nigeria's Sustainable Development' (2013) 1(4) *International Journal of Accounting Research* 33.

[6] Several literatures abound on this subject. A few include – J. Baird, 'Oil's Shame in Africa' (2010) 156 (4) *Newsweek* 115; P. Gibson, 'Niger River Delta: 50 Years of Oil Spills (Cover story)' (2006) 29 (46) *Oil Spill Intelligence Report*, 1-2; 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* 15.

[7] L. Pyagbara, 'The Adverse Impacts of Oil Pollution on the Environment and Wellbeing of a Local Indigenous Community: The Experience of the Ogoni People of Nigeria', International Expert Group

and degradation of the ecosystem from oil and gas exploration activities by the Multinational Oil Companies (MNCs) is at the epicentre of the Niger Delta conflict and is responsible for the environmental problems associated with the region. Indigenous people of the Niger Delta region and local and international environmental groups place the blame for the environmental neglect and degradation on the MNCs and the government while the MNCs and government are at great pains to defend their actions and seek to proffer viable explanations for the plight of the region which usually include the restiveness in the region and inability to secure adequate investments in better oil production facilities.[8]

Nevertheless, a critical unbiased appraisal of the Niger Delta conflict has shown that the exclusive blaming of the government and MNCs is essentially an emotive response to a difficult and complex interwoven situation where the MNCs and government are merely the most convenient parties to shoulder the blame. In this situation, environmental degradation is seen as the main cause of the conflict and neglect of the region, while, in actual fact, it is merely an effect of the wider conflict in the region which transcends the activities of the extractive industry. This 'fallacy of the false cause' further exacerbates the conflict as, in reality, the extractive industry is just a small part of the wider conflict in the Niger Delta.

A significant part of the environmental pollution from oil spills is mostly attributable to sabotage of oil facilities and there is also intense competition for the limited opportunities for local participation, which often lead to intra and inter-communal conflicts.[9] These factors are not directly caused by the extractive industry but because the MNCs are in more direct contact with the communities than the various government agencies, the deprived population usually make demands for social services and economic opportunities from the oil companies rather than from the inaccessible government.[10] When these demands are not met by the MNCs, the

Meeting On Indigenous Peoples And Protection Of The Environment, Khabarovsk, Russian Federation, AUGUST 27.-29, 2007; See also J. Singh, D. Moffat, and O. Linden, 'Defining An Environmental Development Strategy for the Niger Delta', Industry and Energy Operations Division, West Central Africa Department, Africa Region, The World Bank, 1995.

[8] K. Higgins, 'Regional inequality and the Niger Delta' (2009) Policy Brief No. 5, Overseas Development Institute, available at <www.odi.org.uk/resources/download/2507.pdf> accessed May 21, 2016.

[9] Binuomoyo Olayinka et al, 'Oil spills and the Niger Delta bloodlines: Examining the Human Tragedy', (2017) 8(1) Journal of Life &Physical Sciences 8-18.

[10] A. Adekoya, 'Extractive Industry and Environmental Conflict: Predicament of Rural Households in Nigeria's Oil Rich Region', IAIA09 Conference Proceedings, Impact Assessment and Human Well-Being, 29th Annual Conference of the International Association for Impact Assessment, 16-22 May 2009, Accra International Conference Center, Accra, Ghana (www.iaia.org), pg.2.

indigenous communities become aggrieved and oftentimes resort to violent means to press home their demands through lockdowns of the oil facilities[11]and sometimes sabotaging of the oil facilities leading to environmental pollution of the surrounding area.[12] This practice of sabotaging oil pipelines and other oil and gas facilities is not peculiar to the oil producing communities in the Niger Delta as it is a common occurrence in other oil producing states in Latin America. In Peru, frequent disputes between the oil producing communities and oil producers, such as Canada's Frontera Energy, often result in the sabotage of oil pipelines by the indigenous communities leading to widespread spillage of oil into the Amazonian forest.[13] A December 2018 report revealed that sabotage of oil facilities and pipelines from over 15 separate attacks in Peru between 2016 and 2018 has caused spills of 20,000 barrels in total into the Amazon.[14]

This practice is replicated in different oil producing communities throughout Latin America including Ecuador and Colombia where oil production activities face repeated attacks from indigenous communities protecting their sacred indigenous lands and ecology from the degradations caused by oil production activities.[15] As Vazquez asserts, 'conflicts around hydrocarbons are not new in the three countries under study, and they can be traced back to the beginning of oil operations in Colombia at the beginning of the twentieth century'.[16] Indeed, the causes of sabotage of oil facilities in Latin America are similar to those in the Niger Delta. Expanding on this idea, Vazquez further opined that 'from 2000 to 2010, Latin America experienced an unprecedented increase in the number of conflicts related to natural resources in general and oil and gas in particular. . . Many of the disputes were related to oil and natural gas reserves located in the Amazon basin and its surrounding areas, home to large numbers of Indigenous Peoples. These

[11] For instance, on August 11, 2017, hundreds of protesters in Rivers State in the Niger Delta, stormed an oil platform belonging to Shell Plc and locked it down demanding jobs and infrastructure development from the company. *'Hundreds of protesters storm Shell oil facility in Niger Delta',* Reuters, 11 August, 2017 <https://www.reuters.com/article/us-nigeria-oil/hundreds-of-protesters-storm-shell-oil-facility-in-niger-delta-idUSKBN1AR0VI> accessed 19 June 2018.

[12] United States Institute of Peace, 'Blood Oil in the Niger Delta' (2009) Special Report 229, 12.

[13] I Slav, 'Peru's Largest Oil Field Stops Producing After Pipeline Attack' (Oil Price, 04 December 2018) <https://oilprice.com/Latest-Energy-News/World-News/Perus-Largest-Oil-Field-Stops-Producing-After-Pipeline-Attack.html#> accessed 08 May 2019.

[14] 'Canada's Frontera stops production after attack on Peru oil pipeline' (Reuters, 03 December 2018) <https://uk.reuters.com/article/peru-pipeline/canadas-frontera-stops-production-after-attack-on-peru-oil-pipeline-idUKL1N1Y824W?rpc=401&> accessed 08 May 2019.

[15] P Vásquez, *Oil Sparks in the Amazon: Local Conflicts, Indigenous Populations, and Natural Resources* (University of Georgia Press, 2014) 1

[16] Ibid, 3.

historically marginalized groups have for years maintained numerous grievances that have largely gone unnoticed by the rest of the population…'[17] These conflicts often result in sabotage of oil and gas facilities in Latin America.

Nevertheless, the conflict in the Niger Delta transcends an environmental conflict and environmental degradation is likely an outcome of the wider conflict rather than the cause. While there is no usefulness in engaging in a 'chicken or egg' debate regarding the sequence in which environmental degradation and the Niger Delta conflict arose, it is important to highlight the fact that the Niger Delta area has for long been the epicentre of numerous overlapping conflicts: between host communities and oil companies (mainly over land rights or compensation for ecological damage); between oil producing communities and the government (over increased access to oil revenue); and between the various ethnic groups in the region (over claims to land ownership and sharing of amenities).[18] Added to these interwoven conflicts are the activities of 'conflict entrepreneurs'[19] benefiting from the crises economy and the entrenched lopsided colonial legacy subjugating control of the region's resources to stronger federating units in the country.

Further support for this view is presented by the World Bank which stated that available scientific evidence indicates that environmental pollution from oil exploration activities is not of highest concern relative to other issues.[20] The United Nations Development Programme (UNDP) 2006[21] asserts that 'the Niger Delta is a region suffering from administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor and endemic conflict'. This highlights the myriad of issues involved in the Niger Delta conflict which cannot be solely attributable to environmental degradation but

[17] Ibid, 25; See also M Bozigar, C Gray, and R Bilsborrow, 'Oil extraction and indigenous livelihoods in the Ecuadorian Amazon' (2016) 78 *World development* 125–135.

[18] J. Oladapo - Oluwole, 'Niger Delta Crisis and The Master Plan: An Evaluation', (2009) National Institute for Policy and Strategic Studies, Kuru, 15.

[19] ibid.

[20] '*The Niger Delta: A Stakeholder Approach to Environmental Development'*, Findings reports on ongoing operational, economic and sector work carried out by the World Bank and its member governments in the Africa Region, African Region No. 53 December 1995

[21] United Nations Development Programme (UNDP), 'Nigeria', Human Development Report 2006, Human Development Indicators Country Fact Sheets.
<http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_NGA.html> accessed January 15, 2016.

which may, in fact, be plausibly viewed as creating a fertile ground for the persistent environmental pollution of the region.[22]

In addition to the skewed attribution of responsibility for the Niger Delta conflict to environmental degradation, there is also the mis-placement of the blame for environmental degradation solely on the MNCs operating in the region. Empirical evidence reveals that a significant part of environmental pollution results from sabotage of oil facilities by indigenous people and oil bunkering activities by criminal elements operating within the region with the knowledge and (alleged) connivance of some of the host people and communities.[23] Ironically, the sabotage of oil facilities by people in the host communities is often carried out as a form of protest against oil pollution and environmental degradation by the MNCs not minding the fact that the chosen form of protest further creates pollution and degrades the environment. This pollution caused by sabotage is in turn blamed on the MNCs thus creating a vicious circle that perpetuates the environmental situation in the region.

1.2 Geographical and Political Delineation of the Niger Delta

The term 'Niger Delta' geographically refers to the cross-network of lands and rivers surrounding the Delta of the River Niger as it empties into the Atlantic Ocean in Nigeria's southern region along the Gulf Coast. It covers an area of about 70,000 square kilometres and is noted for its peculiar and difficult mangrove terrain. The whole area is crisscrossed by a large number of streams, swamps, canals and creeks.

[22] Various governmental agencies have been put in place by the Nigerian government to tackle some aspects of the conflict, particularly the infrastructural neglect, poor social amenities and economic empowerment of people of the region. The Niger Development Commission (NDDC) was established in 1999 to replace the Oil Mineral Producing Areas Development Commission (OMPADEC) established in 1983. Their main aim was addressing the socio-economic perspectives to the Niger Delta conflict, and even though the NDDC has made some strides in this respect, the fundamental challenges of the region remain unaddressed.

[23] O. Emoyan, I. Akpobori & A. Akporhonor, 'The Oil and Gas Industry and the Niger Delta: Implications for the Environment' (2008) 12(3) J. Appl. Sci. Environ. Manage 29 – 37; P. Okumagba, 'The Politics of Oil and the Niger Delta Regional Development Master Plan: Its Workability and the Option of Political Goodwill', (2012) 1(1) International Journal of Arts and Humanities Bahir Dar 277-287.

The region can be classified into four ecological zones: coastal inland zone; freshwater zone; lowland rainforest zone; and mangrove swamp zone. This region is considered one of the ten most important wetlands and marine ecosystems in the world.[24] Generally, the region is divided into the tropical rainforest vegetation in the northern part and the thick mangrove swamps in the southern part bordering the Atlantic Ocean.

The Niger Delta has the third largest mangrove forest in the world and the largest in Africa. It is estimated to cover between 5,400 km^2 and 6000 km^2.[25] The region has been declared as a key zone for the conservation of the western coast of Africa on the basis of its extraordinary biodiversity.[26] It is estimated that there are more than 46,000 plant species in the region of which about 205 are endemic, and approximately 484 plants in 112 families are threatened with extinction as well as many animal and bird species.[27]

The political delineation of the 'Niger Delta' in Nigeria, however, is an expansion on its geographical delineation as the term is used to represent all oil-producing areas of the country's southern region including the south-east, south-south and south-west regions.[28] Consequently, some states[29] which are geographically outside the typical Niger Delta vegetation are classified under the 'Niger Delta Region' for oil exploration and resource control purposes. As a result, oil-producing states from the south-east[30] and south-west[31] geo-political regions which do not fall within the Niger Delta geographical definition are classified under the term 'Niger Delta' as a geopolitical reference. More areas/communities are added to the classification when oil is discovered in such areas.[32]

[24] 'Oil of Poverty in the Niger Delta', A publication of the African Network for Environment and Economic Justice (ANEEJ), Federal Ministry of Environment Abuja, Nigerian Conservation Foundation Lagos, WWF UK and CEESP-IUCN Commission on Environmental, Economic, and Social Policy, May 31,(2006).

[25] ibid.

[26] K. Ayuba, 'Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria', (2012) 12(3) *Global Journal of Science Frontier Research Environment & Earth Sciences*, 12.

[27] Y. Twumasi, & E. Merem 'GIS and Remote Sensing Applications in the Assessment of Change within a Coastal Environment in the Niger Delta Region of Nigeria' (2006) 3(1) *International Journal of Environmental Research & Public Health*, 98.

[28] A. Benedict, 'Breaking Barriers to Transformation of the Niger Delta Region of Nigeria: A Human Development Paradigm', (2011) 4(3) *Journal of Sustainable Development* 15.

[29] E.g. Ondo State.

[30] Abia and Imo states.

[31] Ondo state.

[32] For instance, the recent discovery of oil in some communities in Anambra state has led to discussions about including the state amongst the Niger Delta state.

The distinction between the geographical and geopolitical reference to 'Niger Delta' is significant in the context of this thesis because the major problem of environmental pollution discussed in this thesis occurs within the Niger Delta as a geographical unit with its dense mangrove forests and swamps severely degraded by constant and un-remediated pollution dating back several decades. The bulk of oil exploration and production in Nigeria is carried out within the core geographical states in the Niger Delta, with only minimal oil production taking place in the other states, and this explains the predominance of environmental pollution in this geographical area. Therefore, a large part of the discussions in this thesis relating to environmental pollution and ancillary issues is focused on the Niger Delta as a geographical unit and not in its geopolitical reference.

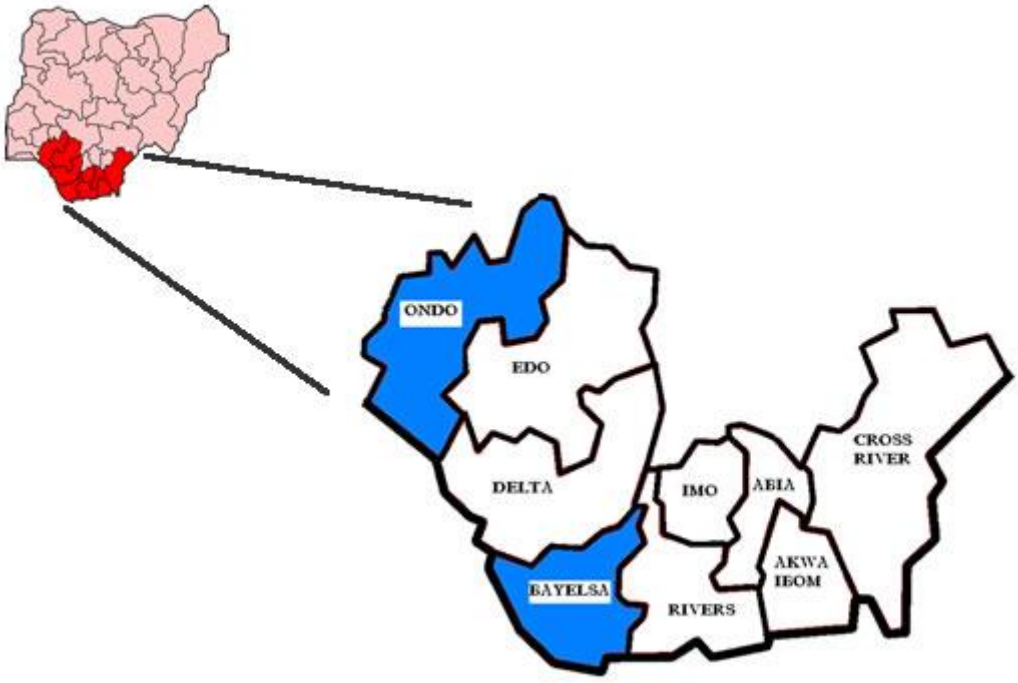
Nevertheless, as this thesis discusses wider constitutional issues relating to environmental rights for oil producing areas in Nigeria generally, it is more suitable to adopt the geopolitical reference to Niger Delta throughout this work in order to truly represent all oil producing host communities. Also, it is in the geopolitical sense that the term is referenced in all government and official sources, legislative enactments and policy documents and in most literature on the subject. This is also reflected in the name of the Niger Delta Development Commission (NDDC) which portfolio covers all oil-producing states including those outside the core geographic region of the Niger Delta. Consequently, it is in the geopolitical context that the term 'Niger Delta' is used in this thesis, except in particular cases where it is necessary to distinguish the two references in line with the context under discussion, e.g. in discussing the issue of ecological imperialism which is peculiar to the people of the Niger Delta area as a geographic unit..

The Niger Delta consists of 9 states[33] in the country with 185 local government areas. The region has a steady growing population of approximately 30 million people as of 2014, accounting for more than 23% of Nigeria's total population and covering 12% of the country's total landmass.[34] There are over 25 ethnic groups in the region including Igbos, Yorubas, Ijaws, Itsekhiri, Efik, Ibibio, Urhobo and Anang.

[33] The states are Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers. There is currently uncertainty whether a 10th state- Anambra- has been included in the delineation by Federal Executive directive following the recent discovery of oil in commercial quantities in the state.

[34] Niger Delta Development Commission (NDDC) Statistics 2014, available at <http://www.nddc.gov.ng/masterplan.html> accessed June 15, 2017. See R. Tuschl & H. Ejibunu,

Figure 1: Geo-Political Map of the Niger Delta Region of Nigeria



Source: NDDC 2014

1.3 Scope of Environmental Degradation in the Niger Delta

The story of the Niger Delta in the past five decades is a rendition of environmental degradation on a monumental scale beyond the regenerative capacity of the fragile ecosystem in the region. The commencement of oil production in the region in 1958 and its attendant environmental effects on the oil-producing areas left an indelible mark on a once blossoming ecosystem which supported a variety of plants and animal bio-diversity and was integral to the livelihoods of the people of the area whose main occupations involved interactions with the environment in terms of fishing and agriculture, both subsistence and commercial in nature.

Indeed, the scale and magnitude of the environmental degradation in the region are so profound that from an eco-centric perspective it can be termed 'ecocide', which is defined as the 'substantial destruction of an integral part of a particular

'Nigeria's Niger Delta Crisis: Root Causes of Peacelessness' (2006) 7(7) *EPU Research Papers,* 17.

ecosystem or the unreasonable degradation of the environment in general'.[35] Large portions of lands have been rendered toxic and completely uninhabitable as a result of pollution and entire communities have been dislocated from their ancestral habitat due to degradation of the environment.[36]

In analysing the environmental situation of the Niger Delta, care must be taken not to adopt, without scrutiny, the generally held misconception that oil and gas exploration activities constitute the sole cause of the destruction of the ecosystem in the region. Quite to the contrary, oil exploration activities, although a major contributor, is just one of the sources of environmental degradation in the region and other major causes include unrestricted and unregulated toxic waste dumps, construction of dams and other unsustainable environmental practices in the region not related to the extractive industry.[37]

Interestingly, one of the foremost incidents – the Koko incident - which drew international attention to the environmental plight of the region was unconnected to oil and gas exploration. The case of a small town of Koko in the Niger Delta region of Nigeria, gained international attention in 1988 when it was exposed that the town was the unfortunate dumping ground for toxic wastes generated and exported by two Italian Multinational Corporations—Ecomar and Jelly Wax - in 1987 in collaboration with a Nigerian accomplice, who leased his residential property, located in Koko, for the storage of 18,000 drums of hazardous wastes disguised as building materials and allied chemicals for about $100 a month.[38] The Koko incident sparked major changes in environmental protection laws in Nigeria as it led to the creation of the Federal Environmental Protection Agency 1988 (FEPA) charged with the administration and enforcement of environmental regulations in Nigeria. In addition, the government enacted the Harmful Waste (Special Criminal Provisions) Act, 1988, to deal specifically with illegal dumping

[35] A. Pettigrew, 'A Constitutional Right of Freedom from Ecocide', (1971) 2 *ENv. L.* 1.

[36] K. Ayuba, 'Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria', supra, n 26.

[37] 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* 15.

[38] A. Otubu, 'Environmental and Human Rights: An Overview of Current Trends in Nigeria', available at <http://www.unilag.edu.ng/opendoc.php?sno=19981&doctype=doc&docname=ENVIRONMENTAL%20AND%20HUMAN%20RIGHTS:%20AN%20OVERVIEW%20OF%20CURRENT%20TRENDS%20IN%20NIGERIA> accessed 22 April 2015; See S. Ogbodo, 'Environmental Protection in Nigeria: Two Decades After the Koko Incident' (2009) 15 *Annual Survey of International & Comparative Journal* 13 for detailed discussion on the Koko incident and its consequences.

of harmful waste, recognising that this was a significant problem in environmental management in the country and specifically in the Niger Delta region.[39]

Notwithstanding the foregoing, environmental pollution arising from oil and gas exploration and production remains a major cause of environmental degradation in the region. Although different figures abound from several studies as to the estimated volume of oil spilt into the environment in the region, the various estimations are mind-boggling and reveal the extent to which the environment in this region has been subjected to wanton and unrestricted pollution. Some Studies have shown that the quantity of oil spilt in the region in the past three decades was at least 9-13 million barrels, which, put in context, is equivalent to 50 Exxon Valdez spills.[40] Official estimates from the Nigerian government confirm the above scenario as the Nigerian National Petroleum Corporation (NNPC) estimates that 2,300 cubic meters of oil has been spilt in 300 separate incidences annually between 1976 and 1996 alone[41] while UNDP 2006 also reported that between the period of 1976 to 2001, 3 million barrels of oil were lost in 6,817 oil spill incidences with over 70% of the spilt oil going un-recovered.[42]

According to another NNPC estimate, over 2,567,966 barrels of crude oil have been spilt in 5733 incidents in the Niger Delta from 1976 to 2000 and about 549,060 barrels were recovered while 1,820,411 barrels were lost to the environment.[43] From the findings of independent experts, an estimated 9-13 million barrels of oil have been spilt in the Niger Delta since drilling began in 1958 and about 7,000 spills have occurred between 1970 and 2000.[44] The Shell Petroleum Development Company (SPDC) (the largest oil and gas producer in

[39] See S. Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident', supra, n 38.

[40] A. Ite, U. Ibok, M. Ite & S. Peters, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1(4) *American Journal of Environmental Protection*, 78-90**;** P. Gibson, 'Niger River Delta: 50 Years of Oil Spills (Cover story),' (2006) 29(46) *Oil Spill Intelligence Report*, 1.

[41] Nigerian National Petroleum Corporation (NNPC) Annual Statistical Bulletin 2015.

[42] See UNDP 2006, United Nations Development Programme (2006a) 'Nigeria', Human Development Report 2006 Human Development Indicators Country Fact Sheets. <http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_NGA.html> accessed January 15, 2016.

[43] Nigerian National Petroleum Corporation (NNPC) Annual Statistical Bulletin 2013.

[44] See P. Gibson, supra, n 40.

the region) alone has since 1989 recorded an average of 221 spills per year in its operational area involving an average of 7,350 barrels annually.[45]

More worrisome than the above troubling statistics, however, is the report by Amnesty International that most MNCs operating in the Niger Delta underestimate the quantity of oil spilt and a large number of oil spills are not frequently reported.[46] Consequently, the total volume of oil spilt into the environment may be 10 times higher than the officially reported figure as the MNCs attempt to minimise their environmental liability by concealing the true extent of oil leaks from their facilities.[47] As a corollary to the above, a sizeable amount of these spills go unreported and no record is therefore taken of the volume of the spill. Consequently, the official estimates merely paint a faint picture of the true scale of the enormity of environmental pollution by the MNCs in the region. The plethora of pending litigations against the various MNCs in several judicial forums within Nigeria[48] and in foreign jurisdictions[49] gradually reveals the full scale of the deleterious consequences of such spills on the ecosystem of the region. In *Bodo v Shell,*[50] 15,000 claimants filed a group action in relation to spills of over 6,000 barrels of oil from pipelines owned by Shell Petroleum which destroyed farmlands and polluted rivers on a massive scale in the entire Bodo and Gokana communities.

[45]SPDC Nigeria Brief, May 2015 <https://www.shell.com.ng/media/2015-media-releases.html> accessed 14 January 2018.

[46] See Amnesty International Report, 'Nigeria: Clean it up: Shell's false claims about oil spill response in the Niger Delta' (2015) Amnesty International Ltd, 12 <https://www.amnesty.org/download/Documents/AFR4427462015ENGLISH.PDF> accessed 09 January 2018.

[47] J. Baird, J, 'Oil's Shame in Africa' (2010) 156(4) *Newsweek*, 27.

[48] See Chief (Dr.) Pere Ajuwa V. The Shell Petroleum Development Company of Nigeria(2011) Supreme Court of Nigeria, SC.290/2007; The Shell Petroleum Development Company of Nigeria v Ambah (1999) 3 NWLR 1 SC & The Shell Petroleum Development Company of Nigeria v Isaiah (2001) 11 NWLR 168 SC.

[49] See Bodo Community & Others V. The Shell Petroleum Development Company (2014) EWHC 1973 TCC; His Royal Highness Okpabi v Royal Dutch Shell Plc [2017] EWHC 89 (TCC) (26 January 2017)

[50] See Bodo Community & Others V. The Shell Petroleum Development Company (supra) n 44.

Figure 2: Major Recorded Oil Spill incidents between 1979 and 2011[51]

S/N	Date	Episode	State	Quantity (Barrels)
1	July, 1979	Forcados Terminal oil spillage	Bende	570,000
2	Jan. 1980	Funiwa Well blow-out	Rivers	400,000
3	May 1980	Oyakama Oil spillage	Rivers	10,000
4	Nov. 1982	Warri-Kaduna pipeline rupture at Abudu-Edo	Edo	18,000
5	August, 1983	Oshika Oil spill	Rivers	10,000
6	Jan. 1998	Idoho oil spill	Akwa-Ibom	40,000
7	Jan. 1998	Jones Creek oil spill	Delta	21,548
8	Oct. 1998	Jesse oil spill	Delta	10,000
9	May, 2000	Etiama oil spill	Bayelsa	11,000
10	Dec, 2003	Agbada oil spill	Rivers	Unknown
11	August, 2004	Ewan oil spill	Ondo	Unknown
12	August, 2005	Ughelli oil spill	Delta	10,000
13	August, 2008	Bodo Community Oil Spill	Rivers	70,000
14	May, 2010	Qua Iboe Oil Spill	Akwa Ibom	665,000
15	Dec, 2011	Bonga Field Oil Spill	Bayelsa	50,000

Source: Department of Petroleum Resources, 2014[52]

In the context of the discussions in this chapter, a distinction must be drawn between environmental pollution and environmental degradation. These two terms, often used interchangeably, are not synonymous in meaning or context. While environmental pollution describes the introduction of foreign harmful elements into the environment or alteration of the environment by foreign

[51] Official statistics are only available covering the period from 1979 up to 2011.
[52]DPR, 2014. '*Nigerian Oil Industry Annual Statistical Bulletin 2012'.* Department of Petroleum Resources (DPR).Retrieved from <www.dpr.gov.ng> accessed 15 May 2015.

substances released unto it (in this context crude oil), it does not equate to a degradation of the environment in all cases. In a significant amount of cases, this crude oil spilt into the environment can be recovered and the affected environment cleaned up and remediated thus averting a degradation of the affected environment.[53] In this context, environmental pollution, where appropriately followed up with the effective recovery of the spill, clean up and remediation, has minimal impact on the ecosystem of the region. It is an accepted fact that some form of spills, especially operational spills, from oil and gas exploration activities are a normal occurrence requiring effective management and clean up to protect the environment from degradation.[54]

Environmental degradation is the reduction in quality of the natural environment which is compromised in some way, reducing biological diversity and the general health of the environment as a result of the environment being left to suffer the deleterious consequences of the pollution either by neglect of the pollution that has occurred in the environment or by inadequate clean up and remediation by the polluter, thereby leaving the environment to absorb these toxic spills with significant damage to ecosystem.[55] Unfortunately, the major environmental problem in the Niger Delta is the fact that environmental pollution and oil spills result in environmental degradation in almost all cases owing to a myriad of factors, such as the very low recovery rate of the spills by the MNCs and the incomplete, ineffective or inappropriate clean up and remediation of the polluted environment.[56] In some cases, attempts by the MNCs to clean up pollution has been carried out by merely overturning the affected soil - in effect concealing the spill from the surface while it seeps down deeper into the groundwater.[57] The failure of regulatory oversight on the part of the government allows such practice to go undetected and without remedy.

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[53] K. Ayuba, "Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria", supra, n 36.

[54] Shell 2016 Annual Report, 18, available at <https://reports.shell.com/annual-report/2016/servicepages/download-centre.php> accessed 11 July, 2017.

[55] Thomas J.Deana, Jeffery McMullen, 'Toward a theory of sustainable entrepreneurship: Reducing environmental degradation through entrepreneurial action' (2007) 22(1) Journal of Business Venturing 50-76.

[56] A. Tolulope, 'Oil Exploration and Environmental Degradation: the Nigerian Experience', (2004) *International Information Archives*, 387-393.

[57] S. Worgu, 'Hydrocarbon Exploitation, Environmental Degradation and Poverty in the Niger Delta Region of Nigeria', available at <http://www.lumes.lu.se/student99/stanleyW/econs-paper.PDF> accessed 24 December, 2015.

It can be observed from the official estimates of oil pollution enumerated earlier that less than 25% of oil spills are successfully recovered by the MNCs in almost all reported cases of spills. For instance, from 1976 to 1996, a total of 4647 oil spill incidences occurred spilling approximately 2,369,470 barrels of oil into the environment of which 1,820,410.5 (77%) were not recovered.[58] In effect, within a period of about 20 years, almost 2 million barrels of oil has been absorbed into the environment of the Niger Delta unrecovered. The extent of damage done to ecosystems as a result of this wanton absorption of oil spills into the environment has led to the warning by the United Nation Environmental Programme (UNEP) in its 2009 report[59] that the ecosystem of the region would lose its ability to sustain itself within the next 30 years if no urgent steps are taken to remediate the environment.

The adverse effects of environmental pollution from oil spills in the region is well documented in several scientific studies conducted in the region which reveal that all aspects of the ecosystem in the region are gradually losing their sustainability and the wildlife, aquatic and agricultural systems in the region are dying at an alarming rate.[60] Because most of these oil spill incidences in the Niger Delta occur on land, inland waters, swamps and the offshore environment, no aspect of the ecosystem is spared. The health implications for people of the region is enormous as tests conducted in various communities in the region have revealed that the groundwater systems which they depend upon for fresh water supply have visible coats of oil spills centimetres thick in some instances.[61] The health implication of environmental pollution is a globally recognised concern. The United Nations Environemnt Assembly of UNEP in a 2017 report estimates that approximately 19 million premature deaths globally are estimated to occur annually as a result environmental pollution from extraction of natural resources particularly oil and gas exploration and production.[62] UNEP 2016 report further

[58] UNDP 2006, supra, n 42.

[59] UNEP Report 2009, Environmental Assessment of Ogoniland available at <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> accessed January 25, 2016.

[60] O. Odeyemi, & O. Ogunseitan, 'Petroleum Industry and its Pollution Potential in Nigeria', (2011) 2 *Oil & Petroleum Pollution,* 223-229.

[61] J. Ebegbulem, 'Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis', (2013) 4(3) *International Journal of Business and Social Science*, 12.

[62] UN Environment Assembly, 'Towards a Pollution-Free Planet: Background Report' UNEP 2017 <https://wedocs.unep.org/bitstream/handle/20.500.11822/21800/UNEA_towardspollution_long%20version_Web.pdf?sequence=1&isAllowed=y> accessed 09 April 2019.

estimates that environmental effects on health represent 23 per cent of deaths globally, the figure increases to 26 per cent for children under 5 years and to 25 per cent for adults between the ages of 50 and 75.[63] The World Helath organisation (WHO) also estimates that over 7 million people die annually from stroke and heart disease, respiratory illness and cancersdirectly linked with environmental pollution.[64]

In the Niger Delta, studies have shown the serious health impact of repeated oil pollution and gas flaring in the region to include lung cancer, heart diseases, intestinal diseases from ingesting oil infested water and marine lifestocks such as fishes and crabs, rising cases of throat infections and increase in maternal mortality rates of pregnant women in the region dying from pollution-induced pregnancy diseases.[65]

Apart from the health and physical effects of environmental degradation in the Niger Delta region, one of the insidious consequences of environmental degradation is that it creates environmental refugees as people are forcefully dislocated from their habitats which have been made uninhabitable by the pollution.[66] Environmental degradation leaves local populations with two basic options:

a. migrate from the degraded environment to a more habitable place and become environmental refugees or environmentally displaced people, or
b. remain in the degraded environment and risk increased morbidity and mortality through exposure to pollution and depleted, degraded, or contaminated food and water sources.[67]

[63] UNEP 2016, 'Healthy Environment, Healthy People' Thematic report Ministerial policy review session Second session of the United Nations Environment Assembly of the United Nations Environment Programme Nairobi, 23–27 May 2016.

[64] WHO, 'Air Pollution, Climate and Health' 2018 Report <https://www.who.int/sustainabledevelopment/AirPollution_Climate_Health_Factsheet.pdf> accessed 02 May 2019.

[65] J Babayemi, M Ogundiran, O Osibanjo, 'Overview of Environmental Hazards and Health Effects of Pollution in Developing Countries: A Case Study of Nigeria' (2016) 26 (1) Environmental Waste Management, 12; S Ukemenam, 'Causes and Consequences of Air Pollution in Nigeria: A Case Study' (2014) 2(2) *South American Journal of Public Health* 4.

[66] Gregory S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Geo. Int'l Envtl. L. Rev*. 151 (1993).

[67] A. Gabriel, 'Women in the Niger Delta: Environmental Issues and Challenges in the Third Millennium', cited in O. Adedokun, 'Assessment of Oyster Mushrooms Found on Polluted Soil for Consumption' (2015) 6(5) *Natural Resources*, 15.

Although the filial nature of the communities in the Niger Delta region results in the seamless absorption of these environmental refugees by other communities with which they share ancestral linkages and thus conceal the exact scope of the environmental refugee problem in the region, this pollution dilemma is an unpleasant situation for most people of the host communities in the region.[68]

Overall, the deleterious consequences of environmental degradation in the region cannot be overstated and this has always formed a focal point for agitation by indigenous activists, civil society and environmental groups and international organisations (such as Friends of the Earth and Climate Justice) demanding better environmental management system in the region and improved environmental welfare for the people of the region.[69]

Figure 3: Samples of Environmental Degradation in the Niger Delta

[68] J. Eaton, 'The Nigerian Tragedy: Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *B.U. INT'L L.J.* 261, 297.

[69] A. Tolulope, 'Oil Exploration and Environmental Degradation: the Nigerian Experience' (2004) *International Information Archives*, 387-393.

Source: Climate Justice/Friends of the Earth 2011

The extent of environmental degradation in the region is so severe that a 2011 report by United Nations Environment Programme (UNEP)[70] found groundwater within the region contaminated with oil by-products including benzene, thought to be a carcinogen, a substance capable of causing cancer in living tissue. The UNEP report indicated that a 'sustainable recovery' of the area could take up to 30 years to achieve and the ecosystem in the region could lose the ability to sustain itself within 50 years if the current trend continues unabated.

1.4 Fundamental Challenges of Environmental Protection in the Niger Delta

The widespread and intractable environmental pollution in the Niger Delta discussed above has its roots in other factors deeply rooted in the legal, geopolitical and socio-economic landscape in Nigeria. Attempting to stop pollution without addressing these root causes is bound to fail, as evidenced by the various futile efforts implemented by the government in this regard since the first major oil spill in 1979.[71]

[70] UNEP 2011, 'Environmental Assessment of Ogoniland' <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed June 21, 2016.

[71] This includes the establishment of OMPADEC (and later the NDDC) to FastTrack socio-economic and infrastructural development in the region; promulgation of the Environmental guidelines and standards for the petroleum industries in Nigeria (EGASPIN) in 1992 and the tightening of regulatory approvals for oil and gas exploration activities in the region. See See Federal Ministry of Environment Abuja, Nigerian Conservation Foundation Lagos, WWF UK and CEESP-IUCN Commission on Environmental, Economic, and Social Policy, May 31, (2006) Niger Delta Resource Damage Assessment and Restoration Project.

These efforts have been treating the symptoms of the disease rather than the illness itself. A diagnosis of the real problems reveal the underlying issues as the weak environmental rights framework in Nigeria; ecological imperialism; lack of access to environmental justice; inapplicability of international environmental law and the 'full-belly' syndrome. These are critically analysed below.

1.4.1 Weak Environmental Rights Framework in Nigeria

The weak environmental legal framework in Nigeria has impacted negatively on the country's environmental management strategies for curbing pollution from oil exploration.

Over the years, the Nigerian government has attempted to implement a wide variety of environmental regulations, practices and policies to protect the environment and is yet to find an effective and sustainable policy for improving environmental protection in the region. The MNCs operating in the region have found it convenient to pollute the environment while paying token fees as fines or clean up and remediation fees as prescribed under various environmental regulations imposed by the government.[72] Various civil liability suits instituted against the MNCs for damages to the environment arising from their oil and gas exploration activities have succeeded in securing significant financial compensations for the host communities but have not reduced the pollution of the environment. In Chief (Dr.) Pere Ajuwa V. The Shell Petroleum Development Company of Nigeria,[73] the Federal High Court awarded 150 billion naira compensation to the Claimants for environmental pollution of their farmlands by Shell Petroleum. In Bodo Community & Others V. The Shell Petroleum Development Company,[74] an English High Court awarded £55 million compensation to the Claimant for damages to their houses and other properties by the Respondent in the course of oil and gas exploration while in The Shell Petroleum Development Company of Nigeria v Isaiah[75] over $3.6 billion was awarded against

[72]A. Tolulope, 'Oil Exploration and Environmental Degradation: the Nigerian Experience' (2004) 2 *Environ Inform Arch* 387–393; E. Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 *Wash & Lee J Energy, Climate, & Env't* 97; V. Aghogin, 'Gas Flaring, Government Policies and Regulations in Nigeria: A Myth Or Reality" (2008) <http://dspace.nwu.ac.za/bitstream/handle/10394/3633/aghogin_victorb(1).pdf?sequence=1> accessed 15 January 2016.

[73] Chief (Dr.) Pere Ajuwa V. The Shell Petroleum Development Company of Nigeria(2011) Supreme Court of Nigeria, SC.290/2007.

[74] Bodo Community & Others V. The Shell Petroleum Development Company (2014) EWHC 1973 TCC.

[75] The Shell Petroleum Development Company of Nigeria v Isaiah (2018) 11 NWLR 168 SC.

Shell Petroleum in 2018 for the widespread damages to coastline communities arising from the bonga oil spill that occurred in the Gulf of Guinea in 2011.

Despite the severity of the environmental degradation highlighted by the UNEP Report 2011, very little has been done by the government to rein in the MNCs and curtail continuous pollution of the environment. Rather, prior to this UNEP report, the government had embarked upon a restructuring of the country's environmental management system with an agency established to handle issues of oil spills and cleanups – the National Oil Spill Detection and Response Agency (NOSDRA)[76]- and a new environmental regulator – the National Environmental Standards And Regulations Enforcement Agency (NESREA)[77] - established to replace the pre-existing regulator[78]with renewed powers and contemporary mechanisms to effectively regulate environmental impacting activities. The focus on establishing institutions and regulators mask the real deficiency in the legal structure/framework these institutions are to operate under in ensuring better environmental protection in the country. More importantly, it ignores the absence of enforceable environmental rights by citizens and relies solely on a regulatory approach to the problem.

The weak environmental legal framework in Nigeria does not entail an absence of an environmental management framework. Constitutional and statutory provisions exist on environmental matters creating a similitude of environmental rights, but which fall short of creating any cognizable framework within which issues of environmental rights can be sustainably managed. Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) obliges the government to "protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria". This constitutional obligation requires the establishment of an environmental protection framework by the government to safeguard the environmental integrity of all parts of the country, including the Niger Delta. However, the non-enforceability of this provision[79] renders the provision unhelpful in the environmental situation in the Niger Delta, as the government has not taken

[76] National Oil Spill Detection and Response Agency (Establishment) Act 2006.
[77] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.
[78] The Federal Environmental Protection Agency (FEPA).
[79] Section 6(6)(c) of the Constitution renders Chapter II of the Constitution, which includes Section 20, non-justiciable, meaning no suit can be instituted before any court of law to compel its performance. See Fawehinmi v. NNPC (2000) 2 NWLR (Pt. 654) 123.

any proactive step to fulfil this constitutional obligation and no administrative step can be taken to compel the government.

To further compound the problem, the 1999 constitution is unclear on where the power of regulating the environment lie between the central government and the federating units. Because 'environment' is not included in the constitutional delineation of legislative powers in the Second Schedule to the Constitution,[80] there is a legal flux regarding which tier of government has the power to regulate it. Technically, this omission should confer such power on the federating states, as the Nigerian Supreme Court has held[81] that any matter not expressly listed in the constitutional legislative lists belongs to the states as a 'residual matter'. Flowing from this decision, areas of domestic environmental issues such as pollution control, waste management, urban planning, land reclamation etc., are, therefore, undoubtedly within the ambit of state power to regulate. States within the Niger Delta region can, therefore, lay claim to the constitutional power to regulate environmental issues within their jurisdictions and can, therefore, institute different frameworks and guidelines on the subject. However, none of the states[82] within the region has enacted any legislation or imposed any environmental guidelines to protect the environment in their jurisdiction despite huge revenue allocations received annually from the proceeds of oil and gas sales assigned to the region under the derivation formula in Section 162 of the Constitution.[83] The states are content to enjoy the financial benefits of oil and gas exploration from their jurisdictions but unwilling to institute any environmental framework to protect the environment in the aftermath of the exploration activities, leaving such task to the central government.

Despite the constitutional uncertainty, the obligation of the central government to regulate the environment in relation to oil and gas exploration can be drawn from a combined reading of Items 39 and 68 of the Exclusive legislative list in the Second

[80] Part I and II of the Second Schedule to the 1999 Constitution enumerates the exclusive legislative list for the central government and concurrent legislative lists shared between the central government and federating states.

[81] Attorney General of Lagos State v Attorney General of the Federation (2003) 15 NWLR PT 833 pg. 113.

[82] Although some of the states (Delta and Imo state, for instance) have enacted the equivalent of the NDDC within their jurisdictions, this addresses infrastructural and socio-economic welfare of the people and not environmental protection as a subject.

[83] Section 162 mandates the allocation of at least 13% of all revenue from oil and gas sale to be given to the area from where such oil and gas is produced. Based on this provision, the Niger Delta states annually receive substantial shares of oil and gas proceeds from the Federal Government.

Schedule to the Constitution which confers on the central government power over 'mines and minerals, including oil fields, oil mining, geological surveys and natural gas' and 'any matter incidental or supplementary to any matter mentioned elsewhere in this list'. In fulfilment of this constitutional obligation, the government has put in place disparate pieces of the statutory environmental regulatory framework to regulate the environmental impact of the MNCs in the course of their activities. The Environmental Impact Assessment Act of 1992 mandates the performance of environmental impact assessment by all companies before carrying out their activities while the National Environmental Standards And Regulations Enforcement Agency (NESREA) (Establishment) Act, 2007 established NESREA as an environmental regulatory agency to supervise the protection of the air quality and environmental integrity of all areas of the country.[84] However, NESREA was inexplicably exempted from handling environmental issues arising from oil and gas exploration.[85] This leaves the regulation of environmental issues arising from oil and gas exploration with the Department of Petroleum Resources (DPR), the Nigerian National Petroleum Corporation (NNPC) and the National Oil Spill Detection and Response Agency (NOSDRA). None of these government agencies has any clear-cut environmental framework for managing pollution by the MNCs but rather rely on incongruent and un-coordinated environmental guidelines such as the Associated Gas Reinjection Act (AGRA) 1979, Effluent Limitation Regulations of 1991, Harmful Wastes (Special Criminal Provisions) Act of 1988 and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002 promulgated by DPR.

EGASPIN is the closest to an environmental regulatory framework Nigeria has, as it is designed to minimise oil pollution and protect the environment. It also sets out the approach to be adopted regarding contamination of the soil and groundwater, with the person responsible for the contamination required to restore the soil and groundwater to appropriate safety levels under threat of fines, potential imprisonment and loss of a license.[86] While EGASPIN represents a reasonable regulatory framework, at least in terms of its target values, its practical impact on

[84] Section 20 and 21 of NESREA Act 2007.
[85] Section 29 of NESREA Act 2007.
[86] C. Cragg, J. Croft and I. Samiama, 'Environmental Regulation and Pollution Control in the global oil industry in relation to reform in Nigeria' (2014) A Report prepared by SDN, <http://www.stakeholderdeMNCracy.org/stockholm/wp-content/uploads/2015/04/SDN_ENVIRONMENTAL-REPORT_PDF.pdf> accessed January 14, 2017.

environmental protection is diminished by the impracticality of some of its provisions, e.g. the requirement that oil spills be cleaned up within 24 hours,[87] at a time when the spill is likely not to have even been discovered coupled with the fact that it takes far longer than 24 hours to clean up a significant spill. The overzealousness in such provision renders it largely unenforceable and practically cosmetic. In addition, the legal status of EGASPIN is unclear as it was released as a guideline by DPR without reference to any specific primary legislation backing it. It, therefore, appears to be more of an administrative guideline than a statutorily backed regulatory framework for MNCs in the oil and gas sector in the country. Moreover, as with most regulations in the oil and gas sector in Nigeria, EGASPIN is largely ignored, both by the MNCs and the government in dealings relating to environmental matters in the Niger Delta region.[88]

The statutory enactments and guidelines discussed above all focus on different aspects of environmental regulatory issues and do not contain any reference to environmental rights in any manner or form. The African Charter on Human and Peoples Right (Ratification and Enforcement) Act 1990 incorporates a reference to the rights of people to a clean and general satisfactory environment[89] but this stand-alone provision is largely overlooked within environmental discourse in the country. Situating this provision within the general environmental protection framework in Nigeria creates difficulties, not least due to the lack of a suitable environmental framework within which this provision can be implemented. While a similar constitutional provision would be capable of institutionalising a framework on its own and superintend over all other statutes, the ACPHR provision is situated within a maze of disparate statutes on environmental protection from which it is difficult to analyse how article 24 of ACHPR can be implemented.[90] This leaves a grossly undeveloped environmental rights framework in Nigeria with its attendant consequence on the continued pollution of the Niger Delta region without any form of judicial restraint on the MNCs.

[87] Paragraph 2.0, EGASPIN.
[88] Alison Shinsato, 'Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 *Nw.J. Int'l Hum. Rts* 186**,** available at **<**http://scholarlycommons.law.northwestern.edu/njihr/vol4/iss1/14> accessed January 28, 2016.
[89] Article 24 of ACHPR.
[90] This is discussed in detail in Chapter 6 analysing the environmental rights framework in Nigeria.

1.4.2 Ecological Imperialism in the Niger Delta

Another fundamental challenge is the socio-political dimension to the environmental conflict flowing from Nigeria's political structure, peculiar revenue sharing formula and assignment of environmental burdens in the oil and gas sector. The people of the Niger Delta communities constitute a minority group in the geopolitical scheme of Nigeria. Notwithstanding its population of over 30 million, its vast oil and gas wealth and constituting almost 12% of the total land mass of the country, the people of the region are still regarded as a minority group in comparison to the three major ethnic groups- Hausa, Igbo and Yoruba – in the North, East and West of the country respectively. The resultant diminished influence that the region exerts in socio-political discussions in the federation and the inequality in the environmental burdens shouldered by the region bears the hallmark of ecological imperialism which is a subset of internal colonialism.

The plight of the people of the region as a minority group has always been recognized and formed the subject of major consideration prior to independence by the British Government during colonial times. The Willinks Commission was set up by the British Government in 1958 to consider the agitation of the minority groups in Nigeria in the lead up to independence and to propose a way of allaying the fears in the proposed single political entity - Nigeria.[91] This was in recognition of the fact that the socio-political set up of the country was unfavourable to minority groups who would be vulnerable to domination by the majority groups in the federation.

In the course of the commission's sittings, one of the major ethnic groups in the Niger Delta -the Ijaws - argued that the peculiar problems of those living in the creeks and the swamps of the Delta were not understood and indeed were deliberately neglected by both the regional and federal governments.[92] Meanwhile, the indigenous traditional rulers from the area, many of whom had concluded "treaties of protection" with the British in the 18th and 19th centuries, argued that the British should revoke the treaties and allow them to revert to their previous position of independence, rather than become a part of the Nigerian state.[93]

[91] R. Ako., 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice', (2009) 53(2) *Journal of African Law* 289-304.
[92] ibid.
[93] ibid.

Nevertheless, despite admitting that these fears of the 'poor, backward and neglected' indigenous people of the Niger Delta were well founded, the Commission rejected the plea by the minority groups that they should be allowed to be independent of the Nigerian nation. This was partly because such request was outside its term of reference, and it was, therefore, not qualified to advise Her Majesty on the structure of the Nigerian federation, and partly because, in its opinion, it is seldom possible to draw a boundary that does not create a fresh minority.[94] This refusal to severe the minority groups of the Niger Delta from the rest of the Nigerian federation prior to independence laid the foundation for the current situation of the people of the region.

It is imperative to note that the agitation of the Niger Delta people at this point was not in any way connected to resource control, as oil exploration and production in the region had not begun on any commercial scale, rather it was a genuine fear of domination and imperialism by the rest of the federation. The rejection of this agitation proved to be an ominous sign of things to follow.

The concepts of internal colonialism and ecological imperialism are interrelated and have been developed in the literature relating to environmental justice and distortion of environmental burdens.[95] Internal colonialism is the converse situation of the typical colonialism experienced in several continents of the world prior to the 21st Century whereby foreign powers dominate, annexe and subjugate other people and administer their affairs. In internal colonialism, the dominant and subordinate groups coexist and are indigenous within the same society. In other words, internal colonialism refers to the domination and subjugation of a group of people by other groups within the same political state structure.

Internal colonialism is closely linked to the concept of 'core' and periphery' groups whereby the core group refers to the dominant ethnic group within the political structure while the periphery group refers to the politically weaker ethnic group which offers the path of least or no resistance to domination by the core group.[96]

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[94] Report of the Commission Appointed to Enquire into Fears of Minorities and the Means of Allaying Them (CO957) 4 July 1958, Colonial Office.

[95] See F. Adeola, 'Cross-National Environmental Justice and Human Rights Issues: A Review of Evidence in the Developing World", (2000) 43 *American Behavioural Scientist* 686; J. Nickel & E. Viola, 'Integrating environmentalism and human rights' (1994) 16 *Environmental Ethics*, 265-273; A. Sachs, 'Upholding human rights and environmental justice' in L. Starke (Ed), *State of the World* (New York, 1996) pp 131-151.

[96] F. Adeola, ibid..

While internal colonialism manifests in different spheres of a nation's political structure, where it manifests in an environmental perspective relating to ecosystem degradation and environmental pollution, it is aptly referred to as ecological imperialism.

Ecological imperialism can, therefore, be described as the state of wanton natural resources exploitation and inequitable distributions of environmental hazards (or externalization of costs of production) by powerful socio-political groups within a country. It manifests in the inequitable placing of environmental burdens on a weak section of the population for the benefit of the strong section of the population within the same state. Adeola[97] theorizes that ecological colonialism explains the relationship between the Nigerian government/MNCs/dominant core ethnic groups and the peripheral indigenous Niger Delta people whereby political power by the core ethnic groups has been used to appropriate and transfer resources from the periphery to develop the core areas, while leaving the whole environmental burdens on the periphery and creating economic impoverishment and increased inequality among the periphery ethnic groups.

Adeola's theory finds support in the outcome of the National Dialogue convened by the Nigerian government in 2005 to discuss important issues facing the federation and allow for the respective regions to air their historical grievances.[98] The representatives of the Niger Delta region jointly put forward a request to increase the derivation formula[99] from 13% to 50%, sought more resource control over the oil and gas products gotten from the region and better environmental pollution management within the region. Unsurprisingly, the representatives of the other regions jointly denounced the request of the Niger Delta, claiming it was unrealistic and impractical, particularly because it will be disadvantageous to the other regions' interests. In effect, the core regions utilised their political and numerical advantage to suppress the environmental grievances of the Niger Delta periphery region and

[97] ibid.

[98] K. Ajayi, 'From the Demand for Sovereign National Conference to National Dialogue: The Dilemma of the Nigerian State' (2006) 4(2) *Stud. Tribes Tribals*, 123-130.

[99] Derivation formula is a constitutional formula under Section 162 of the Nigerian Constitution whereby oil producing states are guaranteed a fixed percentage (not less than 13%) of all revenues derived from oil and gas production within their state boundaries. For further discussions on the derivation formula, see Z. Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 *Journal of Law, Policy and Globalization* 2224-3259.

ensured the Niger Delta continued to solely bear environmental burdens of oil and gas exploration which benefitted the other regions even more than the Niger Delta region.

The environmental situation in the Niger Delta is a classic case of ecological imperialism which hinges on four main pillars-

i. a central hegemony which controls and exploits the resources of oil-rich Niger Delta minority for the benefit of the dominant ethnic groups in other regions of the country;
ii. the union between these core ethnic groups to perpetuate the resource exploitation in their favour;
iii. degradation of the ecosystem and destruction of the basic modes of subsistence of the minority groups; and
iv. inadequate response to or neglect of the ecological degradation of the minority group's environment with focus only on the resources generated therefrom.

The first pillar of ecological imperialism is displayed by the federal government (central hegemony), which is controlled by elites from the core ethnic groups, enacting statutes and policies aimed at exploiting the resources of the Niger Delta region for the development of other regions by depriving the people of the Niger Delta region of their property rights and other rights necessary to benefit from their resources. Statutes like the Petroleum Act of 1969 and the Land Use Act of 1978 stripped the people of the Niger Delta of their entitlement to the petroleum resources and land respectively and conferred same on the government. Other relevant legislation in this respect includes the Oil in Navigable Waters Act Decree No. 34 (1968) (Nigeria), the Oil Pipelines Act Decree No. 31 (1956) (Nigeria), the Associated Gas Re-Injection Act (1979), and the Petroleum (Drilling and Production) Regulations (1969).

The second pillar was the result of the British amalgamation of the Northern and Southern Protectorates to form a unified Nigeria in 1914, while the third pillar stems from the destruction of the farmlands and marine foods in the rivers which are the basic modes of subsistence of people of the Niger Delta.

The fourth pillar is illustrated by the government's lack of regulation of the MNCs' oil pollution activities, inadequate response to the environmental degradation of the region and neglect of its deleterious consequences provided oil and gas exploration continue unhindered. An example is the enactment of the Associated Gas Reinjection Act of 1985 which, while banning flaring of gas by the MNCs, permits flaring of gas if no other economic way of oil extraction is available. In essence, while the adverse environmental and health effects of gas flaring are acknowledged, flaring of gas will be permitted where to do so will enhance oil extraction and to do otherwise will impede exploitation of more oil from the fields. Thus, the health and environmental well-being of the people of the region are viable trade-offs for resource exploitation.[100]

In *Gbemre v. Shell,*[101] a Federal High Court in Nigeria declared the Associated Gas Reinjection Act of 1985 unconstitutional as it legalizes acts which constitute direct threat to the life and well-being of the people of the region in breach of the constitutional right to life of the people of the region guaranteed under Section 33 of the Constitution. However, in keeping with the general tenor of ecological imperialism, the government ignored the court's ruling and took no step to restrain continuous flaring by the MNCs in accordance with the decision.

Adekoya[102]recognised the effect of the power differentials between the geo-political regions with respect to the Niger Delta situation, arguing that-

> "Because oil wealth is shared to all federating units, any arrangement to commit more resources to develop the Niger Delta will be at the expense of other regions, which are more influential in the national polity and will clearly meet strong resistance."

In essence, the socio-political structure of Nigeria is disadvantageous to the clamour for resource control and environmental decontamination by the Niger Delta. It was in a bid to prevent the current lopsided political structure and its effect on the Niger Delta that the Willinks Commission of 1958 in its report recommended that the region should be conferred the status of a special development region to

[100] K. Higgins, 'Regional inequality and the Niger Delta' (2009) Policy Brief No. 5, Overseas Development Institute <www.odi.org.uk/resources/download/2507.pdf> accessed January 16, 2017.
[101] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005).
[102] A. Adekoya, supra, n 10.

be developed directly by the Federal Government. The Niger Delta Development Board was established in 1961 to implement this recommendation but overall, the region has lapsed into neglect and this reflects in the level of environmental degradation currently witnessed in the region.

In cognizance of the fact that they are too weak politically, economically and socially to resist the federal government, dominant ethnic groups and MNCs, the indigenous communities of the Niger Delta resorted to a violent struggle to stake their claim for better treatment by the other regions. Ako[103] argues that 'the reasons for the pervasive violence in the Niger Delta include the decision of hitherto voiceless, subordinate and underprivileged minority groups to take up the gauntlet and challenge state structures and institutions controlled by majority groups who have been grossly unjust over time in the distribution of national resources'.

However, aside from the use of violence, there have been other concrete political moves made by people of the region to assert their socio-political rights in the federation. One of the most remarkable of these means is the preparation of a bill of rights by the various groups in the region containing declarations of their inalienable rights and making demands for better resource control and safer environmental practices in the region.[104] These bills of rights include the Ogoni Bill of Rights, the Kaiama Declaration, Akaka Declaration of the Egi People, the Oron Bill of Rights and the Warri Accord.[105] In 1990, the Movement for the Survival of the Ogoni People (MOSOP) presented its manifesto, the Ogoni Bill of Rights, to the government and the people of Nigeria. The document demanded fair compensation for oil pollution, decontamination of the polluted environments in the region, a more equitable distribution of oil revenues, and more political autonomy for the Ogoni people.[106] The Kaiama Declaration on its part was couched in the following words-[107]

[103] R. Ako, supra, n 91.

[104] J. Omotola, 'From the OMPADEC to the NDDC: An assessment of state responses to environmental insecurity in the Niger Delta, Nigeria', (2007) 54(1) *Africa Today*, 73–89.

[105] See J. Adalikwu-Obisike, and E. Obisike, 'Communities at Risk: An Aftermath of Global Capitalism', (2014) 10(25) *European Scientific Journal*, 17.

[106] Ogoni Bill of Rights 1990 <http://www.waado.org/nigerDelta/RightsDeclaration/Ogoni.html> accessed 6 January 2017). The Ogoni's people's case was presented before the UNCHR in Geneva in 1992 and in 1993 Ogoni became a member of the Unrepresented Nations and Peoples' Organization based in the Hague.

[107] Kaiama Declaration (11 December 1988) <http://ijawcenter.com/kaiama_declaration.html> accessed 9 February 2017.

> "All land and natural resources (including mineral resources) within the Ijaw territory belong to the Ijaw communities and are the basis of our survival... We cease to recognise all undemocratic decrees that rob our communities of the right to ownership and control of our lives and resources, which were enacted without our participation and consent…it is our wish to remain part of the Nigerian family, but not in conditions that would undermine our survival and demean our humanity"

The wording of the Kaiama Declaration, which bear similarity with the American Declaration of Independence of 1776, is evidence of the realisation of the skewed socio-political distribution of power within the Nigerian federation and the push by the Niger Delta people to even the balance by asserting their inalienable fundamental right to freedom from oppression by the dominant ethnic groups.[108]

While these bills of rights have failed to actualize their objectives, and have not gained any form of recognition within the legal or political structure of the country, it highlights the importance of the social and political distribution of power in the attainment of environmental rights and justice. It is, therefore, evident that ecological degradation in the Niger Delta can be attributed to a combination of ecological imperialism and the lopsided socio-political structure of the country especially in areas of resource exploitation, material allocation, and distribution of power among various subnational groups. Ako,[109] for instance, asserts that the absence of political and economic power by the Niger Delta inhabitants who are most impacted by the adverse effects of the Land Use Act 1978[110] is a fundamental reason why the Act has not been abrogated. The incorporation of the Land Use Act in the Constitution makes it hard to repeal or amend the Act as it requires the same procedure for amendment of the Constitution itself. The Niger Delta region does not have sufficient representatives at the central political structure of the country to push this through, and the other core regions benefitting from the status quo will easily block any such move.

Tackling ecological imperialism in the region requires a fundamental legal provision that can be utilised by the people of the region to assert their environmental rights

[108] A. Akinwale, 'Re-engineering the NDDC'S Master Plan: An Analytical Approach' (2009) 11(2) *Journal of Sustainable Development in Africa*, 18.
[109] R. Ako, Supra, n 91.
[110] The Land Use Act confers all lands within a state on the government and allows for easy expropriation of land by the government for public purposes. See Section 1 of the Act.

and prevent the continued subjugation of the environmental integrity of the region to the economic interests of the other regions. A constitutional environmental right is capable of fulfilling this objective as it superintends over all legislation and can be utilised to prevent any legislative activity or other governmental actions that undermine the ecological integrity of the region. The promulgation of the Ogoni Bill of Rights and Kaima Declarations were the result of fruitless search by people of the Niger Delta region for a fundamental legal platform to assert their environmental right to freedom from pollution and continued degradation. While these declarations lacked any political force and failed to achieve their objectives, a constitutional environmental right will have a potential impact on the socio-political structure of the country in terms of its ability to address the ecological imperialism problem facing the region.

1.4.3 Lack of Access to Environmental Justice

One of the outgrowths of ecological imperialism in the Niger Delta is the struggle for environmental justice by people of the region, seeking ways to protect themselves from environmental inequity and the skewed distribution of environmental burdens arising from oil and gas exploration in the region.[111]

Environmental injustice implies any undue imposition of environmental burdens on communities that are not parties to the activities generating such burdens. As stated by Adeola,[112]environmental injustice arises from parties reaping the economic benefits of natural resources exploitation without bearing the burden because their communities are insulated by distance from direct sources of toxins. Bullard defines environmental justice as 'the principle that all people and communities are entitled to equal protection of environmental and public health laws and regulations.'[113]The basic tenet of the equality principle in the concept of environmental justice is that all parties should be entitled to identical or comparable environmental burdens or costs and rewards or benefits.[114] In this context, environmental justice requires that the

[111] F. Adeola, 'Cross-National Environmental Justice and Human Rights Issues: A Review of Evidence in the Developing World', supra, n 95, 688.
[112] ibid.
[113] R Bullard, 'Symposium: the legacy of American apartheid and environmental racism' (1996) 9 *St. John's J. Leg. Comment* 445–74, 495.
[114] C Ikporukpo, 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria' (2010) 8 *Space and Polity* 12.

cost of pollution should be fairly distributed and no single group is required to bear an unduly large part of the environmental burdens without corresponding benefits, especially where the group bearing less environmental burden is enjoying most of the environmental benefits.[115]

Environmental injustice, therefore, results where the costs of pollution are unfairly distributed among individuals or areas.[116] Bullard, on his part, associates environmental injustice with environmental racism which he defined as 'racial discrimination in environmental policymaking, the enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of the life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from leadership of the ecology movements'.[117]Thus, according to him, environmental racism as a subset of environmental injustice refers to any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color'.[118]

While environmental racism often includes the segregation of groups based on race, in some communities, such segregation is not based on race or the colour of the groups or communities unfairly prejudiced with environmental burdens. Within communities of the same race or colour, environmental racism can take the form of tribal or ethnic segregation of communities and the imposition of unde environmental burdens on such groups or communities as a result.[119]

The situation in the Niger Delta can be aptly described in this light seeing the disproportionate environmental burdens borne by the minority ethnic groups in the region without commensurate benefits from the resource exploitation giving rise to such burdens. Although the root cause of such environmental injustice in the Niger Delta is traceable to ecological imperialism, environmental injustice can also take the form of ecological racism which involves ethnic discrimination in environmental

[115] D Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP, 2007) 2.

[116]S Cable, *Environmental Problems: Grassroots Solution. The Politics of Grassroots Environmental Conflict* (New York: St Martin's, 1995)

[117] R Bullard RD, *Environmental Racism: Voices from the Grassroots* (Boston: South End, 1993) 495.

[118] ibid, 497.

[119] F Steady, *Environmental Justice in the New Millenium: Global Perspectives on race, Ethnicity, and Human Rights* (Palmgrave Macmillan, 2009) 2.

policy formulation, implementation, and enforcement of environmental laws at local, national, and global levels. This form of environmental injustice is promoted through the systematic exclusion of minority groups in vital environmental policies and decisions.[120] In this case, the various ethnic groups in the Niger Delta are regarded as minority ethnic groups within the country and are systematically excluded from environmental decision making, policy formulation and implementation. The major factors responsible for this heightened environmental injustice in the region are the minority status, lower socio-economic status, powerlessness and systematic marginalisation of the people of the region.

Different definitions of environmental justice highlight the different perspectives from which it is viewed. The United States Environmental Protection Agency (EPA) defines environmental justice as 'the fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, culture, education or income, with respect to the development, implementation and enforcement of environmental laws, regulations and policies'.[121] Fair treatment in this context means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from environmental-impacting activities, particularly where such activities are carried out in their immediate environment.

Realistically, it is an accepted fact that people of the immediate environment where environment-impacting activities are carried out will no doubt feel the impact of such activities more than people in communities geographically distanced from the location. There is no way of physically sharing this environmental burden equally between the host communities and the non-host communities - short of unreasonably taking the environmental pollutants and dumping them on sites in the non-host communities - for the purpose of ensuring such communities also feel the environmental impacts. Consequently, the argument against disproportionate sharing of the environmental burdens as a way of ensuring environmental justice does not focus on the physical environmental burdens, such as resulting pollution and degradation of the environment, but on the mostly procedural involvement of

[120] T. Agbola and M. Alabi, 'Political Economy of Petroleum Resources Development, Environmental Injustice and Selective Victimization: A Case Study of the Niger Delta Region of Nigeria' in J. Agyeman, R. Bullard and B. Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 269 at 277.

[121] United States Environmental Protection Agency (EPA), 'Environmental Justice 2020 Action Agenda: EPA's Environmental Justice Strategy', <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy> accessed 10 July, 2017.

the major bearers of the burdens in decision makings relating to their environment. The EPA, therefore, calls for 'meaningful participation' of such host communities in decision making relating to their environment.

Four pillars of meaningful participation in this context were identified by the EPA to include the provision of 'appropriate opportunity' to affected communities to participate in the environmental decision-making; the contribution of these communities should be capable of influencing the outcome/decision rather than being merely cosmetic and irrelevant; the concerns of the affected communities should be given considerable weight in the decision-making process; and the decision makers seek out and facilitate the involvement of those potentially affected.[122]

Adopting these four pillars of meaningful participation will ensure that even though the host communities will continue to generally bear the physical environmental burdens of the activities, they will be involved in making decisions relating to environmental issues in their communities. As a result, they will have a voice in determining the most effective ways of tackling these environmental issues and obtaining adequate compensation for such impacts. This perspective was adopted by the United Kingdom's National Environmental Justice Advisory Council (NEJAC) which defined environmental justice along two dimensions: deprived communities, which may be more vulnerable to the pressures of poor environmental conditions, should not bear a disproportionate burden of negative environmental impacts; to ensure this, all communities should have access to information and to the means to participate in decisions which affect the quality of their local environment.[123] The second point which deals with access to information and participation in environmental decisions is viewed as the way of ensuring the first point – the disproportionate burden of environmental impacts- is averted. In essence, the vesting of inalienable procedural environmental rights on people of host communities is central to the achievement of environmental justice.[124]

[122] ibid.

[123] National Environmental Justice Advisory Council (NEJAC), 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs' (2004) NEJAC Publication 5 available at <https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council> accessed April 15, 2017.

[124] A. Obiora, 'Symbolic Episodes in the Quest for Environmental Justice' (1991) 21(2) *Human Rights Quarterly* 466 at 477.

Three theories of the causes of environmental justice have been developed in the literature: neighbourhood transition theory; eco-racism theory; and political and economic power model.[125] The neighbourhood transition theory focuses on the relative economic power of the host and non- host communities of environmental-impacting activities. This theory posits that economic power determines the extent of environmental justice enjoyed by host communities.[126] An economically strong host-community will have the power to demand better environmental treatment and cannot be ignored because of its economic contribution to the country. An economically weak host community will, however, be voiceless and likely to be ignored.

Although this theory addresses an important factor that accounts for the marginalization of host communities, it is a rather simplistic explanation which does not take account of the myriad of other issues at play, such as the socio-political structure of the country, the historical perspectives of marginalization and the suppression of the voice of the people of the region. Also, the definition of economic strength is relative and may be misconstrued to refer to the actual economic wealth in such a region and not its economic contribution to the country. For instance, in terms of economic contribution, the Niger Delta can be classified as the strongest economic base in the country as it produces the oil and gas that accounts for 90% of the country's economic revenues. However, extreme poverty is prevalent in this region and its actual economic strength is not commensurate with its economic contributions.

The eco-racism theory focuses on the deliberate targeting of minority groups for environmental injustices on the basis of race or ethnicity.[127] This theory ascribes environmental injustice to racial or ethnic discrimination and the intention to subject such group to environmental degradation on the basis of their race or ethnic origin.

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[125] S. Gbadegesin, 'Multinational Corporations, Developed Nations and Environmental Racism: Toxic waste, Exploration and Eco-catastrophe' in L. Westra and B. Lawson (eds), '*Faces of Environmental Racism: Confronting Issues of Global Justice*' 2nd ed, (Rowman and Littlefield Publishers, 2001) 187 at 195; T. Agbola and M. Alabi, 'Political Economy of Petroleum Resources Development, Environmental Injustice and Selective Victimization: A case study of the Niger Delta Region of Nigeria' in J. Agyeman, R. Bullard and B. Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 269.

[126] G. Mbamalu, C. Mbamalu and D. Durett 'Environmental Justice Issues in Developing Countries and in the Niger Delta', paper delivered at the International Conference on Infrastructure Development and the Environment, Abuja, Nigeria, 10–15 September 2006, 5.

[127] R. Ako, Supra, n 91, 293.

Although racial or ethnic factors may account for the exclusion of certain groups from environmental decision making, it is more likely that such exclusion or subjecting to environmental injustice was primarily because such group offered the path of least resistance owing to their lack of economic or political power or weak regulatory system to prevent such occurrence. For instance, the dumping of toxic waste in Koko community in the Niger Delta [128] by an Italian firm may be ascribed to eco-racism by a western power, but it is more likely because the area was seen as a site where there will be the least resistance to the toxic waste dump owing to the weak environmental regulation in the country.

The political and economic theory posits that the lack of political and economic power is responsible for environmental justice in a region.[129] This theory bears the hallmark of ecological imperialism in that it highlights the ecological subjugation of an area on account of its relative weakness in economic and political power. While ecological imperialism focuses on the environmental degradation resulting from such subjugation, the environmental injustice in this situation arises from the exclusion of the subjugated group from participation in environmental decision making in relation to issues affecting them. This theory is most suited to the plight of the Niger Delta region as the people of the region are systematically excluded from participating in or influencing decisions regarding their environment on account of their lack of political influence and socio-economic strength relative to the other regions in the country.

In the Niger Delta context, therefore, environmental justice requires an equitable access to environmental amenities/resources necessary to protect the ecological integrity in the region. It also entails the subjecting of corporate and government bureaucratic environmental decision making to democratic scrutiny and accountability with meaningful participation and access to information by the people of the region. The absence of this procedural platform for people of the region results in their exclusion from environmental decision making with respect to oil production activities that affect their environment. This makes it easier for the MNCs, with government approval or acquiescence, to commence and perpetuate oil production activities that prejudicially affect the environment with little or no inhibitions and is

[128] See page 57 for the discussions on the incident.
[129] P. Francis, 'For the use and common benefit of all Nigerians: Consequences of the 1978 Land Nationalization' (1984) 54(3) *Journal of the International African Institute* 5 at 7.

one of the underlying reasons why environmental pollution in the region has proven difficult to halt or control.

1.4.4 Domestic Inapplicability of International Environmental Treaties / Principles

International environmental law recognises the protection of the environment as an essential part of protecting the well-being of humans. The inexorable link between human rights and the environment has long been recognized by Principle 1 of the Stockholm Declaration on the Human Environment of 1972[130] and was given further impetus by the Brundtland Report of 1987.[131] Over the years, this principle has been developed at the international level to a point where there is a growing acceptance that the right to a safe environment is an inalienable right of all people. The Draft Declaration on Human Rights and the Environment[132]is the first international instrument that comprehensively addressed the linkage between human rights and the environment. It proclaimed the accepted principle that environmental and human rights principles embody the right of everyone to a secure, healthy and ecologically sound environment. The Draft Declaration established the environmental dimension of established human rights, such as the rights to life, health and culture and included procedural environmental rights, such as the right to participation, necessary for the realisation of the substantive rights.

Although the draft declaration lacks any international legal force on account of its non-ratification by member states, the principles proclaimed in it influences environmental governance around the world and highlight the generally accepted environmental rights of people. Part 1(2) of the Draft, for instance, proclaims that 'all persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible'. Part 1(4) incorporates inter-generational environmental rights by proclaiming that 'all persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet

[130] Stockholm Declaration on the Human Environment of 1972..
[131] Brundtland Report of 1987.
[132] The Draft Declaration on Human Rights and The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

equitably their needs'. This provision seeks to protect the environmental rights of future generations to a clean environment and is an advance on the original concept of environmental rights which focused on the rights of present people to a clean and safe environment.

In relation to the Niger Delta situation, Part 1(5) directly addresses the issue of environmental degradation by proclaiming that 'all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.' This provision encapsulates the core elements of an environmental right to a clean environment which the people of the Niger Delta require to protect their environment. Unfortunately, as stated earlier, the Draft Declaration does not have the status of a treaty and lacks any binding effect, and it merely operates as guiding principles to nations willing to incorporate its provisions in their domestic legislation or Constitutions. In the same vein, the Draft Universal Declaration of the Rights of Mother Earth 2010 which seeks to provide eco-centric protection for the environment and mother earth lacks any legal force as an international instrument in view of its non-ratification by states.

In respect of ecosystem protection, the UN Convention on Biological Diversity[133] imposes an obligation on parties to take appropriate measures to protect the ecosystem and biological diversity within their territory. This convention is binding under the Vienna Convention on the Law of Treaties 1969 and Nigeria, being a signatory to this convention which she has ratified, is therefore obliged to ensure that activities within its jurisdiction do not threaten the biological diversity and ecosystem of the Niger Delta region. Nevertheless, having regard to the problem of enforcing international law obligations on account of the sovereignty of states and lack of a binding judicial mechanism that can be utilised against state actors, it is difficult to hold the Nigerian government accountable for non-compliance with this obligation. Even where it is possible to hold the government accountable at the international level, enforcing this obligation at the domestic level faces a fundamental constitutional hurdle arising from the non-domestication of the Bio-Diversity Convention. Section 12 of the Nigerian Constitution renders all international treaties and conventions inapplicable within the country unless, and

[133] UN Convention on Biological Diversity, 1992 available at <http://www.cbd.int/doc/legal/cbd-en.pdf > accessed 15 March 2019.

until, it has been domesticated by the country's parliament – i.e. adopted as a local legislation by the country's parliament.[134]

Apart from international legal instruments, there are several international environmental principles which are generally relied upon in addressing various environmental issues around the globe. The polluter pays principle, precautionary principle, no-harm principle and the prevention principle[135] are relevant international law principles that to various extents are applicable within the context of the environmental degradation in the Niger Delta. The polluter pays principle, for instance, is applicable to hold MNCs responsible for paying compensation and costs of clean-up of the environment for pollutions arising from their activities, while the prevention principle obliges the government and MNCs to take proactive steps to prevent activities that may result in harm to the environment. However, the judiciary in Nigeria is unwilling to apply these international principles within the domestic jurisdiction as they do not form part of the *corpus juris*[136] of the country's legal system.[137]

Presently, only the polluter pays principle is applied by the Nigerian courts to hold MNCs responsible for environmental pollution in the Niger Delta region and this is only on the basis of the domestication, by the Nigerian parliament, of the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969[138] by the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 2006.

Kotze[139] argues that international environmental law is weak to address pressing environmental issues around the globe owing largely to two key problems: lack of compliance with and enforcement of environmental laws, norms and standards and; the non-existence, and/or lack of adherence to and enforceability of universal, fundamental environmental rights. Added to these key problems are unique legal hurdles peculiar to different jurisdictions. In Nigeria, there is the added constitutional

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[134] See See Fawehinmi v. Abacha (1998) 2 NWLR (Pt. 575) 45.

[135] See P. Birnie & A. Boyle *International Law and the Environment* (Oxford Press 2009) 3; T. Kamminga, 'Principles of International Environmental Law' (1995) 1 *Environmental Policy in an International Context* 111-131.

[136] Literary translated as 'body of law'.

[137] See Attorney General of Abia State & 35 others v Attorney General of the Federation (2002) 3 NWLR (Pt 764)1.

[138] Adopted 29 November 1969; Entry into force: 19 June 1975; Replaced by 1992 Protocol which was adopted 27 November 1992 and entered into force on 30 May 1996.

[139] L. Kotze, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law* 199-233.

challenge of the domestication of international environmental instruments and principles before they can be applicable and enforceable in the country. This creates difficulty in relying on international environmental law to protect the environmental rights of the people of the Niger Delta.

The absence of an environmental rights framework in Nigeria creates a gaping hole which established international environmental conventions and principles could have partly filled in enforcing the right to a clean environment in the Niger Delta. The inability to rely on these international conventions and principles, therefore, further isolates the region from any form of effective legal framework to rely upon in asserting their environmental rights and this allows for the continuous environmental pollution of the region by the MNCs with impunity and acquiescence from the government.

1.4.5 The 'Full-belly' Impediment to Environmental Protection

> *"Without a belly full of food and other vital needs, human rights and fundamental freedoms become meaningless"* - Rhoda Howard [140]

Howard's 'full-belly' thesis reflects the scepticism with which impoverished people in deprived communities view theoretical discussions about human rights and other legal entitlements which do not immediately translate to immediate sustenance. This scepticism often results in general disinterest in abstract legal entitlements in favour of short-term immediate sustenance. In most cases, this translates to such impoverished people selling their birthrights for a 'plate of porridge' by trading off their legal entitlements (civil, political, economic and environmental rights) for short-term physical handouts like food and money, often given by their oppressors (e.g. environmental polluters). It is difficult to convince a hungry man that abstract legal rights are more important than collecting money and foodstuffs that will feed his family for the coming days.

The 'full-belly' thesis was first propounded by Howard in 1983 wherein she argued that 'economic rights to basic needs are just as important as civil and political human rights and that the latter rights cannot be achieved until basic economic needs are

[140] Rhoda Howard, 'The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub Saharan Africa' (1983) 5(4) *Human Rights Quarterly* 467-490.

secured'.[141] She focused her thesis on Sub-Saharan Africa, taking examples from East and West African countries like Kenya, Tanzania and Nigeria, and argued that the push for improved civil and political rights in sub-Saharan Africa has largely failed due to the impoverished nature of these societies which makes the people devalue civil and political rights in favour of measures that will satisfy their basic economic needs. Often times, this leads to a trade-off of political freedoms and other civil rights for economic benefits and is exploited by the political elites to deprive the people of their civil and political rights under the guise of fending for their economic interests.

Howard cited prominent African leaders like Julius Nyerere of Tanzania and Colonel Acheampong of Ghana who espoused this view to support the political subjugation of their people. Nyerere is quoted as saying "…Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity"[142] while Colonel Acheampong, a Ghanaian military dictator that was overthrown and executed, argued that "One man, one vote, is meaningless unless accompanied by the principle of "one man, one bread".[143]

Reflecting on this theory, Olawuyi[144] posits that the thesis is a 'theoretical anchor for the position that social, economic and cultural rights are important and vital and must be respected and protected with equal vigour'. He further contended that-

> "The full-belly thesis takes a functionalist approach to debates on how attempts to respect, promote and fulfil human rights could fail if they do not reflect justice perspectives or take into consideration basic social, economic and *environmental* needs"[145]

Olawuyi's contribution to the full-belly thesis adds a new dimension to the functionalist perspective of the thesis by considering environmental needs (interpreted as rights in this context) as included in the bouquet of social and economic rights that propel impoverished people to disregard civil and political rights. In essence, he argues that the environmental rights of impoverished people are just as important as civil and political rights and that failure to protect the former

[141] ibid.
[142] Julius K. Nyerere, 'Stability and Change in Africa' (an Address to the University of Toronto, 1969), printed in Africa Contemporary Record 2 (1969-70), C30-31.
[143] Amnesty International, 'Background Paper on Ghana' (London: Mimeo, 1974) 9.
[144] Damilola S. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press, 2016) 172-175.
[145] ibid, 174.

will lead to failure to advance the latter. Even though environmental right was not included in Howard's initial elucidation of the thesis, Gwam[146] argues that environmental rights must necessarily be considered amongst the socio-economic rights that propel people to disregard civil and political rights until the former rights are satisfied and that protection of human rights must extend beyond civil and political rights but necessarily incorporate environmental and other economic rights.

Theoretically, Olawuyi and Gwam's positions are faultless because it has long been internationally recognised, since the Stockholm Declaration 1972[147] and Brundtland Report 1987,[148] that environmental rights i.e. having a clean environment, is central to the enjoyment of the other basic civil and political human rights like the right to dignity, right to private life etc. Nevertheless, their argument misjudges the central focus of the 'full-belly' thesis but adopt an idealistic and theoretical approach to a consideration of the choices that impoverished people face in negotiating rights.

Howard's 'full-belly' thesis focuses on the bifurcation of human rights based on the practical needs of impoverished people and not based on an idealistic view of what these people need or should recognise as important. In essence, by 'social and economic rights', she intended the right to adequate nutrition, financial provisions and a minimum standard of health care for the sick and elderly in their society. Environmental rights and a clean environment are, no doubt, idealistically important (and are, in fact, central to achieving adequate nutrition and health care), but to people severely impoverished for decades, lacking the ability to provide food and basic nutrition, lacking financial provisions to obtain adequate health care for their sick and elderly, they do not consider a clean environment as practically and immediately necessary when compared to the immediate provision of food, money and medicines. They, therefore, willingly trade off a clean environment (and other associated environmental rights such as participatory rights, access to information in environmental matters, access to justice, rights of Mother Nature etc.) alongside other civil and political rights, for immediate food and basic provisions. Certainly, these environmental rights alongside other civil and political rights will enable them to achieve their quest for food and basic provisions in the medium and long-term,

[146] C. Gwam, *Toxic Wastes and Human Rights* (UK: Author House, 2010), 105.

[147] Declaration of the United Nations Conference on the Human Environment, Stockholm, June 1972.

[148] Report of the World Commission on Environment and Development: Our Common Future, Brundtland, 1987.

but it remains abstract rights to them in the immediate short term so long as it does not translate to physical gains they can immediately rely on to satisfy their hunger.

In essence, therefore, the 'full-belly' thesis in its pure and practical form considers environmental rights as included in the bouquet of other civil and political rights that impoverished people willingly sacrifice for physical sustenance needs. Viewed from this perspective, protecting environmental rights require that the socio-economic needs (in this context, food, money, medicines and other immediate sustenance needs) of the impoverished people be satisfied, otherwise attempts to enshrine environmental rights will only result in failure.

1.4.5.1 'Full-Belly' Syndrome in the Niger Delta

The Niger Delta region is a model case of the application of the 'full-belly' thesis as an impediment to environmental rights. Despite having amongst the most polluted environments in the world, the impoverished people of the region are focused majorly on the immediate short-term gains of food, nutrition and financial rewards and are willing to trade the sanctity of their environments to achieve this. The inhabitants of the Niger Delta are amongst the poorest people in the whole of Nigeria, as over 70% of the total population in the region live significantly below the poverty line,[149] according to Amnesty International studies in the region.[150] Considering that Nigeria is currently ranked third in the world in terms of poverty with over 60% of its population living below the poverty line,[151]the plight of the impoverished people of the region can be better understood, as they rank as the poorest amongst the poor in Nigeria.

The oil companies whose activities cause the environmental pollution and degradation in the region capitalise on this high poverty rate to advance financial compensations and other basic sustenance provisions to the people as a way of

[149] The International Poverty Line, according to the World Bank, is $1.90 per day. See the 2017 global poverty update from the World Bank available at <http://blogs.worldbank.org/developmenttalk/2017-global-poverty-update-world-bank> accessed 09 March 2018.

[150] Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta – 2016 Report' <https://www.amnestyusa.org/reports/nigeria-petroleum-pollution-and-poverty-in-the-niger-delta-report/> accessed 13 December 2016.

[151] See World Bank, 'Nigeria: Poverty & Equity Data Portal 2017' <http://povertydata.worldbank.org/poverty/country/NGA> accessed 15 February 2018.

diverting attention from the polluted environment.[152] As a result, the impoverished people of the region consider environmental rights as 'abstract luxuries' that do not satisfy their immediate basic needs.[153]

To further worsen matters, the inhabitants take the 'full-belly' syndrome one step further by deliberately polluting their own environment in search of the fulfilment of their 'full-belly'. Two major ways this is done are –

a) By criminally sabotaging and vandalising pipelines in the region to cause oil spills and consequent pollution which, they hope, will ultimately lead to payment of financial compensations to the inhabitants of the affected communities by the oil companies concerned; and
b) By operating illegal oil refineries which create widespread pollution.[154]

Pipeline Sabotaging and Vandalism

Official statistics from the Nigerian National Petroleum Corporation (NNPC)[155] reveal that over 90% of oil pollution from ruptured pipelines are caused by pipeline vandalism by inhabitants in the Niger Delta region.[156]

Although vandalism and sabotage are often viewed as a means of civil protest by the people against the activities of the oil companies (this is the narrative advanced by most community leaders and stakeholders in the region), the paradox inherent in this approach renders this excuse absurd and untenable. To claim that communities and their inhabitants sabotage and vandalise pipeline and create widespread oil pollution as a way of protesting against widespread pollution by the oil companies is incomprehensible and illogical. Economic motives are unarguably behind such

[152] John Ottuh, 'Poverty and the Oppression of the Poor in Niger Delta: A Theological Approach' (2013) 3(11) *International Journal of Humanities and Social Science* 256.

[153] A. Adedeji and R. Ako 'Hindrances to effective legal response to the problem of environmental degradation in the Niger Delta' (2005) 5(1) UNIZIK Law Journal 415 at 415–39.

[154] Okolo, Philips & Etekpe, Ambily, 'Oil Pipeline Vandalization and the Socio-Economic Effects in Nigeria's Niger Delta Region' (2010) SSRN Electronic Journal. 10.2139/ssrn.1723169.

[155] NNPC 2018, 'NNPC Records Massive Reduction in Pipeline Vandalism' <http://nnpcgroup.com/PublicRelations/NNPCinthenews/tabid/92/articleType/ArticleView/articleId/725/NNPC-Records-Massive-Reduction-in-Pipeline-Vandalism.aspx> accessed 25 March 2018. According to the report, a total of 16,083 pipeline breaks were recorded within the last 10 years and while 398 pipeline breaks representing 2.4 percent were due to ruptures, the activities of unpatriotic vandals accounted for 15, 685 breaks which translated to about 97.5 percent of the total number of cases.

[156] There are no independent statistics on the extent of oil spillage caused by pipeline vandalism, as the widespread militancy and volatility of the region makes it difficult for independent bodies to conduct assessments of the extent of sabotage by the inhabitants. The official figure from the NNPC, which is often disputed, is, therefore, the only source of statistics on the extent of pipeline vandalism in the region.

vandalism, as they seek ways to claim compensation from the oil companies for the resultant pollution.

Ibaba and Olumati[157] argue that economic motive is central in their actions, stating that 'while serving a social purpose in terms of protesting against deprivation, the economic gains from vandalization is paramount in the minds of the actors'. Okoko concurs with this view, arguing that '… those who support (pipeline vandalization) feel justified in line with the national syndrome of 'national cake-sharing',[158] besides the prevailing feeling of discontent occasioned by neglect and deprivation.'[159]

Certainly, the impoverished people of the region are unconcerned about the environmental impact of their activities so long as they achieve a 'full-belly' from their actions, thereby trading environmental sanctity for economic gains.

Illegal Crude Oil Factories/Oil Bunkering

Another application of the 'full-belly' syndrome by the inhabitants involves engaging in illegal crude oil processing activities utilising make-shift facilities to process crude oil illegally scooped from vandalised pipelines or other oil exploration facilities installed by the oil companies. The haphazard manner of processing the crude oil and disjointed manner of these illegal 'factories' results in widespread pollution of the immediate environment from such activities as shown in Figures 4 and 5 below.

This practice, also a form of oil bunkering, is a major source of environmental pollution in the region and the oil companies ascribe a significant part of the degraded environment in this region to this self-inflicted pollution by the inhabitants.[160]

[157] S. Ibaba and J. Olumati, 'Sabotage Induced Oil Spillage and Human Rights Violation in Nigeria's Niger Delta' (2004) *Journal of Sustainable Development in Africa* 6.

[158] A uniquely Nigerian euphemism for sharing in the spoils of usually ill-gotten wealth or financial benefits from public funds.

[159] Okolo, Philips & Etekpe, Ambily, 'Oil Pipeline Vandalization and the Socio-Economic Effects in Nigeria's Niger Delta Region' supra, (n 137).

[160] See Shell Annual Report 2017, <https://reports.shell.com/annual-report/2017/servicepages/disclaimer.php> at page 8; accessed 16 January 2018.

Figure 4: Site of an illegal crude oil 'factory'

Figure 5: Devastated ecosystem from an illegal crude refining 'factory'

Source: Wall Street Journal[161]

[161] Benoit Faucon, 'Nigerian Oil Thefts Prompt Shell to Act', *Wall Street Journal,* 12 April 2013 <https://www.wsj.com/articles/SB10001424127887324010704578416593346146824> accessed 06 May 2017.

From the discussions above, it is apparent that the Niger Delta inhabitants play a role in the environmental pollution that they complain about, and while oil spills from the MNCs account for most of the major pollution incidents, the contribution of the inhabitants in pursuit of their 'full-belly' is not insignificant.

1.5 Conclusions

The environmental challenges in the Niger Delta is a product of deep-seated fundamental issues having their roots in the lopsided geopolitical structure in the country, the extreme poverty in the region and the poor environmental legal framework. Focusing on the role of the government and MNCs alone in addressing the environmental problem in the region will be problematic as it ignores the various stakeholders involved in the perpetuation of the problem. Also, unreservedly casting the Niger Delta inhabitants as victims of pollution will be oblivious of their contribution to a significant part of the pollution. While the extreme poverty in the region and the natural human quest for sustenance may explain their 'full-belly' pursuit, this does not excuse such actions which undermine the environment and certainly imposes some responsibility on them to also work towards protecting their environment.

While avoiding the apportionment of blame for pollution between the government, MNCs and individuals, this chapter identifies the key challenges responsible for the intractability of the environmental degradation in the Niger Delta. This sets the scene for discussing the role of constitutional environmental rights in addressing these challenges in Chapters 6 and 7. Chapter 7 will specifically analyse how constitutionalising such rights will potentially impact each of the challenges identified in this chapter.

Before delving into that, however, the subsequent four chapters will establish the theoretical framework on which constitutionalization of environmental rights is based. The chapters analyse the theoretical basis of environmental rights, its importance in environmental protection and the benefits of these rights attaining constitutional status and protection. It is from this theoretical foundation of environmental rights and constitutionalism that the potential solution to the key challenges of the Niger Delta will be extracted and analysed in chapters 6 and 7.

CHAPTER TWO

CONCEPTUALISING ENVIRONMENTAL RIGHTS

2.1 Introduction

> *"… there will be resistance to giving the thing "rights" until it can be seen and valued for itself: yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights" – which is almost inevitably going to sound inconceivable to a large group of people".* – Christopher D. Stone[1]

As Stone asserts above, ascribing 'rights' to inanimate objects and other non-human sentient beings in the environment generally encounter resistance on account of their non-human character which makes it difficult for their intrinsic worth to be appreciated and protected by humans. This paradox of the rights' debate is exemplified by the focus of national and international legal instruments on the instrumental value of the natural habitat to humans and yet resistant to the idea of this natural habitat having intrinsic value worthy of protection by legal instruments. The underlying environmental ethic behind this paradox is the belief that protection of the environment for human benefits equates to the protection of the environment as an entity. In actual fact, the instrumental value of the environment to humans is often at the expense of nature's interests and the competition of interests between humans and nature which leads to human exploitation of nature's resources is viewed as acceptable so long as 'the rules of the game are fair'.[2]

This chapter examines the theoretical bases of environmental rights and analyses the jurisprudential concept of rights and its application in environmental contexts. The chapter discusses the nature of environmental rights, the convergence of

[1] C. Stone, 'Should Trees Have Standing? – Towards Legal rights for natural objects' (1972) 450 S Cal L Rev 456.

[2] S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (1994) 6(3) *The Georgetown Int'l Envtl. Law Review* 545-742.

nature's rights with the environmental rights of humans and the development of environmental rights from its anthropocentric origins in the early 19th century to its present stage encompassing the rights of future generations and nature. The various theoretic models of nature's rights such as holism, biocentrism, physiocentrism and ecocentrism are discussed with a view to determining which theory best represents the incorporation of nature's rights in the environmental rights debates and provides an effective option for protecting nature's rights and its intrinsic environmental interests.

This chapter argues that the concept of environmental rights has to be looked at beyond the human-centric perspective (anthropocentrism) which focuses on the instrumental value of the environment to humans. Nature's right in an ecocentric perspective is an important aspect of environmental concern that should be incorporated in relevant legal instruments in a merger of human and nature's environmental interests in a *coalesced anthropocentric approach*. This approach preserves the central position of humans as the alpha environmental entity with pre-eminent environmental interests but also ingrains nature's intrinsic value and interests as a vital component of ensuring holistic environmental protection.

This chapter identifies ecocentrism as the preferred approach for protecting nature's interests as it ensures that harmony of human and nature's interests is paramount in *coalesced anthropocentrism* unlike biocentrism and physiocentrism which encourage competition of interests between humans and nature within a 'marketplace of interests'.[3] Where conflicts inevitably arise between these rights, as they often do between different rights' holders, the resolution will be predicated on the pre-eminence of human environmental interests. For instance, the right of some species (such as mosquitoes or other viruses) to exist within an ecosystem may be understandably restricted on account of their threat to human health or existence within that ecosystem; the right to non-disturbance or non-exploitation of woodlands or other forested ecosystems can be restricted to enable humans to acquire necessary infrastructure for development, provided such resources are exploited reasonably and in a sustainable manner.

[3] ibid.

2.2 Jurisprudential Concept of Rights

The idea of 'rights' in the contemporary era is so proliferated that virtually every issue of legal, social or political concern is framed in a 'rights' context without due regard for the import of such classification. Merrills[4] noted that it is easy to mix up issues of preferences and morality with the more significant issue of rights in most contexts, due to the often casual use of these terms, yet most of such discourse could be validly made in other contexts outside of 'rights'. He also posited that this proliferation of rights and right holders have unwanted consequences as it not only multiplies the occasions when right holders come into conflict with each other but also generates tension between rights as a basis for actions and other moral considerations.[5] Essentially, rights are more than just another way of expressing preferences, desires, entitlements or moral claims, but act as a 'trump card' which raises a claim of entitlement from morally neutral grounds to a position of legal enforceability or protection.[6]

The idea of 'rights' has been variously described as 'an astonishing moral phenomenon',[7] 'a remarkable development in human consciousness',[8] and 'the most dynamic legal concept of the twentieth and twenty-first centuries'.[9] It represents the reasonable minimum demands upon society that are rooted in moral values and thus places compelling principles on the side of the person asserting the right.[10] Ignatieff[11] argues that "rights are not just instruments of the law; they are expressions of our moral identity as a people". In this sense, rights can be viewed as a reflection of the most important moral values of a people which they represent and the translation of such values to rights is to ensure the protection and enforcement of the values. Boyd[12] refers to rights as providing recognition for society's most cherished values, such as dignity, equality, and respect and the language of rights have considerable symbolic force and can be

[4] J. Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).
[5] ibid, 4.
[6] ibid.
[7] J. Mahoney, *The Challenge of Human Rights: Origin, development, and Significance* (OUP 2007) 3.
[8] ibid.
[9] J. McHugh, *Comparative Constitutional Traditions* (New York Press 2002) 12.
[10] H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 2nd ed., 1996) 5.
[11] M. Ignatieff, 'The Rights Revolution' (2000) CBC Massey Lectures, Toronto, 15.
[12] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 8.

a source of political power. Similar to Ignatieff's position, Boyd's view reflects the importance attached to societal values which are then translated into rights for their protection and enforcement.

A 'right' generally refers to a moral or legal entitlement to have or do something. Entitlement in this context portrays a justiciable claim over something that can be staked on a moral or legal foundation. This distinguishes it from the more casual use of 'right' to separate good from bad deeds (or right from wrong choices) in the English language, although it may sometimes coincide or correlate to having a legal or moral right to take such step or make such decision. Thus, saying a person did *'the right thing in the circumstance'* will generally refer to making the correct or acceptable response to an act or situation as against staking a claim or entitlement, although such response may be based on legal or moral rights.

Nevertheless, the societal expectation of right from wrong deeds may sometimes be opposite of 'rights' in the jurisprudential sense. As Bowie[13] pointed out, a person may have the right to do something that is the wrong thing for him to do, e.g. gambling. While the act of gambling is generally considered the wrong thing by society and is thus not a part of societal values, it may be permissible within the legal system in the society and thus a right to gambling may exist in such society. Conversely, something may be the right thing for a person to do, yet they may have no right to do it, in the sense that it would not be wrong for someone to interfere with the person engaging in such act e.g. a father taking custody of a child from an alcoholic or drug abusive mother who has been awarded custody by the court despite her alcohol or drug abuse. As a result, contrary to Ignatieff's consideration of rights as a reflection of the moral values of a society, rights do not always reflect societal values on various subjects but can run counter to such values.

In the jurisprudence of rights, they are derived from foundations much deeper than societal values, expectations or individual desires. Also, distinctions between moral and legal entitlements are expressed in the jurisprudential concept of rights. Three perspectives of rights explain the concept as applicable within a legal

[13]N. Bowie, 'Taking Rights Seriously by Ronald Dworkin: Book Review' (1977) 26(4) *Catholic University Law Review* 12.

framework. Campbell[14] espouses the 'societal rules' perspective which views rights as deriving from societal rules on a given subject expressed in concrete terms and conferred on individuals for the protection of their self-interests. Thus, Campbell argues, 'rights are only of importance to those seeking to protect their self-interest from the predation of others'.[15] However, he concedes that rights cannot be equated with societal rules, even though derived from them, as

> "…although there cannot be rights without societal rules, there may be societal rules that are unconnected with rights. Not all behavioural directives or authoritative requirements for human action can be interpreted plausibly as involving the rights of others'.

Campbell's 'societal rules' perspective is predicated on legal positivism as it focuses on those rights which are already expressed in positivist forms in legal instruments or other ascertainable forms. It does not elucidate on the origin of those societal rules translated into rights neither does it seek to explain the criteria for determining which societal rules are translated into rights and which are omitted. This is particularly important when dealing with the creation of new rights for previously excluded classes, as it becomes necessary to determine whether the interests/preferences sought to be protected and made a societal rule is worthy of translation into rights. More so, Dworkin's liberal theory of law proposes the idea that "individuals can have rights against the state that are prior to the rights created by explicit legislation"[16]and as a result, there are rights which predate the formation of societal rules on a subject.

Campbell further propounded three theories of rights- the contract theory, power theory and interest theory.[17] The contract theory limits rights to entitlements arising from contracts or promises which the recipient or either contractual party can enforce against the other. The contract theory is too restrictive as it does not apply to liberty rights and other rights derivable from non-contractual situations. The power theory defines right in the context of obligations imposed on another person to act in a certain way. Thus, A only has a right to a thing if there is a rule

[14] T. Campbell, '*Prescriptive Legal Positivism: Law, Rights and Democracy*' (UCL Press, 2004) 153.
[15] ibid, 156.
[16] R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 12.
[17] T. Campbell, '*Prescriptive Legal Positivism: Law, Rights and Democracy*', supra, n 14.

that makes A's choice or will superintend over the actions or will of others in certain specified ways and circumstances. This presupposes that a right derives from power to control, determine or limit how others act in relation to a subject. The power theory is positivist in nature as it focuses on rights proclaimed in ascertainable form without elucidating on the origin of such rights. It is also too narrow and does not give insight on how the rights of persons unable to claim or waive such rights are derived e.g. infants or mentally challenged persons. The interest theory is grounded on the existence of an obligation to satisfy or protect the interests of another person, the rights holder. This theory postulates that a 'right' is the possession of an interest which is protected or furthered by a co-relating obligation on others to act or restrain from acting in a manner capable of having a bearing on the interests of the right holder. The interest theory is broad enough to cover all manner of rights and provides a plausible explanation for the origin of rights which is founded on the 'interests' of the rights' holder.

Campbell's interest theory is a simplistic elucidation of the jurisprudential concept of rights but it fails to address the important question of the rendition of interest-protection into rights. Not all interests are protected in the form of rights, and some interests are unacceptable, objectionable and too insignificant to be accorded legal recognition as 'rights'. For instance, a father may have a justifiable interest in the custody of his child but he may not have the right to such custody for various reasons. Thus, it is not enough to say that rights are interests for which an obligation is conferred on others to protect or refrain from interfering with. There must something which distinguishes protected interests from other moral interests or desires.

Dworkin's[18] thesis on rights supplies this missing link with his view of rights as 'trumps' identifying the distinctive feature of rights as against other moral preferences or interests. According to Dworkin-

> "Individual rights are political trumps held by the individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."

[18]ibid.

Analysed alongside Campbell's interest theory, it can be said that, as posited by Dworkin, rights are designated interests which trump over other preferences and desires and are accorded special protection by the legal system.[19] Rights, therefore, predate positivist enactment or encapsulation of these rights as they exist because their protection trumps other collective goals and individual preferences. Although Hart's[20] positivist legal theory is the prevailing theory on legal rights and rules, Dworkin's analysis of rights identifies the underlying basis of rights as found in positivist legal instruments.[21] Regan expounds on this 'trump' philosophy with the 'special weight' perspective by arguing that what makes rights trump over other preferences is that they are given 'special weight' or 'more accurately, perhaps, rights are special protections accorded certain preferences in the form of extra weighting'.[22] Reagan's perspective introduces a positivist angle to the 'trump' philosophy as he contends that this extra weighting is supplied by positivist legal instruments. It is this 'special weight' that is the definitive feature which distinguishes rights in the legal sense from moral preferences and desires.

It is not possible to derive the jurisprudential meaning of rights from a single perspective or theory. Rather, a blend of the various elements in each theory and perspective can lead to a reliable conceptualization of rights in a legal context. From the analysis above, it is reasonable to define rights as the legal entitlement to the protection of an interest which trumps other preferences or desires on account of the special weight accorded to them. This conceptualisation does not, however, address all the issues surrounding rights such as the individual versus collective rights debate and the resolution of the inevitable conflicts of rights. Suffice to state that the conferment of rights is not limited to individuals. A collective group can be conferred with rights for the protection of their interests which are regarded as important and therefore given special weight to trump other interests. Although Dworkin focused on individualism of rights, arguing that "we must recognise as competing rights only the rights of other members of the society as individuals",[23] undue focus on individual rights and a disregard for collective

[19] A. Sangai, 'Trump Rights or Right Trumps? Understanding Dworkin's 'rights as trumps' thesis' (2013), available at <https://searchingtherightanswer.wordpress.com/2013/03/04/trump-rights-or-rights-trump-understanding-dworkins-rights-as-trumps-thesis/> accessed 23 January, 2017.
[20] H. Hart, *The Concept of Law* (Clarendon Law Series, 2nd Ed., 1997).
[21] J. Costa-Neto, 'Rights as Trumps and Balancing: Reconciling the Irreconcilable? (2015) 11(1) *Revista Direito GV*, 159-187.
[22] D. Regan, 'Glosses on Dworkin: Rights, Principles, and Policies' (1978) 76 *Mich. L. Rev* 1213.
[23] R. Dworkin, n 16, 23.

goals “may prove costly not only for the community but also for the right holder”.[24] Balancing individual rights with collective interests is, therefore, an integral part of the application of rights in legal contexts.

While it is easy to determine the conferment of rights on humans, embedding such rights on nature or other abstract entities presents a unique challenge, as the lack of appreciation of their intrinsic value reduces the acceptability of their ability to bear rights. Nevertheless, the task of embedding such rights is made easier when it is viewed from the interest theory of rights focusing on utilising rights to protect the interests of the right-bearer. It is from this perspective that several non-human entities have been conferred rights including ships, corporations and trusts.[25] In essence, once it is accepted that nature and the components of the ecosystems have interests to be protected i.e. the interest to not be over-exploited, polluted or degraded, then embedding rights in nature becomes an acceptable proposition.

In this sense, abstract entities such as an ecosystem or Mother Nature which comprise of different inter-connected and inter-related individual elements formed into a whole are capable of enjoying rights provided they have interests requiring protection in the form of being accorded special weight over other preferences. The aggregation of the rights of the individual elements can be ascribed to the collective whole or the collective whole can be ascribed rights on its own as an entity. Even though this right may not be as strong as rights of the individual elements, it is nevertheless a right capable of trumping other preferences, e.g. the right of an ecosystem to exist undisturbed can trump the preference for unmitigated exploitation of forest resources by humans. As Reagan opines,[26] ‘a right which guarantees the preference it protects only a little extra weight is a weak right, but a right nonetheless.’ In the example of the ecosystem above, the conferment of a right to exist on Mother Nature by the Draft Universal Declaration of the Rights of Mother Earth (UDRME) 2010[27] may be a weak right, considering the unratified status of the instrument, but it is a right nonetheless (in the legal sense of rights). Any consideration of the extent of protection it affords an

[24] R. West, ‘Rights, Harms, and Duties: A Response to Justice for Hedgehogs’ (2010) 90 *BU L. Rev*. 819.
[25] See C. Stone, ‘Should Trees Have Standing? Supra n 1.
[26] D. Regan, ‘Glosses on Dworkin: Rights, Principles, and Policies’, supra, n 22, 25.
[27] See Article 2 of the Universal Declaration of the Rights of Mother Earth 2010.

ecosystem will only arise in the context of resolving conflicting rights between the ecosystem and humans.

Campbell[28] posits that where conflicts between rights inevitably arise, the right which should prevail is that which belongs to a higher order, serves a graver purpose, or is based on a stronger claim or title. These criteria are disjunctive and therefore have to be considered separately in resolving conflicts between rights. In an environmental context, resolving conflicts between the rights of humans and that of nature may depend on the extent to which these rights are entrenched in legal instruments. In most countries of the world, the right to economic development may be based on a stronger claim or title than Mother Nature's right to exist under the UDRME (as it is a non-binding instrument) and the former will, therefore, trump the latter. In Bolivia, however, where the Law of the Rights of Mother Earth 2010[29] has been enacted as a domestic legislation, Mother Nature enjoys a stronger right than under the UDRME and its right may not be easily trumped by the right to economic development. Other parameters may, therefore, be employed to reconcile the conflicting rights which will entail a balancing of the need for economic development and the preservation of the ecosystem.

In this context, the discourse on 'rights' necessitates a consideration of the ambit of environmental rights particularly as it relates to the categories of rights' holders and resolution of conflicting rights by the different rights' holders in an environment. As rights are considered special interests that are given special weight to trump other preferences, a reference to 'environmental rights' raises the question of what interests are protected, for whose benefit and the respective weights accorded to the rights of the different rights' holders within the environment.

[28] T. Campbell, '*Prescriptive Legal Positivism: Law, Rights and Democracy*', supra, n 14.
[29] Law of the Rights of Mother Earth, of Bolivia 2010, Article 7.

2.3 Ambit of Environmental Rights – Human Vs Nature's Rights

2.3.1 Rights' Holders in the Environment

Over the past three decades, a rights revolution is blossoming owing, in large part, to the unprecedented expansion of the concept of rights and its extension to previously 'right-less groups' such as natural objects, indigenous communities and minority groups.[30] In the midst of this rights revolution, one crucial issue which stands out is the problem of determining rights' holders with consistency, as indeterminacy and lack of consistency are two critical bottlenecks in the ascription of rights to specific groups or entities. As Anderson[31] stated,

> 'to secure effective implementation, rights must be determinate in scope and consistent in formulation…the problem of defining such rights to satisfy diverse ethical criteria is complicated by the need to make them operate in a legal context.'

A right is only determinate if it can be ascribed to a determinate being or object known as a 'right bearer' or 'right holder'. Anderson's view, therefore, reflects the problem of determining the recipients of rights in legal contexts. According to Merrills:

> Rights cannot exist as free-floating abstractions, but need rights' holders, for the function of rights, as we have seen, is to mark out protected areas for the benefit of someone or something, and so the concept of a right without a rights-holder is a contradiction in terms.[32]

Merrill equates the valid existence of a right with its attachment to a determinate right holder for whose interest a protected area is carved out by law and this view finds support in academic discussions of rights which are always in the context of rights' holders. There can be no right without a right holder and although the

[30] D. Boyd, supra, n 12.
[31] M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).
[32] J.G. Merrills, 'Environmental Protection and Human Rights : Conceptual Aspects', n 4, 31.

nature and classification of rights' holders in different contexts are not fixed, a recipient of a right must always exist in every context for which the term is used in legal discussions. Stone[33] highlighted the three core requirements to be considered a holder of rights - the thing can institute legal actions at its behest; injury to it must be taken into account in granting it relief – reliefs must be available for injuries to it, and the relief must run to the benefit of it. Utilizing these criteria for the determination of rights' holders yield a plethora of animate and inanimate objects that are capable of being rights' holders and the categories of rights' holders are therefore not exhaustive as the formulation of new rights inevitably leads to the creation of new rights' holders.

In an environmental context, while the idea of 'rights' is often equated with 'human rights', humans are not the only recognized rights' holders in the environment. The rights' revolution has expanded the application of rights to various entities, groups and non-human, non-sentient beings such as the environment itself (Mother Nature) and even future generations. Although humans are traditionally the subjects of environmental rights, Stone[34] pointed out that 'the world is peopled with inanimate right holders: trusts, corporations, Joint Ventures, Partnerships, municipalities, nation-states and even ships and thus equating rights with human rights is a restrictive interpretation of the dynamic concept of rights'. Stone's exposition is a reflection of the growing recognition of the entitlement of non-human elements in the environment to legal protection through conferment of rights on such elements. The natural habitat and the complex organisms in an ecosystem, Stone argues, are capable of being rights' holder and the conferment of determinate rights on such non-sentient elements in the environment such as lakes, trees, rocks and forests will not be a strange proposition given the conferment of rights on corporations, ships, partnerships and other non-human elements. Stone's proposition, first propounded in 1972, has continued to gain traction and increasing recognition of the idea of conferring rights on nature no longer sounds as strange as it did back in 1972 with the debates raising different theoretical explanations of the basis of such rights.

[33] Christopher Stone, 'Should Trees Have Standing? – Towards Legal rights for natural objects', supra, n 1.
[34] ibid, 3.

Discussing the ambit of environmental rights, therefore, begins with identifying the scope of such rights and rights' holders, whether they are limited to humans in the environment or extend to non-human elements in the environment. Emmenegger and Tschentscher[35] argue for the rights of non-human elements in an environment to be referred to as 'Nature's rights' as distinct from 'environmental rights', stating that while 'environment' always needs a related subject which is environed; in this case humans, 'Nature', in contrast, is defined without such reference to humankind. Accordingly, it is a more suitable term for instruments with a non-anthropocentric approach. This argument seeks to identify nature and its elements as a distinctive and unique rights' holder without associating it with humans owing to the tendency to substitute humans as rights' holders for all other possible rights' holders in the natural habitat. Nevertheless, this argument overlooks the presence of humans as a part of the natural habitat and the extensive scope of the term 'environment' which covers all natural habitat and nature with all its elements. Humans are not the only subject environed within an environment, as all parts of the natural habitat – rocks, trees, lakes and all living and non-living organisms in nature- are also environed within an environment. Therefore, the definition of 'environment' does not exclusively relate to humans but applies to all elements within a natural habitat.

According to Kiss and Shelton, the term 'environment' can signify any point on a continuum between the entire biosphere and the immediate physical surroundings of a person or group.[36] 'Environment' can also refer to the complex of physical and biological factors acting on an organism or ecosystem.[37] Kotze[38] also points out that the statutory definition of 'environment' under international and domestic law – e.g. the National Environmental Management Act 2009 of South Africa[39]- shows that the environment transcends mere ecological interests of humans and also includes the socio-economic and cultural dimensions of the inter-relationship between people and the natural environment. Natural habitat is a part of the

[35]S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', supra, n 2.

[36] Kiss & Shelton, *International Environmental Law* (Transnational Publishers 2004) 23.

[37] Klipsch Ronald, 'Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process' (1974) 49(2) Indiana Law Journal 210 <http://www.repository.law.indiana.edu/ilj/vol49/iss2/1> (accessed 02 December 2015).

[38]Louitz Kotze, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 Journal of Court Innovation 157.

[39] National Environmental Management Act 2009 of South Africa, Section 24.

environment within which both humans and non-human elements dwell and the term ‘environment’ is wide enough to cover ‘nature’s rights’ without the need to separate the two, except for specific contexts to differentiate humans and non-human rights’ holders.

Consequently, the bifurcation between environmental rights and nature’s rights is unnecessary, as the latter can be subsumed under the former and they both refer to rights’ holders within an environment. However, as a descriptive term, it is necessary to use separate terms in referring to humans as rights’ holders and other non-human rights’ holders in the natural habitat. In this regard, the current trend under international and domestic laws is to use the term ‘Mother Earth’ to refer to non-human rights’ holders such as ecosystems, natural communities, species and all other natural entities.[40]

Mother Earth can be considered as a rights’ holder within the environment going by the interests’ theory of rights because the various components of the natural habitat have interests which are worthy of protection and, as propounded by Dworkin, these interests can be used as trumps over other preferences or desires. As a rights’ holder, Mother Earth can be viewed as a single entity representing the interests of the various components of the natural habitat, all of which interests are protected within a unified right of ‘Mother Earth’. Alternatively, the various components of Mother Earth such as ecosystems, species and other natural entities can be viewed as individual rights’ holders with separate and distinct rights which may within a ‘marketplace of rights’ which Mother Earth represents. In this situation, the amalgamation of the individual rights of these separate rights’ holders can be represented as the rights of nature as distinct from the rights of humans within the environment.

The first approach promotes harmony within the components of Mother Earth by unifying the interests of the various components within the natural habitat under a single rights’ holder and discouraging competition within these components. Current international and domestic instruments adopt the first approach, for instance, the Universal Declaration of the Rights of Mother Earth 2010 defines ‘Mother Earth’ as ‘the living dynamic system formed by the indivisible community

[40] See the Universal Declaration on the Rights of Mother Earth 2010 and the Law of the Rights of Mother Earth 2010 of Bolivia.

of all life systems and living creatures, interrelated, interdependent and complementary, which share a common destiny'. It confers a unified right on Mother Earth such as the right to life, the right to water, the right to clean air and the right to restoration[41] and by so doing it creates a unified rights' holder for the protection of non-human interests in the environment.

As a subset of human rights' holders in the environment, future generations constitute the third category of rights' holder in the environment for which legal recognition can be provided. Like nature's rights, this category of rights holder poses difficulties in assessing their entitlement to rights on account of their futuristic and group-collective nature. As Hiskes[42] points out, the difficulty in assessing the environmental rights of future generations is that they do not yet bear their 'human countenances'. Furthermore, 'those countenances seem ineluctably lost as faces in a very abstract crowd—as members of a group that we can imagine but to which we have a hard time extending group human rights.'[43] He points out that legal rights are not normally extended to persons not yet born and thus it is difficult to ascribe environmental rights to future generations. This is because the concept of 'right holders' depend on determinate objects on which such rights are conferred and where such objects are merely futuristic and presently indeterminate, it becomes difficult to ascertain the nature and scope of the rights to be borne by such future objects. Ball[44] further argues that-

> 'we cannot know what men and women in distant generations will mean by "justice", nor what they will regard as unjust....the more distant the generations, the greater the likelihood that their moral concepts and ours will be at least partially or even perhaps wholly incommensurable."

As rightly pointed out by Ball, it is difficult to ascertain what the 'interests' of future generations will be or what their idea of rights, trumps and justice will connote. Conferring rights on such future generations based on our present idea of what their interests, preferences and values will mean will be unsuitable to the jurisprudential concept of 'rights', particularly when viewed in the context of such

[41] Universal Declaration of the Rights of Mother Earth, Article 7.
[42] R. Hiskes, 'The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice', (2005) 27(4) *Human Rights Quarterly* 1346-1364.
[43] ibid.
[44] Terence Ball, 'The Incoherence of Intergenerational Justice' (1985) 28 *INQUIRY* 321.

rights acting as trumps or given special weight over the preferences, values and desires of the present generation.

Ekeli,[45] however, argues in favour of conferring environmental rights on future generations but concedes that difficulties lie in assessing the environmental needs of future generations and what their concept of justice would be. He however argued that future generations should have rights to an environment that satisfies their basic biological and physiological needs (bio-physical needs) since it is known that there are certain bio-physical needs derived from the environment that humans, whether now or in the future, cannot live without and is critical to their enjoyment of the environment regardless of the level of development or advancement in technologies that would be achieved at some point in the future. While Ekeli's proposition of relying on the 'biophysical' interests of future generations as the basis for conferring rights on them, there are methodological difficulties of ascertaining the exact scope of these biophysical needs in the future, as the improvement in technology and other discoveries may substantially alter the biophysical needs of future generations from what is termed indispensable by present generations.

Despite these methodological difficulties in evaluating intergenerational environmental rights, it is far less controversial and far more acceptable than nature's rights under current international and domestic legal instruments. The constitutions of several countries provide for the environmental rights of future generations and several court decisions across the globe have emphasized the need to protect the environment for future generations. For instance, Kenya's 2010 Constitution[46] emphasizes the sustenance of the environment for future generations by stipulating that 'everyone have a right to have the environment protected for the benefit of present and future generations'[47] while Article 24 of South Africa's Constitution,[48] Article 225 of Brazil's Constitution[49] and Article IX,

[45]Skagen Ekeli, 'Green Constitutionalism: The Constitutional Protection of Future Generations' 2007) 20(3) *Ratio Juris* 378–401.
[46]Constitution of Kenya 2010 <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf> accessed 25 June 2016.
[47] Constitution of Kenya, Art 42(a)
[48]Constitution of South Africa 1996 < http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf> accessed 25 June 2016.
[49]Constitution of the Federal republic of Brazil 2010, 3rd Edn <http://english.tse.jus.br/arquivos/federal-constitution> accessed 25 June 2016.

Section 1 of the US State of Montana's Constitution[50] entrenches the protection of the environment for the benefit of present and future generations, through reasonable legislative and other measures.

At the international level, several legal instruments recognize the protection of the environment for future generations as an important aspect of environmental protection. The Biodiversity Convention of 1992, the Rio Declaration of 1992 and the Charter for Economic Rights and Duties of States 1975[51] contain provisions recognizing the need to protect the environment for future generations. The Charter for Economic Rights and Duties of States which was adopted by the General Assembly of the United Nations was followed up by two other General Assembly resolutions - the Historical Responsibility of States for the Preservation of Nature for Present and Future Generations[52] in 1980 and the United Nations General Assembly Resolution of 2012, 'The future we want'.[53] These General Assembly resolutions are not formally binding since they do not constitute a formal source of law within the traditional categories of sources of international law. However, they have a formative influence on the development of international law as they are seen as an "expression of common interests and the 'general will' of the international community.[54] In this context, they influence the recognition of the environmental rights of future generations within domestic jurisdictions.

Judicial recognition of the rights of future generations can also be found within states. In *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr*.[55] the Supreme Court of the Philippines, while granting standing to a group of Philippine children to represent themselves and future generations challenging the grant of timber licences by the government that was destroying the country's natural forests, held that "every generation has a responsibility to the next to preserve the rhythm and harmony for the full enjoyment of a balanced and healthful ecology" of future

[50]The Constitution of the State of Montana, US, < https://courts.mt.gov/portals/113/library/docs/72constit.pdf> accessed 25 June 2016. See also Barton H. Thompson, Jr. 'Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions' (2003) 64 MONT L REV 157, 160.

[51] G.A. Res. 3281, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc A/9631 (1975), 14 I.L.M. 251 (1975).

[52] G.A. Res. 35/80, U.N. GAOR, 35th Sess., Supp. No. 48, at 15 , U.N.Doc A/35748 , Oct. 30, 1980.

[53]United Nations General Assembly Resolution 66/288 of 2012, 'The future we want' <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E> accessed 13 May 2015.

[54] I. Brownlie, *Principles of Public International Law* (Oxford University Press, 7Th ed, 2008) 571.

[55] G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993).

generations. Also, in *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province,*[56]the South African Constitutional Court held that the protection of the environment is vital to life itself and must be protected for the benefits of the present and future generations.

In the United States, in addition to the recognition of the rights of future generations by the National Environmental Policy Act of 1969,[57] atmospheric trust litigations seeking to protect the climate for future generations in cases such as *Rettkowski v Department of Ecology*[58] and *Citizens for Responsible Wildlife Mgmt v State*,[59] are increasingly becoming useful in protecting the interests of future generations. In *Rettkowski v Department of Ecology*, the court acceded to the claimant's request for a judicial order to restrain pollution activities in order to protect the environment based upon the public trust doctrine, a legal doctrine that entrusts on the government the protection of a healthful and pleasant environment for future generations of citizen beneficiaries.[60] The doctrine imposes a mandatory duty on the state to prevent substantial impairment to the state's essential natural resources for the benefit of future generations and this constitutes an important recognition of the environmental rights of future generations.

The increased recognition of the rights of future generations has led to the proposal by Ekeli[61] for future generations to be given a voice in democracies by the reservation of some seats for them in democratically elected assemblies. Various models for the protection of the interests of future generations have emerged across the globe including the use of Ombudsman, Guardians, Commissioners and Trustees[62]and these representations will provide political

[56] 2007 (6) SA 4 (CC) para 102.
[57] 42 U.S.C. § 4331(a) (2006).
[58] (1993)122 Wn.2d 219, 858 P.2d 232.
[59] (2004)124 Wn.App. 566 103 P.3d 203.
[60] J Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68(3) *Michigan Law Review* 471–566.
[61]K. Ekeli, 'Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People' (2005) 18 *Journal of Agricultural and Environmental Ethics* 429–450.
[62]See 'Models for Protecting the Environment for Future Generations' (2008) Science and Environmental Health Network, The International Human Rights Clinic at Harvard Law School <http://hrp.law.harvard.edu/wp-content/uploads/2013/02/Models_Future_Generations.pdf> accessed 21 January, 2017. See also 'A Case for Guardians for Future Generations' (2006) Mary Robinson Foundation, Climate Justice.

protection for the rights of future generations in addition to the legal protection provided by the conferment of explicit environmental rights on future generations.

Flowing from the above discussions, present humans, future generations and Mother Earth are the three distinct rights' holders within the environment. 'Environmental rights' in this context therefore broadly refers to the protection of the interests of these rights' holders within the natural habitat. While current legal instruments expound the anthropocentric protection of human interests in the environment by focusing on environmental human rights of present and future generations, the protection of the rights of Mother Earth is an emerging trend in international environmental law and is still surrounded by debates as to the theoretical basis, scope and implementation.

2.3.2 Historical Development of Environmental Rights

> *"The myopic cornucopian syndrome - that man is the purpose and end for which the inexhaustible resources of his environment exist - like the Ptolemaic theory of the earth as the centre of the universe - must be provided its proper demise."* - Harry W. Pettigrew[63]

Environmental rights grew out of the realization of the inextricable link between a clean environment and the enjoyment of other basic fundamental human rights. The early focus of environmental rights was therefore on the need to protect the environment for its instrumental benefit to humans. This approach has however been labelled as a 'myopic cornucopian syndrome', for good reason, because of its disregard of the relevance of protecting the other vital parts of the natural habitat for their intrinsic value, unconnected to their instrumental benefits to humans. Pettigrew[64] argued that the extent of the decimation of the natural habitat by humans amounted to 'ecocide' - the equivalent of genocide in relation to humans- because of the deliberate attempt at significantly and extensively decimating useful habitats necessary for the survival of natural elements in the

[63] H. Pettigrew, 'A Constitutional Right of Freedom from Ecocide' (1972) 2 *Envtl L* 1; Over ten countries – including Georgia, Kyrgyzstan, Russia and Vietnam – already recognize a form of ecocide in their national laws. See P. Higgins, D. Short & N. South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59(3) *Crime, Law and Social Change* 251–66; also P. Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepheard-Walwyn, 2010) 63.

[64] ibid.

environment. While genocide is fundamentally condemned and criminalized at all levels and is considered a 'war crime', ecocide is barely given legal recognition at the international or domestic levels despite having similar effects on non-human natural habitats.[65]

There are broadly two theoretical frameworks for analysing environmental rights in modern legal discourse. The human-centric approach (anthropocentrism) which has largely remained the dominant theory within legal and political circles; and the nature-centric approach which is an emerging framework focusing on rights of non-human elements in the natural habitat. Discarding the myopic cornucopian syndrome entails moving away from the purely anthropocentric exposition of environmental rights to a more balanced approach which incorporates the nature-centric approach. The critical question in this regard was aptly stated by Boyle[66] thus-

> "should we continue to think about human rights and the environment within the existing framework of human rights law in which the protection of humans is the central focus – essentially a greening of the rights to life, private life, and property – or has the time come to talk directly about environmental rights- in other words, a right to have the environment itself protected? Should we transcend the anthropocentric in favour of the eco-centric?

Transcending the anthropocentric in favour of nature-centric approach as canvassed by Boyle is a gradual process that requires the re-orientation of the thinking in environmental discourse to accept nature's interests as worthy of protection. A study of the development of environmental rights across the globe over the past century indicates that this gradual process began in the 1970s and is currently at an advanced stage. Emmenegger and Tschentscher[67] identified four stages in the development of environmental rights.

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[65] '*British campaigner urges UN to accept 'ecocide' as international crime'* The Guardian, 9 April 2010. <https://www.theguardian.com/environment/2010/apr/09/ecocide-crime-genocide-un-environmental-damage> accessed January 12, 2015.

[66] A. Boyle, 'Human Rights or Environmental Rights? A Reassessment' <http://www2.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf> accessed 2 December, 2015.

[67] S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', supra, n 2.

The first stage of environmental rights which began in the early 1900s focused exclusively on the anthropocentric protection of the environment for its instrumental benefit to humans of the present generation. As a result, international environmental legal instruments of the period were exclusively human-centric. The 1875 Declaration for the Protection of Birds Useful to Agriculture signed between Austria/Hungary and Italy,[68] for instance, was not seeking to protect birds for their intrinsic worth but for their relevance to human agriculture. Similarly, in 1900, the Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive[69] was ratified to ensure that certain species of wild animals are protected for human benefits. In the same vein, the Convention for the Preservation of Fauna and Flora in their Natural State[70] set aside national parks areas for the benefit, advantage, and enjoyment of humans. It was therefore obvious that the earliest international environmental instruments were exclusively designed for anthropocentric purposes.

This anthropocentric trend continued into the 1970s and early 1980s as the Stockholm Declaration 1972 and Brundtland Report 1987 were founded on the 'environmental human rights' platform. Principle 1 of the Stockholm Declaration states that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being…" and although it referred to the need for man to preserve the environment for future generations, it leaves no doubt that humans were the centre of its clamour for environmental protection. The Brundtland Report 1987 made this point clearer by stating that 'All *human beings* have the fundamental right to an environment adequate for their health and well-being'.[71] The same agenda permeated other international instruments which followed the Stockholm Declaration and Brundtland Report. Article 24 of the African Charter on Human and Peoples Right 1981[72] stipulates that "all peoples shall have the right to a general satisfactory environment favourable to their development" while the 1988

[68] Declaration for the Protection of Birds Useful to Agriculture, Nov. 5 and Nov. 29, 1875, Aus./Hung.-Italy.
[69] Convention Designed to Ensure the Conservation of Various Species of Wild Animals which are Useful to Man or Inoffensive, Mar. 19, 1900.
[70] Convention Relative to the Preservation of Fauna and Flora in their Natural State, Nov.8, 1933, 172 U.N.T.S. 242.
[71] World Commission on Environment and Development 1987, 348.
[72] African Charter on Human and Peoples' Rights, (done at Banjul, June 26, 1981; entered into force, Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reproduced in 21 I.L.M. 59 (1982), art. 24.

protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, (known as the San Salvador Protocol) in its Article 11 states that: "Everyone shall have the right to live in a healthy environment and to have access to basic public services" evincing its focus on humans to the exclusion of the natural habitat.[73]

The second stage of the development of environmental rights saw the inclusion of future generations in the anthropocentric definition of environmental rights in recognition of the need to protect the environment not just for present humans, but also future generations of humans. While still an anthropocentric approach, this approach signified the gradual shift from a myopic view of the environment as a source of satisfying immediate human needs to a more sustainable view of environmental goods beyond immediate human needs. The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973[74] for instance, recognized the need to protect the natural systems for the present and future generations. The Charter for Economic Rights and Duties of States,[75] the Rio Declaration[76] and the Biodiversity Convention[77] all called for protection of the ecosystem for present and future generations. Principle 3 of the Rio Declaration states that- "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Even previous international instruments which had focused only on the present generation of humans were revised to include future generations. For instance, the Whaling Conventions of 1946 revised the 1931 Whaling Convention by providing a new conservationist philosophy which emphasized the need to safeguard whales for future generations. This gradual shift in orientation gave rise to the inclusion of the nature-centric approach in environmental instruments.

Almost simultaneously with the inclusion of future generations in the anthropocentric definition of environmental rights, the roots of nature-centric

[73]Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador 1988 <http://www.oas.org/juridico/english/treaties/a-52.html> accessed 12 May 2017.

[74] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

[75] Charter for Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc A/9631 (1975), 14 I.L.M. 251 (1975).

[76] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Principle 3.

[77]The Convention on Biological Diversity (CBD) was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993Art 2.

approach were already sprouting with the release of Christopher Stone's piece arguing for nature's rights in 1972. Following Stone's exposition, the first inclusion of nature-centric approach in a legal instrument was done in the Convention on the Conservation of European Wildlife and Natural Habitats 1979[78] which seeks to protect the intrinsic value of natural habitats. In 1982, the General Assembly of the United Nations adopted the World Charter for Nature which included a provision that "every form of life is unique, warranting respect regardless of its worth to man.[79] This eco-centric approach was also incorporated in the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources[80]and also found its way into some important international instruments such as the 1980 Convention for the Conservation of Antarctic Living Resources[81] and the Berne Convention on the Conservation of European Wildlife and Natural Habitats.[82] While these instruments provided for respect for nature's intrinsic values, the focus on biocentrism (i.e. focus on living beings within the environment) left gaps in the holistic protection of all aspects of the natural habitat. Moreover, these instruments stopped short of conferring explicit rights on the natural habitat but rather conferred obligations and responsibilities on humans to protect and respect the environment.

The fourth stage of development of environmental rights, however, saw the rising acceptance of the position of nature as a right holder requiring legal protection. As a result, the focus moved beyond merely seeking protection of nature's interests, to conferring rights on nature. The Universal Declaration of the Rights of Mother Earth (UDRME) 2010 was the first international instrument to implement this approach and although this instrument lacks any legal force, its principles act as guidance for domestic institutions on the need for rights for the natural habitat. The enactment of the Law of the Rights of Mother Earth by Bolivia in 2010 is an

[78] Convention on the Conservation of European Wildlife and Natural Habitats Sep 19, 1979, EUROP T.S. No. 104.

[79] General Assembly Resolution on a World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, U.N. Doc. A/RES/37/7 (1983).

[80] Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, <http://cil.nus.edu.sg/rp/pdf/1985%20Agreement%20on%20the%20Conservation%20of%20Nature%20and%20Natural%20Resources-pdf.pdf > accessed 17 January 2017.

[81]Convention for the Conservation of Antarctic Living Resources 1980 <https://www.ccamlr.org/en/document/publications/convention-conservation-antarctic-marine-living resources> accessed 17 January 2017.

[82] Convention on the Conservation of European Wildlife and Natural Habitats, Berne, 1979 came into force 1982 <http://www.coe.int/en/web/bern-convention> accessed 17 January 2017.

indication of the impact of the UDRME in propagating the rights of natural habitats within domestic jurisdictions and the bridging of the gap between the theoretical dualism in environmental rights.

2.4 Theoretical Dualism in Environmental Rights

The anthropocentric and nature-centric debate represents two distinct environmental philosophies pitching nature conservativists against human rights propagators. There are middle camps between these extreme views and contemporary scholars tend to find middle grounds that best serve the interests of both humans and nature and also protect future generations. Ideas such as 'biotic rights', 'accommodationist' approach and 'dilute anthropocentrism' have cropped up to douse the tension that arises when the need to conserve nature and the environment is pitched against the satisfaction of basic human needs in the exploitation of the environment.[83] Understanding the scope of these approaches to environmental rights is therefore vital to appreciating their implication for environmental protection.

2.4.1 Anthropocentrism and its Scope: Environmental 'Human' Rights

Anthropocentrism is a philosophy based on the primacy of humans as possessing a moral value higher than other organisms in the environment and being the dominant creature within the ecosystem for whose benefit all activities in relation to the environment should be channelled. As an environmental concept, it emphasises the status of humans in the natural hierarchy regarding care for the earth and believes the earth should be preserved for human interests.[84]

The anthropocentric approach to environmental protection focuses on the values humans derive from a clean and safe environment and seeks to protect the environment solely on the basis of its relevance to the satisfaction of basic needs of humans and its importance to the enjoyment of life by humans. Under this

[83] K. Cuomo, 'Human Rights and the Environment: Common Ground' (1993)18 *YALE J INT'L L* 227.

[84] L. Feris, 'Constitutional Environmental Rights: An under-utilized resource' (2008) 24(1) *South African Journal on Human Rights* 29-49.

approach, 'the environment is only protected as a consequence of, and to the extent needed to protect human well-being'.[85] In essence, there is a surrogate protection of the environment on account of its instrumental values for a purely human end.

Feris[86] identifies the two approaches within the anthropocentric view - a strong anthropocentric approach that essentially views the environment and all its resources from a purely economic point as resources available for human exploitation; and the weak approach that views the environment as instrumental to human needs and seek to protect the environment for its benefits to humans, but also recognizes the intrinsic value of the environment as worthy of protection by humans. Proponents of the weak approach propagate sustainable development as a means of preserving the environment in the course of exploitation of environmental resources by humans.[87]

An anthropocentric approach to environmental rights and protection is achieved in two basic ways- by re-formulating or re-interpreting basic human rights such as the right to life, health and privacy to include environmental rights; or by expanding the scope of human rights to provide a new substantive human right to a clean and safe environment suitable for the satisfaction of human needs. The first approach is essentially a 'greening' of human rights i.e. introducing environmental standards into pre-existing human rights through evolutionary interpretations by the judiciary on account of the inextricable links between a clean and safe environment and the enjoyment of basic human rights. It is therefore predominantly actualized by the judiciary in the course of enforcing human rights through the traditional human rights enforcement mechanisms. This approach was first popularized by the Indian Supreme Court in several landmark cases where it declared that the protection of the environment by the government is an inviolable aspect of the protection of the fundamental rights of the citizens to life and good health.[88]

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[85] A Kiss and D Shelton, *International Environmental Law* (Transnational Publishers 2004) 23.
[86] L. Ferris, 'Constitutional Environmental Rights: An under-utilized resource', supra, n 84.
[87] F. Capra, 'Deep Ecology: A new Paradigm' in G. Sessions (ed.) 'Deep Ecology for the 21st Century' (1995) 19-25.
[88] See the Indian Supreme Court decisions in People's Union for Democratic Rights v Union of India (1982) 3 SCC 2352; M C Mehta v Union of India [1987] 1 SCC 395; Subhash Kumar v State of Bihar AIR 1991 SC 420. .

Equating environmental pollution to a violation of human right to life as was done by the Indian Supreme Court is an anthropocentric enforcement of environmental rights, because the judicial intervention in this sense is not based on the need for environmental integrity, but the protection of the environment for human benefit. Also, in *Subhas Kumar v. State of Bihar*[89] the Indian Supreme Court held that the discharging of untreated effluents into agricultural areas and local drinking water supplies had violated citizens' right to life. In *Intellectual Forum, Tirupathi v State of AP*,[90] the Supreme Court declared that 'all human beings have a fundamental right to a healthy environment commensurate with their well-being ... ensuring that natural resources are conserved and preserved in such a way that present as well as the future generation are aware of them equally'. This ruling extends the derivation of the right to life from Article 21 of the Indian Constitution to future generations as an extension of the public trust doctrine. Several other decisions of the Indian Supreme Court have re-iterated this approach[91]and this practice has been adopted by the judiciaries in several other jurisdictions[92] including Nepal, Pakistan, Costa Rica, the Netherlands, Belgium and several Latin American countries.[93]

In the European Union (EU), the Right to Life and Right to Private and Family Life in Articles 2 and 8 of the EU Convention on Human Rights[94] are utilized for environmental protection by the European Court of Human Rights (ECHR). This is done by greening these rights to include protection from environmental pollution which is a violation of the right to enjoyment of life and privacy as enshrined in the

[89] AIR 1991 SC 420; See also People's Union for Democratic Rights v Union of India (1982) 3 SCC 2352; and A.P. Pollution Control Board v Prof. M.V. Nayudu [1999] 2 SCC 718.

[90] AIR 2006 SC 1350.

[91] See Francis Corralie v. Union Territory of Delhi, 1981 A.I.R. (S.C.) 746 (1981); Bandhua Mukti Moreha v. Union of India, 1984 A.I.R. (S.C.) 802 (1984); Olga Tellis v. Bombay Municipal Corp., 1986 A.I.R. (S.C.) 180 (1986); Vincent v. Union of India, 1987 A.I.R. (S.C.) 990 (1987)

[92] Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others, WP 35/1991 (Supreme Court of Nepal, 1995); Asociación Interamericana para la Defensa del Ambiente y otros (Costa Rican Constitutional Court, 2009); Asghar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) (Pakistan); Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June 2015); Jacobs v. Flemish Region, No. 80.018 (Belgium, Council of State, 1999); Venter, No. 82.130 (Belgium, Council of State, 1999).

[93] See Environmental Law Institute Research Report, 'Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa' (UNEP, 2007) for a detailed discussion on judicial enforcement of environmental protection through the right to life in countries across South East Asia, Africa and Latin America.

[94] Convention for the Protection of Human Rights and Fundamental Freedoms in the European Union 1953 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 12 February 2016.

EU Convention on Human Rights. In *Lopez-Ostra v. Spain*[95] the ECHR held that pollution of the environment is a violation of Article 8 of the EU Convention on Human Rights which provides for right to private and family life because pollution impacts on an individual's well-being and prevent him or her from enjoying his or her home in such a way that his or her private and family life is damaged. However, the ECHR clarified in the subsequent case of *Kyrtatos v. Greece*[96] that the degradation of the environment must directly affect private or family life of the applicant within the context of Article 8 in order to constitute a violation. According to the Court, -

> "the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment".

This decision evinces the pure anthropocentric approach of judicial interpretation of existing human rights to cover environmental concerns. The Court here was only concerned with the direct impact of the environmentally unpleasant activity on the complainant with no regard to the impact of the activity on the environment itself. The Court went further to state that-

> "the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 of the Convention… "[97]

In essence, even if all the birds and natural habitats are destroyed as a result of the activity, the Court will not interfere so long as human health and well-being are unaffected by the activity.[98] This is a classic illustration of the anthropocentric foundation of judicial intervention in environmental issues.

Apart from the substantive rights to life and privacy, other human rights which can be 'greened' for environmental protection include the freedom of association and

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[95] Lopez-Ostra v. Spain, No. 16798/90, decision of 9 December 1994.
[96] Kyrtatos v. Greece, No.41666/1998, decision of 22nd May 2003.
[97] ibid, 23.
[98] Although the EU Environmental Liability Directive 2004/35/EC recognises damage to protected species and natural habitats as actionable, this has not been a focus of judicial decisions based on the EU Convention on Human Rights.

freedom of expression as part of procedural environmental rights.[99] Freedom of association can be expansively interpreted to include the right of environmental activist groups to pursue their legitimate objectives of furthering environmental protection and the freedom of expression can be used to confer them voice needed to stringently push for better environmental protection and challenge unwholesome environmental activities in courts.

The second approach to anthropocentrism in environmental protection is the creation of a new substantive human right to a clean environment suitable for health and well-being. Various terms are used to classify this right including 'habitable' 'healthful' 'viable' 'safe' etc.[100] The clamour for the 'Right to a Safe Environment' (RSE) is the attempt to enhance environmental protection by conferring a new human right to a safe environment in addition to the other traditional human rights such as the right to life, liberty, privacy, freedom of expression etc. Most literature on the subject of environmental rights concentrates on this particular approach. Tim Hayward,[101] a leading scholar on the subject of environmental rights considers the debate surrounding the creation of this substantive new right as largely centred on the question of whether the rights should be regarded as fundamental human rights and not mere socio-economic rights; and whether the rights should be constitutionalized in view of their importance, to prevent political roll-back in their advancements.

Whichever way the new substantive right is presented, a human 'Right to a Safe Environment' is an inherently anthropocentric view of environmental rights as 'RSE is human-oriented. It does not speak directly to issues such as biodiversity, the claims of animals, conservation, or sustainable development'.[102] Taylor[103] states that "with limited exceptions, an environmental human right is essentially an anthropocentric concept. Environmental protection serves solely human interests, reflected in thresholds for harm linked to human needs and concerns."

[99] See Art 10 & 11 of the EU Convention on Human Rights.
[100] See the Constitution of the Federative Republic of Brazil 2010, art 225; and the Constitution of the Republic of South Africa 1996, Section 24.
[101] T. Hayward., 'Constitutional Environmental Rights: a Case for Political Analysis', (2000) 48 *Political Studies* 558-572.
[102] J. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification'', 1993) 18 *YALE J INT'L L* 281–85.
[103] P. Taylor, 'From Environmental to Ecological Human Right: A New Dynamic in International Law? '(1998) 10 Georgetown Environmental Law Review 309, 311.

As stated by Taylor, the defining characteristic of environmental human rights is that the standard of environmental protection is tied to the threshold of suitability for humans only and not necessarily its suitability for the environment itself. Thus, the anthropocentric approach accepts a minimum threshold of harm for the environment which does not adversely affect human health, well-being or the continued usability of the environment by humans even though such harm may be deleterious to the environment itself and could affect the overall integrity of the environment. Thus, the 'right to a safe environment' effectively connotes a 'right to an environment safe enough for humans'. In a sense, it is a humanly selfish view of the environment for the benefits of humans.

2.4.2 Nature-Centric Perspective of Environmental Rights

The right of nature and all components of the natural habitat to protection from unbridled exploitation is the new frontier of environmental rights brought up in the fourth wave of the development of environmental rights. A nature-centric approach emphasizes the intrinsic value of the environment and nature outside of its instrumental value to humans. It focuses on the protection of the environment for its own sake and requires that environmental law develops in order to protect the environment beyond human needs. This approach is predicated on the interrelationship and interdependence of animal and plant life systems and argues that humans have no right to reduce this richness and diversity in pursuit of their own needs. The nature-centric approach clamours for the conferment of legally enforceable rights on the environment itself i.e. mother earth including trees, lakes, mountains and animals of an ecosystem, distinct in form and content from the rights of humans to a safe environment.[104] This approach rejects completely the link between environmental protection and human rights[105] and clamours for an analysis of the environment from a perspective not premised on the satisfaction of human needs but wider ecological considerations involving interrelationship between all beings in the environment both sentient and non-sentient.

[104] A Shinsato, ''Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 *Nw.J Int'l Hum Rts* 186.

[105] R. Lee, 'Resources, Rights, and Environmental Regulation: The Human Rights Act: A Success Story?'(2005) 32 (1) *Journal of Law and Society* 111-130.

Stone,[106] a major proponent of the rights of natural habitat, argues for nature to be accorded legal rights to protect its intrinsic worth.[107]

With regards to the enforcement of this right, he suggests that a guardianship system can be put in place whereby an interested party environmental NGOs or concerned citizens) can apply to the court for appointment of a guardian to act as an effective voice for the environment.

Stone's proposal has been severely criticized by some scholars who view it as 'unworkable', 'utopian', 'largely symbolic' and 'seeking a quick legal fix'.[108] Elder[109] considers it as posing the wrong answer to the right question as conferring rights on nature does not address the problem of valuing the intrinsic worth of nature. Callicott[110] views the concept of nature's rights as flawed in view of its tendency to create rights which are in reality mere moral objectives. Tribe[111] refers to Stone's proposal as seeking to create 'plastic trees' because, in his view, treating nature as a right holder takes away its natural feel and makes it a juristic person, a sort of 'plastic form'. Tribe's view is echoed by Livingston[112] who argues that ascription of 'rights' to nature makes nature to become a rights' holder and therefore becomes 'anthropomorphize' i.e. loses some of its natural appeals.[113] In his words-

> "The language of rights comes at a high cost, for in accepting an exclusive metaphor we are precluded from invoking richer and more diverse images of the natural world. As a consequence, nature becomes reduced to a rights-holder and is no longer "beautiful, alive, mystical, breath-taking, frightening, part of us, etc."[114]

Conferring rights on nature does not translate to anthropomorphizing nature, as argued by Livingston, as humans are not the only subjects of rights within legal systems. Ships, corporations, firms, partnerships, associations and other abstract

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[106] C. Stone, n 1.
[107] See C. Stone, 'Should Trees Have Standing Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective' (1985) 59 *S CAL L REv* 1.
[108] C. Giagnocavo and H. Goldstein, 'Law Reform or World Re-form*'* (1990) 35 *McGiL L J* 346.
[109] P. Elder, 'Legal Rights for Nature-The Wrong Answer to the Right(s) Question' (1984) 22 *OSGOoDE HALL L J* 285.
[110] J. Callicott, 'The Case against Moral Pluralism*',* (1990) 12 *Envtl Ethics* 99.
[111] L. Tribe, 'Ways Not to Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83 *YALE L J* 1315.
[112] J. Livingston, 'Rightness or Rights*?'* (1984) 22 *OSGOODE HALL L J* 309.
[113] Anthropomorphizing a thing is when you talk about a thing or animal as if it were human.
[114] J. Livingston, 'Rightness or Rights*?,* supra, note 112, 311.

entities are rights' holders under the law and these entities have not been anthropomorphized by these rights. Similarly, nature will retain its mystical and aesthetic feel even with the conferment of rights, as these rights are only intended to ensure legal protection for nature's intrinsic value. The other criticisms of Stone's clamour for conferment of rights on natural habitat are based on resistance to the contemporary realization that nature and its components are worthy of legal protection and the need for such protection is not a mere moral objective, as canvassed by Callicott, but an important legal objective for the preservation of the natural ecosystem which all humans depend for sustenance.

There are four theoretical views in the nature-centric approach to environmental rights – holism, biocentrism, physiocentrism and ecocentrism- and each theory examines rights for the natural habitat from a different perspective. Holism views nature from a unified, holistic perspective, as a single entity. With holism, there is only one unitary interest, as Mother Earth is regarded as a single entity, akin to a single individual human. Thus, rights for the natural habitat are in actual fact rights for a single entity and there is no diversification of interests for the various components in the natural habitat. As a result, situations of conflicting interests are impossible, because the various components of Mother Earth do not have individual interests, the same way the various parts of an individual human person cannot have separate rights.[115] This is the approach to nature's rights adopted in the UDRME which refers to Mother Nature as a 'single, living being with indivisible interests'. The weakness of this theory is its impracticality, as it overlooks the fact that the various components in Mother Earth are separate entities bound in an inter-connected and inter-related network called the natural habitat and conflicts are bound to arise between the rights of the various components. It is, therefore, not practical to have a unified right for all components in a natural habitat.

Biocentrism focuses on the rights of the living or sentient beings within the natural habitat. It proposes that humans are equal to all other living entities of nature and competition is allowed amongst such living entities in the natural habitat.[116] Biocentrism recognizes the interconnectedness and interrelatedness of the living beings within an ecosystem and proposes that rights should be conferred on living

[115] M. Cuncan, 'The Rights of Nature: Triumph for Holism or Phyrric Victory?' (1991) 31 *WASHBURN L J* 62.

[116] S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law* 113–43.

beings within the ecosystem but competition amongst these living beings is permitted so long as the rules of the game are fair.[117] It goes further to permit natural competition amongst the diverse entities even to the extent of the extinction of some species through the competition in a process regarded as natural selection. Under biocentrism, conflicting rights amongst the various living components in the ecosystem can be resolved by these components competing amongst themselves with possible extinction for the weaker component. The biocentric theory, therefore, only recognizes living, sentient beings such as humans, animals and other micro-organisms within a natural habitat as capable of being rights' holders and the competition amongst these beings can lead to the extinction of a species as part of natural selection.

Physiocentrism is an extension of the biocentrism theory with the addition of non-living beings to its proposition. In essence, physiocentrism proposes the conferment of rights on both living and non-living beings such as lakes, rivers, rocks, forests and earth formations within a natural habitat. However, similar to biocentrism, it encourages competition amongst the various components up to the point of extinction of any species or component as a part of natural selection.[118]

Ecocentrism focuses on the interrelationship of the various components in a natural habitat. It acknowledges that various components exist within a natural habitat and all components are deserving of rights and protection. Thus, both living and non-living beings in a natural habitat, including plants, lakes, trees, rivers, rock formation and all parts of a natural habitat are deemed worthy of protection for their intrinsic value.[119] It does not, however, focus on their individuality but on their collective intrinsic value as a natural habitat. A key feature of the ecocentric theory is that it proposes harmony of the diverse entities within a natural habitat, especially harmony between humans and other entities of nature. Since harmony is an important factor in ecocentrism, competition amongst the various components is prohibited, particularly competition of humans with

[117] ibid; See also S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', supra, n 2.
[118] M. Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, 2014) 279–81.
[119] L. Tribe, 'Ways Not to Think about Plastic Trees: New Foundations for Environmental Law' supra, n 111.

nature, which is viewed as a destructive rather than constructive factor in the light of the propensity of humans to desecrate nature to fulfil human needs.

Emmenegger and Tschentscher[120] argue in favour of biocentrism as the most relevant approach to protection of the rights of the natural habitat. They argue that ecocentrism and its focus on harmony within the various components of the natural habitat 'is not in keeping with our legal systems which rely on individualism, market mechanisms, and adversarial processes'. They, therefore, contend that biocentrism should be the relevant new paradigm in environmental law, protecting animals and plants as right-holders but leaving non-living natural entities (physiocentrism) and compounds without protection if such protection does not derive indirectly from their function as a natural habitat for living beings.[121]

However, it is difficult to accept this view of biocentrism as the relevant paradigm in the protection of the rights of the natural habitat. The focus on living beings in a natural habitat by biocentrism is a form of 'species chauvinism' for which the anthropocentric view has been criticised, except that biocentrism, unlike anthropocentrism, includes other living beings such as animals and micro-organisms in its protection. Still, biocentrism views vital non-living beings within a natural habitat only for their instrumental value to living beings and this discriminatory treatment of the various components within a natural habitat is not a sustainable or effective approach to protecting the rights of the natural habitat as it creates segregation amongst entities within the same class on account of their living/non-living characteristics. For instance, biocentrism regards fishes within a river or lake as rights' holders worthy of protection and the rivers or lakes are only to be protected to the extent they function as a natural habitat for the fishes and other microorganisms dwelling there. This does not protect the intrinsic value of the rivers and lakes as a vital component of the ecosystem and is merely an extension of the anthropocentric approach to other non-human living beings.

In addition, the promotion of competition amongst the components in a natural habitat to the point of extinction of some species in the biocentrism approach is not an acceptable form of natural selection but a promotion of the 'Hobbesian

[120] S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously' supra, n 2.
[121] ibid, 549.

state of existence' based on survival of the fittest within an ecosystem. The 'rules of the game' for such competition to be determined by humans is an anthropocentric intervention in protection of the natural habitat and undermines the essence of seeking rights for the natural habitat.

Although physiocentrism acknowledges the rights of non-living beings within a natural habitat, its promotion of competition similar to biocentrism makes it an ineffective approach to protecting the rights of the natural habitat. Ecocentrism, however, proposes harmony within the natural habitat and adopts an all-inclusive approach which recognises both living and non-living beings in a natural habitat as worthy of protection. Harmony is important in a natural habitat, as the various components within a natural habitat are interconnected and interrelated in various ways and this inter-relationship is best protected within a framework of rights which ensures harmonious interaction between the various components. The UDRME and the Law of the Rights of Mother Earth of Bolivia 2010 both emphasise the need for harmony in the protection of the rights of the natural habitat. Article 3(1) of the UDRME stipulates that 'every human being is responsible for respecting and living in harmony with Mother Earth' while Article 2(1) of the Bolivian Law provides for harmony and 'dynamic balances with the cycles and processes inherent to Mother Earth' as the first binding principle in the law.

With regards to the distinction between living and non-living beings in biocentrism, Article 1(5) of the UDRME stipulates that –

> "Mother Earth and all beings are entitled to all the inherent rights recognised in this Declaration without distinction of any kind, such as may be made between organic and inorganic beings, species, origin, use to human beings, or any other status"

Article 2 of the Draft International Covenant on Environment and Development 1995[122] states that 'nature as a whole warrants respect; every form of life is unique and is to be safeguarded independent of its value to humanity'. This runs counter to the discriminatory approach of biocentrism which focuses only on the living

[122]The Draft International Covenant on Environment and Development was prepared by the Commission on Environmental Law of the IUCN World Conservation Union in cooperation with the International Council of Environmental Law released at the United Nations Public International Law Congress in New York in March 1995.

aspect of nature. Moreover, Mother Earth is defined in article 1(1) of the UDRME as a 'living being' which includes ecosystems, natural communities, species and all other natural entities which exist as part of Mother Earth. It is therefore difficult to implement the discriminatory coverage of biocentrism within the current trend in international environmental law as it relates to the natural habitat.

Although conflict of rights is inevitable within a natural habitat, this conflict can be resolved through the dynamic balancing of the rights of the various components rather than competition between these components in a sort of 'winner takes all' approach which biocentrism proposes. Article 1(7) of the UDRME provides that 'the rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth'. Situations may arise where the right of one component of the natural habitat may trump the right of another component, but such can be done with balancing of the health of Mother Earth as its main focus. For instance, the right of humans to good health will trump the right of mosquitoes to live within a habitat close to humans; however, this will not justify the total extinction of all mosquitoes in every habitat regardless of their link to malaria or other human diseases.

The 'individualism, market mechanisms, and adversarial processes' which Emmenegger and Tschentscher advance as a reason for rejecting ecocentrism are the core foundation of anthropocentrism which contemporary environmental rights seek to move away from.

In the future, it may be possible to adopt holism as the prevailing theory in environmental rights of the natural habitat, as article 1(2) of the UDRME defines 'Mother Earth' as a 'unique, indivisible, self-regulating community of interrelated beings' indicating that natural habitat may be viewed as a single entity with multiplicity of rights amongst the interrelated beings. However, the difficulty in ascribing indivisible rights to 'Mother Earth' considering the various components of the natural habitat makes ecocentrism a more effective theory in protecting the rights of the natural habitat and ecocentrism is therefore adopted as the prevailing paradigm for nature's rights utilised in this thesis.

2.4.3 '*Coalesced Anthropocentrism'* Environmental Rights Paradigm

Various ideas have been proposed to achieve a balance between the anthropocentric and ecocentric approaches to environmental rights without necessarily dismissing the merit of either environmental philosophy in view of their varying merits. Nash[123] proposes the adoption of 'biotic rights' in place of eco-centric rights arguing that these biotic rights are 'morally justified claims or demands on behalf of non-human organisms, either individuals or aggregates (populations and species), against all moral agents for the vital interests or imperative conditions of well-being for non-humankind'. He suggests that these morally justifiable rights for nature, though not strictly legally enforceable as sought by ecocentrists, imposes obligations and responsibilities on humans towards ecosystem protection and this will ensure the recognition and protection of the intrinsic value of the environment. The non-ascription of legally enforceable rights on nature, however, is a significant shortcoming of this proposal as it still leaves nature devoid of significant legal protection which ecocentrism seek. It also leaves nature at the mercy of humans as the absence of enforceable rights for nature makes human obligations towards nature weak.

Taylor[124] suggests a 'Charter of Ecological Responsibilities' in place of ecocentric rights, arguing that '"responsibilities" is used to move beyond the difficulties raised by the debates surrounding "legally enforceable rights," and to focus rather on morally significant responsibilities, which must then be translated into international and municipal legal obligations'. In his view, imposing such responsibilities signifies the recognition and respect which humankind has for the intrinsic nature of the environment and will ensure that this recognition and respect guides human activities in various aspects including legislative and policy agendas. In this sense, the concerns of the ecocentrists will be catered for without necessarily creating substantive rights for the environment while humans will remain at the centre of environmental protection as championed by the anthropocentric philosophy. Taylor's proposal does not satisfy the demand of ecocentrism which goes beyond seeking mere recognition of the intrinsic worth of nature but seeks explicit rights

[123] J. Nash, 'The Case for Biotic Rights' (1993) 18 *YALE J INT'L L* 235, 238.
[124] P. Taylor, 'From Environmental to Ecological Human Right' supra, n 103.

for nature. The value of having 'rights', viewed from the interests and trump theories of rights, is significant for ecocentrists, as it provides a framework for nature to have legally protected interests which can be used as trumps over other preferences and desires, including those of humans, where they conflict with nature's protected interests. Merely ensuring that humans value the intrinsic worth of nature will not achieve this purpose as it does not provide a legal protection for nature from the exploitation of nature's resources by humans to meet human preferences and desires which are based on 'rights' of humans, such as the right to development. By conferring rights on nature, as sought by ecocentrists, nature's interests can be weighed alongside humans' in a 'marketplace of rights' and balancing of these rights will result in better protection for nature than relying on ecological responsibilities of humans.

Nickel[125] proposes an 'accommodationist' approach which attempts to incorporate both anthropocentric and ecocentric philosophies in a single agenda by championing the need for humans to protect the intrinsic value of non-humans in the environment while admitting of the need not to neglect the satisfaction of human needs from the exploitation of the environment. Nickel, however, did not provide a detailed guideline of the structuring of this accommodationist approach or how the incorporation of the two philosophies can be actualized. However, Nickel's failure to provide details of the framing or structuring of this approach is unhelpful in this regard.

Redgwell[126] provides one of the clearest and well-structured mid-ground positions in her proposal of 'dilute anthropocentrism' as the preferred approach to incorporating both philosophies. She argues that-

> 'the exclusively anthropocentric approach of simply valuing the environment in terms of immediate human utility is being displaced by a more *dilute anthropocentrism* which recognizes the interrelatedness and interdependence of the natural world of which human beings form a part.'[127]

[125]J. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification', supra, n 102.
[126]C. Redgwell, 'Life, the Universe and Everything: a Critique of Anthropocentric Rights' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).
[127] ibid 73.

In her view, the major problem in adopting a universally accepted approach to environmental protection lies in the utilization of 'unreconstructed anthropocentrism' by policymakers and legislative drafters all over the world. Unreconstructed anthropocentrism is the undiluted intention to focus exclusively on the satisfaction of human needs from the environment as though humans are the only creatures in the environment. She stated that by recognizing the importance of the whole ecosystem as a network of inter-dependent beings, both living and non-living beings, environmental protection can be structured in a manner which balances the interests of humans with those of the environment by diluting the focus on human needs and incorporating the interests of other participants in the ecosystem.[128]

Redgwell's proposal focuses on the need to dilute the anthropocentric content of environmental rights framework in order to allow for more attention to be placed on the intrinsic worth of nature. Her proposal, however, does not explicitly canvass for the incorporation of ecocentrism in environmental protection as a fundamental part of environmental rights framework. By seeking to dilute anthropocentrism, her proposal assumes that such dilution will inevitably lead to more inclusion of ecocentrism, without necessarily determining the manner, scope and impact of such inclusion in a rights' framework. Indeed, a dilution of anthropocentric contents of environmental rights may be counter-productive if it results in greater environmental harm to humans in the bid to protect nature. More reluctance and resistance will arise if humans continue to suffer environmental harm from a dilution of the anthropocentric contents of environmental protection framework. Consequently, it can be argued that it is not necessary to dilute anthropocentrism in order to recognize ecocentrism. Instead, it is more effective to incorporate both philosophies in their full form within a single framework, as proposed by Nickel's 'accommodationist approach', in a sort of 'best of both worlds'.

The shortcomings of the 'accommodationist' and 'dilute anthropocentrism' approaches can be addressed with the adoption of a '*coalesced anthropocentrism'* approach which focuses on the amalgamation of the anthropocentric and ecocentric philosophies within a single environmental rights framework. 'Coalesced' literally means the amalgamation or combination of two

[128] See M. Midgley, 'The End of Anthropocentrism?' in Attfield and Belsey (eds.), *Philosophy and the Natural Environment (*Royal Institute of Philosophy Supplement No. 36, 1994) 111.

subjects into a single whole and in this context, anthropocentrism and ecocentrism as two different subjects can be combined into a single whole known as ‘coalesced anthropocentrism’. The resulting environmental rights framework will incorporate the core ideas of the two philosophies in their full form without diluting their core essence in a bid to accommodate the other. By combining the two philosophies in equal measure within a single framework, the rights of the various components within the ecosystem, including humans, will exist within a ‘marketplace of interests’ where various rules and principles can be adopted for determining the resolution of conflicting rights of the various components.

Conflict between rights is inevitable where several subjects of rights co-habit within a single framework and adopting coalesced anthropocentrism approach allows for a unified framework for resolving these conflicts within a rights framework. Rather than allowing for competition between these conflicting rights’ holders to the point of extinction of species, as allowed under biocentrism, the adoption of ecocentrism as the prevailing paradigm for nature’s interests means that harmony between the various components is paramount. Therefore, resolving conflicts can be based on the recognition, in Article 1(7) of the UDRME, that ‘the rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth’. A *coalesced anthropocentrism* approach, therefore, presents an environmental rights framework which promotes the harmonious incorporation of the rights of humans (including future generations) and rights of Mother Earth with a common goal of preserving and protecting the environment (natural habitat) for all of nature without any distinction based on the features of the components of the natural habitat.

The retention of ‘anthropocentrism’ in the description of the approach is an indicator of the fact that anthropocentrism will continue to dominate environmental protection in whatever form or approach that is adopted. This is because, so long as a ‘rights’ language is used or employed in environmental protection, there will always be an undeniable deep structural anthropocentrism which characterizes ‘environmental rights’ in whichever way or form it is shaped or structured.

Anderson[129] aptly captures the inevitability of human involvement in environmental rights in the following words-

> "Even if humans agreed to confer rights upon animals or mountains, the act of conferring would still be conceived and executed by humans, and the rights could only be enforced by humans against other humans. There is, it would seem, a deep structural anthropocentrism which inevitably accompanies a human-made legal system."

Human involvement in environmental rights is unavoidable and inextricable as human institutions are required for the conferment, protection and enforcement of these rights, including those conferred on nature and other components of the natural habitat. These rights are conferred by humans, to restrain other humans and enforced by humans against other humans through the judiciary and other human political, legal and social institutions. Even Stone,[130] a major proponent of the rights of nature conceded that conferring and enforcing these rights would require human involvement in the appointment of human guardians and these rights would be enforced against fellow humans. Therefore, rather than refer to this approach as 'eco-anthropocentrism' for instance, the use of the term 'coalesced anthropocentrism' is a reflection of the incorporation of the ecocentric approach but with anthropocentrism as the central axle on which the conferment, expression and enforcement of the resulting environmental rights framework rely for its efficacy.

Adopting *coalesced anthropocentrism* in environmental rights framework will mean that relevant legal and constitutional instruments seeking the protection of the environment will contain provisions conferring rights on humans and Mother Earth with respect to the environment without distinction as to the hierarchy of these rights. The resolution of conflicts between the rights of humans and that of Mother Earth will be done by the judiciary or policymakers imposing guidelines on how the 'marketplace of interests' arising from the environmental rights framework will be managed. The Constitution of Brazil,[131] for instance, appears to adopt this approach by providing for the rights of humans to a clean environment and going

[129] M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', supra, n 31.
[130] C. Stone, 'Should Trees Have Standing? Supra, n 1.
[131] Constitution of the Federative Republic of Brazil, 3rd Edn, 2010, art 225.

further to oblige the government to 'preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems'; and 'protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty'. This provision encapsulates the '*coalesced anthropocentrism*' approach by providing for the human right to a clean environment alongside *equally* providing for ecocentric rights of Mother Earth to survival and preservation of vital processes required for the ecosystem. The conferment of the obligation on the government to protect and implement these ecocentric rights is a reflection of the deep structural anthropocentrism of environmental rights highlighted above.

The advancement in recognition of ecocentrism in environmental rights frameworks in the third wave of environmental rights development is arguably a major breakthrough in protecting the ecosystem as a whole. As Redgwell[132] put it-

> "The dam of anthropocentrism has clearly been breached. Given the increasing awareness of the interconnectedness of human beings and the environment and of the intrinsic value of the latter**…** nature [is] unlikely to simply be ignored; rather, the problem is one of reconciling a diverse environmental and human rights agenda."

Nevertheless, rather than considering the advancement in environmental rights of nature as breaching 'the dam of anthropocentrism', *coalesced anthropocentrism* views the situation as the incorporation of the waters of ecocentrism into the dam of anthropocentrism. This analogy represents a more practical reflection of the extent of ecocentrism in current environmental rights framework. It is a far stretch to say ecocentrism has breached the dam of anthropocentrism in existing international and domestic legal frameworks. There is as yet no binding international instrument with enforceable ecocentric rights, aside from the UDRME which lacks binding force on states. At the domestic level, only Bolivia's Law of the Rights of Mother Earth 2010 provides definitive and extensive rights for nature, although a number of countries' constitutions increasingly recognise ecocentric rights to varying degrees.[133]However, as rightly indicated by Redgwell,

[132] C. Redgwell, supra, n 126, 75.
[133] See for instance, Brazil's Constitution 2010, art 225.

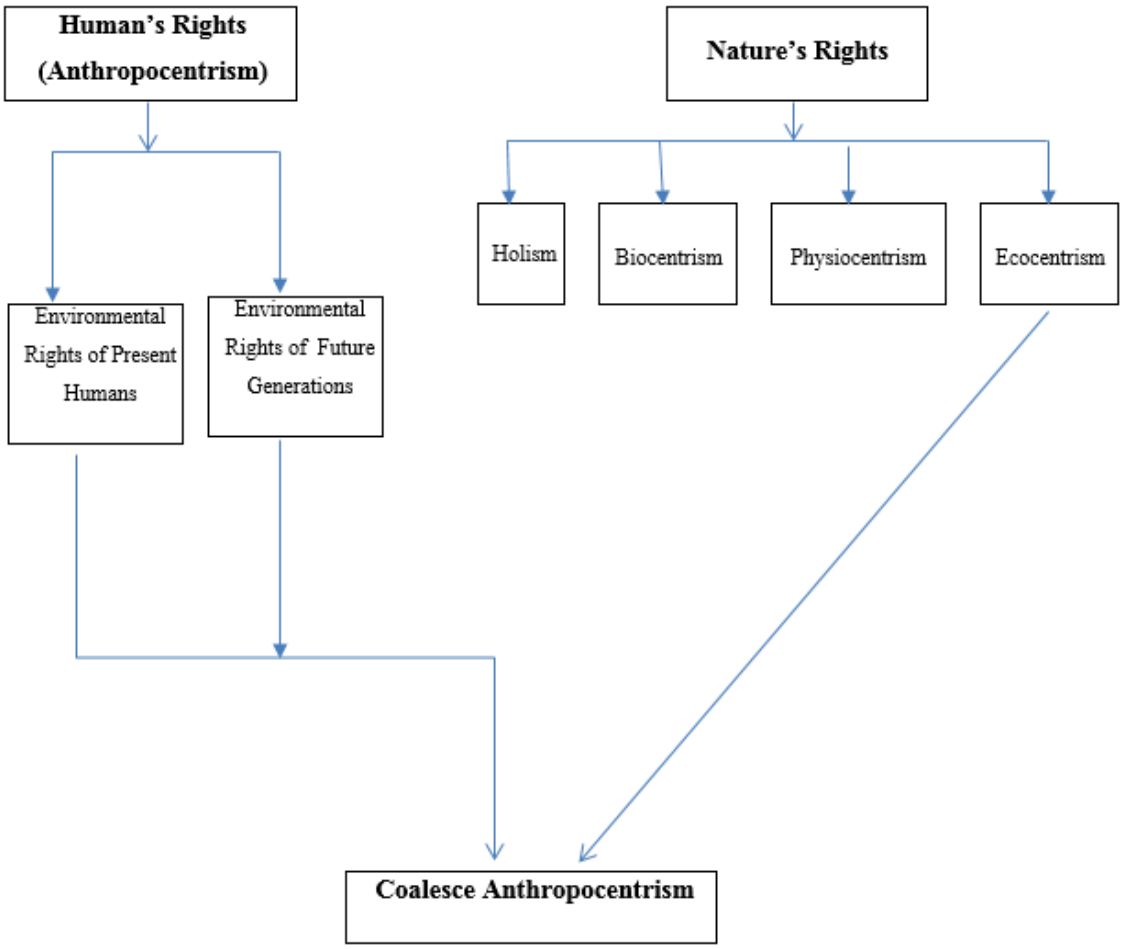
the protection of nature's interests is no longer likely to be simply ignored and the reconciliation of the diverse interests in a natural habitat can be effectively achieved within the framework of a 'coalesced anthropocentrism' approach.

It is essential to distinguish the *coalesced anthropocentrism* model from holism. While holism seeks to protect nature's interests by conferring the natural habitat with a single indivisible interest (as seen in the UDRME), *coalesced anthropocentrism* focuses on the broader issue of equal protection of both human and nature's interests in the environment, while recognising the pre-eminence of human's interests over nature's in the event of a conflict.

Based on the foregoing discussions, *coalesced anthropocentrism* yields a definition of environmental rights which incorporates the rights of the three rights' holders in the environment- present humans, future generations and Mother Earth. Taylor's[134] definition of environmental rights as referring to 'the traditional rights approach of granting rights and creating duties and obligations to the environment, at a level sufficient to ensure the continued survival of present and future generations of humanity', therefore, falls short of the inclusion of a third, vital component of environmental rights framework- Mother Earth. A more inclusive definition of environmental rights can be stated as the rights of humans, future generations and nature to a clean, safe and ecologically sound environment suitable for the sustainable use of humans for present and future generations, the survival of the essential ecological processes of nature and the equal ecological treatment of species and other components of the ecosystem. It is this definitional elucidation of 'environmental rights' that is adopted in this thesis.

[134] P. Taylor, 'From Environmental to Ecological Human Right' supra, n 103.

Figure 6: *Coalesced Anthropocentrism* Environmental Rights Paradigm



The figure above reveals the three pillars of coalesced anthropocentrism in environmental legal frameworks – environmental human rights of the present generation, environmental rights of future generations and nature's rights in an ecocentric perspective. The incorporation of these three essential attributes of environmental rights in any environmental legal instrument is a key determinant of the adoption of coalesced anthropocentrism as an ideal paradigm for effectively protecting the environment. Thus, contemporary environmental instruments which provide extensive environmental rights of humans and future generations but lack incorporation of nature's environmental rights fall short of the adoption of a *coalesced anthropocentrism* paradigm.

An illustrative example of a contemporary environmental legal instrument viewed in this light is France's Charter of the Environment 2005 which is positively viewed

across the globe as a major advancement on environmental rights[135] but which omits an essential aspect of environmental rights protection – nature's rights - in its substantive contents. France's Charter of the Environment was enacted with the objective of bringing French law in line with foreign models of environmental protection and entrenching sustainable protection for the environment to the same extent as other constitutional human rights.[136] The charter provided wide-reaching environmental rights provisions including the express provision of the right to live in a balanced environment which shows due respect for health; the incorporation of '*polluter pays principle'*,[137] '*precautionary principle',[138]* provisions on remedying of environmental damages and individual obligations on citizens to prevent environmental harm and protect the environment for future generations.[139] Nevertheless, the charter is noticeably silent on nature's rights despite acknowledging in the preamble that 'natural resources and equilibriums have conditioned the emergence of mankind' and that 'the future and very existence of mankind are inextricably linked with its natural environment'. This omission of an important pillar of environmental rights in the Charter prevents the addressing of environmental challenges from a holistic perspective where nature's rights and interests are granted similar constitutional status as the environmental rights of humans in view of the inextricable link between these two subjects as acknowledged in the Charter's preamble.

Adopting a *coalesced anthropocentrism* approach as an environmental rights paradigm helps to ensure that environmental legal instruments incorporate the three key pillars of environmental rights and environmental challenges are addressed from a broader, inclusive perspective with the inclusion of nature's rights in environmental considerations. This leads to a consideration of the importance of adopting a rights' approach to environmental protection considering the extent to which contemporary environmental legal instruments regulate activities which affect the environment and provide for governance and regulatory

[135] C. Dadomo, 'The Greening of the French Constitution – The Constitutional Act of 1 March 2005 on the 2004 Environmental Charter' (2005) 6 *Env. Liability* 175-186.

[136] To attain constitutional status, the Charter had to be incorporated into the French Constitution by means of *loi constitutionnelle* - an Act of constitutional amendment which must be adopted according to a special procedure under Article 89 of the Constitution. The Constitutional Act on the environmental Charter was adopted by the Congress on 1 March 2005, thus elevating the provisions of the charter into constitutional status.

[137] Art 4.

[138] Art 5.

[139] Art 3.

tools which, to a large extent, ensure the environment is protected for present and future generations.

In canvassing for the adoption of a *coalesced anthropocentrism* model to environmental rights, this thesis is not unmindful of alternative philosophical theorisations of nature's role in environmental protection from the natural law perspective as propounded by reknowned philosophers like Finnis and Davidson. Finnis' conception of the natural law concept of rights and how it applies to the natural order[140] formed the basis for Davidson's[141] postulation that the theory of natural law and natural rights can be developed into an environmental ethic that generates human obligations to non-human animals, plants, and perhaps even eco- systems. French relied on Finnis' conceptualisation of natural law rights to argue in favour of imposing ecological responsibilities on humans drawing validity from natural conception of the rights of the ecosystem which imposes obligations on humans to ensure their protection.[142]

While useful from a philosophical standpoint in explaining the origin and possible foundation of nature's intrinsic worth to be protected by rights, the natural law approach is largely abstract, devoid of actual normative contents and not likely to improve the framework of rights around which the protection of nature's environmental interests can be structured.

In addition, the concept of structuration developed by Giddens[143] examines the relationship between agency and culture in that they cannot be understood separate from each other as they are intertwined and cannot be developed and progressed without the other.[144] In an environmental context, Buhr has attempted to link the structured organisation of environmental regulatory systems under a structuration concept with improved environmental outcomes.[145] However, this still relies on environmental regulatory frameworks for environmental protection with its attendant shortcomings which are discussed in Chapter 3 of this thesis. In

[140] J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).
[141] S Davison, 'A Natural Law Based Environmental Ethic' (2009) 14(1) *Ethics and the Environment* 1,13.
[142] W French, 'Natural Law and Ecological Responsibility: Drawing on the Thomistic Tradition' (2008) 5(1) *University of St. Thomas Law Journal* 12.
[143] A. Giddens, *New Rules of Sociological Method* (Basic Books, 1976).
[144] A. Giddens, 'Structuration Theory: Past, Present and Future' in C. Bryant, D. Jary (Eds.), *Giddens' Theory of Structuration: A Critical Appreciation* (Routledge, 1991) 201-221.
[145] N Buhr, 'Structuration View on the initiation of Environmental Reports' (2002) 13 *Critical Perspectives on Accounting* 17–38.

effect, the shift towards a normative incorporation of *coalesced anthropocentrism* in protecting environmental rights presents a more assured structure under which the tripod of environmental interests can be effectively protected and guaranteed by legal and constitutional instruments.

2.5 Conclusions

This chapter examined the jurisprudential and theoretical basis of environmental rights and argued in favour of a shift from an anthropocentric view of environmental rights to a liberal, more inclusive approach which accommodates nature's intrinsic interests. This liberal approach, encapsulated in the *coalesced anthropocentric* concept, ensures that efforts to entrench environmental rights in statutory and constitutional instruments are comprehensive and tolerant of the rights of non-sentient components of the ecosystem which are often neglected in legal and judicial considerations of environmental issues. The *coalesced anthropocentrism* approach exposes the shortcomings of current environmental legal instruments around the world which are generally considered advancements on environmental rights despite being lopsided in favour of the rights of humans to a clean environment.

Having conceptualised environmental rights, it becomes necessary to examine the importance of adopting a rights' approach to environmental protection particularly considering that regulatory and judicial mechanisms have always been utilised for environmental protection. The focus in chapter 3 will, therefore, be on establishing the benefits of adopting an environmental rights approach over the regulatory and private law/civil liability approach which has for decades been the dominant forms of regulating environmental concerns in jurisdictions across the globe. While the regulatory and civil liability approaches are indispensable forms of protecting the environment, the chapter examines their critical shortcomings which makes the rights' approach a more effective approach to sustainable environmental protection.

CHAPTER THREE

UTILIZING RIGHTS' BASED APPROACH TO ENVIRONMENTAL PROTECTION

3.1 Introduction

As the example of the French Charter of the Environment shows, contemporary environmental legal instruments tend to incorporate regulatory tools designed to protect the environment through the adoption of the polluter pays principle, precautionary principle, preventive principle. In addition, private law remedies are also available for redressing environmental pollution in the form of property law liabilities arising from torts law, nuisance law and other strict liability negligence claims for activities impacting the environment.

While these approaches to environmental protection have their shortcomings, they generally provide a reasonable environmental protection framework across jurisdictions. This has led to questions over the necessity of incorporating a rights' model into environmental protection, in an area of law which may be considered to be highly technical, relativist and difficult for standardisation.

This chapter examines the importance of rights' based approach to environmental protection and why it trumps the regulatory and civil liability approaches in effectiveness as an environmental protection framework. The chapter argues that a rights' based approach elevates environmental concerns above mere policy objectives of governments which can be traded off for developmental and other economic pursuits. By embedding rights in environmental concerns, individuals are empowered to push back on regulatory laxity and environmentally injurious regulatory policies of governments. Also, rights' based approach shifts focus from the monetisation of environmental problems which the civil liability approach tends to do by allowing individuals to focus on the potential windfalls to be gotten from litigating environmental pollution.

3.2 Environmental Rights Model Vs Regulatory Approach

The focus on rights' language in environmental discourse in recent times has tended to overshadow the conventional governance approach (also known as the regulatory approach) of imposing regulatory standards on activities which impact the environment. The primary obligation for protecting the environment, prevention of pollution and improvement of the safety of the air, water and other parts of the ecosystem rests essentially on the state and its agencies. This obligation is generally discharged by the imposition of environmental standards, controlling of polluting activities, issuance and revocation of licences subject to pollution control conditions and the imposition of penalties for activities which violate the environmental integrity of an ecosystem. In most countries, different governmental regulations through statutes and secondary legislation are in place to guide environmental conducts and state resources are allocated towards restoring faltering ecosystems.[1] There is also a significant amount of soft law regulatory policies in the form of policy guidelines, master plans, and code of conducts etc. which are utilized at the domestic levels as environmental governance tools to protect the environment. Governments are regularly held accountable through administrative reviews for environmental governance actions which fall short of required standard in protecting the environment through adequate regulations.[2]

Environmental governance is a regulatory approach to environmental protection as it relies on regulatory actions by governments and other state actors at various levels to govern activities impacting the environment through statutory regulations, orders, licensing regimes, imposition of procedural requirements such as environmental impact assessments,[3] and even contractual regulations included in most production sharing contracts between governments and oil exploration companies. These regulations are supplemented by environmental principles developed over time at the international and domestic levels such as the precautionary principle, polluter pays principle and preventive principle

[1] M. Thorne, 'Establishing environment as a human right' (1991) 19 *Denver Journal of International Law and Policy* 301-342.

[2] A. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press 2010) 245.

[3] See for instance - the Environmental Impact Assessment Act 1992 of Nigeria; the Environment Protection Act 1986 of India; the National Environmental Policy Act, 1969 of the US; and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 of the UK.

intended to guide governmental actions in respect of the environment.[4]These international environmental law principles are regularly applied by the courts in resolving environmental disputes relating to the failure of governmental regulations in respect of the environment. In *Vellore Citizens Welfare Reform v. The Union of India,*[5] where a district authority in India had failed to properly regulate an industry which was discharging contaminants into the water used for drinking by the populace, the Indian Supreme Court invoked the precautionary principle and polluter pays principle to hold the district and polluting industry liable for environmental damage. The Court, applying the precautionary principle, stated that the Indian state must anticipate, prevent, and attack the causes of environmental degradation; also, the lack of scientific certainty should not be used as a reason for postponing measures to prevent pollution in that district. Applying the polluter-pays principle, the court held the polluting industries strictly liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and stated that this liability for harm extends also to the cost of restoring the environmental degradation.

In addition, international environmental governance also developed other non-statutory regulatory instruments which are market-based instruments for promoting environmental protection by incentivizing participation in environmental protection activities with the prospects of economic benefits. In essence, these instruments are targeted at attracting investments in environmental protection projects with the allure of reaping financial benefits in the process. They include carbon-trading schemes such as the EU Emission Trading Scheme (ETS)[6] and other financial mechanisms under the Kyoto Protocol[7] - such as the Clean Development Mechanism - in response to the growing environmental challenge of climate change and global warming. There has also been a suggestion for creating 'surrogate regulation' of environment-impacting activities by requiring companies in environment-impacting industries to obtain financial guarantees

[4]C. Miller, 'Environmental Rights: European fact or English fiction? (1995) 22(3) Journal of Law and Society 374-97.

[5]1996 A.I.R. (S.C.) 2715 (1996); See also Shehla Zia v. WAPDA, Human Rights Case No. 15-K of 1992, P.L.D. 1994 Supreme Court 693 (1992).

[6] The EU ETS was established under Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC; amended in 2004, 2008, 2009 and 2014.

[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. <http://unfccc.int/kyoto_protocol/items/2830.php> accessed 17 June 2016.

such as insurance, bonds or guarantees, to cover their environmental liabilities and it offers considerable regulatory potential to restrict the incentives for environmental irresponsibility created by the doctrine of limited liability of these operators. This is intended to make insurance companies and other third-party financiers surrogate regulators of the operator's activities, thereby augmenting the monitoring and enforcement capabilities of public regulators and creating a more robust regulatory regime [8]

Despite these elaborate regulatory mechanisms in environmental governance around the globe, environmental degradation has continued unabated as various factors impede the effectiveness of using regulatory tools to curb pollution and degradation. Various reasons have been advanced for the failure of environmental governance systems and its regulatory approach around the globe. One of the reasons advanced for this failure is the inability of a regulatory approach to influence behaviour in such a way as to avoid the causes of pollution. Young[9] postulates that '[A]n effective governance system is one that channels behaviour in such a way as to eliminate or substantially to ameliorate the problem that led to its creation. A governance system that has little behavioural impact, by contrast, is ineffective'. In essence, while the regulatory approach dictates the way and manner individuals or corporations act in relation to the environment, it mostly achieves functional compliance with the regulatory requirements without any sustainable behavioural change in the environmental ethics of the individuals or corporations. Consequently, loopholes in regulatory standards are maximally exploited to the detriment of the environment and this undermines the effective protection of the environment.

Kysar,[10] on his part, attributes the major failure of global environmental governance to a myriad of factors including – the lack of compliance with environmental laws, norms and standards, weak enforcement mechanisms, the continued prevalence of environmental injustice, difficulties of holding private entities such as transnational corporations to account for their environmental

[8] C. Mackie, 'The Regulatory Potential of Financial Security to Reduce Environmental Risk' (2014) 26 Journal of Environmental Law 189-214.
[9] O. Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, 1994) 3.
[10] A. Kysar, *Regulating from Nowhere,* supra (n 2) 241.

wrongs and democratic deficits in decision-making structures.[11] While non-compliance with environmental norms and standards is generally accepted as a leading cause of failure of environmental governance, Boyle[12] denounces the suggestion that democratic deficit in environmental decision-making is a factor in the failure of environmental governance. He opined that-

> "Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption. Indeed the industrial democracies of the North, with their liberal rights-based legal systems, are disproportionately responsible for much environmental damage, including the consumption of finite resources and the emission of greenhouse gases. The point is that procedures alone cannot guarantee environmental protection."

Boyle's analysis of the failure of environmental governance points to a central theme underlying regulatory approach- it is based on institutionalizing procedures for dealing with the environment and regulating how this dealing with the environment is done. It is a top-down approach which relies on the imposition of rules, guidelines, procedures, protocols and other mandatory steps aimed at protecting the environment. This top-down approach, however, falls short of instilling environmental ethics in the subjects and functional compliance with regulatory standards results in minimal progress on environmental protection objectives.

An important cause of failure of the regulatory approach is the role other socio-political factors play in the subjugation of environmental protection and the subservient position of environmental objectives as regulatory goals viz-a-viz other socio-political objectives such as property rights and economic development. The pre-eminence accorded to property rights over environmental objectives is one of the biggest hurdles most governments face in tackling environmental concerns.[13] Property rights are accorded statutory and constitutional protection in many countries while environmental protection is largely governed by regulatory mechanisms without legal or constitutional

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[11] ibid.

[12] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment', <http://www2.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf> accessed 2 December, 2015.

[13] J. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification', (1993) 18 *YALE J INT'L L* 281–8523.

protection. More importantly, many governments - especially governments of developing nations - generally accord priority to the pursuit of economic developments over environmental protection. These governments consider global environmental norms and standards as a form of economic colonialism and they view the emphasis on environmental ethics by the developed nations as an attempt by these nations to unduly restrict the growth of Third World nations. This is more so considering that these industrialized nations attained industrialization through the wanton exploitation of natural resources without environmental considerations in the pre-1990 era.[14]

The pursuit of development as a social objective is often considered an important right of people and in the developing world, development objectives are often pursued exclusively of environmental considerations.[15] The exploitation and utilization of natural resources for development purposes often conflicts with environmental objectives and resolving the conflict between these two important social objectives is often a difficult task[16]. An illustration of this developmental leanings of many developing countries can be found in the decision of a provincial court in Ecuador in *Viteri y otros v. Ecuacorriete S.A., Ministerio de Recursos Naturales, Procurador General del Estado*[17] where a challenge was made to some energy infrastructures sought to be constructed by the government. Rejecting the claim, the court declared that-

- "the development of the project represented the public interest in that it was necessary to achieve the state's sustainable economic development and to enable the state to achieve its social development aims."[18]

Since the promulgation of the Rio Declaration in 1992, the rights to development and environmental protection have become largely interwoven within the concept of sustainable development. Principle 4 of the Rio Declaration states that 'in order

[14] P. Taylor, 'From Environmental to Ecological Human Right: A New Dynamic in International Law? '(1998) 10 *Georgetown Environmental Law Review* 309, 311.
[15] P. Andrade, 'The Government of Nature: Post-Neoliberal Environmental Governance in Bolivia and Ecuador', in F. de Castro, B. Hogenboom & M. Baud (eds), *Environmental Governance in Latin America* (Palgrave Macmillan, 2016) 113–36, at 121–5.
[16] L Kotzé and P Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador', (2017) 6(3) *Transnational Environmental Law* 401–433.
[17] Judgment, Provincial Court of Pichincha, Case No. 17111-2013-0317, available at: <http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf> accessed 08 March 2019.
[18] Ibid, 52.

to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' Seeking to integrate environmental protection into development efforts requires restraining development activities which impact negatively on the environment. By introducing the principle of common but differentiated responsibility in Principle 7, the Rio Declaration sought to impose greater obligations on developed countries for achieving sustainable development relative to their contributions to global environmental degradation.[19] However, the conceptual difficulties surrounding the implementation of this concept have often led to the absence of any definite responsibility and watered down obligations on both the developing and developed nations.

Consequently, developing countries generally focus on development objectives and sacrifice environmental objectives in the process, considering it as an unnecessary restraint on rapid industrialization as experienced in the developed countries. UNEP's First Global Report on Environmental Rule of Law 2019 reiterated this problem, stressing that many developing countries prioritize macroeconomic development when allocating government funds and setting priorities. This results in environment ministries that are under resourced and politically weak in comparison to ministries for economic and natural resource development.[20] This is often based on a perception that environmental rules will slow down or impede development.[21] This creates a problem for the regulatory approach, as the government, which ought to implement the regulatory standards and policies, is willing to relax these standards and guidelines or deliberately refuse to enforce environmental regulations where doing so will restrict development activities or efforts. This situation is at the heart of the failure of environmental governance in most developing countries around the globe because the regulatory approach is dependent on government policies and decisions. As a result, environmental objectives are traded off for development policies and other socio-political gains.

[19] See also Art 3(1) and 4(1) of the United Nations Framework Convention on Climate Change 1992.
[20] UNEP First Global Report on Environmental Rule of Law, January 2019.
[21] UNEP International Advisory Council for Environmental Justice 2015. "Environmental Rule of Law: Critical to Sustainable Development." Issue Brief. May 2015.

3.2.1 Trump of Environmental Rights over Policy Objectives and Regulatory Procedures

A key impact of the rights' approach to environmental protection is its ability to trump socio-political objectives and constitute environmental protection as a non-derogatory interest protected by law which is given special weight or preference over other socio-political objectives. Following on from Dworkin's 'trump theory' of rights, adopting a rights' model for environmental protection accords special weight to the environmental interests of humans and nature and elevates these interests beyond mere objectives susceptible to trade-offs in favour of other socio-political objectives and rights such as property rights and development rights.

Granted that property rights and the right to development are often existing rights within a legal system, clothing environmental protection with the rights' apparel places it within the 'marketplace of rights' and its placement as a competing right with these other rights grants it stronger stake than where it exists as a mere socio-political objective governed by regulatory mechanisms. As a competing right, judicial measures can be sought to protect it from trade-offs in favour of other socio-political objectives and this presents a unique potential for shifting the balance of power from the hands of the government and other property rights holders and spreading it more evenly across the populace with environmental protection accorded a prime status. Determining which right should prevail amongst these competing rights – property rights, development rights and environmental rights - becomes the domain of the courts taking into consideration all relevant factors and the need to protect the environment for future generations. Exclusive reliance will no longer be placed on the regulatory state to put out suitable policy documents and extensive regulatory standards for effective environmental protection, as the citizens are now conferred with legally recognized rights to compel government actions to protect the environment and compel discontinuance of acts which threaten the environment even where such acts are vital to the economic development of the country (such as important oil and gas exploratory licences). In a nutshell, a rights' model shifts environmental protection from the exclusive domain of the regulatory state in a top-down approach, to a citizen-led domain in a bottom-up approach. It, therefore, promotes

civic environmentalism and ensures environmental stewardship and accountability of the government in environmental protection matters.

Three instances from Latin America and one from the Philippines illustrate this point. In the Chilean case of *Pablo Orrego Silva v. Empressa Pange SA,*[22] the Supreme Court of Chile ordered a halt to the construction of six hydroelectric dams on the Bio-Bio River in view of the threat to the ecosystem and the environmental rights of the indigenes in that region. This was despite the immense socio-economic and development benefits that construction of these hydro dams portends for the country and its people. The decision of the Chile Supreme Court was predicated on the basis of Article 19(8) of the Chilean Constitution which provides that 'citizens have the right to live in a pollution-free environment' and 'the state, through legislation, must protect this right and ensure the conservation of nature.' The provision of environmental rights in Chile's constitution enabled the citizens, through the courts, to prevent the Chilean government trading off environmental considerations for development objectives. In the absence of an environmental right in this instance, the dam projects would have easily sailed through under a regulatory/governance model set out under the Chilean Law 19,300 (Environmental Law) even with the necessary environmental impact assessment and other democratization and procedural requirements in the decision-making process relative to the projects.

Similarly, in Costa Rica, the Supreme Court in *M.M Levy y Asociacion Ecologista Limonense v Ministerio del Ambiente y Energia*[23] struck down a lucrative oil and gas exploration deal between the government and oil companies which threatened the environmental integrity of the affected ecosystems and rights of the indigenous people of the communities. Although the necessary environmental impact assessments and other regulatory protocols regarding environmental management for the affected areas were carried out and deemed satisfactory by the government, the Supreme Court intervened to override this regulatory approval on the basis of the protected right of the people of the affected area to the integrity of their environment. This decision of the court was based on the

[22] Pablo Orrego Silva v. Empressa Pange SA Supreme Court of Chile 5th August 1993.
[23] Supreme Court of Colombia Decision 2001-13295, Expediente 00-007280-0007-CO, 21/12/2001.

constitutionally protected environmental right of the people enshrined in Article 50 of the Constitution of Costa Rica, 1949 which stipulates that-

> "Every person has the right to a healthy and ecologically balanced environment*, being therefore entitled to denounce any act that may infringe said right* and claim redress for the damage caused. The state shall guarantee, defend and preserve that right. The Law shall establish the appropriate responsibilities and penalties". (italics added for emphasis)

The italicized words in Article 50 is the fulcrum of the role and importance of a rights' approach to environmental protection. It confers on citizens the power to denounce any act, whether government initiated or approved, that threatens the environment. In essence, a rights' approach to environmental protection ensures that environmental concerns trump environmental regulatory compliance and other socio-economic and political objectives pursued by the government, state agents or government's commercial partners. Environmental degradation and destruction can be achieved even while complying with regulatory protocols, procedures and standards imposed by governments and policymakers, either due to weak regulatory standards or the inability of regulatory instruments to cover the different facets of the threat facing the environment from a particular subject. Boyle's statement that 'democracies are entirely capable of environmental destruction'[24] reflects the susceptibility of regulatory instruments instituted through democratic processes to permit environmental destructions slipping through several cracks in the instruments. A rights' approach to environmental protection addresses this problem by empowering the ordinary citizens directly affected by the potential environmental impact to protect their interests through judicial means rather than rely on the government and its regulatory protocols. Moreover, in cases where the government (and its agents) is the source of the environmental destruction, such as in the *Pablo Orrego Silva* case, the environment is better protected through enshrined rights enforceable against the government, as regulatory instruments will be conveniently brushed aside by the government in pursuit of its objectives.

[24] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment', n 12, 10.

In the Venezuelan case of *Donato Furio Giordano v. Ministry of Environment and Natural resources,*[25] the Supreme Court of Venezuela ordered the destruction of septic tanks on private property which threatened the integrity of the surrounding environment. The court held that this infringes on the constitutional right to a clean environment guaranteed under Chapter IX, Article 127 of the Constitution of the Bolivarian Republic of Venezuela 1999[26]which stipulates that-

> "Everyone has the right, individually and collectively, to enjoy life and a safe, healthy and ecologically balanced environment. The State shall protect the environment, biodiversity, genetics, ecological processes, national parks and natural monuments and other areas of special ecological importance"

An important factor, in this case, is the fact that efforts to have the septic tanks removed under various regulatory processes regarding waste management and environmental protection had failed, resulting in the ventilation of the right to a clean environment as the basis for demanding their removal.

In the Philippines, the Supreme Court, on application to it by aggrieved inhabitants of the Manilla Bay in *MMDA v Concerned Residents of Manila Bay,*[27]ordered the creation of a Manila Bay Advisory Committee to replace the government committees set up to clean up the bay, in view of the failure of the government's regulatory standards and policies put in place. In essence, seeing the failure of the Philippine government's regulatory institutions to address the pollution of the Manilla Bay, the Supreme Court intervened to protect the environmental right of the inhabitants to a clean environment, thereby safeguarding the Manilla Bay from continued despoliation for the interest of the inhabitants.

These cases reveal the important role of environmental rights as a safeguard against environmental despoliation in the event of failure of governance/regulatory processes to preserve environmental integrity. While governmental intervention in environmental management and regulation is indispensable, the above cases illustrate that the gradual shift from an entirely regulatory approach to a rights-based approach is engendered by the need to

[25] Supreme Court of Justice, Venezuela, 21.9.1999. 101. 3.
[26]Published in Official Gazette on Thursday, December 30, 1999 , No. 36860.
[27] Metropolitan Manila Development Authority v Concerned Residents of Manila Bay, December 18, 2008, GR No. 171947-48.

elevate environmental concerns to a higher pedestal where it is not subject to unrestrained policy trade-offs and bureaucratic laxity. As highlighted in the Stockholm Declaration, a clean environment is vital to the enjoyment of human rights of people, even the right to life itself,[28] and it is therefore important that safeguards, in the form of environmental rights, be instituted to protect the environment from the failings of government environmental regulations. A rights' approach, therefore, acts as a safety net for environmental concerns that fall through cracks in the net of environmental regulations/governance approach.

3.2.2 Environmental Rights' Model Supplementing Regulatory Approach

A rights'-based approach to environmental protection is, in some sense, inevitable given the global recognition of the need for a cleaner and safer environment for humans to thrive and, for ecocentrists, the recognition of the intrinsic values of the natural environment. Nevertheless, a rights' based approach does not dispense with the need for a regulatory approach to environmental protection which entails administrative controls and institutional regulation of environmental matters. Rather, environmental rights' model works better as a supplement to the regulatory approach, because government intervention in environmental regulation is an indispensable part of environmental management around the globe.

The indispensability of government involvement in environmental management through regulatory controls is based on three pillars- firstly; the primary obligation to protect the environment rests on the government as an exercise of public authority over the environment within its jurisdiction. Discharging this obligation requires the imposition of environmental regulatory controls by the relevant public authority subject to administrative review under public law doctrines.

Many constitutions around the globe with environmental provisions emphasize the fundamental role of governmental regulations for environmental protection even while stipulating the individual rights of the citizens to a clean environment. Article 225 of the Brazilian Constitution, for instance, while stipulating the right of

[28] Principle 1 of the Declaration of the United Nations Conference on the Human Environment, Stockholm, June 1972.

citizens to 'an ecologically balanced environment', highlighted the seven key obligations of the government with respect to protecting the environment. Article 24 of the South African Constitution, while stipulating the right of citizens to 'an environment that is not harmful to their health or well-being,' obliges the government to institute legislative measures to protect the environment by preventing pollution and ecological degradation and securing ecologically sustainable development and use of natural resources. Section 20 of the Nigerian Constitution[29] mandates the state to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria' while articles 5 and 6 of France's Environmental Charter 2005 obliges the relevant public authorities to institute public policies to promote sustainable development and institutionalize risk assessment policies for protecting and guaranteeing the sanctity of the environment. Failure to institute regulatory controls will, therefore, tantamount to a dereliction of governmental obligation to protect the environment.

Secondly, a regulatory approach is indispensable for giving effect to the enforcement of environmental rights. A rights' approach will be ineffective without appropriate regulatory systems, principles and policies to give effect to the application of the rights. This is because the mechanisms, framework, institutions and policies set up under a regulatory system is important in setting up procedural and institutional frameworks for ventilating a right to a clean environment, in whatever form or manner it is expressed. Paragraph I, Article 225 of the Brazilian Constitution which follows the conferment of a right to an ecologically balanced environment in Article 225(1), states that-

> "*in order to ensure the effectiveness of this right*, it is incumbent upon the Government to (i) preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems…"

This evinces the reliance on regulatory controls for the effectiveness of environmental rights, particularly in relation to standardization of environmental rules as a way of enforcing the right to a clean environment. This reliance becomes even more relevant when environmental rights are considered from a '*coalesced anthropocentric'* view where nature's rights are considered an integral aspect of environmental rights. Protecting the intrinsic rights of nature requires

[29] Constitution of the Federal Republic of Nigeria 1999 (as amended).

the incorporation of environmental standards and rules for nature's benefits by the government in all regulatory controls in environment-impacting industries.

Regulatory mechanisms are also relevant for enforcing environmental rights because they institute standards, guidelines and enforcement systems which are utilized for the ventilation of environmental rights within a jurisdiction. In the *Manila Bay's case,* the Supreme Court of the Philippines ordered the government to set up a regulatory committee and institute other regulatory measures for the protection of the right of the Manilla Bay residents to an environment free from pollution. This shows that regulatory mechanisms are indispensable in enforcing environmental rights. Indeed, one of the major criticisms of the environmental rights' approach by scholars is the seemingly science-based nature of environmental protection which, they argue, makes environmental protection more suited to regulatory approach than a rights' based approach. Tarlock[30] maintains that environmental management must remain science based in view of the technical standards of environmental issues requiring routine scientific reviews. Anderson,[31]on his part, argues that precise qualitative and quantitative dimensions of environmental protection are not readily translated into legal terms and technical measures of environmental quality are more easily incorporated within regulatory instruments than in a human rights provision of general application. However, Tarlock and Anderson's views overlook the inter-relationship and inter-dependency between regulatory approach and the rights' based approach whereby regulatory instruments addressing the science-based, qualitative and quantitative dimensions of environmental protection are utilized more as a means of enforcing the underlying and fundamental right to a clean environment. The rights' based approach is, therefore, merely the legal basis of the regulatory instruments which address the scientific aspects of environmental protection. Therefore, rather than being a weakness, this shows that the rights' based approach is best viewed as supplementary to the regulatory approach by constituting the legal basis for the latter and also, as discussed earlier, acting as

[30] A. Tarlock, 'Environmental Law: Ethics or Science?' (1996) 7 Duke Environmental Law & Policy Forum 193–223.

[31] M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996), 14.

a safety net for environmental concerns that slip through the cracks of the regulatory approach.

A third pillar of the indispensability of the regulatory approach is the public law/private law dichotomy between the regulatory and rights'-based approach. Regulatory systems and environmental governance policies are governed by public law as it deals with governmental actions, policies and administrative instruments in relation to the environment. Public law mechanisms such as judicial reviews of administrative actions and other judicial mechanisms such as mandamus and prohibition are available remedies within the regulatory systems. A rights' based approach, on the other hand, largely deals with the private law rights of citizens and individuals to a clean and habitable environment. Nevertheless, the subject of both regulatory approach and rights' based approach – the environment- largely falls within the public law sphere because the environment belongs to all citizens/individuals in common and equal measure and is, therefore, largely governed by public law.

In this respect, the tort of nuisance, for instance, seeks to protect the entitlement of individuals to peaceful enjoyment of their private land (private nuisance) while protecting the larger public's entitlement to freedom from interference with the environment (public nuisance).[32] However, while a single act of nuisance may individually affect different landowners, it is classified as a public nuisance since it affects more than one person and, therefore, falls within the sphere of public law which is enforceable by the government through regulatory mechanisms.[33]

In addition, nature's rights within a *coalesced anthropocentrism* paradigm fall within the public law sphere as the natural environment is a public good and, therefore,not subject to private expropriation. Because the environment and nature's interests are subjects of public law, regulatory systems and controls will inevitably be required to manage, protect and preserve the environment for the common use and benefit of all persons. Thus, while the individual rights of citizens to a clean environment is a vital aspect of environmental protection, government

[32] Victor Schwartz and Phil Goldberg, 'The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort' (2006) 45 *Washburn L.J*. 541.
[33] D Gifford, 'Public Nuisance as a Mas Products Liability Tort', (2003) 71 *U. Cin. L. Rev*. 741.

intervention through regulatory controls and systems is indispensable in other to preserve and protect the environment for all persons within the jurisdiction.

Flowing from the above, it is apparent that adopting a rights' based approach should not be viewed as discarding the regulatory approach, but rather as a supplementary system of environmental protection predicated on the private law right of individuals to a clean environment. Ideally, environmental legislation should incorporate both regulatory controls and environmental rights in a mutually dependent normative structure, whereby each system is separately enforceable but inextricably linked to each other. The French Environmental Charter of 2005 is an illustrative case of an environmental legislation that incorporates both rights' based and regulatory systems within a single document in an inextricably linked structure.[34] Articles 1 and 7 of the Charter provide substantive and procedural environmental rights to a clean environment and access to information and participation in environmental decision making, while article 4, 5 and 6 entrench environmental regulatory systems with incorporation of polluter pays principle, precautionary principle and obliging the public authorities to adopt policies to promote sustainable development. The provisions of the Charter are inextricably linked and not isolated provisions to be separately considered. In this way, the environmental rights provisions supplement the regulatory provisions and can be relied upon in cases of regulatory failure. This was the situation in the 2008 landmark case on the *Statute on Genetically Modified Organisms ('the Law on Genetically Modified Organisms')*.[35] The French Constitutional Council had to consider if the statute on GMOs passed by the government conformed to the Charter as enshrined in the Constitution. The Court held the statute to be in non-conformity with the environmental rights in the charter which were held to have constitutional force.

This reliance on environmental rights to challenge regulatory statutes/policies makes the Charter a 'good, if not the only, example of a legal text which intersects

[34]See D. Marrani, 'Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts', (2010) 10 *Sustainable Development Law & Policy* 1 at 52–57.

[35] Décision 2009-599 DC 29 December 2009, JORF 31 December 2009. See <www.conseilconstitutionnel.fr/decision//decisions-depuis-1959/2009/2009-599-dc/decision-n-2009-599-dc-du-29-decembre-2009.46804.html> accessed 20 April 2017.

the constitution, human rights and the environment'[36] in such a way as to preserve the preeminent position of government as the protector of the public interests in the environment while guaranteeing the environmental rights of individuals as a supplementary protection against regulatory excesses or insufficiency.

3.3 Environmental Rights' Model Vs Civil Liability Approach

There is a seemingly close relationship between the environmental rights' model and the civil liability approach. They are both rights' based approaches which confer legal entitlements on the rights' holders for protection of their varying interests, and they both rely significantly on judicial enforcement mechanisms for their viability. However, this is as far as the semblance goes, for the nature of both rights are not only structurally diverse and import different considerations, but they are also largely conflicting in most situations.

The right which is enforced in civil liability approach to environmental protection is not a right to the environment itself, but either a property right or a right derivable from the law of torts under the doctrine of nuisance. The ventilation of this property or tortious right results in the protection of the environment from which these rights are derived. The civil liability approach protects private rights in properties involving environmental goods and is generally actualized through tortious claims in court for trespass to land (property right), nuisance and the rule in *Rylands v. Fletcher*[37] involving strict liability for objects brought unto the land which causes damage to neighbouring properties.

The civil liability approach depends on the institution of civil suits by an aggrieved party seeking compensation or an injunction against another party for damages done to his property and environment by the negligent or wrongful act of the other. It generally requires proof of causation, foreseeability and damage by the claimant.[38] In the event of success in the suit, the claimant is compensated for

[36] D. Marrani, 'The Intersection between Constitution, Human Rights and the Environment The French Charter for the environment and the new ex post constitutional control in France' (2014)16 *Envtl. L. Rev*. 108.

[37] Rylands v Fletcher [1868] UKHL 1; In its application to environmental law, it imposes a strict liability on a person for environmental damage done to the property (land) of a neighbour if noxious or other harmful chemicals escapes from his land into the neighbouring property. See Cambridge Water Co. Ltd v Eastern Counties Leather (1994) 2 AC 264.

[38] Vivienne Harpwood, *Principles of Tort Law* (Cavendish publishers, 2000) 52.

foreseeable damage without taking into cognizance the long-lasting impact on the integrity of the environment and other ecosystems. Essentially, in civil liability approach, the claimant is not asserting a right to a clean environment and is thus not protecting the environment *per se* but is rather extending some form of 'surrogate protection'[39] for the environment by establishing his claim to property or other environmental goods which entitles him to a peaceful enjoyment of such property including the environment on which the property is based.

In many communities affected by environmental pollution in developing countries, such as Nigeria and a number of Latin American countries, the civil liability approach constitutes the major form of protection from wanton pollution by instituting suits against the multinational oil companies (MNCs) seeking significant compensations against them for damages done to their environment.[40] Indeed, huge sums of money have been awarded against several MNCs by courts in various jurisdictions[41] for environmental degradations and there are a plethora of such cases still pending in various courts across the globe especially in third world countries.[42] In *Dr Pere Ajuwa v. Shell Petroleum,*[43] the trial court awarded US$1.5 billion to the Appellants as compensation for injuries suffered as a result of pollution and destruction of their farmlands and contamination of their streams by oil leakage from the Respondent's facilities. The Court of Appeal reversed this decision, faulting the basis of the trial court's decision and the case is currently pending at the Supreme Court of Nigeria. In Ecuador, there is a pending litigation against Chevron brought on behalf of 30,000 Ecuadoreans seeking damages totalling $18.2bn (£11.5bn) from Chevron over Amazon oil pollution.[44]

Despite the potential for civil liability approach to generate huge finances in terms of compensations for environmental wrongs, this approach falls short of an

[39] P. Taylor, 'From Environmental to Ecological Human Right', supra, n 14, 351.

[40] A. Shinsato, 'Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 *Nw.J Int'l Hum Rts* 186. <http://scholarlycommons.law.northwestern.edu/njihr/vol4/iss1/14> (accessed 04 April 2015).

[41] R. Meeran, 'Liability of Multinational Corporations: A Critical Stage' <http://www.labournet.net/images/cape/campanal.html> (accessed 08 February 2016).

[42] See 'Royal Dutch Shell braced for flood of Nigeria compensation claims after court tells it to hand over oil spill evidence' <http://www.thisismoney.co.uk/money/news/article-3366548/Shell-faces-Nigeria-oil-spill-compensation-claims-judges-order-company-hand-documents.html > accessed 13 December 2016.

[43] Dr Pere Ajuwa v Shell Petroleum (2011) 11 SC 207.

[44] '*US court rules against Chevron in Ecuador oil case'*, (*BBC*, 20 September 2011), <http://www.bbc.co.uk/news/world-latin-america-14983123> accessed 15 June 2017.

effective protection for the environment. Fundamentally, it does not address the causes of pollution of the environment nor seek to prevent its re-occurrence, but is mainly reactive, compensatory and externalizes the cost of environmental pollution for the major polluters. In a sense, it is a monetization of environmental degradation akin to government fines on polluting activities which can be considered as pollution taxes as they mostly succeed in raising finances from the polluters rather than halt pollution. This is because the basic remedy available for suits against polluters for damages to the environment is the award of damages in the form of monetary compensations to the claimant for the assessed injury, as determined by the court. In *Ajuwa's case* discussed above, compensations to the tune of billions of dollars were awarded to the claimants by the court for property damage resulting from environmental pollution. This monetary award to private individuals will not be used to clean up the environment but will rather go into private pockets and allocated to address other personal socio-economic concerns while the environment continues to suffer the consequences of the pollution.

Although the polluters are often ordered by the court to clean up the polluted environment, this is rarely enforced and is difficult to monitor in most cases.[45] Even where the clean-up order is enforced, this is merely reactive in nature as it only comes into play when the environment has been polluted and the polluted environment often struggles to recover and may never be the same again. The reactive nature of civil liability approach to environmental protection is an unavoidable element of the approach as the right to sue only arises after the environmental damage has been done or is imminently threatened, for it is only then that an enforceable cause of action arises. Civil liability approach is, therefore, incapable of ensuring a proactive, preventive approach to environmental protection neither is it able to incorporate important environmental governance principles such as the precautionary principle. In the same vein, when governments penalize polluters by imposing fines for the act of pollution, the financial cost of pollution, therefore, becomes a negative externality which polluters can account for in monetary terms and the raising of funds from such pollution activities then constitute a form of tax on pollution, which does nothing to address the root cause of pollution nor deter its re-occurrence.

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[45] A. Shinsato, supra, n 40, 187.

While imposing huge financial penalties on polluters in the form of compensations by the courts can potentially act as a deterrent to future pollutions, in reality, such awards do little to discourage polluting activities, especially by MNCs with huge financial war chests. The decision to invest in facilities that reduce the prospect of resulting pollution is usually an economic decision based on the comparative cost of such investment versus the potential financial liability for pollution. As proof of this, the major oil and gas corporations in Nigeria regularly set aside huge shares of their annual budgets to settle compensation claims that may arise in the course of their activities, while relatively little capital allocation is made for investing in improving their aging oil facilities which usually cause pollution. For instance, Shell's 2017 Annual Report disclosed that the company had set aside $2.5 billion for settlement of compensation claims arising from pollution incidents while only $15 million was set aside for investing in replacement of aging pipeline facilities in the same fiscal year.[46] This shows that these corporations are financially prepared for substantial awards against them for environmental pollution and such punitive awards do little to deter continuous pollutions as the MNCs invest more in preparing for such awards than they invest in improving their facilities to reduce pollution incidents.

In relation to gas flaring, a form of environmental pollution of the atmosphere by burning of associated gas derived from oil exploration, the Global Gas Flaring Reduction Partnership (GGFR) stated that 'in theory, the economics of associated gas dictates that operators will reduce flaring and venting until the marginal costs of gas utilization in a field exceed the marginal benefits'.[47] In essence, where the cost of investing in facilities and programmes to prevent pollution exceeds the potential liability for pollution, then pollution becomes an economically viable option for the MNCs. Although this is not put forward as a policy direction by MNCs operating in developing countries, it is evident in the response of the MNCs to repeated complains of pollution and other environmental degradation.

In some jurisdictions with significant environmental pollution arising from oil and gas exploration activities, such as Nigeria, civil liability suits against the MOCs are almost always in the form of tortious and property rights claims for

[46]Shell's Annual Report 2017 <https://reports.shell.com/annual-report/2017/> accessed 07 May 2019.

[47] GGFR 2004, 'Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons from International Experience', Report Number 3 - World Bank Group pg. 25.

damages/compensations. Ladan[48] examined the cases on environmental protection in Nigeria from 1960 to 2015 and found that almost all suits relating to environmental issues have been based on tortious claims (nuisance and negligence) and property rights claims (trespass to land) seeking damages/compensations for pollution of the environment[49] and noise from exploration activities.[50] Consequently, the nexus between the overwhelming reliance on civil liability approach to environmental pollution and the continued pollution of the environment in Nigeria is difficult to overlook.

Okonmah[51] highlights the major drawbacks in civil liability approach as including the onerous burden of proof placed on the claimants regarding causation and damages under the common law, and the fact that injuries arising from denial of peaceable enjoyment of property and family life, social and cultural life, diminution of economic well-being, threat to life and damage to the environment are hardly taken into consideration in assessing damages to be awarded to such claimants. In the Nigerian case of *Seismograph Services (Nigeria) Ltd v. R.K. Ogbeni,*[52] the claimant's action for compensation for extensive damage to his buildings caused by the shooting operations carried out by the defendants while prospecting for oil failed due to his inability to prove the negligence of the defendants while conducting the exploration. In *Ikpede v. Shell-BP*[53] where the claimant's action was against the environmental impact caused by the Defendant's laying of pipeline on properties belonging to the claimant, the claim failed as the Defendant was held to have a government license to carry out such activity and was thus covered by statutory authority. *Ikpede's case* would have had a different outcome under an environmental rights' approach as the holding of government's license (regulatory approval) would not be a justification for infringing on a right to a clean environment, as seen in *M.M Levy's case*[54]where the Costa Rican Supreme Court

[48] M. Ladan, *'Materials and Cases on Environmental Law and Policy* (Econet Publishers, 2004), 117-244.
[49] Shell petroleum development (Nigeria) Ltd v. HRH Chief GBA Tiebo VII & Ors(1976) 4 NWLR (pt 445) 657.
[50] Adediran & Anor v. Interland and Transport Limited (1991) 9 NWLR (PT 241) 155.
[51] Patrick D. Okonmah, 'Right to a Clean Environment: a Case for the People of Oil-Producing Communities in the Nigerian Delta' (1997) 41(1) Journal of African Law 43-67.
[52] (1976) 4 SC 85. 53; See also Chinda and Ors v. Shell-BP (1974) 2 RSLR 1.
[53] (1973) MWSJ 61.
[54] M.M Levy y Asociacion Ecologista Limonense v Ministerio del Ambiente y Energia, supra, (n 148).

held that regulatory approval for an environmentally injurious activity was no defence to its infringement on a citizen's right to a clean environment.

Another major drawback in the utilisation of civil liability approach is the vagaries of uncertainty usually associated with tortious claims and liabilities. There are a number of technical hurdles, hitches and restrictions[55] which apply at different stages of a civil suit which hampers its efficacy as an environmental protection tool. In countries with conservative judiciaries, this problem assumes even bigger proportions as the reluctance of the judiciary to interfere with government's social development objectives will hinder its willingness to penalize the MNCs' activities given their importance to the economic development of the country. In *Shell Petroleum Development Company of Nigeria Limited v. Abel Isaiah & 2 Others*,[56] an old tree fell on the appellant's oil pipeline and indented it, thereby obstructing the free flow of crude oil. The oil pipeline was owned and controlled by the appellant and ran across the respondents' swamp land and surrounding farmlands. The appellant engaged the services of a contractor to repair the dented pipeline. In the cause of the repairs, crude oil freely spilled onto the respondents' swampland. The spillage quickly spread over the respondents' communally owned swampland and polluted the surrounding farmlands, streams and fishponds. The Respondents sued claiming compensation for pollution of their land which was granted by the trial court and upheld by the Court of Appeal. However, on final appeal to the Supreme Court, the Appellant raised the issue of lack of jurisdiction of the trial court under the Petroleum Act 1961 and section 230 of the 1979 Constitution which was in force at the time of the accrual of the cause of action. The Supreme Court upheld the jurisdictional challenge, holding that the trial court lacked the jurisdiction to entertain the claim and, therefore, its proceedings and judgments are null and void. The Respondents consequently lost their claim for compensation, not based on the lack of evidence of the pollution damage caused by the Appellant, but on technical jurisdictional principles.

In addition, the civil liability approach raises the important issue of *locus standi* (the right or capacity to bring an action to court)[57] which is the bane of most public

[55] These include the locus standi issue, proof of causation, limitation of actions, statutory defences and pre-action requirements under the civil procedure rules. See the discussion on this point in Chapter 6 of this thesis.
[56] See Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah (2001) 5SC (pt 11) 1.
[57] This subject is discussed further in Chapter 6 of this thesis.

interest litigations in common law jurisdictions, especially related to environmental claims.[58] In the Nigerian case of *Oronto Douglas v Shell Petroleum Development Company Limited,*[59] the Claimant's suit to compel the Defendant to carry out an environmental impact assessment before commencement of oil drilling activities was dismissed on the basis that the Claimant would not be directly affected by the activities of the Defendant and thus lacked the locus standi to bring the suit. Although the locus standi rule has been watered down in several jurisdictions across the globe by statutes[60] and judicial decisions,[61] echoes of its application still reverberate in several civil liability suits relating to environmental protection.[62]

3.3.1 Civil Liability Approach in Transnational Environmental Litigation

The shortcomings of the civil liability approach extend beyond environmental litigations within national jurisdictions and are equally reflected in transnational civil liability claims related to environmental protection cases. When aggrieved claimants have sought to bring transnational suits against major polluters for environmental pollution in jurisdictions outside the country where the pollution occurs, such efforts are besieged by procedural jurisdictional hurdles.

Transnational environmental litigations arising from pollution are usually filed in courts in developed countries such as the US, UK and Netherlands by claimants

[58] M.O Makoloo et al, 'Public Interest Environmental Litigation in Kenya: Prospects and Challenges' (2007) ILEG 29.

[59] (1998) LPELR-CA/L/143/97.

[60] See Section 32(1)(e) of the National Environmental Management Act 107 of 1998 (NEMA) of South Africa, Section 3(4) of the Environmental Management and Coordination Act (EMCA) No. 18 of 1999 of Kenya and the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 of Nigeria.

[61] See for example the Kenyan case of Albert Ruturi and Another v Minister for Finance and Others (Albert Ruturi) [2002] 1 KLR 51 at 54, where the court stated that "as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi." In the UK case of R v Inspectorate of Pollution, ex p Greenpeace (No. 2) [1994] All ER 329, the Court of Appeal applied a liberal interpretation of the locus standi principle in environmental rights cases, stating that 'a responsible body with a bona fide concern about the subject matter of the proceedings may be regarded as being more than a mere 'busy body.' This decision was applied in the more recent UK case of Cherkley Campaign Ltd, Regina (on The Application of) v Longshot Cherkley Court Ltd [2013] EWHC 2582.

[62] See P. Kameri-Mbote, 'Kenya' in L.J Kotzé and A.R Paterson (eds.), 'The Role of the Judiciary in Environmental Governance: Comparative Perspectives' (Kluwer Law International 2009) 451, 467.

from developing countries such as Nigeria,[63] and Zambia.[64] These cases usually canvass the lack of access to justice within national jurisdictions as the reason for seeking remedy in foreign courts where the defendant has a corporate base or its parent company is based. However, a major procedural hurdle such transnational environmental litigations face is the reluctance of foreign courts to get unnecessarily involved in domestic disputes within another sovereign country encapsulated in the *forum non-conveniens* doctrine laid down by the UK House of Lords in the landmark case of *Spiliada Maritime Corp v Cansulex*.[65] Under this doctrine, courts in foreign jurisdictions will often decline jurisdiction where it is shown that there is a court in another jurisdiction which is clearly a more suitable forum for the trial of the action, in the interests of all the parties and the justice of the case. In the opinion of Chief Justice Roberts of the United States Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.,*[66] the reluctance of foreign courts to entertain extra-territorial claim is to prevent the danger of judicial interference in foreign policy.

In the recent 2017 decision of the English Court in *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria (SPDC) Ltd,*[67] the court declined jurisdiction to entertain the claimant's suit arising from environmental pollution occurring in Nigeria by a Nigerian company (SPDC) even though the parent company (Royal Dutch Shell) based in the UK was joined as a defendant in the suit. Although the claimant averred that they could not receive justice in Nigerian courts, the English court reasoned that a foreign court has to be very careful before passing qualitative judgments on the legal systems of other sovereign nations. The same approach was adopted by the US Supreme Court in *Kiobel's case* above and this reveals an important procedural hurdle facing civil liability approach to environmental protection at the transnational level.

However, this procedural jurisdictional hurdle is not a blanket restriction on transnational environmental litigations as the attitude of the court on this principle

[63] See Ken Saro Wiwa et al v Royal Dutch Petroleum Co et al (2008) No. 96 Civ 8386 (KMW) and Kiobel v. Royal Dutch Petroleum Co., (2013)133 S.Ct. 1659.
[64] Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC [2016] EWHC 975.
[65] [1987] AC 460.
[66] Kiobel v. Royal Dutch Petroleum Co., supra, n 63.
[67] This case was jointly filed with Lucky Alame and Others v Royal Dutch Shell plc, The Shell Petroleum Development Company of Nigeria Ltd [2017] EWHC 89 (TCC).

varies across jurisdictions and is also influenced by existing international and regional legal instruments on jurisdiction and conflict of laws. Even within the UK, for instance, there is a conflicting judicial opinion on the application of the *forum non-conveniens* principle to transnational environmental suits. In the 2016 case of *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines Plc,*[68] the English Court entertained a transnational environmental claim by claimants from Zambia relating to environmental pollution occurring in Zambia, against a mining company operating in Zambia with a parent company based in the UK. The court reached a different conclusion from the *Okpabi's case* and held that the claimants are entitled to seek justice in foreign courts if they are convinced they would not secure justice in their home jurisdictions. Existing international and regional legal instruments such as the Brussels Convention,[69] Brussels Regulation of the European Union,[70] and the Lugano Convention[71] on jurisdiction in civil and commercial matters also favour the grant of access to foreign courts for redressing transnational environmental wrongs. These instruments are, however, limited in application to EU countries that are signatories to them and other members of the European Free Trade Association (EFTA). In *Owusu v Jackson,*[72] the European Court of Justice (ECJ) upheld the applicability of the provisions of the Brussels Convention and Brussels Regulation to transnational environmental claims by declaring that the claimant could file a claim in English courts against defendants based in Jamaica for tortious actions which occurred in Jamaica. The ECJ further declared that the doctrine of *forum non-conveniens* is incompatible with article 4 of the Brussels Regulation and therefore is inapplicable to transnational claims arising from tortious and environmental claims.[73] This decision was further applied in two other recent ECJ decisions[74]

[68] Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines Plc, supra, n 58.

[69] Article 5(3) & (5) and Article 6(1) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated version CF OJ L 299, 31.12.1972, 32–42.

[70] Article 7(2) & (5) of the Brussels Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[71] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007, p. 3–41 (Lugano Convention).

[72] Owusu v Jackson C-281/02 Judgment of the Court (Grand Chamber) 1 March 2005 ECLI:EU:C:2005:120.

[73] See Page 45 of the ECJ Judgment, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=55027&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1369798> accessed 08 December 2017.

[74] Turner v Grovit Case C-159/02 and Gasser v Misak Case C-116/02.

and appear to have settled the position as far as the EU is concerned, although English courts still appear to adopt a contrary position as evinced by the recent decision of the English Court of Appeal in *Okpabi's case.*

In the Netherlands, the decision of the Dutch Court of Appeal in *A.F. Akpan v. Royal Dutch Shell, Plc & SPDC*[75] affirmed the position of Dutch law to allow transnational environmental claims for pollution occurring in other countries. This decision has made the Netherlands a focus of most transnational environmental suits by litigants from oil-producing developing countries, such as Nigeria, against Royal Dutch Shell and other multinational oil corporations.[76]

Notwithstanding the disparity between the treatment of transnational environmental litigations in the EU and other jurisdictions, the civil liability approach on a transnational level has the potential to generate huge financial rewards for claimants even in countries where the judicial system is unfavourable to such transnational claims. In the US, although *Kiobel's case* failed, an earlier case filed against Royal Dutch Shell was settled out of court with the defendant paying significant sums of money as compensation to the claimant for environmental pollution and other human rights infringement.[77] In the UK, an earlier case filed against Royal Dutch Shell was also settled out of court with the defendant paying £55 million pounds to compensate the claimant for environmental pollution in the Niger Delta.[78]

While payment of compensations may be regarded as a successful outcome of an environmental claim within national or transnational civil liability regimes, this reactive, compensatory remedy under civil liability approach does not provide a sustainable, long-term framework for protecting the environment. An environmental rights' model approach outweighs the civil liability approach as it is focused on the qualitative state of the environment and provides a proactive, fundamental platform for addressing environmental concerns.

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[75] Court of Appeal of the Hague (December 18, 2015) Arrondisse- mentsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA. 09-1580.

[76] L Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', (2014) 10 *Utrecht Law Review* 1, 44-54.

[77] Ken Saro Wiwa et al v Royal Dutch Petroleum Co et al (2008) No. 96 Civ 8386.

[78] The Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC).

3.3.2 Trump of Rights' Model over Civil Liability Approach

An environmental rights' approach is not entirely immune to some of the challenges facing civil liability approach to environmental protection discussed above. As rights' based approach also depends on judicial mechanisms for enforcement of environmental rights, procedural jurisdictional hurdles and other legalistic challenges associated with the judicial process may impact on the ventilation of environmental rights. Also, a conservative judiciary may restrict the extent to which environmental rights can be exploited by citizens.[79]

Nevertheless, three key advantages of a rights' approach over civil liability approach stand out - the displacement of the burden of proof; the availability of protection of the environment for future generations; and the potential for the ecocentric protection of the intrinsic value of the environment. A rights-based approach displaces the difficult burden of proof associated with a civil liability approach especially in the area of causation and damage. As argued by Klipsch,[80]-

> "Pollution is a complicated function of population, urbanization, industrialization and technology and some of the difficulties associated with proving causation of pollution includes the fact that environmental hazards sometimes develop so slowly that the harm may be far removed from the cause. The delicate nature of the balance in the ecosystem, and the systemic nature of the environment often means that solving one pollution problem often leads to or causes other forms of pollution."

In civil liability environmental claims, both under national and transnational regimes, the claimant is faced with the difficult task of proving the direct causation link between the actions of the defendant and the actual damage that was suffered by the claimant. This often requires utilizing expert witnesses and other highly advanced forms of proof to show this direct causation and failure to do so results in failure of the claim regardless of the extent of damage done to the environment. In *Akpan*'s case discussed above, although the claimants succeeded in scaling

[79] L Kotzé, Alexander R. Paterson, (eds.), '*The Role of the Judiciary in Environmental Governance: Comparative Perspectives*', (Kluwer Law International, 2009) 3.

[80] R Klipsch, 'Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process' (1974) 49(2) *Indiana Law Journal* <http://www.repository.law.indiana.edu/ilj/vol49/iss2/1> accessed 04 April 2015.

the procedural jurisdictional hurdle before the Dutch court, three out of the four claimants had their substantive cases dismissed for lack of sufficient proof of the causation link between the pollution and the defendant's acts. Thus, for a litigant in a civil liability suit, proving claims of environmental pollution against a polluter is a herculean task with often little rewards. This difficulty associated with utilising liability mechanisms to address environmental concerns is acknowledged in Paragraph 13 of the EU Environmental Liability Directive which states that-

> "Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is, therefore, not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors."[81]

The complications involved in dealing with widespread pollution across a wide expanse of an environment with possible mixed sources creates immense difficulties in establishing liability for the pollution and this leaves room for the environment to go un-remediated flowing from the inability to ascribe liability to specific actors. A rights' based approach displaces this burdensome requirement of proof as it is predicated on a violation of the rights-holders' entitlement to a clean environment and can be proactively and pre-emptively utilized to defend the sanctity of the environment even without proof of actual harm on the basis of the precautionary and preventive principles of environmental law.

More importantly, the rights' holder does not need to identify the specific actor responsible for the pollution or disturbance to environmental sanctity, as the conferment of this right in a statute or constitution entitles the right-holder to proceed against the government or relevant local authority for failure to protect the environment through appropriate regulations. The burden then rests on the relevant governmental authority to identify the polluters/cause of pollution and proceed against such entities using relevant regulatory tools. This is a more

[81] Paragraph 13 of the Preamble, Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, L 143/56 EN Official Journal of the European Union.

suitable approach for the citizens as against being required to slug it out against polluters through difficult and uncertain civil trials in court.

In civil liability approach, an unfavourable outcome could result in the polluted environment being left in its state in the event of lack of proof linking the defendant to the pollution (as in *Kiobel* and *Okpabi's* cases and a long line of other unsuccessful cases against oil polluters in Nigeria).[82] However, in a rights' based approach, once pollution or other environmental disturbance is identified or is determined as likely to occur, the outcome will always result in orders being made to remediate or restore the environment or prevent the disturbance, as the focus of the suit is not the liability or otherwise of a specific entity/defendant, but the protection of the environment from deterioration or potential disturbance. This shift in focus is essential as it underpins the fundamental advantage of a rights' approach to civil liability approach and is better reflective of contemporary environmental management focus around the globe.

Another important advantage of the rights approach is its utilization to protect the intrinsic value of the environment. A civil liability approach depends on a claim by property rights' holder and the benefits of the claim accrue to the rights holder even though it is the environment that bears the direct consequences of the harm. A rights' approach encompasses claims made on behalf of inanimate parts of the ecosystem uninhabited by humans and the protection of the interests of such components of the ecosystem are not based on their instrumental values to humans. This was the basis for Stone's clamour for rights for the natural environment as he decried the benefits of remedies for environmental harms accruing to humans when the environment is the actual 'victim'. [83] Protection of nature's intrinsic value is, therefore, better achieved under a rights' approach.

In addition, a rights based approach is capable of protecting the environmental interests of future generations. As argued by Hiskes,[84] environmental rights are the only human rights that are intrinsically tied to the welfare and interests of future generations and that provide reciprocal benefits for present generations in arguing for beneficial environmental policies. It is difficult to bring civil liability actions

[82] See M. Ladan, *'Materials and Cases on Environmental Law and Policy',* supra, n 48.
[83]C. Stone, 'Should Trees Have Standing? – Towards Legal rights for natural objects' (1972) 450 S Cal L Rev 456..
[84] R. Hiskes, 'The Right to a Green Future', (2005) 27(4) *Human Rights Quarterly* 1356.

seeking damages for tortious acts committed against future generations or other property rights of future generations that are still lost in some distant future. However, as seen in the Philippines' case of *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr*,[85] rights' based claims to the environment can be brought to restrict activities that are environmentally harmful in order to protect the environment for future generations.

The rights of future generations can be protected under the environmental rights paradigm in either of two ways- 1) the explicit statutory establishment of appropriate bodies/commissions to protect and advance the interests of future generations; or 2) the explicit conferment of rights on future generations under relevant statutory provisions with standing granted to present humans to bring relevant proceedings to protect these rights of future generations. The first form usually takes the shape of statutory establishments of an ombudsman or commission exclusively dedicated to issues relating to future generations. The Israeli Commission for Future Generations[86]and the Parliamentary Commissioner for Future Generations established by the Hungarian Parliament in November 2007[87] are examples of Ombudsmen system for protecting the interests of future generations pursuant to explicit recognition of the environmental rights of future generations protected by the present generation.[88]

The second form takes the shape of explicit conferment of environmental rights on future generations in statutory or constitutional provisions with individuals or civil society groups entitled to bring actions to enforce these rights on behalf of future generations. For example, section 24 of South African Constitution and article 225 of Brazil's constitution explicit provide for the right to a clean and ecologically sound environment for the present and future generations, mandating the government to take legislative and other administrative steps to enforce and protect these rights. Based on these provisions, individuals and civil society

[85] Juan Antonio Oposa v. Fulgencio S. Factoran, Jr G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993).

[86] Commission for Future Generations operated pursuant to enabling legislation passed by the Knesset, Knesset Law (Amendment No. 14), 5761-2001.

[87] Law CXLV of 2007, § 10, 164/2007 Magyar Közlöny [MK.] 12426-12429 (Hung.) (amendment to Law LIX of 1993).

[88]K Burns, 'Constitutions & the Environment: Comparative Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement' (2016) *Georgetown Environmental Law Review* 3.

groups can institute suits seeking to halt any environmental activities that have the potential to harm the right of future generations to a clean environment.[89]

In addition, relevant rights' based environmental instruments incorporate the protection of the interests of present and future generations as a cardinal principle. For instance, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[90] highlights this basic principle in article 1 by reiterating its main objective as being "to contribute to the protection of the *right of every person of present and future generations* to live in an environment adequate to his or her health and well-being…" The Aarhus Convention further exemplifies the importance of a rights' based approach by providing extensive rights to accessing justice and information in environmental matters and participation in environmental decision making of present and future generations. This right, which is not available in a civil liability approach, expands the scope of environmental protection through the 'proceduralisation' of environmental concerns and the introduction of democratic principles into environmental management systems. The incorporation of procedural environmental rights (alongside substantive environmental rights) is a driving force for environmental democracy[91] and leads to a strengthening of participation procedures.[92]A rights' based approach, therefore, allows for a comprehensive approach to environmental protection both from a substantive and procedural perspective and allows for greater involvement of the citizens in environmental protection.[93]

In summary, a rights' approach to environmental protection ensures an equitable distribution of the benefits of environmental protection between the present and future generation of humans and incorporates protection of the intrinsic value of the environment itself. It also obviates the major technical hurdles faced in the

[89] P Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Publishing, 2014) 3.

[90] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998.

[91] J Wates, 'The Aarhus Convention: a Driving Force for Environmental Democracy' (2005) 2(1) *Journal for European Environmental & Planning Law* 2 – 11.

[92] N Hartley & Christopher Wood, 'Public participation in environmental impact assessment—implementing the Aarhus Convention', (2005) 25(4) *Environmental Impact Assessment Review* 319-340.

[93] J. Palerm, 'Public Participation in Environmental Decision Making: Examining the Aarhus Convention' (1999) *J. Env. Assmt. Pol. Mgmt*., 229.

ventilation of private property rights' civil liability claims related to environmental issues.

The effectiveness of a rights' approach depends largely on the extent to which a country's legal system is developed to incorporate the rule of law and respect for rights as integral aspects of the legal framework. Environmental constitutionalism and the role of the judiciary in environmental governance, therefore, becomes a vital part of the implementation of environmental rights and influences the enforcement of these rights to a great extent. The extent to which environmental constitutionalism influences the effectiveness of a rights' based approach to environmental protection is discussed next.

3.4 Environmental Constitutionalism and the Judiciary

The concept of environmental constitutionalism in environmental discourse is one which is beset with uncertainty, ambiguity and is generally avoided by available literature in the field in discussions relating to environmental rights and protection. Yet it lies at the heart of legal efforts directed at enshrining environmental protection at various levels in the society. Kotze[94] stated that 'the concept of environmental constitutionalism remains ambiguous as there is a dearth of literature on the subject and therefore the exact theoretical content and extent of environmental constitutionalism remains insufficiently determined'.

Most of the confusion associated with the concept lies in its incorporation of several similar themes with slightly distinct meanings and importance. It is so easy, for instance, to confuse or equate environmental constitutionalism with environmentalism or with constitutionalization of environmental rights. While these latter subjects are closely related to and derivable from environmental constitutionalism in different contexts, they connote different meanings and have varying degrees of importance. Environmentalism 'is narrowly concerned with environmental preservation, species conservation or combating climate change'[95]and refers to activism on the part of concerned groups and NGOs towards ensuring better environmental protection through different means which

[94] L Kotze, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law* 199-233.

[95] J Barry, 'Towards a Green Republicanism: Constitutionalism, Political Economy, and the Green State' (2008) 17(2) *The Good Society PEGS Journal* 2.

can include political pressures, lobbying and other socio-economic mechanisms. Environmentalism is therefore not synonymous with environmental constitutionalism which connotes constitutional protection of environmental values and is thus premised on legal mechanisms. Where the constitutional legal order in a given jurisdiction is supportive of environmentalism and creates a framework for espousing the ideals of environmental activists, it is referred to as constitutional environmentalism.

Similarly, environmental constitutionalism differs from constitutionalization of environmental rights in the sense that while the latter is a major component of the former, it is not the defining characteristic as there can be environmental constitutionalism in the absence of express constitutionalization of environmental rights.[96] In some jurisdictions, such as India, the decisions of the courts on environmental matters have been reflective of environmental constitutionalism even though there is an absence of explicit environmental rights in its constitution. In the Indian case of *Subhash Kumar v. State of Bihar,*[97] the Indian Supreme Court extended the constitutional protection of the right to life under article 21 of the Indian Constitution to apply to environmental preservation and in the process upheld environmental constitutionalism in India even though no express provision on substantive environmental rights is found in the Constitution.[98]

Environmental constitutionalism is made up of three key integrated and interrelated components – constitution, constitutionalism and constitutionalization of environmental rights. The terms 'constitution', 'constitutionalism' and 'constitutionalization' are all 'evaluative-descriptive terms'[99] and when placed in an environmental context, they describe a state of constitutionalized environmental protection or ecosystem protection couched in a constitutionalist language and legal context.

A constitution is the basic fundamental legal document in a state which delineates political powers, sets out duties and responsibilities of organs of government and

[96] L Kotze, 'Arguing Global Environmental Constitutionalism', supra n 94 201.
[97] (1991) AIR 420.
[98] See also the Pakistani case of Zia v. WAPDA, (1994) PLD 693.
[99] A. Peters and K. Armingeon, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16(2) *Indiana Journal of Global Legal Studies* 385–95, 387.

enumerates the rights and privileges of citizens in the state. Boyd[100] states that 'a constitution represents the highest or supreme law in a nation, establishing the formal rules that direct and constrain government powers, defining the relationship between government institutions, and protecting individual rights.' Finer[101] defines it as 'codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationship between these and the public.'

A constitution can be analysed from a 'thin' or a 'thick' sense[102] and this has significance in the context of the present discussion. A constitution in the 'thin' sense refers to the actual document itself which sets out the legal order in a state and delineates political powers, functions, rights and duties within the state. This invariably requires a restrictive and narrow view of a constitution as merely a legal document, albeit constituting the fundamental basis upon which the organs of state are founded. A constitution in the 'thick' sense, however, connotes a wider interpretation of the term which transcends merely the constitutional document itself but considers the constitutional features of being constitutive, mostly written or codified, justiciable, entrenched, superior and expressing a common ideology.[103] In other words, a constitution in the 'thick' sense looks at a broader perspective of constitutional features of legitimacy of the constitutional document, its compliance with acceptable basic standards, recognition and respect for basic rights in the constitutional document, its superiority and primacy over governmental actions and control, access to justice and enforceability of rights and duties spelt therein. In this context, constitutional principles can be derived from countries without a written constitution, such as the United Kingdom. This is because a constitution in this thick sense does not focus on the existence of a constitutional document but on the features and attributes of basic, foundational constitutional principles within a country's legal system and these principles can be derived from a series of legislation or other legal documents.

[100] D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 8.
[101] S. E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (OUP 1995) 1.
[102] L Kotze, 'Arguing Global Environmental Constitutionalism', supra, n 94, 202.
[103] D. Bodansky, 'Is there an International Environmental Constitution?' (2009)16(2) *Indiana Journal of Global Legal Studies* 565–84, 570.

The idea of constitutionalism is closely associated with a constitution in the thick sense as it looks beyond the mere presence of a constitutional document in a state, but evaluates the legitimacy of such constitution, its compliance with basic acceptable human rights and standards, respect for its provisions by organs of state and enforceability of the rights and duties spelt therein. Quite importantly also, it looks at access to justice therein and presence of a strong and virile judiciary capable of protecting the inalienable rights of the citizens.[104] Where these features are absent in a state, the state may have a constitution but lacks constitutionalism. As stated by Bodansky,[105] 'it would be possible to have 'either constitutions without constitutionalism ... or constitutionalism without a constitution.' The Democratic People's Republic of Korea (North Korea), for instance, has a Constitution[106] which spells out basic human rights and limits governmental powers. Article 4 of the Constitution stipulate that "the sovereignty of the DPRK resides in the workers, peasants, working intellectuals and all other working people." However, the constitution is a mere paper tiger as human rights abuses are rampant in the country owing to the absence of any institutional framework that restrains the exercise of executive powers.[107] It thus has a constitution but lacks constitutionalism. On the other hand, the United Kingdom does not have a codified document that can be referred to as a 'Constitution' in the thin sense,[108] but the legal framework within the country provides restraints on the exercise of governmental powers, respects for human rights and a strong and virile judiciary – all features of constitutionalism.

Kotze[109] points out that constitutionalism is a vague concept and difficult to cast accurately in a clear descriptive mould but stated that 'constitutionalism arguably refers not only to "a constitution" but importantly also to a specific type of constitution – that is, a legitimate one universally accepted by society'. The idea of constitutionalism, therefore, is not related to the codification or non-codification of fundamental rules in a state but refers to the presence of a 'superior law which,

[104] A. Peters, 'The Constitutionalist Reconstruction of International Law: Pros and Cons', (2006) *NCCR International Trade Working Paper No. 11*, 3.
[105] ibid, 569.
[106] Socialist Constitution of the Democratic People's Republic of Korea 1972, amended in 2013 <http://www1.korea-np.co.jp/pk/061st_issue/98091708.htm> accessed 07 June 2017.
[107] See the Human Rights Watch 2018 release on the human rights situation in North Korea. Human Rights Watch, 'Human Rights in North Korea' June 2018 Briefing Paper, <https://www.hrw.org/news/2018/06/05/human-rights-north-korea> accessed 4 August 2018.
[108] The UK is a classic example of a country with an 'unwritten' constitution.
[109] L Kotze, 'Arguing Global Environmental Constitutionalism', supra (n 94) 204.

because of its universality, is respected and revered by society as such'. It thus 'entails conceptions of fairness, justice and legitimacy and it strives to improve legal stability and predictability'.[110]

The third component of constitutionalism- constitutionalization of rights- refers to the normative inclusion of specific rights in a given constitution for the purpose of elevating such rights to a higher pedestal on account of their fundamental importance to the state and with a view to placing such rights above the vicissitudes of political horse-trading, manoeuvrings and rollbacks.[111] While the constitutionalization of specific rights cannot be considered a 'magic cure' for the ills which such rights seek to prevent, there is no doubt that protecting important rights through a constitutionalized legal order is preferable and more acceptable than mere statutory or other non-constitutionalized means. This is due to the supremacy of constitutional rights and protections over other statutory and non-constitutional provisions. Therefore, protecting important rights through constitutional means ensure they are not easily eroded by the multitude of potentially restrictive statutory and other legal drawbacks within the legal system.

3.4.1 Environmental Constitutionalism and the Rule of Law

Environmental constitutionalism is, therefore, the concept whereby ecosystem protection, environmental values and policies and the needs of present and future generations are given foundational legal importance by their inclusion in a constitutionalized legal order. It is the junction where constitutionalism meets ecosystem protection i.e. where environmental protection is made a vital part of the practice of constitutionalism within a given jurisdiction. Boyd[112] opines that 'environmental protection is one of the most pressing concerns of the modern era and there is little doubt that it deserves protection at the constitutional level. It should be elevated from an 'ordinary' legal level to the 'higher', more enduring, constitutional level'. This practice of elevating environmental protection to a constitutional level through means such as constitutionalization of environmental

[110] L Kotzé, 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' (2007) 16(3) *Review of European Community and International Environmental Law* 298–311.

[111] M. Mills and F. King, 'Ecological Constitutionalism and the Limits of Deliberation and Representation,' in M. Saward (ed), '*Democratic Innovation'* (Routledge 2000) 133–54.

[112] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment,* supra, n 100, 5.

rights, reforming the organs of government to embed ecosystem protection in governmental policies and 'greening' the judiciary portends a more enduring way of enshrining environmental protection in a given jurisdiction. Some of the key characteristics of environmental constitutionalism include constitutional provisions of environmental rights, embedding of environmental justice in the constitutional legal order, constitutional environmental obligations on government and private actors and judicial control of governmental functions in relation to the environment through judicial review mechanisms.[113]

According to UNEP, environmental constitutionalism examines the development, implementation and effectiveness of incorporating environmental rights, procedures, and policies into constitutions around the globe.[114] One of the hallmarks of environmental constitutionalism is that it has always been part of a transnational conversation – countries look to each other in developing their constitutional texts and as their courts seek to interpret and apply them.[115]

The significance of environmental constitutionalism, also commonly referred to as 'Green Constitutionalism', is linked to the importance of the constitution to the political structure of any state and its potential to positively affect the core workings of a state and policy direction in favour of environmental protection. Barry[116] stated that 'the greening of the constitution is a potentially powerful mechanism for any transition away from unsustainability. Hence, any change in the constitution in a green or sustainable direction could signal a profound shift in the political order'.

Environmental constitutionalism focuses on the broader issues of implementation, environmental governance, institutions and policies involved in the implementation of constitutional protection of the environment.[117] Also, the increasing interdependence of nation states has created a certain "constitutionalization of international organizations" and a degree of uniform

[113] L Kotze, 'Arguing Global Environmental Constitutionalism', supra, n 94.
[114] UNEP, 'New Frontiers in Environmental Constitutionalism', May 2017 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> accessed 08 May 2019.
[115] B Gareau, 'Global Environmental Constitutionalism' (2013) 40(4) *Boston College Environmental Affairs Law Review* 403-408.
[116] J Barry, 'Towards a Green Republicanism: Constitutionalism, Political Economy, and the Green State', (2008) 17 (2) *The Good Society PEGS Journal* 5.
[117] L Kotze, '*Global Environmental Constitutionalism in the Anthropocene'* (Hart Publishing, 2016).

constitutionalist principles such as human rights, state responsibility, and *jus cogens* or *erga omnes norms*.[118]

Thus, beyond merely constitutionalising environmental rights, the status of the implementation institutions, the legal and regulatory frameworks relating to the enforcement of these rights, the compliance of these rights with minimum acceptable international standards relevant for protecting the environment and the extent to which judicial mechanisms are available for the enforcement of these rights fall within the broad scope of environmental constitutionalism concept.[119]

Environmental constitutionalism is an enduring way of institutionalizing environmental protection in a country and can be achieved in different forms.[120] The most popular means is by constitutionalization of environmental rights as justiciable socio-economic rights or as a basic human right of the citizens under the bill of rights in the constitution. Different theories exist on the rationale behind constitutionalization of rights in a democratic setting[121] and there is literature devoted to a discussion of the need for, ways to, and effect of constitutionalization of environmental rights in contemporary democratic settings.[122] It is, however, clear that the inclusion of environmental rights in a constitution confers it with a universal and binding character on all organs of government in a state and is the most effective means of securing the regulation of economic actors such as MNCs which hold significant influence on governments and are often the largest producers of environmental polluting substances.[123]

Because environmental constitutionalism focuses on broader issues of implementation of constitutional environmental rights, institutions, frameworks and enforcement issues, it is interdependent with the concept of environmental rule of law. Environmental rule of law is the result of a dynamic and iterative process that relies on monitoring and evaluation, revision, and indicators to track

[118] K Bosselmann, 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) *Widener Law Review* 171-185.
[119] J May, E Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014) 1.
[120] J May and E Daly, 'Judicial Handbook on Environmental Constitutionalism' (2017) United Nations Environment Programme.
[121] This is discussed in chapter 4.
[122] See Tim Hayward, *Constitutional Environmental Rights* (OUP, 2005) 1 and David Boyd, *The Environmental Rights Revolution*, supra, n 100.
[123] J Nickel, 'The Human Right to a Safe Environment', supra, n 13.

progress in the implementation, enforcement and promotion of environmental rights and the guarantees of effective environmental protection.

Environmental rule of law looks beyond the theoretical presence of environmental rights in the legal framework or within legal instruments, but focuses on the implementation of these rights and the challenges, hurdles and opportunities that abound for the effective implementation and enforcement of these environmental rights. The concept of environmental rule of law was espoused because, according to UNEP, 'while environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and inefective. In many instances, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates)'.[124]Therefore, as stated by UNEP, environmental rule of law offers a framework for addressing the gap between environmental laws on the books and in practice and is key to achieving the Sustainable Development Goals.[125]

While drawing on broader rule of law principles, environmental rule of law is unique in its context, principally because it governs the vital link between humans and the environment that supports human life and society, as well as life on the planet. Environmental rule of law focuses on ensuring compliance with and enforcement of environmental laws. Environmental governance comprises a broader set of objectives and approaches related to making and implementing decisions related to the environment—with environmental rule of law speaking particularly to the implementation.[126] While enforcing existing laws is critical, the ultimate goal of environmental rule of law is to change behavior onto a course toward sustainability by creating an expectation of compliance with environmental law coordinated between government, industry, and civil society.

The concept of environmental rule of law has been growing steadily at the global stage, beginning from 2013 when the UN Environment Governing Council Decision 27/9 became the first inter-governmentally-negotiated document to

[124] UNEP First Global Report on Environmental Rule of Law, January 2019, 2.
[125] Ibid.
[126] Ibid.

establish the term environmental rule of law.[127] Since Since Rio+20, there has been growing interest in and attention to the environmental rule of law as other international environmental forums have also adopted the concept of environmental rule of law including the UNEP International Advisory Council for Environmental Justice 2015[128] and the first United Nations Environment Assembly in 2014 which adopted resolution 1/13, calling upon countries "to work for the strengthening of environmental rule of law at the international, regional and national levels."[129]

In 2016, the First World Environmental Law Congress, co-sponsored by the International Union for Conservation of Nature and UN Environment, adopted the 'IUCN World Declaration on the Environmental Rule of Law' which outlines 13 principles underpinning the effective practice of environmental rule of law. It declared that 'environmental rule of law should thus serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, sub-national, regional, and international levels'.[130]

Akin to the general concept of the rule of law, environmental rule of law is underpinned by three critical components – environmental laws should be consistent with fundamental rights; environmental laws should be inclusively developed and fairly implemented; environmental laws should enshrine accountability not just on paper but in actual practice, such that the law becomes operative through observance of and compliance with the law.[131] The component of environmental rule of law is represented in Figure 7 below-

[127] 27th Session of UNEP Governing Council/Global Ministerial Environment Forum, February 2013.

[128] UNEP International Advisory Council for Environmental Justice 2015. "Environmental Rule of Law: Critical to Sustainable Development." Issue Brief. May.

[129] Summary of the First UN Environment Assembly of the UN Environment Programme, Volume 16 Number 122 - Monday, 30 June 2014.

[130] IUCN World Commission on Environmental Law. 2016. "IUCN World Declaration on the Environmental Rule of Law." April 29. <https://www.iucn.org/sites/dev/fles/content/documents/english_world_declaration_on_the_environmental_rule_of_law_fnal.pdf> accessed 08 April 2019.

[131] UNGA (United Nations General Assembly), 'Strengthening and Coordinating UN Rule of Law Activities', Report of the Secretary-General 2014 A/69/181. undocs.org/A/69/181.

Figure 7: Components of Environmental Rule of Law

Source: UNGA 2014

These three components are interdependent in their nature, impact and dimensions. Environmental laws that are consistent with fundamental rights are required to be inclusively promulgated by involving relevant stakeholders in the form of public participation in law making and integrating concerns of environmentally marginalised groups in the society. These laws are then required to be even-handedly and effectively implemented, resulting in the laws being respected and observed by the afected community. Therefore, each component of environmental rule of law extends into the other component and they cumulative result in environmental laws that are legitimate, representative of the various interests in the society and command respect by public bodies and individuals/corporations in the society.

Because these principles form the core of the general principles of the rule of law, it is obvious that environmental rule of law derive these components from the general principles of the rule of law and applies them in the environmental context. As such, environmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet. By doing so, environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance

that protects rights and enforces fundamental obligations.[132] Confirming the link between environmental rule of law and effective environmental governance, UNEP states that 'with environmental rule of law, well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values.[133] (See Figure 8 below).

Figure 8: Environmental Rule of Law Paradigm

Source: UNEP First Global Report 2019

Weak enforcement of environmental laws is a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the last four decades.[134]This situation persists even within developed regions like the European Union (EU) and the United States. A 2017 EU study on the state of environmental rule of law within the EU found many implementation gaps in the enforcement of environmental laws in many EU countries and made recommendations for improvements.[135]Similarly, in the US, a study conducted on the environmental laws within the various states and at the

[132] UNEP (United Nations Environment Programme) and ELI (Environmental Law Institute). 2016. Environmental Rule of Law Discussion Paper. December 7.
[133] UNEP First Global Report on Environmental Rule of Law, January 2019, 18.
[134] D Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in J Knox, ed, *The Human Right to a Healthy Environment*, (Cambridge UP, 2018) 17-41.
[135]European Commission, 'The EU Environmental Implementation Review (EIR) Package: Common Challenges and How to Combine Efforts to Deliver Better Results'. 2017 <http://ec.europa.eu/environment/eir/pdf/full_report_en.pdf> accessed 24 April 2019.

federal level found several loopholes that hamper the effective enforcement of these laws.[136] The UNEP report on environmental rule of law identified multiple factors contributing to poor enforcement of environmental rule of law, including poor coordination across government agencies, weak institutional capacity, lack of access to information, corruption and stifled civic engagement.[137]

Two pernicious threats to the effectiveness of implementing environmental rule of law are the the criminalization and increasing attacks on environment defenders and the increasing backlash against environmental civil society organisations and the restriction of their activities in various countries including Russia, China, Turkey, Viet Nam, Cambodia, and many other countries.[138] UNEP's report found that 'between 2002 and 2013, 908 people — including forest rangers, government inspectors, and local activists – were killed in 35 countries, and in 2017 alone, 197 environmental defenders were murdered'[139] These continuous attacks on environmental defenders and restriction of environmental civil societies reduce the potential for the robust practice of environmental rule of law, the engagement of individuals and civil societies in ensuring accountability of government/public bodies in implementation of environmental laws and the inclusion of environmental minorities in implementation process of environmental laws, thus weakening environmental rule of law.

Environemntal rule of law is central to the concept of environmental constitutionalism because it focuses on ways of achieving effective implementation and enforcement of environmental laws and constitutional protection of environmental rights. Effective implementation of these laws and constitutional protections of the environment aids in achieving the sustainable development goals (SDGs), as the SDGs are not achieved merely by having sound environmental laws on the books or strong constitutional protection of the environment but through positive environmental outcomes from the

[136] D Farber, 'The Implementation Gap in Environmental Law' (2016) 16(3) *Journal of Korean Law* 32.
[137] UNEP First Global Report on Environmental Rule of Law, January 2019.
[138] Ibid.
[139] Global Witness, 'Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders' 2014, London. <http://globalinitiative.net/wp-content/uploads/2017/12/Global-Witness-Deadly-Environment-June-2014.pdf> accessed 19 May 2019.

implementation of these laws and constitutional protections. Thus, environmental rule of law is central to the achievement of the SDGs.

An important means of enshrining environmental constitutionalism and environmental rule of law is the constitutional setting of minimum thresholds, broad parameters and minimum constitutional requirements to which substantive contents of environmental regulations/legislation must adhere.[140] This aims to prevent rollbacks in environmental regulations by the legislature or political class arising from the pressure of socio-economic factors dictating the lowering of environmental standards in a bid to foster development at the expense of environmental integrity. This situation which is common in third world developing countries represents one vital area where a constitutionalized environmental legal order acts as a bulwark against the subjugation of ecosystem protection in favour of other important competing socio-economic rights such as the right to economic development. In Nigeria, the legislature passed the Associated Gas Re-injection Act of 1979 to legalize the continuous flaring of gas despite its obvious adverse environmental effects due to the need to promote increased oil and gas exploration unrestrained by environmental considerations seeing that oil revenue is vital to the country's economic growth and development. However, the Nigerian judiciary in *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others*[141] struck down the Act for violating the citizen's right to life under section 33 of the Nigerian Constitution[142] which includes right to a safe environment free from noxious pollution by gaseous substances. This is an example of environmental constitutionalism even in the absence of constitutionalization of environmental rights, as the Nigerian constitution does not provide for environmental rights but the judiciary utilized existing constitutional rights to protect environmental rights against erosion by socio-economic considerations.

As evident from the Nigerian example above, environmental constitutionalism relies critically on the instrumental and interpretative works of the judiciary within a state in respect of environmental rights sought to be enforced by citizens through the court systems. Environmental constitutionalism is based on the rule

[140] L Kotze, 'Arguing Global Environmental Constitutionalism', supra, n 94.
[141] (2005) AHRLR 151 (NgHC 2005).
[142] Constitution of the Federal Republic of Nigeria 1999 (as amended).

of law which is dependent on the judiciary.[143] One of the cardinal principles of the rule of law is the reliance on and respect for the decisions of an impartial and independent judiciary as it espouses, delineates and protects the rights and obligations of the citizens. In this light, therefore, the decisions, orders and declarations of the judiciary in respect of suits relating to environmental concerns play a vital role in enshrining environmental constitutionalism within a jurisdiction.

3.4.2 Judiciary's Role in Environmental Constitutionalism

The function of the judiciary in environmental constitutionalism is vital as environmental rights and other constitutional environmental obligations will be mere paper tigers in the absence of access to courts to seek redress for environmental wrongs and the availability of constitutional powers of the judiciary to review government's administrative activities related to the environment. In essence, the presence of strong and virile judicial review power of the courts is a vital aspect of environmental constitutionalism without which there could be constitutional environmental rights without environmental constitutionalism in a jurisdiction. For instance, article 42 of the Russian Constitution[144] provides explicit constitutional environmental rights by stipulating that 'everyone shall have the right to a favourable environment, reliable information about its state and for a restitution of damage inflicted on his health and property by ecological transgressions'. However, owing to the question marks over the independence and impartiality of the judiciary in the country,[145] there can hardly be said to be environmental constitutionalism in Russia and there are no reported cases of the judiciary intervening to protect the environment from despoliation by the Russian

[143] A. Dan Tarlock, 'The Future of Environmental "Rule of Law" Litigation' (2000) 17 Pace Envtl. L. Rev. 237.

[144] The Constitution of the Russian Federation, 1993 <http://www.constitution.ru/en/10003000-01.htm> accessed 10 December 2017.

[145] M Popova, 'Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine' (2010) 43(10) Comparative Political Studies 3; A study carried out by the UK DFID in 2006 found that the judiciary in Russia suffers from a serious lack of independence from the Russian State. The judges are poorly paid and very susceptible to pressures from the authorities, particularly in disputes between government administrative structures and individuals. See Bill Bowring, 'Judicial Independence in Russia' (2006) < <https://s3.amazonaws.com/academia.edu.documents/3362762/5.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1513361879&Signature=QmPi8XEgLoYPJ4KfdeDz6NbRE1g%3D&response-content-disposition=inline%3B%20filename%3DJudicial_Independence_In_Russia.pdf> accessed 08 December 2017.

government or its agencies. Conversely, as seen from the examples of India[146] and Pakistan,[147] the judiciary can ensure environmental constitutionalism in a state even in the absence of explicit constitutional environmental rights and obligations.

Flowing from the above, there are three primary important roles the judiciary plays in environmental constitutionalism. Firstly, by interpreting and clarifying existing environmental laws, regulations and principles and proactively applying such laws towards ensuring adequate protection of the environment. In some jurisdictions, environmental protection is plagued, not by the absence of environmental statutes and regulations, but by the abundance and multiplicity of such regulations. Verschuuren, studying the role of the judiciary in environmental governance in the Netherlands, found that 'Dutch environmental legislation has for a long time been dominated by "sectoral" acts: one act for every kind of pollution (i.e., one for noise, one for air pollution, one for pollution by waste and another for pollution by chemical waste etc.)'.[148]This creates a problem for the judiciary navigating its way through duplicative, and sometimes inconsistent, regulations on environmental issues. Although the enactment of the Dutch Environmental Management Act was intended to harmonise the various Dutch environmental legislation, it did not result in the total integration of environmental legislation and only added to the bulk of legislation on the subject.

The judiciary also plays an important role in interpreting environmental legislation in the context of wider legal, political and constitutional complexities. For instance, in countries with a federal system of governance, the courts are often tasked with clarifying the uncertainties that cooperative federalism creates. In this sense, courts often must determine which statute, federal or state, applies when there is a conflict and simultaneous enforcement of both laws is impossible. In this context, the courts have to determine whether federal or state environmental laws/regulations or both govern in a particular situation, and may also have to decide which agency -federal or state -has the authority to enforce the particular

[146] Subhash Kumar v. State of Bihar, supra, n 97.
[147] Zia v. WAPDA, supra, n 98.
[148] J Verschuuren, 'The Role of the Judiciary in Environmental Governance in The Netherlands' in N. de Sadeleer, G. Roller and M. Dross (eds), '*Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal*', (Groningen, Europa Law Publishing, 2005) 97-117.

laws.[149] The judiciary is, therefore, tasked with the responsibility of interpreting, clarifying and applying the various environmental standards and guidelines found in environmental legislation, particularly where a breach occurs by the government or its agencies.

In countries with constitutional environmental rights provision, the responsibility for interpreting and enforcing respect for this right by the government and its agencies rests on the judiciary. In interpreting and enforcing this right, the judiciary is enthroning environmental constitutionalism within that jurisdiction and where the judiciary is institutionally suppressed by the government, such constitutional environmental rights become mere paper tigers. Environmental constitutionalism exists, therefore, not when environmental rights are constitutionally prescribed, but only when the legal system provides a framework that allows for the effective application and enforcement of environmental rights by the judiciary.[150]

The second role the judiciary plays in environmental constitutionalism is by extending existing human rights to protect the environment in the absence of clear and direct statutory or constitutional provisions on the subject. This is known as a human rights approach to environmental protection and is done by re-interpreting existing substantive human rights, particularly the right to life, as extending to environmental concerns which threaten the health and basic well-being of humans. This approach has been adopted by the judiciary in several domestic, regional and international judicial forum.[151]

This human rights approach to environmental protection as espoused above is generally referred to as the 'greening of human rights' and is also commonly referred to as 'green constitutionalism' whereby the concept of constitutionalism

[149] See United States v. Puerto Rico, 721 F.2d 832, 839-40 (1st Cir. 1983); Colorado v. United States Dep't of Army, 707 F. Supp. 1562, 1564 (D. Colo. 1989).

[150] See the analysis of judicial attitudes to environmental protection in different jurisdictions across the globe in Louis J. Kotzé, Alexander R. Paterson, (eds.), '*The Role of the Judiciary in Environmental Governance: Comparative Perspectives*', (Kluwer Law International, 2009) 3.

[151] See the decision of the Indian Supreme Court in Subhash Kumar v. State of Bihar, supra, n 87, 424. See also similar decisions along this line of reasoning in other jurisdictions including *Beatriz Silvia Mendoza* v. *Argentina*, M. 1569 (Supreme Court of Argentina, 2008); Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others, WP 35/1991 (Supreme Court of Nepal, 1995); Asociación Interamericana para la Defensa del Ambiente y otros (Costa Rican Constitutional Court, 2009); Asghar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) (Pakistan); Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June 2015) (Netherlands); Jacobs v. Flemish Region, No. 80.018 (Belgium, Council of State, 1999); Venter, No. 82.130 (Belgium, Council of State, 1999).

is utilised in environmental contexts to equate environmental concerns with basic human rights concerns, particularly the right to life. Barry[152] considers green constitutionalism as vital to the achievement of the 'triple bottom line' of sustainability—that is, achieving economic, environmental, and social objectives. In this context, 'green constitutionalism' is a subset of environmental constitutionalism, as while the former refers specifically to judicial re-interpretation of human rights to cover environmental concerns, the latter applies to a much wider sphere of environmental rights protection within constitutional structures of a country's legal system.

The 'greening of human rights' has also been applied by regional and international judicial bodies. The Inter-American Commission on Human Rights in *Yanomami v. Brazil*[153] held that environmental degradation of Yanomami lands violated the right to life and other human rights guaranteed under the American Convention on Human Rights. Similarly, the African Commission on Human and Peoples Right held, in *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria,*[154] that the constant pollution of the environment in the Niger Delta region of Nigeria in the course of oil exploration constitutes an infringement on the right to life of the people of the region under article 4 of the African Charter on Humans and Peoples Right 1979. At the international level, the United Nations Human Rights Committee, in *EHP v. Canada*[155] observed that the claim of some Canadian residents regarding radioactive wastes in their environment raises issues of the government's obligation to protect the right to life of the residents.

The third role of the judiciary in environmental constitutionalism relates to the balancing of rights between environmental protection and other legally protected interests, notably property rights and development rights. The conflict between environmental rights and other private rights remains a major area of uncertainty regarding judicial intervention in environmental constitutionalism, especially considering these other private rights, like property rights, are often

[152] John Barry, 'Towards a Green Republicanism', supra, n 116.
[153] Yanomami v. Brazil Inter-American Commission on Human Rights 5 March 1985, Case No 7615, Yanomami v. Brazil (OEA/Ser L/V/II 66, Doc 10 rev. 1).
[154] Socio-Economic Rights and Accountability Project (SERAP) V. Federal Republic of Nigeria Judgment No. Ecw/Ccj/Jud/18/12.
[155] EHP v. Canada Communication 67/1980 (UN Doc. CCPR/C/OP/1, 27 October 1982), 20.

constitutionally protected. Thus, even where environmental rights are embedded in the constitution, it still rests on the judiciary to balance the need for environmental protection against the rights of private persons to unfettered property rights and the economic growth and development of the country.[156] It cannot be assumed that the judiciary will always lean in favour of environmental protection, seeing its significance to a wider portion of the public, over private property rights or other economic considerations. A lot depends on the general attitude and specific ideological leanings of the judiciary in a particular jurisdiction. For instance, in countries with dogmatic respect for property rights, environmental rights can be curtailed in favour of the former. In the United States, a study conducted on the attitude of the judiciary to environmental matters found that the strong jurisprudential leanings in favour of the constitutional protection of property rights by the judiciary have curbed judicial recognition of environmental rights, at least at the Federal level.[157] Generally, in developing countries, the judiciary often lean in favour of prioritising economic rights and developments over environmental rights. In Ecuador, in *Viteri y otros v. Ecuacorriete S.A., Ministerio de Recursos Naturales*, the court expressly ruled in favour of social and development goals in a case challenging the environmental impacts of proposed oil and gas infrastructures.[158] Also, in Bolivia, the courts generally defer to economic and developmental interests in cases concerning environmental rights despite the incorporation of environmental rights for humans and nature in Bolivia's constitution.[159] In Nigeria, Ebeku[160] argues that the pro-economic attitude of the Nigerian judiciary is responsible for the relegation of environmental considerations to the background in Nigeria and this is reflected in the low success rates of environmental litigations in the country, with a further consequence been

[156]Douglas Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) *Transnational Environmental Law* 83-94.

[157] Patricia M. Wald, 'The Role of the Judiciary in Environmental Protection' (1992) 19(3) *Boston College Environmental Affairs Law Review* 530. See also Rosemary O'Leary, 'The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency' (1989) 41(4) *Administrative Law Review* 549-574.

[158] See Viteri y otros v. Ecuacorriete S.A., Ministerio de Recursos Naturales, Procurador General del Estado, Judgment, Provincial Court of Pichincha, Case No. 17111-2013-0317, available at:<http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf> accessed 09 May 2019.

[159] P Calzadilla and L Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law* 397–424.

[160] Kaniye S.A. Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited' (2007) 16(3) *Review of European, Comparative & International Environmental Law* 312–320.

the resort to transnational environmental litigations by aggrieved persons from Nigeria against major polluters.[161]

Regardless of the ideological leanings of the judiciary in a particular jurisdiction, the judiciary is central to the resolution of the conflicts between environmental rights and other private and economic rights. This importance is underscored by the setting up, in several jurisdictions, of specialised environmental courts to handle matters raising environmental concerns within that jurisdiction.[162] In New Zealand, a special environmental court was set up to adjudicate exclusively on environmental matters,[163] while several states in Australia have equally set up environmental courts.[164] The National Green Tribunal in India is also an example of a specialised court set up to adjudicate on environmental matters[165]while the Environment and Land Court of Kenya is an example of a specialised environmental court in Africa.[166] In recent times, there has been a rapid growth in the establishment of environmental courts around the globe spurred on by the increasing recognition of the benefits of specialised adjudication of environmental matters.[167] UNEP's First Global report on Environmental Rule of Law 2019 indicates that over 350 environmental courts and tribunals have been established in over 50 countries between 2012 and 2018.[168] In addition, the role and scope of authority of specialised environmental courts and tribunals around the globe are rapidly changing, with greater powers being conferred on them, wider scope of

[161] See the earlier discussions in this thesis on transnational environmental litigations in Section 2.4.2.

[162]George Pring & Catherine Pring, 'Environmental Courts & Tribunals: A Guide for Policy Makers' (2016) UNEP publication <http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1> accessed 13 November 2017. The study found that there are over 1,200 environmental courts and tribunals now operating worldwide at the national and state/provincial level.

[163] The Environment Court of New Zealand was set up under the Resource Management Act 1991 of New Zealand.

[164] See, for instance, the Land and Environment Court of New South Wales and the Planning and Environment Court of Queensland.

[165] The court was established by the National Green Tribunal, 2010 of India. See G Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge, 2016).

[166] The Environment and Land Court was established by section 4 of the Environment and Land Court Act No. 19 of 2011 of Kenya.

[167] B Preston, 'Benefits of Judicial Specialisation in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental law Review* 395–440; C Warnock, 'Reconceptualising the Role of the New Zealand Environment Court (2017) 26(3) *Journal of Environmental Law* 507–518.

[168] UNEP First Global Report on Environmental Rule of Law, January 2019, 12.

matters and less restrictive access to these courts increasingly being introduced in countries around the globe.[169]

The discussions above establishes that environmental constitutionalism is vital to the effectiveness of environmental rights in any jurisdiction. Kotze[170] noted that 'constitutionalism is important for environmental protection because it provides the means to defend (environmental) rights and interests, to restrict authority and private encroachment on these rights and interests, and to compel the state and even non-state actors to act affirmatively'. Indeed, constitutionalism elevates environmental protection to a higher legal standard thereby prioritising environmental care, and also acts as checks and balances for the creation of legislation and the exercise of executive environmental governance functions.

From the foregoing, environmental constitutionalism represents an important watermark for the elevation of ecosystem protection to a fundamental level within the state where it guides major governmental actions and decisions. Environmental constitutionalism provides a platform for the judiciary to entrench environmental values in the legal framework of the state through its interpretative functions while scrutinizing and applying existing legislation or by extending the scope of human rights protections to environmental concerns.

3.5 Conclusions

A rights' based approach does not supplant or discard a regulatory approach but primarily acts as a supplementary protection mechanism to the latter and is aimed at catching claims that fall through the cracks of the regulatory approach. While civil liability approach tends to address the private legal interests of litigants and utilise liability mechanisms to penalise polluters, the inability of liability mechanisms to address complex cases of pollution or institute proactive measures of environmental protection makes the rights' approach more suitable to effective environmental protection.

[169] K Donald, 'Environmental Courts and Tribunals: The Case of Kenya' (2011-2012) 29 *Pace Environmental Law Review* 566.
[170] Louis Kotze, 'Arguing Global Environmental Constitutionalism', supra, n 94, 210.

The merits of the rights' model over the regulatory and civil liability approaches derive essentially from its 'bottom-up' approach compared to the 'top-down' approach of the regulatory model; and the preventive scope of the rights' approach compared to the civil liability approach which is largely a monetization of environmental problems and an externalization of environmental concerns rather than addressing their root causes.

The judiciary plays an essential role in enshrining environmental values in a state's legal system through the interpretative functions of the courts. While instituting environmental rights in a constitutional form is a step in the direction of environmental constitutionalism, it is not a conclusive step, as the absence of a credible legal framework for enforcing these rights and, more importantly, the absence of an independent and impartial judiciary can result in constitutional environmental rights without environmental constitutionalism.

Even though the mere presence of constitutional environmental rights does not automatically translate to environmental constitutionalism, it is the most assured way of achieving this. Chapter 4, therefore, analyses the process of constitutionalising environmental rights, the theories behind constitutionalization and the global trend in favour of it. The chapter also examines how the *coalesced anthropocentrism* model can be incorporated within the normative contents of constitutional environmental rights to ensure its effectiveness.

CHAPTER FOUR

CONSTITUTIONALISING ENVIRONMENTAL RIGHTS

4.1 Introduction

> *"…any state which is constitutionally committed to the implementation and protection of human rights ought to constitutionalize a right to an adequate environment."* - Tim Hayward[1]

The inextricable link between human rights and a clean environment has led to an increasing push for the incorporation of environmental rights in constitutional documents as an extension of the protection of human rights. As argued by Hayward, since human rights are constitutionally protected as fundamental, the right to a clean and safe environment, being a human right, ought to be equally protected by explicit constitutional provisions. This view has its root in the human rights approaches to environmental protection as espoused by the courts in a plethora of judicial decisions[2] and is generally supported by the literature on the subject.[3]

One drawback of this argument is its undiluted anthropocentric approach to constitutional environmental rights, hinging the case for constitutional protection of environmental rights exclusively on its necessity for protecting the rights of humans to a clean environment. When environmental rights are viewed from a broader, more inclusive context of *coalesced anthropocentrism*, as canvassed in this thesis, the reliance on the human rights' argument for constitutionalising environmental rights becomes insufficient and inherently tenuous. The recognition of the fundamental nature of environmental rights and the case for its

[1] T Hayward, *Constitutional Environmental Rights* (OUP, 2005) 1.

[2] See Rural Litigation and Entitlement Kendra v. State of U.P. (1985) AIR 652 SC; M.C. Mehta v. Union of India (1988) AIR 1115 SC; M.C. Mehta v. Union of India (1988) AIR 1037 SC; M.C. Mehta v. Union of India (1996) 4 SCC 750; Zia v. WAPDA (1994) PLD 693, available at <http://www.elaw.org/resources/text.asp?id=280>.

[3] See J May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace Envtl L Rev 113 < http://digitalcommons.pace.edu/pelr/vol23/iss1/5> accessed 12 November 2015; D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 8; M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

constitutionalization should, therefore, not be tied to its instrumental value to humans but should be hinged on the importance of the environment as a complex, but fundamental, life-sustaining system made up of different inter-dependent components of which humans are but a part, albeit the alpha environmental entity.

This chapter examines the global trend of constitutionalising environmental rights and its normative contents. The chapter analyses the theoretical basis for constitutionalising rights and argues that the case for constitutionalising environmental rights should be non-anthropocentric, hinged on the inherent fundamental nature of the environment as a life-sustaining system and not merely from the perspective that humans have a fundamental right to a clean environment. While the human rights argument builds a strong case for constitutionalization (and portends greater chance of success in getting states to constitutionalise environmental rights), it alienates nature's environmental rights and relegates other important aspects of environmental rights, such as the rights of future generations, to the background. Therefore, success in constitutionalising environmental rights on an anthropocentric platform will only result in creating another set of problems to be solved. Also, it will fall short of instituting a legal framework that will adequately address the key challenges facing the protection of environmental rights in many jurisdictions.

4.2 Scope of Constitutionalization of Environmental Rights

Constitutions[4] are codifications of the most cherished values in a given state which are considered fundamental and inviolable and are thus positively entrenched in explicit terms in a foundational legal document. Although various legal rights are codified in different legal instruments within a country's legal system, it is only the most fundamental and cherished legal rights deemed inviolable that are embodied in constitutional documents to entrench them in the society's legal order.[5]

[4] 'Constitution' in this Chapter is used in the 'thin' sense – referring to actual codified, written constitutions. See the discussions in Chapter 3.4 on constitutions and environmental constitutionalism.

[5] G. Maddox, 'A Note on the Meaning of 'Constitution'' (1982) 76(4) *American Political Science Review* 806.

A constitution does more than just entrench rights, privileges and governmental duties to citizens. It acts as a fundamental regulatory tool within a given society, instituting foundational frameworks and structure of governance while delineating the scope of powers, functions and duties of the various arms, organs and agencies of the government within a state.[6] Constitutions further institute procedural rules, policies and principles according to which a state is to be governed.[7] On a whole, a constitution is the most important legal instrument within a state's *corpus juris*[8] and its provisions generally prevail over all other legal rules, provisions and principles within that state.

In view of the pre-eminent role of a constitution in a political order, most nations of the world incorporate protection of the human rights of citizens in their constitution as a way of enshrining their inviolability and elevating these rights beyond legislative and political manoeuvrings. One of the earliest declaratory charter of constitutional significance, the English *Magna Carta* of 1215, was conceived as a way of enshrining the inviolable rights of the people against the English Monarchy[9] and many constitutions around the globe have human rights enshrined in them. The practice of entrenching normative rights in a constitution is referred to as 'Constitutionalization of Rights' and it is the process whereby certain legal rights are functionally separated from other rights and positively incorporated into a country's constitution because these rights are deemed to be fundamental rights which should act as a platform/bulwark from which the expression and vindication of other rights can be founded. Constitutionalization of rights has the practical effect of separating fundamental rights from other socio-economic rights which, though cherished and recognized as protectable interests within the legal system, are not deemed vital enough to entail constitutional protection.

Constitutionalization of rights takes Dworkin's 'trump' theory of rights[10] a step further by pre-determining the prevalence of certain rights over other rights and asserting the trump of rights included in the constitution over non-constitutional

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[6] C Sunstein, '*Designing Democracy: What Constitutions Do'* (OUP 2002) 3.
[7] W Brennan, Jr, 'State Constitutions and the Protection of Individual Rights' (1977) 90(3) Harvard Law Review 489-504.
[8] Literally translated as 'body of laws'.
[9] See P Linebaugh, '*The Magna Carta Manifesto: Liberties and Commons for All*' (University of California Press, 2009) 2.
[10] See Chapter 2.2 of this thesis.

rights. Hirschl[11] considers constitutionalization of rights as 'power-diffusing measures commonly associated with liberal or egalitarian values'. It accomplishes some form of social re-ordering of rights by identifying rights which occupy elevated positions over other non-constitutional rights and effectively pre-judges which rights are to prevail and which are to be sacrificed when different rights come into conflict. It also re-shapes the socio-political landscape and public opinion by identifying to the populace, the government and the judiciary which rights are to be accorded pre-eminence in the social order within the society. In addition, it serves as an empowerment of the judiciary to protect specific rights against encroachment by the government and legislature through judicial review and to establish an ordering of rights to be utilized by the judiciary in the adjudication of competing rights of citizens.

4.2.1 Theories of Constitutionalization of Rights

A wave of constitutionalization of rights began building up in the post-World War II era as the world moved towards preventing the horrors witnessed during war. As a result, countries sought to empower citizens to better protect their human rights by enshrining inviolable rights in constitutions while expanding the judicial domain to enforcement of these rights through the power of judicial review. As Hirschl[12] stated, 'this global trend toward the expansion of the judicial domain is arguably one of the most significant developments in the late twentieth and early twenty-first century government'.

Despite the increasing interest in constitutionalization of rights, academic discussions on the theories of constitutionalization of rights are scanty and difficult to come by. Hirschl[13] considers this a 'scholastic lacuna' and states that 'most of the assumptions regarding the predominantly benign and progressive origins of constitutionalization remain for the most part untested and abstract'. Hirschl proposes four theories to explain the current trend in favour of constitutionalization of rights in many constitutions of the world. These theories are - the democratic

[11] R Hirschl., 'The Political Origins of the New Constitutionalism' (2004) 11(1) Indiana Journal of Global Legal Studies 71-108 <http://www.jstor.org/stable/10.2979/GLS.2004.11.1.71> accessed 08 April 2015.
[12] ibid.
[13] ibid.

proliferation theory, evolutionist theory, functionalist theory and the institutional economics theory- and the key points in each theory will be briefly highlighted below.

The democratic proliferation theory is hinged on the premise that the trend towards constitutionalization of rights is correlatively linked to the worldwide expansion of democratic practice to most nations of the world. Arising from the ashes of tyrannical rule and authoritarian monarchy which characterized most nations prior to World War II, this theory posits that there has been a worldwide shift towards democratic governance in all continents of the world. Democracies, to a large extent, cannot function without constitutions and the constitutionalization of rights is a fundamental aspect of every constitution. Thus, the proliferation of democracies around the world is inversely linked to the increasing constitutionalization of rights witnessed around the globe. This theory can be supported with examples from countries such as Nigeria where constitutional developments have always been tied with the democratic transition from years of military rules E.g the Nigerian 1979[14] and 1999 Constitutions[15] which were products of a democratic transition period from military regimes. Hirschl, however, acknowledged the flaw of this theory in that 'the "expansion of democracy" thesis does not provide an adequate explanation for the "no apparent transition" constitutionalization scenario, in which constitutional reforms have neither been accompanied by, nor resulted from, any apparent fundamental changes in political or economic regimes'.[16] In this sense, constitutional reforms in countries like Sweden (1979), Egypt (1980), Mexico (1994) and Thailand (1997) were not premised on any democratic revolution.

The evolutionist theory links constitutionalization of rights to the natural evolution of societies from one socio-economic stage to another. According to this theory, democracies around the globe evolved to the point of realization that the concept of democracy is not synonymous with majority rule and, therefore, minorities should possess legal protections in the form of a written constitution

[14] Constitution of the Federal Republic of Nigeria 1979 <http://www.lawnigeria.com/CONSTITUTIONHUB/Constitution/1979ConstitutionofNigeria.html > accessed 14 November 2017.
[15] Constitution of the Federal Republic of Nigeria 1999 (as amended) <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed 14 November 2017.
[16] ibid.

unchangeable even by an elected parliament.[17] The key hypothesis in this theory is that constitutionalization of rights acts as a form of 'counter-majoritarian policy' whereby rights are entrenched in the constitution to protect special interest groups by restricting manoeuvring of policymakers and limit the power of majorities in legislatures.[18] This theory finds expression in countries with unique minority population requiring constitutional protection such as the case of the Indians, Métis and Inuits in Canada. The theory can, therefore, be used to explain the constitutionalization of the rights of these minority people by section 35 of the Constitution Act 1982 of Canada which entrenched the existing aboriginal and treaty rights of the aboriginal people in Canada.[19]

The functionalist theory is similar to the evolutionist theory as it views constitutionalization of rights as 'an organic response to pressures within the political system itself'.[20] Thus, under this theory, constitutionalization is seen as the best possible way of ensuring the unity and "normal" functioning of such political systems.[21] This theory aptly explains the various amendments to the Constitution of the United States of America which has been largely 'needs-based', responding to pressures within the political system and constitutionalizing rights necessary to address peculiar socio-political issues. For instance, the fourteenth and fifteenth amendments of the US Constitution was a response to the changing view in political circles about racial inequalities, equal protection of all persons before the law and the need to constitutionalize equal civil rights for blacks and other minorities;[22] while the nineteenth amendment which constitutionalised the right of women to vote in the US was a 'needs-based'

[17] J Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke L J* 364, 377–79.

[18] G Tsebelis, 'Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism' (1995) 25 *British J Pol Sci* 289, 323.

[19] See Canada's Constitution of 1867 with Amendments through 2011, <https://www.constituteproject.org/constitution/Canada_2011.pdf?lang=en> accessed 10 December 2017.

[20] R Hirschl., 'The Political Origins of the New Constitutionalism', supra, n 11, 12.

[21] Ibid, 78; Elster, 'Forces and Mechanisms in the Constitution-Making Process', supra, n 17, 371.

[22] C Warren, 'The New "Liberty" under the Fourteenth Amendment' (1926) 39(4) *Harvard Law Review* 431-465; Charles Fairman, 'Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding' (1949) 2(1) Stanford Law Review 5-139.

response to political pressure to recognise gender equality in the political process.[23]

The institutional economics theory is an egalitarian approach which analyses constitutionalization of rights from an economic perspective and sees the growing trend of constitutionalization of rights as mechanisms to mitigate systemic collective concerns such as commitment, enforcement, and information problems.[24] According to this theory, constitutionalization of rights is viewed as a means of promoting 'predictability' within the polity which is key to economic prosperity.[25] Webber[26] noted that the fundamental building-block of every successful capitalist market is a secure "predictability interest" and without this, potential investors lack the incentive to invest.[27] Consequently, politicians and stakeholders in a given polity are encouraged by this economic incentive to pursue a constitutionalization of rights as a means of ensuring long-term economic growth.

A critical review of the above theories reveals that no single theory encapsulates or properly explains the current trend towards constitutionalization of rights as a myriad of socio-political factors unique to different jurisdictions accounts for the move towards constitutionalized rights at a given point in a nation's existence. For instance, the growing trend in constitutionalization of environmental rights arose from the Stockholm Declaration of 1972 and the Brundtland Report of 1987 which drew global attention to the link between human rights and environmental protection, leading to the constitutionalization of environmental rights in many jurisdictions – Panama 1972,[28] Greece 1975,[29] Papua New Guinea 1975,[30]

[23] R Siegel, 'She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family' (2002) 115(4) *Harvard Law Review* 947-1046; Jennifer K. Brown, 'The Nineteenth Amendment and Women's Equality' (1993) 102(8) *Yale Law Journal* 2175-2204.
[24] R Hirschl, supra, n 11, 82.
[25] ibid.
[26] Max Weber, 'Economy and Society: An Outline of Interpretive Sociology' (1922) 161–62 (Guenther Roth & Claus Wittich, eds., University of California Press re-issue 1978).
[27] ibid.
[28] Articles 118-121 of Panama's Constitution of 1972 <https://www.constituteproject.org/constitution/Panama_2004.pdf?lang=en> accessed 12 June 2017.
[29] Article 24 of the Constitution of Greece, 1975 <http://www.hri.org/docs/syntagma/artcl25.html#A24> accessed 12 June 2017.
[30] Article 4, Constitution of Papua New Guinea, 1975 <http://www.wipo.int/wipolex/en/text.jsp?file_id=199188> accessed 12 November 2017.

Portugal 1976[31] - in the immediate aftermath of these international instruments as a means of incorporating this emergent aspect of human rights.

Also, the theories overlook the influence of globalization on the increasing trend of constitutionalization of rights. Countries are influenced by occurrences in other jurisdictions and often adopt similar systems in their domestic arena. Thus, the growing constitutionalization of rights across the global arena has been influenced by transplantation, harmonization, convergence and integration of legal systems between countries at the global level and this is particularly true in the case of global environmental law and constitutionalism.[32] From a theoretical perspective, the growing trend of constitutionalising environmental rights across the globe is based on the idea that granting constitutional protection to environmental rights is the most effective way of protecting the human right to a clean environment from political manoeuvrings and to enshrine the right as a bulwark of public policy in a constitutionalist form.

4.2.2 Global Constitutionalization of Environmental Rights

Over the past three decades, a new constitutional phenomenon has been blossoming in countries across the globe and across all the continents in the world. From Argentina in the Western hemisphere to the Philippines in the Eastern hemisphere, the constitutional right to live in a healthy environment has taken its root in constitutional documents across the globe at the national, sub-national and supra-national levels of an overwhelming majority of countries in the world. From the earlier constitutions of Panama[33] to the more recent constitutions of Jamaica[34] and South Sudan,[35] nations have been amending their constitutions to provide for constitutionalization of environmental rights in different forms.

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[31] Article 66, Constitution of Portugal, 1976 <https://www.constituteproject.org/constitution/Portugal_2005.pdf> accessed 12 October 2017.

[32] See D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 3.

[33] Panama's Constitution of 1972, supra, n 28.

[34] Section 13(3)(l) Constitution of Jamaica 1962 as amended in 2011 <https://www.constituteproject.org/constitution/Jamaica_2011.pdf?lang=en> accessed 25 November 2017.

[35] Section 41, Constitution of South Sudan 2011 <https://www.constituteproject.org/constitution/South_Sudan_2011.pdf> accessed 25 November 2017.

Currently, the constitutions of 150 out of the 196 countries in the world provide for environmental rights in different forms.[36] Out of this figure, however, only 88 countries have substantive environmental rights (predominantly in anthropocentric forms) explicitly provided in enforceable provisions in their constitution.[37] The remaining 66 countries have environmental protection provided as governmental obligations in sections of their constitutions that are either explicitly non-justiciable or are non-executory, requiring legislative actions to render them enforceable.[38]

Countries in the former category have environmental rights provided as declaratory governmental objectives under the section on fundamental principles of state policy which are mostly declared non-justiciable by the constitution or are regarded as such by the judiciary. The constitutions of countries like India,[39] Nigeria[40] and Malawi[41] provide for environmental rights under the 'Directive Principles for State Policy' which have been described as 'worthless platitudes because of their inherently emasculated constitutional status'.[42] In the latter category, environmental rights are incorporated in the constitutions in forms which are not self-executory (in the sense that citizens cannot seek to directly enforce them in courts) until legislative measures have been taken to make them judicially enforceable. This is often the result of counter-provisions in the constitutions that declare the relevant portions containing environmental rights non-executory without necessary legislative actions. Thus, constitutional

[36] UNEP First Global Report on Environmental Rule of Law, January 2019. See also the tabulated list of countries with constitutional environmental rights in David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment,* supra, n 32, 57-59 and B Gareau, 'Global Environmental Constitutionalism' (2013) *B.C. Envtl. Aff. L. Rev* 403-404

[37] See Appendix 1 for a comprehensive breakdown of constitutional environmental rights across all 193 countries in the world.

[38] See the Appendix.

[39] Article 48A, Constitution of India 1949, <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> accessed 18 June, 2017.

[40] Section 20, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[41] Section 13, Constitution of the Republic of Malawi, 1994, <http://www.malawi.gov.mw/images/Publications/act/Constitution%20of%20Malawi.pdf> accessed 01 October 2017.

[42] D. Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan Law Review* 39-78.

environmental rights provisions in countries like Spain,[43] South Korea,[44] Mexico,[45] Czech Republic[46] and Paraguay[47] are rendered non-executory by other provisions of the Constitution and are as a result not directly enforceable. A typical example of a counter-provision rendering constitutional environmental rights non-enforceable can be found in section 53(3) of Spain's Constitution which regulates the enforcement of rights in the constitution. The section stipulates that-

> "Recognition, respect and protection of the principles recognised in Chapter 3 (*where the right to a clean environment is provided)* shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them."[48]

Apart from the express constitutional curtailment of environmental rights as seen in the above, the constitutions of other countries express environmental rights in a manner which require their progressive implementation and are, therefore, not directly enforceable. For instance, Chapter III, article 65 of Turkey's Constitution provides for progressive implementation of the constitutional environmental right, amongst other rights, provided in article 56 by stipulating that –

> "The State shall fulfil its duties as laid down in the Constitution in the social and economic fields *within the capacity of its financial resources*, *taking into consideration the priorities appropriate with the aims of these duties*".[49]

Such self-restricting constitutional provisions raise important question marks over the constitutionalization of environmental rights in these jurisdictions. Also, the courts in Netherlands, Switzerland and Greece have refused to

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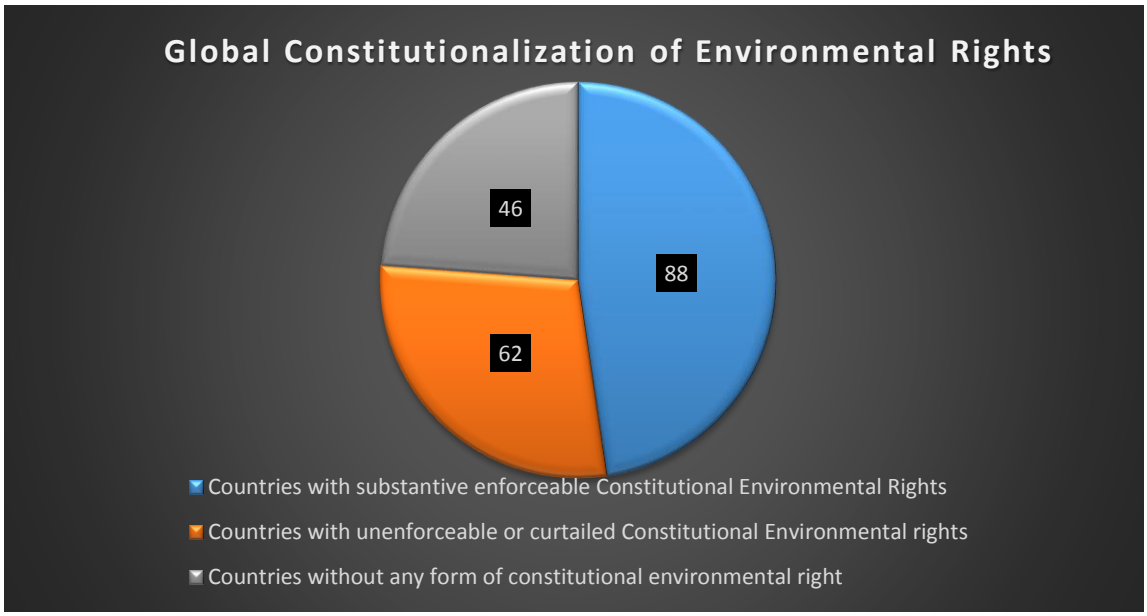
[43] Section 45, Constitution of Spain, 1978 <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf> accessed 06 December, 2017.
[44] Article 35, Constitution of Republic of South Korea 1948, <https://www.constituteproject.org/constitution/Republic_of_Korea_1987.pdf?lang=en> accessed 18 October 2017.
[45] Article 4, Constitution of Mexico, 1917 (as amended in 2015), <https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en> accessed 08 June, 2017.
[46] Article 35, Constitution of Czech Republic 1993, <https://www.constituteproject.org/constitution/Czech_Republic_2002.pdf> accessed 08 June, 2017.
[47] Article 7, Constitution of Paraguay, 1993 <https://www.constituteproject.org/constitution/Paraguay_2011.pdf> accessed 09 July 2017.
[48] Italics and underlining supplied for explanation and emphasis.
[49] The Constitution of the Republic of Turkey, 1982 <http://www.hri.org/docs/turkey/part_ii_3> accessed 01 January 2017.

directly enforce constitutional environmental rights which are considered as requiring progressive implementation.[50] As a result, only 88 countries in the world can be said to have truly constitutionalized environmental rights within the context of such rights being directly available and enforceable to the citizens. This is captured in the global study conducted by this thesis in the Appendix and graphically represented in Figure 7 below.

Figure 9: Global Constitutionalization of Environmental Rights



For many of the 88 countries with enforceable constitutional environmental rights, these rights are included in the section on bill of rights alongside other fundamental human rights such as the right to life, right to liberty and freedom of expression. The importance of including constitutional environmental rights under the bill of rights in a constitution cannot be overemphasized as it guarantees the inviolability of such right akin to the other fundamental human rights within the Bill of Rights. It can also be argued that such rights trump competing constitutional rights in the grand scheme of judicial adjudication of rights.[51] This is as a result of the sacrosanct nature of rights included in the Bill of Rights of many constitutions which are expressly declared inviolable and, in some jurisdictions,

[50] See J Buchanan, 'Why Do Constitutions Matter?' in Niclas Berggren et al. (eds.), *Why Constitutions Matter* (Transaction Publishers, 2002) 12.

[51] Nur Kayacan, Derya, 'How to resolve Conflicts between Fundamental Constitutional Rights', (2016) Saar Blueprints, 02/2016 DE <http://jean-monnet-saar.eu/?page_id=67> accessed 12 November 2017.

amending the portion of the Bill of Rights in the Constitution require more rigid procedures.[52] For instance, in Nigeria's Constitution, amending Chapter IV which contains the Bill of Rights require a four-fifths majority of both houses of Parliament, as opposed to the two-thirds majority needed to amend other portions of the constitution.[53]

Notwithstanding the global spread of constitutional environmental rights, statistics alone do not tell the whole story in this scenario. A deeper study of other variables involved reveal that global constitutional environmental rights is more ubiquitous than the statistics suggests. This is due to the existence of regional and supranational environmental rights instruments applicable within the national jurisdictions of countries without explicit constitutional environmental rights provisions. These instruments, though not in the form of national constitutions, influence the domestic environmental policies of the affected jurisdictions and operate as a form of overarching environmental rights framework from which normative environmental principles can be derived within the jurisdictions. They include the African Charter on Human and Peoples' Rights (ACHPR) 1981,[54] the Arab Charter on Human Rights 2004[55] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador".[56]

Within Europe, although there is an absence of explicit substantive environmental rights provisions in any of the European Union's (EU) treaties, decisions of the

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[52] E. Bomhoff, 'The Rights and Freedom of Others: The ECHR and Its Peculiar Category of Conflicts between Individual Fundamental Rights' in Eva Brems (ed), *Conflict between Fundamental Rights* (Intersentia 2008) 3.

[53] Section 9(3), Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[54] Art. 24 African Charter on Human and Peoples' Rights (ACHPR), Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. The ACHPR has been signed and ratified by 53 out of the 54 African states. South Sudan is the only African nation yet to sign and ratify the charter. <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> accessed 03 January 2017.

[55] Art 38, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum Rts Rep 893 (2005), *entered into force* March 15, 2008, <https://www1.umn.edu/humanrts/instree/loas2005.html> accessed 08 May 2017. As at August 2017, the Arab Charter had been signed by 17 nations but ratified by only 13 – Algeria, Bahrain, Egypt (Signed, not ratified), Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco (signed, not ratified), Palestine, Qatar, Saudi Arabia, Sudan (signed, not ratified), Syrian Arab Republic, Tunisia (signed, not ratified), United Arab Emirates and Yemen, <http://www.icnl.org/research/monitor/las.html> accessed 12 September 2017.

[56] Article 11 of the San Salvador Protocol, <http://www.oas.org/juridico/english/treaties/a-52.html> accessed 09 June 2017; The Inter-American Convention on Human Rights has been ratified by 23 of the 35 countries in the Organization of American States (OAS) while the San Salvador Protocol has been ratified by 16 OAS states.

European Court of Human Rights have re-interpreted the human rights provisions on right to life and right to private and family life in articles 2 and 8 of the EU Convention on Human Rights[57] to include the right to a clean environment.[58] In addition, the Aarhus Convention[59] provides procedural environmental rights related to environmental matters for countries within the EU. The ECHR decisions and Aarhus convention, therefore, constitute a supranational framework for environmental rights applicable to EU countries, albeit a majority of EU countries already have explicit constitutional environmental rights. For countries such as the United Kingdom which has no written constitution (and thus no constitutional environmental rights), its membership of the EU ensures that ECHR's decisions and Aarhus Convention provide an overarching environmental rights framework applicable within its jurisdiction. However, with the recent decision of the UK to rescind its EU membership, there will be the need to institute a domestic environmental rights framework, possibly by reviving the proposed UK Bill of Rights which was introduced at a 2008 joint committee of the House of Commons and House of Lords as part of a wider programme of constitutional reform.[60] The UK government's desire for a Bill of Rights was predicated on the growing disaffection with the EU Convention on Human Rights and its undesired impact on the UK's Human Rights Act (HRA) which informed the government's intention to resile from the former.[61] The proposed Bill of Rights, which was intended to replace the HRA, has not come to fruition owing to distractions by the focus on negotiations over the terms of UK's withdrawal from the EU. Indeed, the UK leaving the EU will potentially invigorate the reintroduction of the Bill of Rights as the EU convention on Human Rights will no longer be applicable to the UK.

[57]EU Convention on Human Rights <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 07 June 2016.

[58] See López Ostra vs. Spain, ECHR Judgment of December 9, 1994, Case No. 41/1993/436/515.T

[59] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 20 December 2016.

[60] Joint Committee on Human Rights; House of Commons and House of Lords, "A Bill of Rights for the UK?", Twenty–ninth Report of Session 2007–08, Published on 10 August 2008, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf> accessed 08 January 2016.

[61]See for instance *R (F) v Secretary of State for the Home Department* [2010] UKSC 17 where the UK Supreme Court declared provisions of the HRA inconsistent with provisions of the EU Convention on Human Rights.

Flowing from the above discussions, it is clear that constitutional environmental rights are more prevalent around the globe than Figure 9 suggests. For a number of countries not covered by national or international instruments with a right to a clean environment, such as India, Nepal and Pakistan, extant constitutional provisions on right to life and health have been interpreted by the judiciary in these countries to import a constitutional right to a clean environment.[62] Indeed, there are only 15 countries around the world that have no form of fundamental environmental rights provision either at the national, regional or supranational levels applicable within their jurisdictions and lack judicial recognition of such right flowing from the ancillary constitutional bill of rights.[63] This is reflected in Figure 10 below.

Figure 10: Global Spread of Constitutional Environmental Rights

Source: UNEP First Global Report 2019[64]

[62] See for instance the decision of the Indian Supreme Court in Subhash Kumar v. State of Bihar, supra, n 87, 424. See also similar decisions along this line of reasoning in Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others, WP 35/1991 (Supreme Court of Nepal, 1995); and Asghar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) (Pakistan). See G Gitanjali, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14(3) Environmental Law Review 200-218.

[63] The countries are - Afghanistan, Australia, Brunei Darussalam, Canada, Cambodia, China, Japan, Kuwait, Laos, Lebanon, Myammar, New Zealand, North Korea, United States of America and Oman; See D Boyd , *The Environmental Rights Revolution,* supra, n 32, 92.

[64]UNEP First Global Report on Environmental Rule of Law, January 2019.

In essence, constitutionalization of environmental rights has become overwhelmingly globalized and, as surmised by Boyd,[65] 'almost 92 percent of national jurisdictions around the world recognizes the right to a healthy environment'. [66] Even amongst the 15 countries without any form of constitutional environmental right, some sub-national governments within these jurisdictions recognize the right to a healthy environment, including six American states, five Canadian provinces or territories, and a growing number of cities.[67] The presence of constitutionalized environmental rights within sub-national jurisdictions is evidence of the recognition of the right to a clean environment in these jurisdictions and can potentially influence the treatment of environmental concerns even at the national level.[68]

On the evidence above, it can be argued, as posited by Boyd, that 'the right to a healthy environment is very close to becoming, if not already, a general principle of international law'.[69] Article 38(1) (c) of the Statute of the International Court of Justice[70] acknowledges the importance of 'general principles of law recognised by civilised nations' in shaping the international legal system and forming a distinct source of international law. Bassiouni opines that this provision incorporates two elements, viz - 'general principles' and 'civilised nations'.[71]Accepting Bassiouni's view that all nations in the post-UN Charter era are presumed to be civilised nations, 'general principles of international law' can, therefore, be said to derive from expressions of national legal systems around the globe, where these expressions are commonly shared by a majority of the domestic jurisdictions and there are no significant objections to the applicability

[65] D Boyd, *The Environmental Rights Revolution,* supra (n 32) 92.
[66]ibid.
[67]In the US, Hawaii, Illinois, Massachusetts, Montana, Pennsylvania and Rhode Island all have explicit constitutional environmental provisions in their state constitutions. The Canadian provinces and territories are Ontario, Quebec, the Yukon, Nunavut, and the Northwest Territories. Cities include Pittsburgh, Santa Monica, and Montreal.
[68] B Wilson, 'State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?' (2004) 53(2) *Emory Law Journal* 627 – 656.
[69] D Boyd , *The Environmental Rights Revolution,* supra, n 32, 92.
[70] Statute of the International Court of Justice, Entry into Force Date 24th October 1945,<http://www.icj-cij.org/en/statute> accessed 15 September, 2017.
[71] B Cherif, 'A Functional Approach to general Principles of International Law' (1990) *11 Mich. J. Int'l L* 768.

of these principles even amongst the few domestic jurisdictions where these expressions are not positively grounded.[72]

The right to a healthy environment, as a legal entitlement of citizens, is found in various forms within domestic jurisdictions of over 92% of states around the globe. Even within the jurisdictions without explicit legislative/constitutional recognition of this right or judicial application of this right from other human rights, there is no overt denunciation of the entitlement of citizens to a clean environment. The United States and Canada, two significant states without any explicit recognition of this right at the national or supra-national level, have sub-national units within them recognizing this right in constitutional forms. In this light, there is room to argue that the right to a clean environment has attained such widespread global recognition and acceptance that is sufficient to constitute the right as a general principle of international law.

Notwithstanding the global recognition of the right to a healthy environment, there are significant differences in the manner of protection accorded to the expression of the right to a clean environment across the globe. While there is a current trend across many jurisdictions to accord constitutional protection to this right or to ratify regional instruments providing fundamental protection of this right, the normative contents and forms of these constitutional or regional protections vary and this often results in unequal protection status for environmental rights across the globe.

4.3 Formulating Normative Constitutional Environmental Right

Although many countries recognise the right to a healthy environment, different approaches are adopted in seeking to protect and promote this right. The most common means of protection is the incorporation of this right in a constitutional form in order to accord it enhanced protection and elevate it above ordinary statutory rights. Nevertheless, the manner this constitutional protection is normatively formulated has a significant impact on the effectiveness of protection

[72]Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP Oxford, 2007) 3; Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1973) 2.

that ensues. It is, therefore, not sufficient to merely analyse the existence of environmental rights in a constitutional form within a jurisdiction, as deeper analysis is required to reveal the extent to which the constitutionalised right imports legal protection, if any. Some constitutional environmental rights are normatively couched in forms that render them legally ineffectual and merely platitudes or declaratory aspirations for governments while others are couched in strongly worded legally binding rights within the general bill of rights (or outside of it but with equal strength).[73]

Existing literature on the subject of constitutional environmental rights focus majorly on the presence of environmental rights in national constitutions and devote little time to the normative contents or framing of such right in constitutions. Thus, major proponents of constitutional environmental rights including Hayward,[74] Brooks[75] and Boyd[76] argue in favour of incorporating environmental rights in the constitution without examining the normative framing or contents of such right. Cognisant of the fact that mere presence of such right in national constitutions is not constitutive of fundamental protection for the environment, it is pertinent to propose and analyse the key normative pillars of a constitutional environmental right which, to a large extent, are determinative of the existence of a fundamental protection framework for the environment.

Securing fundamental protection for the environment through a constitutional right hinges on the presence of three vital pillars that should be embedded in the normative framing of such right. These pillars are-

i. The provision of a substantive and self-executory constitutional right to a clean environment;
ii. The incorporation of fundamental principles of environmental protection (such as polluter pays principle, precautionary principle and preventive principle) and procedural environmental rights including access to justice, information and participation in environmental decision making; and

[73] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment 89- 120.
[74] Tim Hayward, *Constitutional Environmental Rights* (OUP 2005) 3.
[75] R Brooks, 'A Constitutional Right to a Healthful Environment' (1992) 16 VT L REV 1063,1109.
[76] David Boyd, *The Environmental Rights Revolution,* supra, n 32, 92.

iii. The incorporation of *coalesced anthropocentrism approach* in the framing of the right.

4.3.1 Substantive Constitutional Environmental Right

Incorporating substantive environmental rights in constitutions is important because it enshrines the protection of the individual's entitlement to a clean environment globally recognised as a fundamental right of all persons. As Kofi Annan, former Secretary General of the United Nations states-

> 'a rights'-based approach to environmental protection is important because it describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals.'[77]

In addition, UNEP advocates for increasing constitutionalization of substantive environmental rights because it helps to enshrine environmental rule of law within the country. UNEP argues that 'taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections'.[78] Consequently, incorporating substantive environmental rights in constitutional documents is the hallmark of advancing the rule of law and guaranteeing effective protection of the environment.

The first step in constitutionalising environmental right is the inclusion of a clearly worded substantive right to a clean environment in the constitution in clear, direct and enforceable language devoid of equivocation. This is usually couched using various 'evaluative-descriptive' terms including 'ecologically sound', 'habitable', 'conducive', 'viable', 'decent' or simply 'safe' environment. The Constitution of Colombia[79] stipulates that 'every individual has the right to enjoy a *healthy*

[77]Annan, Kofi, 'Partnerships for Global Community: Annual Report on the Work of the Organization' (1998) New York: United Nations.
[78] UNEP First Global Report on the Rule of Law, January 2019, 13.
[79] Article 79, Constitution of Colombia 1991 (as amended in 2005) <https://www.constituteproject.org/constitution/Colombia_2005.pdf> accessed 12 August 2017.

environment'; Kenya's Constitution[80] provides that 'every person has the right to a *clean and healthy* environment' while Ecuador's Constitution[81] uses the phrase '*ecologically balanced environment'* in conferring a substantive constitutional environmental right.

The nomenclature employed matters less than the general framing of the substantive clause, as the framing of the right in a manner that imports progressive implementation by the government or is subjected to legislative implementation can potentially reduce such right to a socio-economic aspirational obligation of government rather than a self-executory right of citizens. This is notwithstanding the use of the term 'right' in the clause. For example, article 35 of South Korea's Constitution[82] provides that 'all citizens shall have the right to a healthy and pleasant environment' but includes in a sub-clause that 'the substance of the environmental right shall be determined by law'; Article 56 of Turkey's Constitution[83] confers 'a right to live in a healthy and balanced environment' but subsequently conditions the right on the availability of sufficient resources by the government to advance environmental protection. In both cases, what appears on the surface as substantive constitutional environmental rights are no more than expressions of socio-economic aspirations dependent on the government for fulfilment within the limits of legislative or executive resources.

Turkey and South Korea above are, however, exceptional cases as the national constitutions in many jurisdictions generally provide for a right to a safe (or any other descriptive nomenclature) environment without any restriction, qualification or conditions and do not subject such right to progressive implementation by the legislative or executive arms of government. Nevertheless, the mere presence of unqualified substantive rights in constitutions is just one aspect of the normative framing of a substantive right. Other substantive issues for consideration include the provision of corollary governmental duties with respect to the environment,

[80] Article 42, Constitution of Kenya 2010, <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf> accessed 12 August 2017.

[81] Article 14, Constitution of Ecuador 2008, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 12 August 2017.

[82] Constitution of the Republic of Korea of 1948 with Amendments through 1987, <https://www.constituteproject.org/constitution/Republic_of_Korea_1987.pdf?lang=en> accessed 08 April 2017.

[83] Constitution of the Republic of Turkey 1982, <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 09 April 2017.

conferment of individual responsibilities to protect the environment and, perhaps most importantly, the location of the substantive right within the constitution. These are important factors which influence the effectiveness of a substantive constitutional environmental right.

The imposition of a constitutional obligation on the government with respect to environmental protection is an important aspect of securing the effectiveness of a substantive environmental right. As Taylor argues, 'responsibilities are, of course, the corollary of rights and vice-versa, so that rights give rise to responsibilities and responsibilities to rights'[84] Environmental rights, like every other right, imposes several layers of duties on the state in respect of their protection and advancement. Kotze[85] identifies the four levels of duties and responsibilities for a state in respect of rights – duty to respect, protect, promote and fulfil – and the enforcement of rights come in varying forms depending on which of these duties is invoked by a particular right. Explicitly imposing a constitutional obligation on the government with respect to protecting the environment fulfils these four co-dependent levels of duties and responsibilities on the state with respect to constitutional environmental rights. Such provisions ensure that not only are the citizens' rights to a safe environment guaranteed, but the government is tasked with the responsibility to promote and fulfil these rights. In essence, such provisions institute a positive obligation on the government to shore up the negative substantive right to a clean environment.

Negative rights are restrictive rights in nature, prohibiting actions by the government from infringing on them but not requiring any affirmative steps or actions by the government for their fulfilment.[86] They are generally based on, and couched in the form of, the concept of liberty (freedom) of citizens to pursue entrenched values which rightfully belong to them unrestrained by governmental interventions. One critical element of negative rights is that they are

[84]P Taylor, 'From Environmental to Ecological Human Right' (1998) 10 *Georgetown Environmental Law Review* 309, 311.
[85]L Kotze 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 *Journal of Court Innovation* 157.
[86]B Wilson, 'State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?' (2004) 53(2) Emory Law Journal 627 – 656.

implementable immediately[87] and, to a large extent, do not require any commitment of resources by the government for their actualization.

Positive rights on their part are mostly social, economic and cultural rights which require affirmative steps to be taken by governments in 'granting to the people something they do not already have'.[88] They are rights based on the welfare of the citizens and require actions on the part of the government to actualize. While negative rights import an obligation on the government to 'respect and protect' the rights, positive rights import obligations of states to 'promote and fulfil' and often involve resource allocations. The substantive right to a clean environment is generally couched in the form of a negative right as it includes the right to freedom from pollution, contamination of the environment (air, land and water) and non-interference with the bio-diversity of ecosystems which generally requires restraints on governmental actions capable of interfering with the enjoyment of a clean environment. Nevertheless, other aspects of the substantive environmental right require affirmative actions by the government towards their actualization. The provision of clean air, safe water and healthy ecosystems require affirmative actions by the government for their actualization. Moreover, as Robert Lee[89] points out, 'arguments about the environment (whether about inputs from or outputs to) will involve resource questions'. Thus, seeing that aspects of environmental rights generally raise resource allocation issues and require progressive implementation, it is possible to consider environmental rights as positive rights in some sense.

Cognisant of the fact that substantive environmental rights straddle the realm of positive and negative rights, it is important to couch the right in a form that does not import progressive implementation, in which case it may not be considered self-executory but merely declaratory, as in the constitutions of Turkey and South Korea. At the same time, it is important to also emphasise the role of the government in actualising the protection of this right through allocating relevant resources towards its fulfilment. Imposing an enforceable governmental obligation

[87] D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment,* supra, n 32, 8.
[88] B. Wilson, 'State Constitutional Environmental Rights and Judicial Activism', supra, n 82, 628.
[89] R Lee, 'Resources, Rights, and Environmental Regulation: The Human Rights Act: A Success Story?'(2005) 32 (1) Journal of Law and Society 111-130

to protect the environment, when incorporated alongside a substantive environmental right, therefore, achieves this dual purpose as it imposes the four levels of duties on the government in respect of this right- duty to respect, protect, promote and fulfil. The approach of the Brazilian Constitution to incorporating environmental rights is a model exemplar which epitomises this point. Article 225 of Brazil's Constitution begins by conferring a substantive environmental right thus-

> "Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life"

Article 225 then proceeds to state in sub-paragraph 1 that-

> "To assure the effectiveness of this right, it is the responsibility of the Government to:
>
> I. preserve and restore essential ecological processes and provide for ecological management of species and ecosystems…"

Effectively, sub-paragraph 1 backs up the substantive environmental right with a positive constitutional obligation on government, highlighting seven specific areas of the fulfilment of this right which is mandated on the government and ensures the substantive right is fully secured. A similar approach is adopted in article 66 of Portugal's Constitution.[90]

The second aspect of a substantive environmental right in constitutions is the conferment of individual responsibilities with respect to the environment. Following Taylor's position that 'rights give rise to responsibilities and responsibilities to rights', the conferment of a substantive right to a clean environment should be accompanied by corresponding responsibilities towards the environment. In this regard, citizens are individually mandated to take steps towards protecting the environment and preventing any action which may negatively impact the environment. The placement of this provision alongside a substantive environmental right in a constitution is instructive as it renders this provision enforceable against individuals rather than being mere lofty renditions of non-enforceable civic duties of citizens, as found in the 'Fundamental Principles

[90]Constitution of Portugal, 1976 <https://www.constituteproject.org/constitution/Portugal_2005.pdf> accessed 26 June 2016.

and Directive State Policies' of the constitutions of many countries.[91] An illustrative example of this approach can be found in France's Environmental Charter of 2005 which provides, in articles 2 to 4, that-

> Article 2- "every person has the duty to take part in the preservation and the improvement of the environment.
>
> Article 3- Every person must, in the conditions defined by law, prevent or, at a minimum, limit the harm that it is susceptible to bring on the environment".[92]
>
> Article 4 Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment."

Constitutional obligations on individuals in the format above create horizontal rights enforceable against individuals and private entities and is a deviation from the usual focus of constitutional provisions on creating vertical rights enforceable against governments and its agencies. Where, however, it is not the intention of the constitution to render this obligation enforceable, it can be expressly declared as such in the constitution, as in the case of section 220 of Gambia's Constitution which, after imposing a constitutional obligation on citizens to protect and conserve the environment in section 220(1) (j), proceeds to state in section 220(2) that 'such duties shall not, of themselves, render any person liable to proceedings of any kind in any court'.[93]

Constitutional obligations on citizens with respect to the environment is an important aspect of securing citizen participation in environmental preservation and should an integral part of a substantive environmental right in every constitution. Boyd, however, downplays the importance of such provisions in constitutions stating that-

> "it is unclear what legal purpose is served by the constitutionalization of individual environmental duties. These provisions appear to be symbolic, hortatory, and educational,

[91] See for instance Part IV of Constitution of India and Chapter II of the Constitution of Nigeria.
[92] Environmental Charter of France, 2005 <http://www.conseilconstitutionnel.fr/conseilconstitutionnel/english/constitution/charter-for-the-environment.103658.html> accessed 09 August 2017.
[93] Section 220, Constitution of the Republic of Gambia 1997, <http://www.wipo.int/wipolex/en/text.jsp?file_id=221243> accessed 05 November 2017.

> confirming that everyone has a part to play in protecting the environment from human-imposed damage and degradation."[94]

However, rather than being 'symbolic, hortatory and educational' as suggested by Boyd, such provisions are part of the environmental rights revolution canvassed by Boyd which has evolved to the point of conferment of horizontal environmental rights on citizens against fellow individuals.[95] The constitutional civic obligation to protect the environment is an enforceable duty which confers a correlative right on citizens to enforce the environmental obligation against fellow citizens as against the conventional theory of environmental obligations being enforceable against governments alone.[96] Indeed, as indicated by Boyd, individual responsibility for protecting the environment is no longer a novel concept as it is currently provided in 83 constitutions around the world and this signifies a constitutional environmental rights revolution targeted at improving environmental stewardship of the citizens. As Orhan[97] stated, civic environmentalism is vital to the achievement of environmental protection goals as 'the environment is not "a special realm" reserved for experts and professional activists, but an essential aspect of public life - a place for citizens'. Constitutionalising an enforceable individual responsibility towards the environment is, therefore, a step towards promoting civic environmentalism and improving environmental stewardship of citizens.

The third aspect of a substantive constitutional environmental right relates to the location of the right within a constitution. Generally, national constitutions across the globe do not follow a defined pattern in their arrangement and some constitutions do not confer differing legal status on different segments of the document. In such cases, the location of the substantive environmental right within a specific segment of the constitution is of no relevance, as it does not affect its status and enforceability. For instance, the Constitutions of Colombia[98]

[94]D Boyd, *The Environmental Rights Revolution,* supra (n 32), 68; See pages 53 to 57 of Boyd's work for a detailed enumeration of countries with individual environmental responsibilities enshrined in their constitutions.
[95]D Anton, and D Shelton, 'Problems in Environmental Protection and Human Rights: A Human Right to the Environment' (2011 GW Law Faculty Publications & Other Works 1048.
[96] Environmental Law Institute Research Report, 'Constitutional Environmental Law', 2016.
[97]Ö Orhan, 'The Civic Environmental Approach' (2008) 17(2) The Good Society 38, 43
[98]Constitution of Colombia, 2005, <https://www.constituteproject.org/constitution/Colombia_2005.pdf> accessed 08 May, 2016.

and Ecuador[99] do not confer differing legal status to rights conferred in specific segments of the Constitution and as such the location of the substantive environmental rights in these constitutions are not important, although in both cases the substantive environmental rights are included under the general segments of 'fundamental rights'.[100]

Nevertheless, the location of substantive environmental rights matters in countries where the constitutional document confer different legal status to the various segments in the constitution.[101] This is usually the case where a specific segment of the constitution, usually the 'Directive Principles of State Policies', is declared non-enforceable (as in the case of India and Nigeria's constitutions)[102] or where the rights conferred in a segment are declared to be only subject to progressive implementation (as in Turkey's Constitution). In such cases, it is important that substantive environmental rights are located in segments of the constitution not affected by the constitutional limitation. In Turkey's case, the Constitution partitions 'social, economic rights and duties' from 'political and civic rights and duties' and declares the former partition an area of progressive implementation by the government and not enforceable.[103] The inclusion of substantive environmental rights in the former partition, therefore, immobilises its effectiveness.

Ideally, a substantive environmental right, being a fundamental right, should be located amongst the Bill of Rights in a constitution for ease of reference and in alignment with the general notion of an environmental right being an inviolable civic right. However, there is a practical side to the argument for the inclusion of substantive environmental right amongst the bill of rights and this relates to the immutability or difficulty of instituting drawbacks on such constitutional right where

[99] Constitution of Ecuador, 2008, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 08 May, 2016.

[100] See Article 79 of Colombia's Constitution which places environmental rights under the segment on 'Rights, Guarantees and Duties'; and Article 14 of Ecuador's Constitution which places environmental rights under the segment on 'Rights'.

[101] OHCHR (UN Human Rights Council) (2015) Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox—Compilation of Good Practices. A/HRC/28/61 (3 February 2015)

[102] See section 37 and Part IV of India's Constitution & Section 6(6)(c) and Chapter II of Nigeria's Constitution.

[103] See Chapters 3 and 4 of the Constitution of the Republic of Turkey, 1982 <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 07 April, 2017.

it forms a part of the bill of rights. In some national constitutions, there are different (usually more stringent) requirements for amending the segment of the constitution incorporating the Bill of Rights and this helps to guarantee the protection of this right from drawbacks by the legislature or constitution amending body. In Nigeria, Section 9 of the Constitution imposes a more stringent requirement for amending Chapter IV relating to fundamental rights, requiring a four-fifths majority of both Houses of Parliament as opposed to the two-thirds majority required for other constitutional amendments; Article 225 of Kenya's Constitution requires any amendment affecting the Bill of Rights to be ratified by a referendum held throughout the country, as against the simple legislative procedure for amending other segments of the Constitution. In Ecuador, Articles 441 and 442 of the Constitution appear to confer immutability on the Bill of Rights provisions in the sense that it excludes the Bill of Rights from any amendment that set constraints on the rights and guarantees. In essence, while an amendment can be made to add to the Bill of Rights, no amendment can be made to curtail, remove or impair any of the rights in any form whatsoever.[104] In this regard, substantive environmental rights are better protected when incorporated in the segment on Bill of Rights within constitutions.

There is a wide range of practice in respect of the location of substantive environmental rights in constitutions. In Africa, 32 of the 54 countries have constitutional environmental rights[105] with the earliest countries being Guinea,[106] Sao Tome & Principle,[107] Benin[108] and Mozambique[109] between 1975 to 1990

[104] For instance, an amendment was made in 2008 to add the rights of Mother Nature to the Bill of Rights. See 'Rights of Nature Articles in Ecuador's Constitution', 2008 <https://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf> accessed 19 June, 2016.

[105] Y. K. Brian Sang, 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and its Prospects within the New Constitutional Order' (2013) 57(1) *Journal of African Law* 29-56.

[106] Article 16, Constitution of Guinea, 1990 <https://www.constituteproject.org/constitution/Guinea_2010.pdf > accessed 08 July, 2016.

[107] Article 48, Constitution of Sao Tome 1975, <https://www.constituteproject.org/constitution/Sao_Tome_and_Principe_1990.pdf?lang=en> accessed 08 July, 2016.

[108] Article 27, Constitution of the Republic of Benin, 1990, <https://www.constituteproject.org/constitution/Benin_1990.pdf?lang=en> accessed 08 July, 2016.

[109] Article 90, Constitution of Mozambique, 1990 <http://confinder.richmond.edu/admin/docs/Constitution_(in_force_21_01_05)(English)-Mozlegal.pdf> accessed 08 July, 2016.

and the latest been Kenya (2010), South Sudan[110] and Morocco[111] (2011). However, out of these 32 African countries, 11 of them – Angola,[112]Cameroon,[113] Mali,[114]Seychelles,[115]Cape Verde,[116] Chad,[117]Congo,[118] Kenya, Mozambique, South Africa[119] and Uganda[120]- have the constitutional environmental right included in the chapter on 'Fundamental Rights and Responsibilities' while 4 of them - Nigeria, Eritrea,[121] Ghana,[122] and Zambia[123] - have constitutional environmental provisions in their 'Directive Principles of State Policies' which are non-enforceable. These two extreme positions - Constitutional environmental rights as fundamental rights on the one hand and as mere directive principles of state policy on the other hand – in Africa alone shows how constitutionalization of environmental rights vacillates between countries and why analysing constitutionalization of rights merely from the standpoint of constitutional inclusion of environmental concerns is too simplistic and inherently misleading.

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[110] Section 41, Constitution of South Sudan, 2011 <https://www.constituteproject.org/constitution/South_Sudan_2011.pdf> accessed 08 July, 2016.

[111] Article 19, Constitution of Morocco, 2011 <https://www.constituteproject.org/constitution/Morocco_2011.pdf?lang=en> accessed 08 July, 2016.

[112] Article 39, Constitution of Angola, 2010 <https://www.constituteproject.org/constitution/Angola_2010.pdf?lang=en> accessed 08 July, 2016.

[113] Article 24, Constitution of Cameroon, 1972 <http://confinder.richmond.edu/admin/docs/Cameroon.pdf> accessed 08 July, 2016.

[114] Article 15, Constitution of Mali, 1992 <https://www.constituteproject.org/constitution/Mali_1992.pdf?lang=en> accessed 08 July, 2016.

[115] Article 38, Constitution of Seychelles, 1993 <http://www.wipo.int/edocs/lexdocs/laws/en/sc/sc001en.pdf> accessed 08 July, 2016.

[116] Article 70, Constitution of Cape Verde, 1980 <https://www.constituteproject.org/constitution/Cape_Verde_1992.pdf?lang=en> accessed 08 July, 2016.

[117] Article 47, Constitution of Chad, 1996 <https://www.constituteproject.org/constitution/Chad_2005.pdf> accessed 08 July, 2016.

[118] Article 35, Constitution of Congo, 2001 <https://www.constituteproject.org/constitution/Congo_2001.pdf> accessed 08 July, 2016.

[119] Article 24, Constitution of South Africa, 1996 <http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf> accessed 08 July, 2016.

[120] Article 39, Constitution of Uganda, 1995 <http://www.statehouse.go.ug/sites/default/files/attachments/Constitution_1995.pdf> accessed 08 July, 2016.

[121] Article 8, Constitution of Eritrea, 1997 <http://confinder.richmond.edu/admin/docs/Eritrea1997English.pdf> accessed 08 July, 2016.

[122] Section 36, Constitution of Ghana, 1996 <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh014en.pdf> accessed 08 July, 2016.

[123] Article 112, Constitution of Zambia, 1996 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/26620/90492/F735047973/ZMB26620.pdf> accessed 08 July, 2016.

In Africa, South Africa, Kenya, Cape Verde and Burkina Faso[124] have the most comprehensive constitutional provisions on environmental rights as their constitutions encapsulate the three key ideals of a substantive environmental right- explicit right to a clean environment as a fundamental right; enforceable duty on the government to respect, protect, promote and fulfil these rights; and enforceable duties on individuals within the state to protect the environment thereby entitling citizens to enforce the constitutional environmental right against each other and not just against the government.

In other parts of the world, France, Colombia, Brazil and Ecuador are notable countries with comprehensive constitutional environmental rights and detailed provisions covering all relevant aspects of the substantive environmental right. Colombia's Constitution contains 34 provisions exclusively dedicated to environmental protection[125] while Brazil's Constitution provides for the environmental right of citizens to an 'ecologically balanced environment',[126] imposes duty on the government and citizens to protect the environment for present and future generations and proceed to elaborate, in several paragraphs, the duties of government in relation to environmental protection. France's Environmental Charter of 2005[127] stands out amongst European nations as it contains elaborate rights of citizens to a clean environment, incorporate relevant international environmental law principles like the precautionary and preventive principles and imposes duties on not just the government, but also the citizens to protect the environment.

4.3.2 Incorporating Environmental Principles and Procedural Rights

Environmental rights provisions in constitutions are better formulated in normative terms which recognise the important role that basic principles of environmental governance and procedural processes play in the ventilation of a right to a clean environment. Substantive constitutional environmental rights

[124] Article 29, Constitution of Burkina Faso, 1991 <https://www.constituteproject.org/constitution/Burkina_Faso_2012.pdf> accessed 08 July, 2016.
[125] Colombia's Constitution of 1991 <https://www.constituteproject.org/constitution/Colombia_2005.pdf> accessed 08 July, 2016.
[126] Article 225, Brazil's Constitution.
[127] Environmental Charter of France, 2005.

should, therefore, not be stand-alone provisions (as is overwhelmingly found in many constitutions around the globe) but should be framed as a bouquet of environmental rights' provisions which incorporate the various norms necessary for instituting a fundamental environmental rights framework. The focus has to be on instituting an environmental rights framework rather than merely providing a solitary right to a clean environment.

Basic environmental law principles developed over time for securing effective protection and management of the environment are useful tools for creating a sustainable environmental legal framework within a jurisdiction.[128] Their inclusion in constitutionalising environmental rights will, therefore, serve to elevate these principles to fundamental constitutional principles in their own right which will guide and govern governmental actions with respect to environmental matters. Global environmental principles including the polluter pay principle, precautionary principle, preventive principle and sustainable development principle have been developed over the years as guiding environmental principles which help to direct government's actions and policies along pathways consistent with sound environmental management.

In addition, procedural rights forming part of the environmental law framework are vital for the protection and ventilation of the right to a clean environment. Issues relating to procedural rights such as access to environmental information, access to justice in environmental matters and public participation in decision-making processes likely to affect the environment are central to the ventilation of any substantive environmental right and should ideally be incorporated alongside the substantive rights. The importance of procedural environmental rights is underscored by its expression in Principle 10 of the Rio Declaration[129] which states that –

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities

[128] L Kotze, 'Arguing Global Environmental Constitutionalism', (2012) 1(1) *Transnational Environmental Law*, 199-233.

[129] Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

in their communities, and the opportunity to participate in decision-making processes"

This principle was reiterated and expanded in the Aarhus Convention[130]which recognised that to be able to assert the right to a clean environment, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. Seeing the importance of these procedural rights, they should not be confined to mere statutory expressions as though they were of less significance than the substantive rights but should be incorporated alongside the latter as a holistic environmental rights framework in constitutions. France's Environmental Rights Charter of 2005 exemplifies this approach as articles 3 (prevention principle), 4 (polluter pays principle), 5 (precautionary principle) and 7 (access to information and public participation in environmental decision making) incorporate basic environmental principles and procedural environmental rights alongside the substantive right to a clean environment in article 1. Article 225, paragraph 2 of Brazil's Constitution incorporates the polluter pays principle alongside the substantive environmental right while article 70 of Kenya's Constitution institutes a dedicated fast-track procedural access to justice in respect of environmental issues to supplement the substantive environmental right provided in article 42.

In incorporating these principles and procedures into the constitution, it is not necessary to adopt elaborate provisions to achieve this purpose, as in France's Environmental Charter, neither is it necessary to dedicate several paragraphs to this purpose, as in Brazil's Constitution. A single clause in the constitution is sufficient to incorporate these principles with a general, but summarised, provision referring to internationally accepted environmental principles and basic procedural rights necessary to ventilate the substantive right to a healthy environment. This will obviate any opposition to this approach on account of its introduction of potentially bulky provisions into the constitution.

[130] Articles 4 – 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Done at Aarhus, Denmark, on 25 June 1998.

4.3.3 Incorporating *Coalesced Anthropocentrism* Approach

The *Coalesced anthropocentrism* paradigm proposed and developed in this thesis focuses on the comprehensive protection of the interests of the tripod rights' holders in the environment - humans, future generations and nature. It is essential that the interests of these rights holders are recognised and incorporated in the normative framing of environmental rights provisions in legal instruments, not least in a constitutional document which is the pre-eminent legal framework for the protection of rights in domestic jurisdictions. Consequently, the test of an effective constitutionalised environmental right should be measured by the extent to which it recognises and incorporates the substantive rights of present humans, future generations and Mother Nature in a holistic and unequivocally enforceable manner.

As discussed earlier in this thesis, the environment is a life-sustaining system for different components of the ecosystem which includes present humans, albeit humans are the alpha environmental entity. Implicit in this statement is a recognition of the vital role that nature and other non-human components of the ecosystem play in the complex interaction in the environment which sustains human life. Article 1(2) of the Draft Universal Declaration of the Rights of Mother Earth (UDRME) 2010 encapsulates this reality thus-

> "Mother Earth is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings"

Limiting constitutional protection of environmental rights strictly to the protection of human interests in the environment constitutes an unjustifiable and myopic exclusion of the interests of vital non-human components of the ecosystem and can be counterproductive in the long term. A counter-productive outcome result from the pursuit of humans' right to a clean environment to the detriment of nature which sustains humans, leading to the potential despoliation of natural habitats to fulfil human needs which in the process undermines any effort to guarantee a clean environment for humans. In essence, a clean environment can only be secured by protecting the important components of the ecosystem which are necessary for its sanctity, as it is the actions of humans despoiling the natural habitat that is responsible for most of the environmental concerns facing the world

today. This *paradox of counter-productive pursuit* is recognised in Paragraph 3 of the UDRME thus-

> "Recognising that the capitalist system and all forms of depredation, exploitation, abuse and contamination have caused great destruction, degradation and disruption of Mother Earth, putting life as we know it today at risk through phenomena such as climate change".

Recognising a substantive right of humans to a clean environment is, therefore, without much benefit if there is no correlative effort to protect the fundamental basis on which the sustenance of humans in the environment is derived - the natural habitat. Although legal efforts are routinely put in place within many jurisdictions to protect the natural habitat, restricting such protections to statutory levels while elevating the human aspect to a constitutional level is an unjustifiable bifurcation and segregation of environmental interests. Such segregation reinforces and entrenches the anthropocentric chauvinism enjoyed by humans in respect to environmental matters which is 'the root of all environmental problems'[131] because it detracts from a more extensive ecological view of environmental rights.

This anthropocentric chauvinism is reflected in the equating of environmental rights with environmental human rights in environmental literature, as though the two terms are synonymous or interchangeable. The view that the right to a clean environment is inherently a 'human' right forms the basis of the strong clamour for constitutionalising environmental rights by its most vocal advocates like Tim Hayward and Richard Brooks. Hayward argues in favour of constitutionalising environmental rights on the following premise-

> "all human rights ought to be constitutionalized; the right to an adequate environment is a human right; therefore, the right to an adequate environment ought to be constitutionalised."[132]

This argument presupposes that the only relevance of a constitutional environmental right is its protection of the human aspects of environmental

[131] A Shinsato, 'Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 *Nw J Int'l Hum Rts* 186, 189.
[132] T Hayward, *Constitutional Environmental Rights* (OUP 2005)12.

concerns and, therefore, disregards the wider considerations of other non-human environmental interests. Backing this view, Brooks argues that –

> 'the *fundamental purpose* of a constitutional right to a healthful environment is to frame the description of the pollution event in terms of a public assault upon an individual's substantive right to life and health'[133]

Regarding humans' right to life and health as the 'fundamental purpose' of a constitutional environmental right is the peak of anthropocentric chauvinism as it is dismissive of the importance of nature and non-human environmental interests. Importantly, the right to a clean environment, it can be argued, is not innate in humans but is attached to humans in order to enable humans to fulfil other innate rights such as the right to life and health. As Gibson posits, the right to a clean environment is an extraneous right not directly linked to the state of being human but arising because of human interactions with other sentient and non-sentient beings in an environmental context. She argues that-

> "... to have a clean environment is not necessarily to be human. A clean environment is not a 'right' because we are members of the human race. It is a right because we are within an ecology."[134]

Gibson's view represents an acceptable basis for formulating a right to a clean environment, for it is widely recognised that this right is not one that humans are born with or is inalienably linked to the state of being human, such as the right to life and health. It is a right that is necessary for improving the quality of life and the enjoyment of other innate human rights that are inalienable to human existence. In this regard, the right to a clean environment operates in the same way as the right to education, which is not innately tied to human existence but is necessary for improving the quality of human life and existence.

Understanding this fundamental distinction, therefore, it can be argued that constitutional environmental rights should be expansively formulated to include all aspects of environmental features that are necessary to improve the quality of human life and existence, including nature's intrinsic gifts and features. This view

[133] R Brooks, 'A Constitutional Right to a Healthful Environment' (1992) 16 VT L REV 1063, 1109.
[134] N Gibson, 'The Right to a Clean Environment' (1990) 54 *SASK L Rev* 5, 15.

is supported by the reasoning in *T. Damodhar Rao v. Municipal Corp., Hyderabad* where the court reasoned that-

> "……..Art. 21 [*right to life provision*] embraces the protection and preservation of *nature's gifts without which life cannot be enjoyed*."[135]

This reasoning of India's Supreme Court was espoused while expanding the scope of the constitutional right to life to cover environmental protection and although the court explicitly declared the right to life to include 'protection and preservation of 'nature's gifts', this decision has been restrictively interpreted within the context of humans' right to a clean environment. However, 'nature's gifts' includes all aspects of the natural habitat and ecology with which the environment is bestowed as human environmental interests are not the sole reflection of 'nature's gifts'.

Consequently, if the enjoyment of the inalienable right to life and health requires the protection and preservation of the natural habitat and ecology as a whole, the human rights argument is an insufficient premise for canvassing the constitutionalization of environmental rights as it is not representative of the whole spectrum of environmental protection. Constitutionalising environmental rights should, therefore, not be restrictively viewed from the human rights angle but from a wider perspective which is accommodative of the general importance of the ecosystem and ecological features which makes the environment a crucial life-sustaining element. Hayward's argument for constitutionalising environmental rights can, therefore, be reconstructed using different premises in the following way-

> 'The environment is a crucial life-sustaining system and the protection of the vital components of the ecosystem on which humans depend is crucial for the enjoyment of the inalienable rights of humans; constitutional protections are granted to fundamental rights necessary for the improvement of the quality of life and existence of humans and the protection of vital interests in a society; therefore, the protection of environmental rights ought to be constitutionalized.'

This argument for constitutionalization of environmental rights recognises the fundamental role that the environment as a whole plays in sustaining humans

[135] 1987 A.I.R. (A.P.) 171; italics supplied for explanation and emphasis.

and argues for the constitutional protection of environmental rights in the broad sense, distinct from the right to a clean environment, which is a narrower focus on humans. Viewed from this perspective, an ensuing constitutional environmental right will incorporate *coalesced anthropocentrism* as a means of ensuring the broader constitutional protection of all environmental interests within the ecosystem.

A crucial point to clarify is that the constitutionalization of nature's environmental rights really matters and is not just based on lofty ideological foundations of grandeur environmental sanctity. One of the most important implications of such constitutional recognition is that it would enable legal systems to maintain vital ecological balances by balancing human rights, as enshrined in the constitution, against the rights of other components of the ecosystem. Presently, many environmentally harmful human activities are completely lawful because they are recognised by the Constitution and statutes as permissible expressions of humans' property rights and interests. Most legal systems define everything that is not a human being or a corporation, as a property (including natural habitat and vital components of the ecosystem). In this sense –

> 'just as slave laws which turned humans into property entrenched an exploitative relationship between the two, our legal systems have entrenched an exploitative and inherently damaging relationship between ourselves and Mother Earth. Even most environmental laws do little more than regulate the rate at which environmental destruction may take place.'[136]

By constitutionalising nature's environmental rights, this exploitative utilisation of nature's vital components by humans will be significantly reduced as nature's rights will have an equal constitutional protection as the right of humans to property and natural resources which are often used to exploit nature's fragile gifts. Environmental contamination and destruction permitted and regulated by statutes will lose their legal validity as the rights of nature to sanctity will constitutionally trump statutory permissions and regulation of environmental destructions. Courts and tribunals could deal with the fundamental issues of

[136]A Martin, 'The Universal Declaration of the Rights of Mother Earth', <http://www.collective-evolution.com/2014/08/24/the-universal-declaration-of-the-rights-of-mother-earth/> accessed 09 November 2017.

environmental contamination by balancing the constitutional rights of humans and nature rather than being bogged down in the technical details of interpreting permitted pollutants and emissions. As an illustration, a constitutional rights-based approach could evaluate whether the rights of humans to clear tropical forests for beef ranching or to drill for oil in the Arctic or other environmentally sensitive locations should trump the right of species in those forests or sensitive ecosystem to continue to exist. Thus, rather than devising ever more complex schemes to authorize environmental damage and to trade in the right to pollute, states would focus on how best to maintain the quality of the relationship between ourselves and Mother Earth.[137]

The proclamation of the UDRME set the stage for broader recognition of the fundamental rights of Mother Nature. The UDRME is intended to act as the equivalent of the Universal Declaration of Human Rights 1948, albeit for Mother Nature and its components. Although the draft is yet to gain significant state recognition around the globe, its principles have found expressions in Bolivia's statute books. The Law of the Rights of Mother Earth was passed by Bolivia's Plurinational Legislative Assembly in December 2010 to confer legal rights on Mother Nature and allow for citizens to sue individuals and groups as part of 'Mother Earth' in response to real and alleged infringements of its integrity. However, this law only has statutory force as Bolivia's Constitution of 2009 does not contain provisions relating to Mother Nature in its entirety but restricts its protection to 'living beings' in the environment. This is most likely because the Constitution was last amended in 2009 prior to the adoption of the UDRME in 2010.

Ecuador's constitution stands out as the first and, so far, the only state constitution to recognise and incorporate the rights of nature as a constitutional environmental right. The Constitution of Ecuador 2008[138] makes express provisions conferring enforceable rights on Mother Nature and imposing obligations on humans in relation to nature. Ecuador's constitution incorporates nature's rights in two formats. Firstly, it includes nature's right in article 10 dealing

[137] ibid.

[138] Constitution of Ecuador, 2008 <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 01 December 2017. Bolivia's Constitution attempts to constitutionalize Nature's environmental rights but limits it to 'living things' in the ecosystem, thus excluding non-living components of nature like rocks, trees etc.

with fundamental rights guaranteed under the constitution. It stipulates that 'Nature shall be the subject of those rights that the Constitution recognizes for it.' The idea here is to ensure that nature's rights are an integral part of the fundamental bill of rights recognised by the constitution which, by articles 441 and 442, cannot be prejudicially altered by any constitutional amendment procedure. The constitution then proceeds to dedicate Chapter 7, articles 71 to 74 to articulating nature's inviolable rights guaranteed under the constitution. Article 71 encapsulates nature's rights thus-

> "Art. 71. Nature [or Pachamama], where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution."

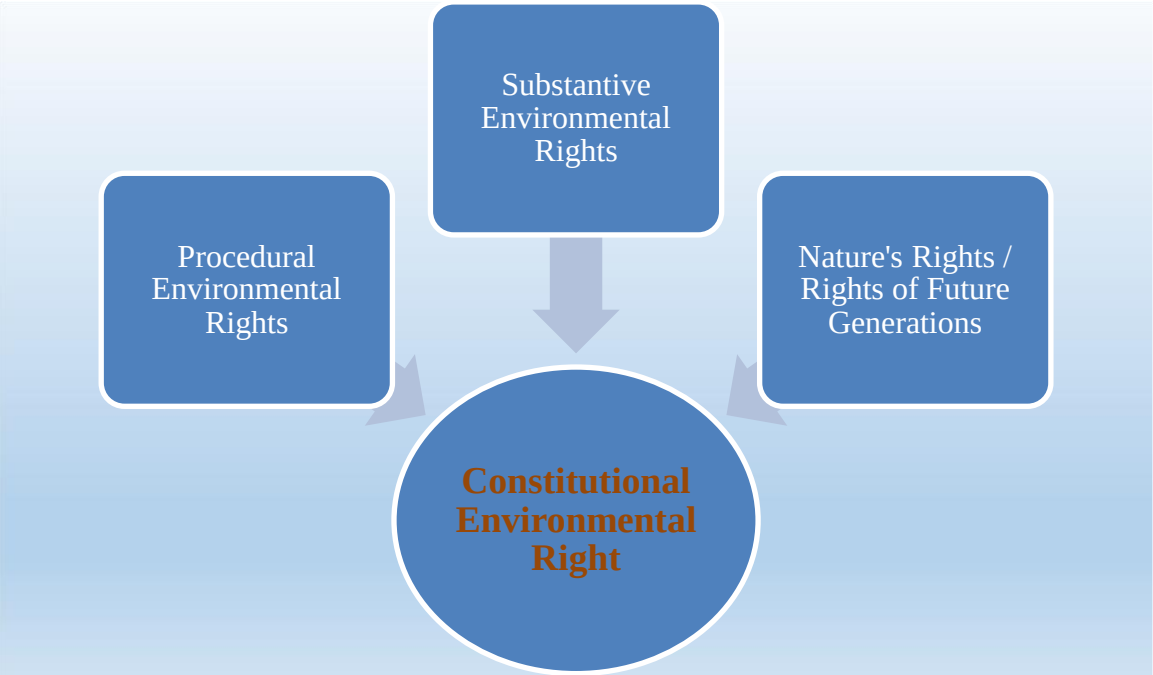
This format of incorporating nature's rights in a constitutional form is reflective of the *coalesced anthropocentrism* approach canvassed in this thesis as Ecuador's Constitution also confers substantive environmental human rights in article 14 recognising the human right to a clean environment. The absence of the rights of future generations in Ecuador's constitution is, however, noticeable and constitutes an omission by a constitution that comes closest to encapsulating the full spectrum of *coalesced anthropocentrism* approach to constitutionalising environmental rights.

The importance of incorporating a substantive environmental right for future generations should not be understated as it ensures sustainable development and utilisation of the environment in such a way that does not undermine the ability of the future generations to meet their own environmental needs. As discussed in chapter 2 of this thesis, the problematic nature of ascertaining the environmental needs of future generations can be obviated by ensuring the protection of the environment to meet the basic biophysical needs of humans which it can be assumed will be also essential for future generations. A number of state constitutions that provide constitutional environmental rights recognise the environmental rights of future generations. For instance, article 33 of Bolivia's

Constitution,[139] article 42(a) of Kenya's Constitution and article 24(b) of South Africa's Constitution all recognise the protection of the right to a clean environment for present and future generations. Article 127 of Venezuela's Constitution[140] encapsulates the environmental rights of future generations by stating that 'it is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future'. This should be a standard provision in every constitutional expression of environmental rights.

The detailed analysis of the three key pillars of a constitutional environmental right can be represented in the diagrammatic form below.

Figure 11: Constituents of a *Coalesced Anthropocentrism* Constitutional Right



It should not be assumed that the incorporation of a constitutional environmental right with all three elements in the diagram above will require bulky, elaborate provisions in the constitution to actualise. On the contrary, this can be achieved with minimal elaboration, focusing on a brief and succinct expression of each element in a constitutional clause. The IUCN Draft Global Pact for the

[139] Constitution of Bolivia, 2009 <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> accessed 18 June, 2016.
[140] Article 127, Constitution of the Bolivarian Republic of Venezuela, 1999 <http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf> accessed 08 June 2017.

Environment 2017 attempts to put together a succinct exposition of how constitutional environmental rights can be framed to cover relevant areas of environmental protection.[141] As a result, only three major clauses (with necessary sub-clauses) may be needed to incorporate a constitutional environmental right with all three elements, as shown in the sample draft below-

[141] IUCN Draft Global Pact for the Environment, Paris, 2017.

Figure 12: Sample Draft of Constitutional Environmental Right Clauses

Acknowledging the growing threats to the environment and the need to act in an ambitious and concerted manner within the country to better ensure the protection of the environment;

Reaffirming the need to ensure, while utilizing the coutnry's abundant natural resources, that its ecosystems are resilient and continue to provide essential services, thereby preserving the diversity of life, and contribute to human well-being and the eradication of poverty in the country;

Determined to promote a sustainable development that allows each generation to satisfy its needs without compromising the capability of future generation to meet theirs, while respecting the balance and integrity of the country's ecosystem;

Recognizing that nature and the country's abundant ecosystem has intrinsic value worthy of constitutional protection and is interdependent with the enjoyment of environmental rights by present and future generations of humans;

Cognizant of the need to incorporate vital principles of environmental governance for the management of the environment including the precautionary principle; preventive principle and polluter pays principle; easy access to courts and access to information and participation in environmental decision making;

Hereby declare as follows -

1. Everyone has the right to a healthy, safe, and ecologically balanced environment and to have the environment protected for the benefit of present and future generations.

    a. Everyone is under a duty to participate in preserving and enhancing the environment.

    b. The government shall preserve and restore the essential ecological processes and shall take all legislative measures and necessary steps to protect, preserve and promote the sanctity of the environment;

    c. In furtherance of this duty, the State shall take a precautionary approach to the use of natural resources and the development and proliferation of new technologies.

2. Everyone has the right to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment.

    a. Everyone has the right to easy access to the courts for the ventilation of environmental rights and concerns and an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

    b. General principles of international environmental law recognised by the community of nations shall be applicable to redressing environmental concerns and environmental management procedures.

3. Nature and the essential components of ecosystems has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people or community shall be able to demand the recognitions of rights for nature before the public organs.

The above is merely a sample draft and is not inflexible nor a definitive guide as the vagaries of national circumstances may dictate different approaches to the drafting of constitutional clauses. What is, however, important is the incorporation of the three pillars of a constitutional environmental right discussed in this thesis. Equally important, also, is the need to keep the clauses realistic in their expressions and avoid grandiose lofty clauses that are practically difficult to implement, especially in relation to incorporating nature's rights (in clause 3). As seen from the sample draft, the approach of the UDRME in providing rights for nature was avoided as it is majorly grandiose and lofty in its expressions but likely to create practical difficulty in implementation. Rather, the approach used in Ecuador's constitution was adopted as it reflects a more realistic expression of nature's rights which can be balanced with human environmental interests without undermining the need to utilise environmental goods in satisfying human needs.

Norway's Constitution of 1814 (as amended in 2014) is a good practice example of drafting a constitutional environmental right to encompass a coalesced anthropocentrism approach. Although it does not elaborate on the three distinct aspects of the coalesced anthropocentrism model, it is couched in a way that allows for the constitutional protection of the rights of future generations and nature. Article 112 of Norway's constitution provides as follows-

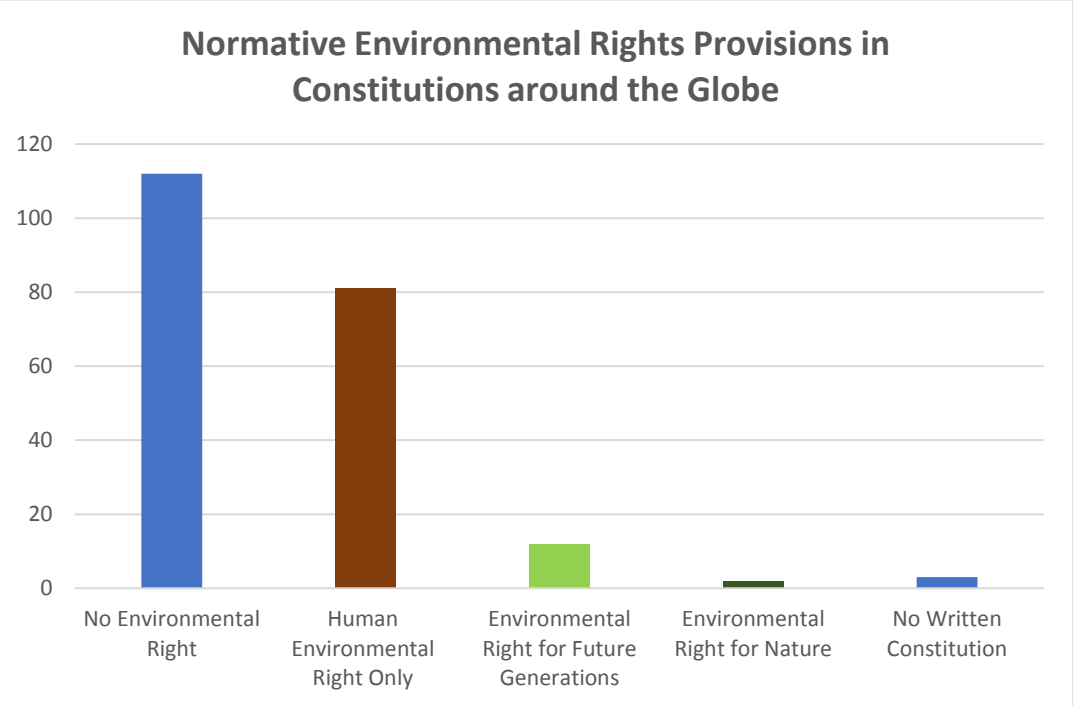
> "Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.
>
> The State authorities shall issue further provisions for the implementation of these principles."

Even though short on providing explicit right for nature, the constitutional provision that 'natural resources should be made use of on the basis of comprehensive long-term considerations' and citizens' right to be 'informed of the

state of the natural environment and of the effects of any encroachments on nature that are planned or commenced' are potent tools that can be used in protecting the intrinsic value of nature through constitutional mechanisms.

In the Appendix, a global study has been conducted of the national constitutions of all 193 countries in the world with written constitutions to determine the extent to which they meet the three essential pillars of constitutional environmental rights in their constitution. The study finds that although no country's constitution successfully ticks all three boxes, a number of countries fulfil two out of the three criteria (including Ecuador, Bolivia, Kenya, Brazil etc.) while the majority of countries only tick one box (the substantive environmental rights box). Over 100 countries, including the United States, Canada and Australia fail to tick any of the boxes and are pariahs as far as substantive constitutional environmental rights are concerned.

Figure 13[142]



This global study, therefore, reveals that while the clamour for constitutional environmental rights has been gaining momentum, no country has yet attained the gold quality standard in this regard, even amongst countries that recently

[142] See the Appendix for a comprehensive breakdown of the state of environmental rights in the constitutions of all 191 countries with written constitutions.

amended their constitution to incorporate environmental rights (e.g. France, Ecuador, Kenya, Jamaica and Morocco). Understanding the necessity of achieving constitutional protection for the environment will aid in highlighting the impact it has on environmental concerns in domestic jurisdictions and makes a strong case for advocating that countries should be more proactive in constitutionalising environmental rights.

4.4 Conclusions

The recognition of the right to a healthy environment is pervasive in many constitutions and this recognition has become so widespread that the right to a clean environment can arguably be said to have become a general principle of international law and an integral part of customary international law, as far as international environmental law is concerned.

In making a case for adopting constitutional environmental rights, the human rights' argument relied upon by proponents is flawed as it overlooks the fundamental importance of the environment as a life-sustaining system worthy of constitutional protection and only focuses on the instrumental value of the environment to humans. Only by framing the discussion in the broader context of guaranteeing fundamental protection of all the inter-dependent and inter-related components of the ecosystem which sustains humans can a comprehensive constitutional right that protects the interests of the three vital rights' holders in the environment – humans, nature and future generations- be efficiently instituted.

Consequently, in formulating a normative constitutional environmental right, it is not sufficient to simply express the right of humans to a clean environment, as that would be anthropocentric chauvinism. There are three key pillars of a constitutional environmental right which should be represented in any normative expression of environmental rights in a constitutional form. First, there should be a substantive environmental right which explicitly confers an enforceable right to a clean environment without any pre-conditions or drawbacks and which incorporates express obligations on individuals and government to protect, promote and defend the environment. Second, the normative framework should also provide for procedural rights related to environmental matters including access to justice, access to environmental information and participation in

environmental decision making, as well as incorporate general principles of international environmental law such as polluter pays, preventive principle and sustainable development principle. Third, the rights of Mother Earth and future generations should be incorporated into the normative framework in an enforceable manner.

Preferably, the normative framework should be included amongst the bill of rights provisions in the constitution to evince its inviolability and, depending on the peculiarity of the state constitution, render it less susceptible than other constitutional provisions to alteration through constitutional amendment procedures.

Having established the basis for constitutionalising environmental rights and its normative structure, chapter 5 examines the impacts of constitutionalization on ecosystem protection, looking at both its legal and extra-legal effects on the environmental protection frameworks in countries that have introduced constitutional environmental rights within their legal systems.

CHAPTER FIVE

IMPACT OF CONSTITUTIONALIZATION ON ECOSYSTEM PROTECTION

5.1 Introduction

With the growing global trend in favour of constitutionalising environmental rights, it is pertinent to understand in what ways elevating environmental rights to constitutional platforms can impact the manner of protection that ensues. For countries with widespread environmental problems, the shift towards constitutional environmental rights is often intended as a seismic move towards better environmental protection, but the absence of methodological means of establishing a causal link between constitutionalization and ecosystem protection often raises doubt on whether constitutionalization makes any significant difference.

This chapter examines the practical impacts of constitutional environmental rights on ecosystem protection from two perspectives- legal and extra-legal. It argues that the legal effects can be felt in the area of environmental legislation and litigation while the extra-legal effects can be established from analysing the ecological footprints of countries with constitutional environmental rights compared to countries without it.

The chapter also argues that while there are no definite methodological means of establishing a direct link between constitutionalising environmental rights and an improvement in environmental protection, the available evidence from a study of environmental legislation and litigation post-constitutionalization supports the view that constitutionalising environmental rights is a landmark step in the direction of improved ecosystem protection within a jurisdiction.

5.2 Benefits of Constitutionalizing Environmental Rights

Constitutionalization of rights has become an important format for guaranteeing the protection of rights and acting as an ultimate safety net for preventing political rollbacks on crucial civil and social rights which are essential in every democratic

society. The increasing reliance on constitutionalization has permeated the environmental rights field and has led to the increasing clamour for constitutionalising environmental rights as a way of guaranteeing such rights and elevating it above socio-political manoeuvrings and other developmental pursuits. The basis for the clamour is the belief that environmental protection is one of the important global concerns of recent times and it thus deserves protection at the constitutional level by elevating environmental rights to a superior, fundamental status within the polity in the form of constitutional rights. Hayward,[1] one of the leading proponents of constitutionalization of environmental rights, framed the argument thus-

> "The most general rationale for taking a constitutional approach to environmental protection, therefore, is that the seriousness, extensiveness, and complexity of environmental problems are such as to prompt a need for concerted, coordinated political action aimed at protecting all members of populations on an enduring basis."

Hayward's view reflects the growing concern that the myriad of serious environmental problems which many countries face require a more fundamental approach to tackling them through the institutionalisation of environmental rights in the basic legal framework of the country. A constitution is a codification of the most important values and most cherished rights within a given state. By constitutionalising environmental rights, therefore, a country is conveying the impression that it attaches immense significance to environmental issues and is resolutely committed to guaranteeing the rights of the citizens to enjoy an environment free of pollution and other environmental despoliation.

The importance of this clamour for constitutionalization of environmental rights lies in the fact that environmental rights are generally perceived as positive rights which often involve allocation of resources by governments to accomplish. Even though, as discussed earlier, the right to a clean environment in many jurisdictions, in its normative form, is presented as a negative right which restricts government's interference, environmental rights are generally classed under socio-economic rights which are mostly capable of progressive implementation as resources become available.

[1] T Hayward, *Constitutional Environmental Rights* (OUP 2005) 3, 12.

Further, and perhaps more importantly, environmental rights often conflict with property rights (which is a constitutional right) and other socio-economic rights such as the right to development which is often accorded preference, particularly in third world countries in keeping with the 'full-belly' syndrome.[2] Thus, environmental interests are often sacrificed at the altar of other rights and are subjugated to these rights to the detriment of environmental protection. Constitutionalizing environmental rights is, therefore, seen as a means of levelling the playing field with property rights and other economic and social considerations which often trump environmental concerns and ensuring that environmental rights are accorded priority considerations in national policies.

Nevertheless, Hayward[3] cautions that the clamour for constitutionalizing environmental rights should not be considered as the ultimate protection measure for the environment as constitutionalization is 'just one approach to solving environmental concerns, by establishing the basic right from which practical jurisprudence and wider social norms will develop progressively to support more ambitious aims'. The significance of this caution is based on the fact that constitutionalization of environmental rights cannot act as a guarantee of environmental sanctity as constitutional provisions merely offer broad and powerful normative tools for protecting the environment but require effective utilisation by the judiciary and the populace for practical effects to be felt in real environmental terms. Kotze[4] studied the constitutionalization of environmental rights in the South African Constitution of 1996 and found that more than 15 years thereafter, environmental protection in the country had not significantly improved from its pre-constitutionalized situation as the South African judiciary had failed to capitalise on the momentum generated by the constitutionalization to revolutionize environmental protection in the country.

As a result, the growing global support for constitutionalization of environmental rights has not tapered the criticisms which such efforts have continued to face from different quarters and it is imperative to discuss and dispel these criticisms before examining the benefits of constitutionalising environmental rights. The

[2] See the discussions on the 'full-belly' syndrome in chapter 1.4.5 of this thesis.
[3] T Hayward, 'Constitutional Environmental Rights: A Case for Political Analysis' (2000) 48 *Political Studies* 559.
[4] L Kotze, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 *Journal of Court Innovation* 157.

criticisms of constitutionalising environmental rights generally derive from criticisms of the rights-based approach to environmental protection as there are still debates whether the concept of environmental rights is an appropriate mechanism towards addressing environmental concerns in view of the many drawbacks involved.

Some of the criticisms include the fact that environmental rights are vague, redundant, undemocratic, inherently anthropocentric, capable of opening the floodgates to litigation, unenforceable and capable of generating false hopes. Constitutionalization of environmental rights has also been condemned as being 'largely symbolic exercises', 'legalistic window dressing'.[5] With regards to the supposed vagueness, it is argued that the exact scope and normative contents of the purported right are unclear, indeterminate and ambiguous. This criticism arises mostly from the uncertainty regarding the threshold for environmental harm that an environmental right imposes, as different terms are constantly being used to describe the right- clean, healthy, decent, habitable etc. - and an indeterminate right is not capable of effective enforcement. Boyd asserts that this generally creates reluctance in regarding substantive environmental rights as anything other than policy declarations of government's objectives for a clean environment without any judicially enforceable potential.[6] In response, it must be noted, as argued by O'Gorman, that rights are generally broad normative standards imposed by law to be interpreted and applied in varying legal contexts by the courts and regulated by administrative policies as necessary.[7] Further, human rights are generally dynamic and evolve with human values; thus it is the function of the courts to interpret this right to suit the particular context in which it is ventilated and legislation can be enacted by governments to give clearer meanings to this right and impose operable standards, not below the constitutional standard, as necessary.[8] Therefore, the accusation of the

[5] D Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) *Transnational Environmental Law* 83, 87.

[6] D Boyd, 'The Effectiveness of Constitutional Rights' Yale UNITAR Workshop. <https://environment.yale.edu/content/documents/00003438/Boyd-Eectiveness-of-Constitutional- Environmental-Rights.docx?1389969747> accessed 19 May 2019.

[7] R O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) *Transnational Environmental Law* 435-462.

[8] R Carnwath, 'Judging the Environment—Back to Basics' (2017) 29 *Environmental Law and Management* 64–71.

vagueness of environmental right cannot be a ground for denying environmental rights a constitutional status.[9]

Also, it is contended that a constitutional environmental right is redundant and unnecessary seeing that other constitutional human rights like the right to life and privacy can be used to ventilate this right and tort law already provides sufficient civil liability remedies for environmental harms.[10] While it is true that other human rights can be 'greened' to protect the environment, there is a limit to judicial creativity and activism as these rights cannot be applied by the judiciary in contexts where environmental protection is invoked without a corollary link to actual harm to humans. Also, the greening of human rights is inherently anthropocentric without any protection for other non-human life forms in the environment and is therefore insufficiently extensive to accord effective protection for environmental interests in its broader context. Further, greening human rights leaves no room for important environmental law principles such as preventive and precautionary policies which are vital to effective environmental management. As stated by Boyd,[11] these 'international environmental principles cannot be shoe-horned comfortably into existing human rights' and therefore require express substantive constitutional rights that incorporate them.

In relation to the contention that constitutionalizing environmental rights is undemocratic as it usurps the powers of the executive and legislature in determining appropriate environmental standards, it is often argued that 'majority approval is necessary for a proper decision on policy or allocation of resources'[12] and vesting such powers on the judiciary is a 'judicialisation' of political and administrative decisions. In response, it should be noted that one of the key features of a constitution is its counter-majoritarian purpose in a bid to protect minority interests and this is done through the recognition of rights which protect basic interests of all persons in the society regardless of their belonging to a majority or minority group. As stated by Dershowitz[13] 'rights serve as a check on democracy, and democracy serves as a check on rights' and thus constitutional

[9] D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 235.
[10] ibid.
[11] ibid.
[12] Regina v. British Broadcasting Corporation ex parte Prolife Alliance [2003] 2 All E.R 977, para 76 (Hoffman LJ).
[13] A. Dershowitz, '*Rights From Wrongs: A Secular Theory of the Origins of Rights'* (New York Basic Books 2004) 31, 35.

environmental rights act as a check on the infringement of the environmental rights of the minority against the majority, often referred to as 'ecological imperialism'.[14]

Finally, on the scepticism over the inherent anthropocentric nature of a constitutional environmental right, earlier discussions in chapter 4 have shown ways that a constitutional environmental right can be formulated to incorporate the essential environmental interests including the interests of nature and other non-human components of the ecosystem. Therefore, a properly formulated constitutional environmental right will not be purely anthropocentric but will guarantee environmental rights in a broader context. As the examples of Ecuador[15] and Bolivia[16] have shown, countries are beginning to recognize the intrinsic value of the environment and according increasing protection to it. Thus, constitutional environmental rights can be couched in a normative form which embraces *coalesced anthropocentrism* as its ideological platform.

Nevertheless, it is imperative to point out that the constitutionalization of nature's environmental rights in Ecuador and Bolivia are not exactly perfect examples of incorporating nature's interests as the legalistic incorporation of these rights have not overcome the democratic deficit and absence of environmental rule of law within these countries.

Several studies conducted in Ecuador and Bolivia since the constitutionalization of nature's rights in 2008 and 2010 have reported poor implementation and enforcement of these rights. Reagrding Ecuador's constitutional incorporation of nature's rights, Kotze brands it a 'window-dressing exercise' done merely to accommodate the animistic cultural worldviews of Ecuador's indigenous peoples in the hope of strengthening political support;[17]Fitz-Henry called it a 'beautiful rhetoric' with no enforcement significance[18] while Magril brands it a constitutional 'green-washing' of nature's rights to cosmetically put forward a show of nature

[14] This is discussed in fuller details in Chapter 1 of this thesis.
[15] See article 10 and articles 74 - 77 of Ecuador's Constitution 2008.
[16] See Bolivia's Law of the Rights of Mother Earth, 2010.
[17] L Kotzé and P Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador', (2017) 6(3) Transnational Environmental Law 401–433, 426.
[18] F Fitz-Henry, 'Decolonizing Personhood', in M. Maloney & P. Burdon (eds), *Wild Law: In Practice* (Routledge, 2014) 19–30.

friendliness.[19] The problem with Ecuador's constitutional incorporation of nature's rights is that, as Kotze pointed out, 'the Constitution is a conflicted text that seems to be at odds with itself in a struggle between ecocentric rights of nature and directly opposing anthropocentric claims that are similarly constitutionally entrenched and legitimized'[20] and as a result, 'when read in the broader context of the Ecuadorian Constitution, the environment and the rights of nature are in some instances subordinate to other concerns'.[21]

Interestingly, this criticism is not peculiar to nature's rights in Ecuador's constitution but is symbolic of the internal contradiction and self-limiting provisions scattered throughout the constitution. For instance, while article 11 proclaims equality of all persons irrespective of sexual orientation, at the same time, it actively discriminates against homosexuals by denying them the right to marriage - 'marriage is the union of man and woman' (article 67); and adoption of children- 'adoption shall only be permitted for different-gender couples' (article 68).

Ecuador's constitution, therefore, appears to be largely a symbolic exercise by the drafters who are over-eager to drum support from native communities and the international community for their commitment to nature's protection.[22] Kotze argues that this over-eagerness by the drafters is displayed in the over-elaborate way the provisions for nature's rights were drafted as the wordiness of the clause undermines clarity and implementation potentials since it begins to looks more like declaratory principles than substantive rights. In Kotze's view, 'while there is no generally accepted or evident trend, it is arguably more common for constitutions to provide condensed but broadly formulated provisions of a more general and abstract nature that are then subsequently refined through detailed statutory provisions'.[23]

[19] M. Margil, 'Building an International Movement for Rights of Nature', in Maloney & P. Burdon (eds), *Wild Law: In Practice* (Routledge, 2014)153–6.
[20] L Kotzé and P Calzadilla, 'Somewhere between Rhetoric and Reality', supra, n 17, 425.
[21] Ibid, 426.
[22] C. Kauffman & P. Martin, 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail', paper presented at the International Studies Association Annual Convention, Atlanta, GA (US), 18 Mar. 2016, p. 9, available at: <http://www.harmonywithnatureun.org/wordpress/wpcontent/uploads/Papers/Testing%20Ecuador%E2%80%99s%20RoN_16_04_20.pdf> accessed 09 April 2019.
[23] L Kotzé and P Calzadilla, 'Somewhere between Rhetoric and Reality', supra, n 17, 427.

Kotze's criticism is justified as the absence of environmental rule of law in Ecuador has resulted in the government's disregard for the constitutional protection of nature and promulgation of statutory instruments, such as the Mining Law, Official Registry No. 517, 29 Jan. 2009, under which authority the government in March 2012 signed the first large-scale open-pit mining contract in the country's history, the so-called Mirador project, which is located in an indigenous territory that is also rich in biodiversity. This mining project threatens the fragile ecosystem in this indigenous project and opponents of the projects have faced government's oppression including killing of some of its leaders.[24]

Even the judiciary in Ecuador have not been helpful in protecting nature's constitutional right as a provincial court in *Wheeler v. Director de la Procuraduría General del Estado en Loja*[25] declined environmental activists' suit seeking to protect nature's vital ecosystem from government encroachment for mining purposes.

In Bolivia, despite relevant laws[26] enacted pursuant to the constitutional mandate for nature's protection in the Bolivian Constitution, pre-existing statutes adopted prior to the Bolivian Constitution which authorise government's encroachment on nature's fragile ecosystem such as Environmental Law 1333 of 1992 is still in force. Also, Supreme Decree 2366, enacted in May 2015 (after the promulgation of Bolivia's Constitution) legalizes exploratory drilling in more than 60 of Bolivia's protected areas and in its 22 national parks, thus undermining the essence of the constitutional protection of nature in the constitution.[27]

Nevertheless, despite some scepticism and shortcomings, constitutional environmental rights possesses great potentials for revolutionising the treatment of environmental concerns in domestic jurisdictions. The growing adoption of constitutional environmental rights in several countries is a testament to the acceptance by nations of the need to elevate environmental care to the higher, fundamental constitutional level. In the US, for instance, over 24 cities have

[24] D. Collyns, 'Was This Indigenous Leader Killed Because He Fought to Save Ecuador's Land?', (*The Guardian,* 2 June 2015), available at: <https://www.theguardian.com/world/2015/jun/02/ecuadormurder-jose-tendetza-el-mirador-mine-project> accessed 28 March 2019.

[25] Judgment, Provincial Court of Loja, Case No. 11121-2011-0010.

[26] Law No. 071 on the Rights of Mother Earth and Framework Act No. 300 of Mother Earth and the Integral Development of Good Living.

[27] P Calzadilla and L Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law* 397–424.

enshrined the rights of nature to exist and instituted policies to protect the intrinsic value of the natural ecosystem.[28] This is borne out by the fact that almost all constitutions enacted or amended since the early 1990s provide for environmental protection in different forms.[29]

Having disposed of the criticisms and scepticism, it is pertinent to analyse the potential benefits of constitutionalising environmental rights which have been canvassed and debated. Bruch et al[30] posit that constitutionalizing environmental rights will enable it to be used both defensively/restrictively to protect against government actions infringing on environmental integrity and also affirmatively/offensively to compel governments to undertake certain acts such as shutting down a polluting industry. They also argue that it can provide a safety net for inadequate or insufficient environmental protection systems especially in countries that are still in the process of developing environmental laws and regulations and prevent the easy manipulation of environmental legislation by Parliament, as constitutional provisions are generally more rigid to amend than ordinary statutes. Feris[31] argues that the insertion of an environmental right into a constitution elevates the importance of environmental protection and conservation and places it on a par with other constitutionally-protected rights such as equality, dignity and the right to life. Daly[32] asserts that constitutionally enshrined environmental rights may provide the last clear chance for people to vindicate their human rights to a healthy environment.

Analysing these views of the benefits of constitutional environmental rights, it is clear that the evidential benefits can be categorised in three distinct levels: in relation to the government; in relation to extant environmental protection framework; and in relation to competing socio-economic rights. The first level focuses on the impact that constitutional environmental rights have on

[28]J Tuholske, 'U.S. State Constitutions and Environmental Protection: Diamonds in the Rough' 21 *Widener Law Review* 239-255 <http://widenerlawreview.org/ les/2008/10/13-Tuholske.pdf> accessed 17 May 2019; N. Rhüs & A. Jones, 'The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature' (2016) 8(174) *Sustainability* 1–19.

[29]D Boyd, *The Environmental Rights Revolution,* supra, n 6, 235; Tim Hayward, *Constitutional Environmental Rights,* supra, n 1.

[30] Carl Bruch, Wole Coker, and Chris VanArsdale, 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa' (2001) Environmental Governance in Africa, Working Papers: WP#2.

[31] L. Feris, 'Constitutional Environmental Rights: An under-utilized resource' (2008) 24(1) South African Journal on Human Rights 29-49.

[32] E. Daly and J.R. May, 'Constitutional Environmental Rights and Liabilities' (2012) 20(3) *Environmental Liability* 75.

governmental obligations with respect to environmental protection. Because substantive constitutional environmental rights can be framed as both a negative and positive right, it can have dual purpose effect on the discharge of government's environmental obligation. As a negative right, it can be relied upon to resist, challenge and nullify any government effort, activity or policy that infringes or threatens to disrupt environmental sanctity or create unfavourable environmental conditions negatively affecting the enjoyment of the inhabitants of such environment. This was done in the Chilean case of *Pablo Orrego Silva v. Empressa Pange SA*,[33] where the Supreme Court of Chile ordered a halt to the construction of six hydroelectric dams on the Bio-Bio River in view of its threat to the ecosystem and the environmental rights of the indigenes in that region. On the other hand, as a positive right, it can be relied upon to compel governments to take steps involving allocation of resources towards addressing areas of environmental concerns where government's intervention is necessary to obviate environmental destruction. In this case, it is not a government decision or activity that is sought to be restricted, rather, it is a step towards moving an inactive government in a specific direction as is necessary for fulfilling environmental protection. Because the basis for such claim is a constitutionally protected right, the government cannot rely on statutory exemptions or absence of resources to defeat the claim.

The second level relates to the impact of constitutional environmental rights on reforming and revitalising the environmental law framework within a country. Often, constitutionalising a right provides the much-needed boost to ailing legal frameworks related to such right within a country. By incorporating a constitutional environmental right, the legislature and other public bodies become under a constitutional obligation to update the environmental laws and legal framework within a jurisdiction to meet up with the constitutional standard. This obligation is either implicitly conveyed in the constitutional provision or is expressly stipulated in the relevant constitutional provisions. For instance, section 24 of South Africa's Constitution explicitly obliges the government to take legislative steps to protect, promote and fulfil the right of citizens to a clean environment while article 225 of

[33] Pablo Orrego Silva v. Empressa Pange SA Supreme Court of Chile 5th August 1993.

Brazil's constitution obliges the government to take relevant policy steps to institute a credible framework for advancing environmental protection.

Under the third level, constitutional environmental rights are analysed through the prism of its interaction with other competing socio-economic rights which previously had precedence over environmental concerns in the grand scheme of national policymaking. By constitutionalising environmental rights, they gain equal strength with other fundamental rights such as the right to life and liberty and are no longer subjugated to other socio-economic objectives. Importantly, the constant struggle to balance property rights with environmental interests assumes a different dimension as the focus becomes one of reconciling conflicting constitutionally protected interests rather than looking for space within property rights to accommodate environmental considerations.

Expanding on the above analysis, the three criteria identified by Boyd[34] for assessing the benefits of constitutionalization of environmental rights are discussed below:

5.2.1 Impact on Environmental Laws and Enforcement

Constitutionalization of environmental rights sets a minimum threshold for environmental laws and regulations within the country. The executive and legislative arms are, therefore, under a constitutional obligation not only to pass legislation/regulations enhancing this constitutional right but are also restrained from settings standards below the minimum thresholds determined in the constitutional right. This results in the enactment and enforcement of stronger and more comprehensive environmental laws within the state. It thus provides an impetus for stronger environmental laws. For instance, section 24(2) of the South African Constitution[35] imposes an obligation on the government to adopt 'reasonable legislative and other measures to prevent pollution and ecological degradation; promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.' This means that the government must adopt legislative measures to promote environmental protection (particularly useful in countries

[34] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 235.
[35] See also Article 66(2) of the Constitution of Portugal 1976.

where there is an absence of relevant environmental laws) and the standards in such legislation and regulations must achieve the constitutionally set thresholds and objectives.

This constitutional foundation for environmental legislation also helps to improve enforcement of environmental laws within the state as it "acts as a powerful catalyst stimulating the more effective enforcement of existing environmental protection laws'[36] and 'equivocation is no longer an option'.[37]

In addition, constitutionalizing environmental rights implements the 'standstill doctrine' in environmental protection by preventing rollbacks of environmental standards since the constitutional right stipulates the minimum thresholds that must be maintained at all times and environmental legislation cannot go below the thresholds.[38] Boyd[39] further argues that it provides a safety net by helping to address gaps in legislation, regulations, policies, and implementation.

5.2.2 Impact on Environmental Rights Vis-a-Vis other Socio-Economic Rights

Constitutionalizing environmental rights has the effect of levelling the playing field for environmental rights vis-a-vis other rights involving economic and social considerations which often trump environmental protection. As Kotze[40] stated, one of the obstacles to recognition and enforcement of environmental rights is that environmental regulation, in general, comes at the expense of other important societal goals such as development and industrialisation, which are the primary interests of most societies, especially developing countries. Constitutionalising environmental rights will, therefore, save the state from itself by ensuring that social and economic considerations such as development goals do not trump environmental concerns which are more enduring than the short-term needs for economic development. The Constitutional Court in South Africa, while adjudicating on the constitutional right to a healthy environment in the South

[36] C. P. Stevenson, 'A New Perspective on Environmental Rights after the Charter', (1983) 21 *OSGOODE Hall Law Journal* 390.
[37] N. De Sadeleer, 'Environmental principles: From Political Slogans to Legal Rules' (OUP 2002) 21.
[38] David Boyd, *The Environmental Rights Revolution,* supra, n 6, 235.
[39] ibid.
[40] Louitz Kotze, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa', supra, n 4.

African Constitution in *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs BP,*[41]stated that-

> Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.

This decision provides judicial recognition of the impact that constitutional environmental rights have on economic and social objectives. By stating that developmental plans shall be balanced by its environmental impact, the court was, in effect, affirming that environmental considerations propelled by the constitutional environmental right trumps any developmental objective sought by the government regardless of its economic or financial benefits to the country. In this sense, therefore, constitutionalizing environmental rights will foster greater government and corporate accountability as it will ensure that the decision on what socio-economic objectives and developmental projects should be pursued is removed from being an exclusive government preserve. Citizens will now be constitutionally conferred with a right to restrain developments and other socio-economic objectives which infringe on the sanctity of the environment and ecosystem. This will result in increased citizen participation in decisions and actions to protect the environment.

5.2.3 Impact on Environmental Justice and Protection of Vulnerable Groups

It is generally acknowledged that the burden of environmental pollution and degradation is disproportionately borne by the weak and vulnerable groups in the society and minority peoples.[42] Even in advanced democracies, vulnerable groups and minorities require constitutional protection of their basic rights from

[41] 2004 (5) SA 124 (WLD) < http://www.saflii.org/ za/cases/ZACC/2007/25.html> accessed 08 April 2015.
[42] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 235.

infringement by the majority. As seen in the discussion on theories of constitutionalization of rights, constitutionalising rights can be used as a counter-majoritarian policy for vulnerable and minority groups. As Bryner[43] stated, 'at the heart of constitutional law is the idea of protecting minorities from majoritarian actions, protecting the weak from the strong'. In this sense, constitutionalization of environmental rights acts as a protection for vulnerable groups that currently shoulder a disproportionate burden of environmental harms.

In addition, environmental constitutionalism can be useful for vulnerable groups and environmental minorities in the context of involuntary resettlement and displacement through loss of sense of place. Feris argues that such involuntary resettlement through loss of sense of place constitutes constructive displacement under international environmental law. She asserts that 'constructive displacement' occurs when-

> "communities have no choice but to live within a natural environment that has been severely degraded and polluted as a result of newly developed roads, coal-fired power plant, mines etc. They bear the brunt of environmental degradation and pollution. As a result, their lived experience and relationship with the environment changes and their sense of place is altered - to the point where they feel displaced."[44]

Because this form of displacement infringes upon environmental rights, there is room for an environmental rights approach to address it and the impact of constitutional environmental rights on constructive displacement can be felt in three material ways. First, by enshrining important procedural rights in the constitution that guarantees their access to information and participation in environmental decision making, as guaranteed under Principle 10 of the Rio Declaration.[45] The idea is that if principles of democratic governance such as openness, accountability and civic participation are adhered to, then environmental standards will be maintained, or at least improved.[46] Once these

[43] G Bryner, 'Constitutionalism and the Politics of Rights' in G. C. Bryner and N. B. Reynolds (eds.) *Constitutionalism and Rights* (New York State University Press 1987) 21.

[44] L Feris, 'Loss of Sense of Place as Displacement – New Frontiers for Environmental Rights' in UN Environment, 'New Frontiers In Environmental Constitutionalism' 2017, 126.

[45] Rio Declaration on Environment and Development UN Doc. A/CONF.151/26, vol.I, 1992, 31 ILM 874.

[46] UN Environment, 'New Frontiers In Environmental Constitutionalism' 2017 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> accessed 21 May 2019.

environmental standards are adhered to, then there will not be room for the constructive displacement of these vulnerable groups from their environment through pollution of their environment, and they will not suffer loss of sense of pride. Second, constitutional environmental rights influences the making and implementation of policies which will safeguard their environment and prevent their displacement and loss of sense of place. Third, constitutional environmental rights provides a potent tool for litigating government's activities that threatens to result in constructive displacement of these vulnerable groups and the loss of their sense of place.[47]

In communities like the Niger Delta in Nigeria and many indigenous communities in Latin America where substantial oil and gas exploration takes place, the majority of the country's population often reside far from the environment where oil exploration takes place and are thus unaffected by the consequential pollution that results. This majority are usually in favour of the continuation of such exploration regardless of the environmental consequences in view of the economic benefits therefrom.[48] In the absence of constitutional environmental rights, the environmental plight of these minority communities will continue to be subjugated to the economic wishes of the majority expressed through majority-supported government legislation and regulations enacted to foster continued exploration with minimal environmental considerations. Thus, constitutional environmental rights strengthen environmental justice within a state and help to ensure that the environmental interests of all groups are protected.

5.3 Practical Impacts of Constitutional Environmental Rights on Ecosystem Protection

The generality of the debates surrounding constitutionalising environmental rights is premised on its necessity for improving environmental protection across countries. However, in the course of these debates, very little focus has been placed on a discussion of the actual, verifiable and empirical impact of constitutionalization on environmental protection or whether constitutionalization really matters in the improvement of environmental protection. While it is easy to

[47] L Feris, 'Loss of Sense of Place as Displacement', supra, n 44.
[48] This is a form of ecological imperialism which is extensively discussed in Chapter 1 of this thesis.

hypothesise on potential impacts of constitutionalising environmental rights by analysing relevant concepts and proposing how, theoretically, the relationship between these concepts and constitutional environmental rights will improve ecosystem protection, it is difficult to actually prove in empirical terms that these potential impacts actually occur. Somehow, proponents of constitutional environmental rights 'hope' 'assume' or 'expect' that constitutionalising environmental rights will improve environmental protection 'in some ways' without any articulation of how, when and to what extent this positive outcome can be derived.

Nevertheless, assessing the practical impacts of constitutionalization of environmental rights is difficult owing to methodological challenges of gauging a causal link between constitutional environmental rights and a positive environmental outcome. As Boyd stated –

> "There are difficulties in establishing a cause-and-effect relationship between a constitutional provision, such as the right to a healthy environment, and an environmental outcome (e.g. improved air quality). Among the key challenges is the lengthy chain of events between the establishment of constitutional provisions and the environmental outcomes, with each step characterized by myriad causal influences and pervasive uncertainty." [49]

Boyd's view is shared by Hayward[50]who argues that establishing a causal link between a constitutional concept and an environmental outcome is outside the realm of scientific proof and thus cannot be conclusively ascertained. Indeed, Boyd's view reflects the practical challenge in determining whether a particular environmental outcome is a direct result of a constitutional right or is influenced by a myriad of other extraneous, non-legal factors prevalent within a society which favours environmental sanctity. Although one of the aims of constitutionalising rights is to positively influence societal values, norms and behaviours, other socio-economic and cultural circumstances present within a society have a similar impact on societal values and a positive environmental outcome may equally be attributed to societal values favouring environmental

[49] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 117.
[50] T Hayward, *Constitutional Environmental Rights,* supra, n 1.

protection. For instance, indigenous Amazonian tribes in the heartlands of Latin America have a strong cultural affinity for protecting their ancestral lands and environment. In this instance, although constitutionalising environmental rights in countries like Ecuador, Peru and Colombia with significant indigenous Amazonian population may be viewed as creating a legal framework for protecting their environment, it cannot be conclusively argued that these environments will not be protected without a constitutional environmental right, seeing the strong cultural affinity of these people in preserving their environment.

This difficulty of establishing empirical impacts is not peculiar to constitutional environmental rights, however, as it is generally difficult to prove a causal link between constitutionalization of rights and improvement in the subject-matter of such rights, often leading to conflicting empirical findings. For instance, Arthurs and Arnold[51] investigated the impact of the Canadian Charter of Rights entrenched in the Canadian constitution[52] on the interests of women and aboriginal groups and found that more than two decades after, there has been little positive improvement in the status quo. On the other hand, Carlson[53] investigated the same subject and found that positive changes have occurred in the status of aboriginal rights arising from the incorporation of the Charter into Canada's constitution. Thus, owing to lack of fixed methodological parameters for gauging a causal link between constitutionalization of rights and the desired outcome, the result of any study will essentially depend on which perspective the study approaches the subject from and this results in varying and often conflicting outcomes as shown above.

Notwithstanding these methodological difficulties, attempts must still be made to investigate a causal link between constitutional environmental rights and improved ecosystem protection for the purpose of assessing the justification of clamouring for the constitutionalization of environmental rights. Generally, this can be assessed from two angles - legal and extra-legal effects. Legal effects investigate the impact that constitutionalization has on the environmental legal framework within a country. It accomplishes this by studying two standpoints of

[51] H. Arthurs and B. Arnold, 'Does the Charter Matter?' [2005] *Review of Constitutional Studies* 11.

[52] Part 1 of the Constitution Act of Canada, 1982 <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> accessed 09 January 2017.

[53] K Carlson, 'Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title' (2005) 22 *Arizona Journal of International and Comparative Law* 449.

the environmental legal framework in a country – environmental legislation and environmental litigation. The choice of these standpoints stems from the fact that these are the two glaring ways of deciphering how a legal framework is responding to changes within a country's legal system as they are the key pillars and pressure-points of the legal framework of any subject matter. Any changes to the fundamental framework in respect of a subject within a country will first be felt in the resultant legislation that ensues from the legislative body and also the way and manner the judiciary interprets the new framework in ensuing litigation.

Extra-legal effects, on the other hand, analyses the impacts that constitutionalization of environmental rights has on the socio-political, economic and scientific aspects of environmental protection within the society. It measures how constitutionalization influences public opinion, values and attitudes towards environmental issues.[54]In this regard, the focus is on the extent to which the constitutional changes influence societal values and behaviours and how it impacts on specific areas of scientific measurements on environmental issues such as air pollution, waste management and climate change concerns.

5.3.1 Legal Impacts of Constitutionalization

Boyd[55] asserts that analysing the impact of constitutionalization on environmental legislation and environmental litigation represents verifiable ways of gauging its potential impact on environmental outcomes. In respect of the impact of constitutionalization on environmental legislation, this can be analysed by looking at the sub-level effects that the presence of a constitutional right will have on legislation and other statutory instruments that will be subsequently enacted by the appropriate body to comply with the constitutional provision. Bearing in mind that a constitutional right to a clean environment implicitly creates an obligation on the government to take relevant steps to protect and fulfil these rights, it is a reasonable expectation that such steps will include introducing legislation, regulations, governmental policies and other statutory standards to guide against environmental degradation in all its various forms. The impact of constitutionalization on legislation can, therefore, be traced through the trickle-down effect of the ensuing constitutional obligation on all sub-levels of legislation

[54] D Boyd, *The Environmental Rights Revolution,* supra, n 6.
[55] ibid.

and regulations up to the point where it results in increased compliance and respect for the environment by corporate bodies, individuals and all manners of persons interacting with the environment.

In this way, the aftermath of constitutionalising environmental rights will see the government become obliged to institute legislation that protects the environment (in countries where no such legislation exists) or improve, upgrade and tighten existing environmental legislation to ensure they proscribe all activities that impinge on the environment. Flowing from such legislation, all regulations, orders and bye-laws on environmental matters will need to become improved, upgraded and the standards tightened to meet up to the new legislative standards. Administrative agencies charged with implementing environmental standards will consequently be required to be more proactive, resolute and stricter in enforcement in order to comply with the improved standards in the legislation/regulations and will also need to amend their practices, policies, procedures and decision-making processes to fulfil their new statutory obligations. The resulting improved implementation of environmental standards will positively change societal behaviours which will ultimately result in positive environmental outcomes.

Boyd encapsulates this trickle-down process in the chart below-

Source: David Boyd[56]

Boyd's framework chart above attempts to show how the constitutionalization of environmental rights in a country trickles down through several causal links to the positive environmental outcome at the end. He argues that constitutionalization achieves this objective by influencing societal behaviours of individuals, governments, corporations, NGOs through a complex blend of legislation and regulations derived from stronger environmental laws pursuant to the constitutional environmental right.

Although Boyd's chart establishes a reasonable causal link between constitutionalised environmental rights and positive environmental outcome, one relevant adjustment to be made to the chart relates to the 'changes in societal behaviours' at the penultimate bottom level of the chart. While it can be argued that changes in societal behaviour result in positive environmental outcomes, there is no proven way of determining this causal link and it may not be necessary in this context. What is relevant is that government agencies, corporations and individuals engaged in environmental impacting activities are compelled, through the effective implementation of legislation/regulations/policies, to channel their activities in line with pathways consistent with environmental sanctity. It does not matter if there is an actual change in societal behaviour in favour of environmental sanctity, but that the improved legislation/regulation makes it legally unattractive for anyone to act in ways that prejudicially affects the environment.

As an analogy, if a government introduces stiffer sanctions for driving above the speed limit, for instance, the potentially reduced incidences of people driving above the speed limit may not necessarily be due to a change in societal behaviour, but because it becomes legally unattractive to do otherwise. The same goes for environmental protection. It is not a precondition that societal behaviour changes positively towards environmental protection (although that is imminently more desirable), but that environmental standards are stringently enforced and people are legally compelled to act in an environmentally responsible manner.

Also, from a methodological standpoint, it is difficult to prove an actual change in societal behaviour in favour of environmental protection, as that will require

[56] ibid 118.

sociological studies to gauge public perception towards environmental issues, the result of which can be interpreted in various ways. However, it is easier to prove actual compliance with regulations/orders by analysing the various environmental protection parameters and standards instituted in legislation/regulations/bye-laws and gauging the extent to which individuals/corporations comply with such standards as available from records held by the relevant public bodies. Such increased levels of compliance can then be causally linked to improved environmental outcomes in that jurisdiction. Therefore, the penultimate tier in Boyd's chart should be replaced with 'increased compliance with environmental standards' as the final thread leading to positive environmental outcomes.

The above analysis is a theoretical exposition of ways that constitutionalization can have an empirical impact on environmental legislation, but it is pertinent to examine if this actually works in practice. An empirical study of countries around the globe reveals that an improvement in environmental legislation is one verifiable area of positive impacts of constitutionalization of environmental rights. Boyd[57] studied the environmental legislation of all 92 countries with express constitutional environmental right and found that environmental legislation has been improved in 78 of those countries in the aftermath of the constitutionalization of environmental rights.[58] In Africa, environmental legislation was strengthened in 23 of the 32 countries with constitutional environmental rights in the aftermath of such constitutionalization.[59] In Latin America, Bolivia[60] and Venezuela[61] both enacted far-reaching environmental legislation in the aftermath of the constitutionalization of rights in both countries. In Venezuela, for instance, the Environmental Criminal Law of 2012 was enacted specifying and sanctioning all crimes that adversely affect the environment and natural resources. The law, which is applicable to individuals and legal persons, provides for different sanctions depending on whether the crimes against the environment are committed by natural or legal persons. Introducing a criminal aspect to

[57] ibid 232.
[58] ibid 233.
[59] ibid 233.
[60] The Law of the Rights of Mother Earth passed by Bolivia's Plurinational Legislative Assembly in December 2010.
[61] Environmental Criminal Law of Venezuela 2012; Waste Management Law of Venezuela, 2010 were passed to strengthen environmental protection in the aftermath of the introduction of constitutional environmental rights in 1999.

environmental degradation is a stringent way of implementing the constitutional protection afforded to the environment.

This has led to the conclusion that 'it is by contributing to stronger environmental legislation that constitutional environmental rights have their greatest impact'.[62] Bogart[63] posits that despite the major focus of literature been on the outcome of environmental litigation, environmental legislation is more effective in achieving better environmental protection than litigation. Bogart's attempt to compare the relative impact of legislation and litigation on environmental protection may not be helpful in the context of the present discussion, as they are intricately inter-related and inter-dependent in their impact and it is often difficult to separate the individual impact they have. Suffice to state, however, that the impact of constitutionalization on environmental legislation is strong proof of the positive influence constitutionalization has on environmental protection.

In relation to environmental litigation, several factors outside of mere constitutionalization of environmental rights are responsible for determining its impact on environmental protection. These factors include the normative contents of the constitutional environmental right, respect for the rule of law in the country, litigation culture, the responsiveness of the judiciary (whether a conservative or activist judiciary) and other socio-economic considerations operating within the society.[64] A study of environmental litigation in countries with constitutional environmental right reveals that it has not really sparked a revolution in environmental practices within such jurisdictions. Ihovbenre[65] and Amaechi[66] studied the constitutionalization of environmental rights in Africa and concluded that despite the provision of constitutional environmental rights in at least 32 African countries, the courts in Africa are not activist in nature and this severely dampens the short-term prospects for recognition and fulfilment of the right to live

[62] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 235.

[63] W Bogart, *Consequences: The Impact of Law and its Complexity* (University of Toronto Press, 2002) 1.

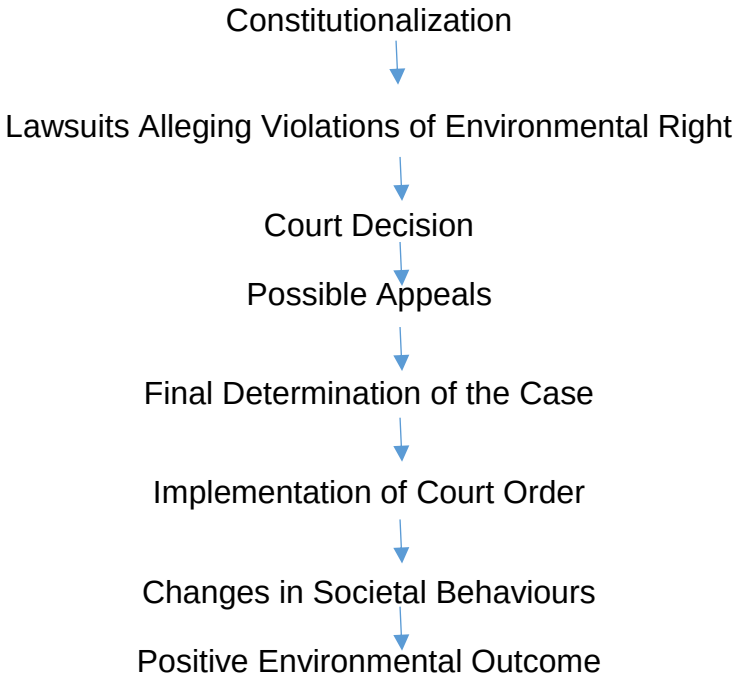
[64] C. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 12.

[65] J Ihonvbere, 'Constitutionalism and Governance in Africa' in O. Ukaga and O.G. Afoaku (eds.) *Sustainable Development in Africa: A Multifaceted Challenge* (Africa World Press 2005).

[66] E Amaechi, 'Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights' (2009) 5 Law Environment and Development Journal 58-72.

in a healthy environment in Africa. Kotze[67] also points out that the courts in South Africa have not utilised the opportunity presented by the constitutionalization of environmental rights in the country since 1996. He argued that there has not been significant improvements in environmental protection in the country more than two decades after its constitutionalization despite the South African Constitutional Court declaring in *Fuel Retailers' case* that it is the duty of the court to ensure that the environmental obligations of the present generation to future generation is carried out.[68] Similar situations can be found in Latin America where widespread constitutionalization of rights have not resulted in concomitant improvement in environmental protection as the judiciary has been largely conservative except for countries like Brazil, Argentina, Costa Rica and Colombia where the judiciary has been activist on environmental issues.[69]

Notwithstanding this gloomy outlook, Boyd charts a possible course for the potential impact of constitutionalization on environmental litigation thus-



Source: David Boyd[70]

[67] L Kotze, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa', supra, n 4.
[68] Fuel Retailers Association of Southern Africa v. Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalange Province (2007) (6) SA 4 (CC) para 102.
[69] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 117.
[70] ibid 118.

The potential trickle-down effect of constitutionalising environmental rights on litigation relies significantly on the presence of environmental constitutionalism within a country, as respect for the rule of law and reliable enforcement of judicial orders is the benchmark of any positive environmental outcome resulting at the end of the process. In countries where judicial orders are flagrantly flouted, ignored or overlooked by the government and its agencies without any consequences, environmental litigation will have minimal impacts on environmental outcomes as the non-implementation of favourable court orders will mean there are no changes to environmentally prejudicial activities by the governments or corporate bodies. This potentially explains the lack of impact of constitutionalization on environmental litigation in African countries as found by Ihovbenre[71] and Amaechi.[72]Many African countries struggle with implementing the rule of law, protecting the independence of the judiciary and obedience to judicial orders.[73] As a result, there is little implementation of court orders on environmental matters and this affects the possibility of achieving any positive environmental outcome.

An illustrative instance is found in the Nigerian case of *Gbemre v. Shell Petroleum*[74]where a private citizen challenged the continued practice of gas flaring by oil companies in the Niger Delta region. The Federal High Court in Nigeria held the practice to violate the citizen's fundamental right to life under the constitution and ordered for its immediate cessation, directing the government to ensure compliance. Unsurprisingly, the government and oil companies ignored the court order and more than 13 years after that court order, gas flaring still continues unabated. In essence, it is the extent to which judicial orders are obeyed and implemented that is the dispositive factor of whether environmental litigation has any impact on positive environmental outcomes.[75]

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[71] J Ihonvbere, 'Constitutionalism and Governance in Africa', supra, n 46.

[72] E Amaechi, 'Enhancing Environmental Protection and Socio-Economic Development', supra, n 47.

[73] See M Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96-118; Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 Annual Review of Political Science 345-366.

[74] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151.

[75] I Worika, 'Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?' (2001) 8 *ILSA J. Int'l & Comp. L*. 1.

In countries where environmental constitutionalism is ingrained in the legal system, Boyd's chart represents the potential flow of any trickle-down effects of constitutionalization through litigation. However, as discussed under the legislation chart, it is important that the 'changes in societal behaviours' in the penultimate tier of the chart is replaced with 'increased compliance with court-imposed environmental objectives' for the reasons discussed previously. In this instance, the implementation of court orders will result in increased cases of government/corporations/individuals complying with environmental objectives which fulfils the constitutional right because failure to do so will render them liable to judicial sanctions. While there is the potential for this to influence societal behaviours in favour of positive environmental outcomes in the long run, there are no methodological means of proving such causal link. It, therefore, suffices to assert that the increased compliance will result in better environmental protection

5.3.2 Extra-Legal Impacts of Constitutionalization

Besides the legal impacts of constitutionalization of environmental rights, some areas of extra-legal effects, especially in the scientific and technical fields, are also worth noting. A study conducted by the Global Footprint Network in 2008 compared the ecological footprints of 150 nations vis-a-vis the constitutionalization of rights in these nations. The study found that nations without any constitutional environmental protection provisions, on average, had a larger ecological footprint (averaging 3.58 hectares per capita) than nations with environmental protection provisions in their constitution which had a lesser ecological footprint (averaging 2.36 hectares per capita).[76] This can logically be attributed to the unwillingness of states that systematically over-exploit their environmental resources to incorporate constitutional environmental rights, seeing that doing so will restrict their ability to continually indulge in such practice. What this reveals, therefore, is that constitutionalization of environmental rights can act as a potentially powerful tool to regulate, control and minimise the ecological footprints of states and, as a result, lead to better environmental management. This is achieved through constitutionally restricting activities with

[76] Global Footprint Network 'The Ecological Footprint Atlas 2008' <file:///C:/Users/pua202/Downloads/Ecological_Footprint_Atlas_2008.pdf> accessed 02 November 2015.

ecological impacts and forcing the government to find alternative energy sources with minimal ecological impacts. The absence of constitutional environmental right leaves such decision at the discretion of the government, influenced by prevailing political and economic exigencies.

In this light, it is unsurprising to find that there is no constitutional environmental right in China, a country with a large ecological footprint. World Wildlife Fund (WWF) study found that –

> "the per capita Ecological Footprint in China was 2.1 gha or 80% of the global average. However, this has already exceeded the global sustainability threshold and is over two times the available per capita bio-capacity in China. In view of its huge population, the total Ecological Footprint of China is the largest in the world."[77]

Although the ecological footprint of China cannot be directly attributed to its lack of a constitutional environmental right, it can be argued that a constitutional environmental right would present a powerful tool to regulate energy and environmental issues and restrict government's policies which are prejudicial to environmental protection. For instance, China remains the largest producer and consumer of coal in the world and is the largest user of coal-derived electricity, relying on coal for 62% of its energy supply.[78] A constitutional environmental right could be relied upon to challenge the Chinese government's investments in coal infrastructure, for instance, akin to the constitutional challenge of the Chilean government's attempt to build six hydro-electric plants on the Bio-Bio River in *Pablo Orrego Silva v. Empressa Pange SA.*[79]Replicating such approach in China requires a constitutional environmental right which grants the fundamental platform for such milestone challenge to an important government-planned infrastructure.

In addition, a judicial declaration could be obtained that the continued investments in heavy polluting energy sources in China violate the constitutional right to a

[77] World Wildlife Fund, 'China Ecological Footprint Report 2012 Consumption, Production and Sustainable Development' (2012) <https://www.footprintnetwork.org/content/images/article_uploads/China_Ecological_Footprint_2012.pdf> accessed 29 September 2017.

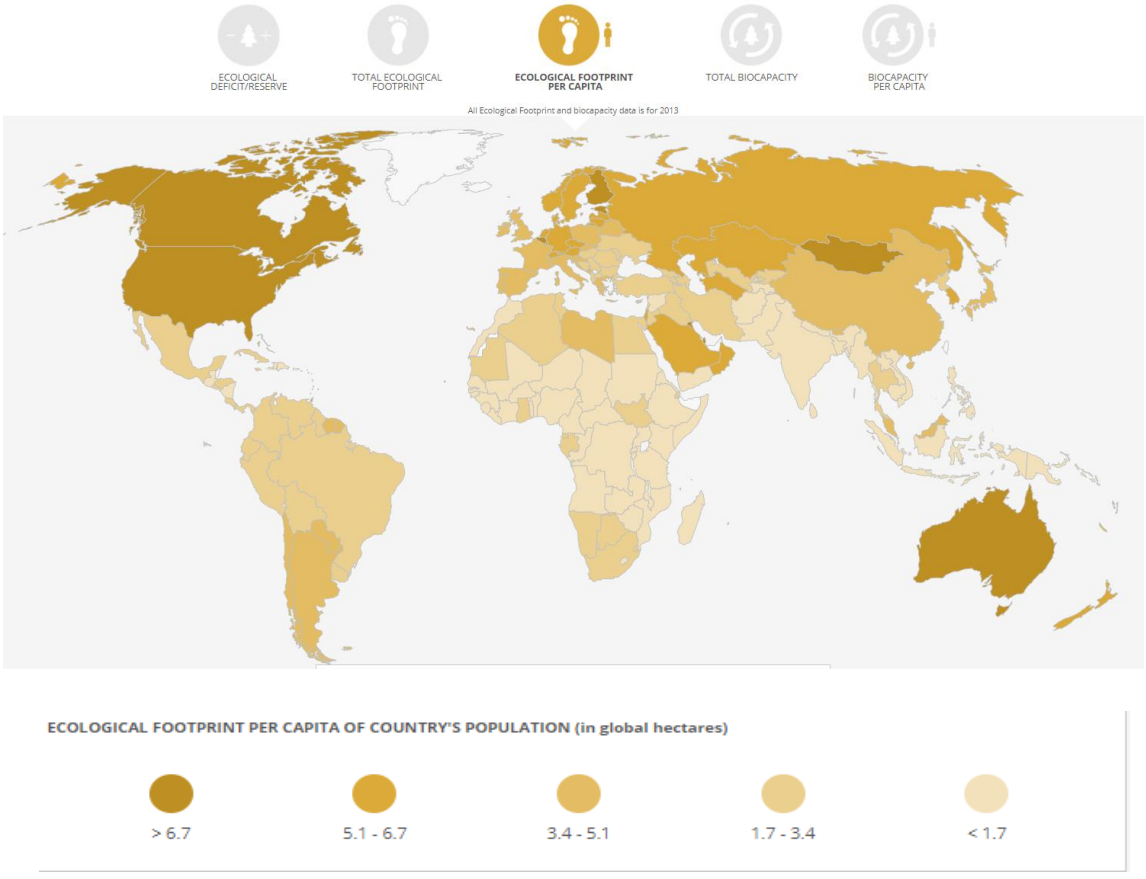
[78] World Resources Institute (WRI), 'China's Decline in Coal Consumption Drives Global Slowdown in Emissions' (2017) <http://www.wri.org/blog/2017/01/china%E2%80%99s-decline-coal-consumption-drives-global-slowdown-emissions> accessed 11 August 2017.

[79] Pablo Orrego Silva v. Empressa Pange SA Supreme Court of Chile 5th August 1993.

clean environment. This could compel the government to shift its policy focus to cleaner energy sources and in the process reduce its ecological footprints. Rather, international pressure from environmental groups and from its ratification of international instruments such as the Paris Climate Change Agreement 2015 remains the major sources of pressure on the government of China to pursue positive environmental outcomes. It is arguable that a domestic constitutional environmental right could achieve better environmental outcomes.

China is not alone in this predicament as it is not the only country without a constitutional environmental right which has a high ecological footprint. Instead, the 2017 global ecological footprint map produced by Footprint Network establishes a potential correlation between constitutional environmental right and a country's ecological footprint, as seen in Figure 14 below:

Figure 14: Global Ecological Footprint Map



Source: Footprint Network 2017[80]

[80] Footprint Network, 'Ecological Wealth of Nations' (2017), <http://www.footprintnetwork.org/content/documents/ecological_footprint_nations/ecological_per_capita.html> accessed 25 November 2017.

Figure 12 reveals that seven – Afghanistan, Australia, Canada, China, New Zealand, United States and Saudi Arabia - of the nine countries with the highest ecological footprints are countries without constitutional environmental rights in their domestic jurisdictions. Although Russia has a constitutional environmental right, this right is largely symbolic owing to the weakened state of the judiciary in the country.[81]

As a disclaimer, it is pertinent to state that the relationship between constitutional environmental right and ecological footprint from Figure 12 is a tenuous one owing to a range of factors that are at play including urbanisation, industrialisation, population density and other domestic factors which may account for the high ecological footprints. Therefore, the analysis above does not attempt to rely on Figure 12 as definite proof of a direct correlation between the two subjects, but rather to indicate that there is a correlation between them requiring further analysis. From the current analysis, it is likely that either countries with high ecological footprints are reluctant to constitutionalise environmental rights because it would affect their over-exploitation of the environment or the absence of a constitutional environmental right allows these countries to over-exploit their environment without any legal repercussions or judicial sanctions. In either case, the introduction of constitutional environmental right may have an impact on the ecological footprints of such countries. While there are no methodological means of proving this assertion, this is certainly a subject requiring in-depth focus and research.

Other areas of extra-legal impacts can be examined according to different sectors of environmental concerns. Boyd[82]conducted an extensive study of various contemporary environmental concerns such as air pollution, climate change, nitrogen oxide emissions, sulphur dioxide emissions and greenhouse gas emissions in nations with constitutional environmental rights and those without such rights. He found that a correlation exists between constitutionalization of environmental rights and progress in addressing these environmental concerns in countries. He, therefore, concluded that, with few notable exceptions (such as Belgium and Denmark), nations with constitutional environmental rights generally

[81] M Popova, 'Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine' (2010) 43(10) *Comparative Political Studies* 3.
[82] D Boyd, *The Environmental Rights Revolution,* supra, n 6, 240-252.

tend to have smaller ecological footprint, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements, and made faster progress in reducing emissions of sulphur dioxides, nitrogen oxides and greenhouse gases than nations without such provisions.[83] Boyd's finding is a confirmation of the earlier analysis linking constitutional environmental rights with ecological footprints and when examined in specific sectors of environmental concerns, it is apparent that the same analysis applies by extension to the various specific sectors of environmental concerns.

Flowing from the above analysis, it can be asserted that while there are no scientific or other cast-iron methodological means of proving a causal link between constitutionalization of environmental rights and improved ecosystem protection, the available evidence suggests a strong case can be made in support of the view that constitutionalization of environmental rights impacts positively and significantly on ecosystem protection. The incorporation of constitutional environmental rights within domestic jurisdictions is, therefore, a definite step in the right direction and a positive move towards the pursuit of more ambitious environmental objectives.

5.4 Conclusions

Constitutionalising environmental rights is not the panacea to all environmental ills in a jurisdiction, but it has potentially significant legal and extra-legal impacts on environmental protection in countries adopting it. It has the potential to bring about robust environmental legislation, improve the environmental legal framework and make for better environmental litigation within a country. Also, the trickle down effects ultimately leads to positive environmental outcomes by making government agencies, corporations and individuals act in a more environmentally responsible manner. Its impact on environmental litigation is, however, less noticeable as any potential impact is conditioned on the presence of environmental constitutionalism and a respectable judiciary within a jurisdiction.

[83]See also B Ewing et al, 'The Ecological Footprint Atlas 2010' (2011) <http://www.footprintnetwork.org/content/images/uploads/Ecological_Footprint_Atlas_2010.pdf > accessed 29 May 2017.

Regarding its extra-legal effects, constitutionalising environmental rights have been shown to influence a country's environmental outlook in various sectors of environmental concerns including air pollution, ecological footprint and the emission of noxious gases within a country. With a few exceptions, there is a correlation between the presence of constitutional environmental rights and a country's ecological footprint. While this is not definitive proof of a causal link between the two subjects, it certainly shows a connection between them sufficient to postulate that constitutional environmental rights is an important factor in a country's environmental protection outlook. This justifies the increased clamour for constitutionalization of environmental rights in countries that have yet to join the global trend.

With the potential impacts of constitutionalising environmental rights discussed in this chapter, it becomes imperative to analyse the prospects for such impacts in Nigeria to alleviate the environmental challenges in the Niger Delta. Consequently, chapter 6 will apply the discussions to Nigeria and analyse how implementing constitutional environmental protection can address the seemingly intractable environmental situation in the Niger Delta region.

CHAPTER SIX

IMPLEMENTING CONSTITUTIONAL ENVIRONMENTAL PROTECTION IN NIGERIA

6.1 Introduction

> *"By their very nature, these assaults on the environment were not caused by any one political group or any one generation. Intrinsically, they are transnational, trans-generational and trans-ideological. So are all conceivable solutions."*
>
> *–Spiritual Leaders of All Faiths from 83 Countries (Moscow, January 1, 1990)*[1]

Environmental degradation in the Niger Delta is a multifaceted problem which is indeed trans-generational and trans-ideological. It straddles different generations of the populace living in the region and has proven intractable to several ideological and political attempts at solving it. The assaults on the Niger Delta environment have resulted in widespread degradation of the ecosystem in the region over the course of the last 60 years. During this time, different ideological approaches to solving the problem have been pursued including environmental militancy by groups in the region seeking to expel the oil companies operating in the region, since they are seen as the source of the problem; resource control advocacy seeking greater share of the oil resources to be utilised and invested in environmental management; political secession from the rest of the country as a way of determining the region's environmental future; environmental activism by civic groups and prominent leaders in the region for better regulatory controls to be instituted by the government to tackle environmental degradation; and the use of prescriptive, command and control legislative mechanisms by government to compel oil companies operating in the region to tackle environmental issues and

[1] G Odogwu, 'On Falana's call for Environmental Justice' *Opinion Nigeria,* 01 October, 2015 <http://www.opinionnigeria.com/on-falana-s-call-for-environmental-justice-by-gregodogwu/#sthash.TaKfdCVg.dpbs> accessed 09 January 2017.

invest in environmental management as part of their corporate social responsibility in the communities.[2]

Evidently, these ideological approaches have repeatedly failed because they focused on the symptoms of the problem rather than the cause; they were reactive to the problem rather than pro-active to prevent the problem by instituting preventive mechanisms. Protecting the environment extends beyond merely cleaning up the environment when it is polluted or compensating the people affected by the pollution; it should have as its fundamental basis the prevention of actions and activities that lead to the pollution. This can be addressed from a fundamental legal position which obliges governments, corporations and all individuals concerned to take necessary pro-active steps in favour of environmental sanctity.

This chapter applies the theoretical discussions in the preceding chapters to the Niger Delta environmental challenges and argues in favour of incorporating constitutional environmental rights in Nigeria's legal framework as a way of instituting foundational and comprehensive environmental protection framework capable of solving the environmental conundrum.

The absence of an environmental rights framework in Nigeria makes the Niger Delta susceptible to environmental despoliation that has repeatedly been exploited by oil companies in the country to perpetuate environmental pollution with impunity. While people in the region have continued to clamour for increased governmental responses to this problem without success, a constitutional environmental rights platform creates a legal tool that can be utilised by individuals to achieve environmental protection without depending on the government to act against the polluters. Rather, individuals will be empowered to act directly against the polluters and even against the government itself for regulatory failures allowing for the environmental despoliation. Constitutionalising environmental rights will, therefore, create a foundational legal platform for environmental accountability by governments and its agencies, corporations and all bodies involved in environmental impacting activities in the region.

[2] See U Orji, 'Right to a Clean Environment: Some Reflections' (2012) 42 *Envtl. Pol'y & L*. 285, 286; I Worika, 'Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?' (2001) 8 *ILSA J. Int'l & Comp. L*. 1

This chapter also argues that for constitutional environmental rights to be effective in Nigeria, it must go beyond the current anthropocentric brand of environmental rights incorporated in the constitutions of many countries around the globe. The adoption of *coalesced anthropocentrism* as the ideological framework for incorporating environmental rights in Nigeria's constitution will institute a sustainable trans-generational protection of the environment as well as the preservation of the intrinsic value of the natural ecosystem in the region.

6.2 Legal Framework for Environmental Protection in Nigeria

Understanding the undeveloped state of environmental protection legal framework in Nigeria is necessary to appreciate the potential impact of constitutional environmental rights in the country. In respect of the analysis in this chapter, a distinction must be drawn between an environmental regulatory framework and an environmental rights framework. The former deals with the myriad of regulatory instruments (statutory and subsidiary instruments) instituted by the government to regulate environmental matters in the country. These instruments basically target the reduction of environmental pollution through a command and control mechanism instituted in all industries impacting the environment, particularly the oil and gas industry. The latter deals with embedded rights in individuals to challenge environmentally injurious activities independent of, and sometimes against, government's regulatory intervention. This is based on the right to a clean environment vested in the individuals (and, as canvassed in this thesis, on Mother Nature and its component systems also).

6.2.1 Environmental Regulatory Framework

Several statutes[3] and subsidiary regulatory instruments[4] evincing regulatory attempts by the government to ensure environmental protection exist in Nigeria. The most comprehensive of these regulatory instruments in relation to the oil and

[3] Such as the National Environmental Standards and Regulations Enforcement Agency (NESREA) 2007, National Oil Spill Detection and Response Agency (NOSDRA) 2006, the Nigerian Extractive Industries Transparency Initiative (NEITI) Act, 2007, Associated Gas Reinjection Act, (AGRA) 1979 and the Effluent Limitation Regulations of 1991.

[4] Such as the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002.

gas industry is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 1991 (revised in 2002) promulgated by the Department of Petroleum Resources (DPR) pursuant to section 8(i)b (iii) of the Petroleum Act 1969 which empowers the Minister of Petroleum Resources to make regulations for the prevention of pollution of watercourses and the atmosphere.

EGASPIN contains some of the most elaborate environmental guidelines of any industry around the world and was intended to ensure comprehensive protection of the Niger Delta environment in the course of oil and gas exploration. Coupled with other statutory instruments on environmental protection such as the National Environmental Standards and Regulations Enforcement Agency (NESREA) 2007 and the Associated Gas Re-injection Act 1979, there is an elaborate environmental regulatory framework in Nigeria to engender environmental sanctity throughout the country and particularly in the Niger Delta. Notwithstanding this, environmental degradation in the Niger Delta has continued unabated and the manner that the oil and gas companies carry out pollution with impunity undermine any semblance of an effective regulatory framework in the country. This is primarily because the environmental regulatory framework in Nigeria is largely unenforced by the government and appropriate regulatory bodies. As Worika argues, neither the abundance of guidelines and standards nor the proliferation of regulatory instruments on environmental matters is the dispositive factor determining how protective a nation's environmental law regime is. Rather, it is the manner in which those standards are enforced that controls the end result.[5]

Two key interlinked factors explain the inability of the Nigerian government to enforce these environmental guidelines. First, environmental regulatory mechanisms in Nigeria are targeted at 'controlling' or 'mitigating' the extent of pollution that occur in the course of oil and gas exploration and ensuring the oil companies promptly clean up such pollution; it is not aimed at preventing pollution as it is deemed impractical and economically inefficient to target the complete eradication of pollution from oil and gas production since the oil companies allege

[5] I Worika, 'Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?' supra, n 2, 15.

that this will affect their oil and gas production output.[6] This policy ideology runs through the breadth of most environmental regulatory mechanisms in the country. For instance, EGASPIN does not prohibit oil and gas companies from releasing effluents into the environment or water bodies during exploration, but rather 'limits' the extent of effluents that can be released by them. Further, where the oil companies deem it necessary, they can obtain a licence from the Minister or the appropriate regulator to release more than the statutorily prescribed maximum.[7] Similarly, although the Associated Gas Re-injection Act (AGRA), on the face of it, appear to prohibit gas flaring (a very harmful environmental practice of releasing burnt gases from oil production into the atmosphere),[8] the Act merely institutionalises state-sanctioned flaring by empowering the Minister of Petroleum to designate the permissible amount of flared gas for each company. Section 3(2)(a) & (b) of the Act permits the Minister to, at his discretion, issue a certificate permitting a company to continue to flare gas in a particular field(s) if the company pays such sum as the Minister may from time to time prescribe.

The imposition of payments on the oil companies for flared gas is a monetisation of environmental degradation aimed at raising revenue for the government rather than preventing this harmful environmental practice. Aware that the oil companies are not willing to end flaring and are happy to pay for the amount of gas they flare (seeing it as being more economically attractive than investing in gas utilisation facilities to end flaring), the Nigerian government, through such regulatory instrument, turns an environmentally harmful practice into a 'cash cow', milking the oil companies to increase the government's revenue stream to the detriment of the environment, as the payments are equated to royalties to the government by companies engaged in oil and gas production.[9] This is borne out by the

[6] See Shell's Annual Revenue Statement 2006, <https://reports.shell.com/annual-report/2006/> accessed 08 January 2017.

[7] See Paragraph C of EGASPIN Revised edition 2002.

[8] See O. Saheed Ismail, G. Ezaina Umukoro, 'Global Impact of Gas Flaring', (2012) 4 Energy and Power Engineering, 290-302. The study sums up the effects of gas flaring thus- "A large number of hydrocarbons are produced when waste oil-gas and oil-gas-water solutions are flared. Flaring is inefficient with combustion being most affected by ambient winds and heating value of the fuel… Flaring releases methane, a greenhouse gas that, when released directly into the air, traps heat in the atmosphere. The process of flaring contributes directly to global warming. Flaring has a substantial impact on the health and environment of landowners who live near a flared well. The methane release is smelly, noisy, and, according to the Natural Institute of Health, exposure causes "headache, dizziness, weakness, nausea, vomiting, and loss of coordination" in people and animals. It creates a 24×7 bright light, blocking out the night sky."

[9] The proviso to Section 3 states that "any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil".

significant revenue the Nigerian government obtains from the penalties imposed on oil and gas companies that flare gas in the country. The fine for flaring gas increased from $0.03(3 cents) per 1000 ft3 in 1984 when it was first introduced to $0.07(7 cents) per 1000 ft3 in 1988.[10] This fine continued to increase geometrically over the years and by 2015, the fine on defaulting companies had reached $3.50 per thousand cubic feet (mcf) of flared gas (a 4,900 percent increase in 27 years).[11] Considering that Nigeria flares, on average, over 17.2 billion m3 per year,[12] studies have shown that the Federal Government receives over $25 billion in annual revenue from the proceeds of fines imposed on oil and gas companies for gas flaring.[13] This significant revenue derived by the government from penalties for gas flaring is one of the main reasons behind the reluctance of the government to clamp down hard on flaring, in order not to shut this lucrative income source despite the adverse effects of the activity on the environment and people of Nigeria.[14]

The 'limited' or 'controlled' pollution permitted by the regulatory instruments accumulate over time and severely degrade the environment, in addition to deliberate or negligent pollution of the environment by the oil companies in the course of their exploration and production activities.[15] This has resulted in the present predicament of the Niger Delta environment.

The second factor behind the weak environmental regulatory system is the incapacity of the government to enforce environmental standards owing to the undue economic dependence of Nigeria on oil and gas revenue, resulting in the oil companies holding the government hostage whenever attempts are made to enforce these standards. Nigeria's economy is largely oil-dependent, as revenues from oil and gas production constitute over 76% of the country's earnings and foreign reserves.[16] This makes the country susceptible to any

[10]Central Bank of Nigeria, 'Central Bank of Nigeria Statistical Bulletin, 2015', Abjua.
[11] Ibid.
[12] Department of Petroleum Resources Statistics Bulletin, 2017.
[13] N Nelson, 'National Energy Policy and Gas Flaring In Nigeria' (2015) 5(14) *Journal of Environment and Earth Science* 2; N Yunusa, I Idris, A Zango, M Kibiya, 'Gas Flaring Effects and Revenue Made from Crude Oil in Nigeria' (2016) 6(3) *International Journal of Energy Economics and Policy* 617-620.
[14] Ojide M et al, 'Impact of Gas Industry on Sustainable Economy in Nigeria: Further estimations through Eview' (2012) Journal of Applied Sciences, 12: 2244-2251.
[15] O. Saheed Ismail, G. Ezaina Umukoro, 'Global Impact of Gas Flaring', supra, n 8.
[16] According to the CEIC, "the proceeds from Nigeria's oil and gas industry comprised 38.77% of its nominal GDP and generated 76.26% of the country's overall government revenues in the first quarter of 2013". See 'Oil Dependence Hindering Nigeria's Emerging Economy', CEIC Data

changes in oil production outputs or drops in oil prices[17] and this vulnerability is easily exploited by oil and gas companies with threats to pull out of the country or reduce their oil outputs whenever policies they consider unfavourable are touted by the government.

Considering that the Nigerian environmental regulatory system does not seek to prevent or prohibit pollution but merely to 'control' or 'limit' it, it becomes increasingly difficult for the government to enforce these boundaries of pollution when they are crossed by the oil companies. It is easier to set boundaries when a door is shut completely than when it is left slightly open and the struggle is to ensure that the door is not opened far wider than intended. More strength will be required to maintain the boundaries in the latter case than in the former. Unfortunately, Nigeria's environmental regulatory system is built on the latter ideology and considering the weak enforcement capacity of the government, it is not surprising that, over time, the door has become completely ajar and the focus has turned to seeking compensation for persons affected by pollution and, recently (and half-heartedly), moves to clean up the polluted environment.

This top-down regulatory system has unwittingly created a dual caste structure in the enforcement of environmental obligations in Nigeria. At the upper caste is the government and its regulatory agencies with the exclusive responsibility of monitoring the environmental activities of companies and other institutions engaged in environmentally impacting activities. Where the upper caste fails in its responsibility, the lower caste, consisting of the citizens and individuals dwelling in the environment impacted by these activities, is then expected to pick up the task of seeking compensation from the companies for the injuries they have suffered as a result of the companies' activities and the regulatory failure of the upper caste. The strict caste demarcation ensures that members of the lower caste are not able to seek enforcement of the environmental obligations of the companies directly but are confined to compensations for injuries and loss.

Company Ltd, 03 June 2013, <https://www.ceicdata.com/en/blog/oil-dependence-hindering-nigerias-emerging-economy> accessed 07 November 2017.

[17] A Sotunde, 'Nigeria's oil-dependent economy plagued by plunging crude prices' *The Global Mail*, 25 March, 2017 <https://www.theglobeandmail.com/report-on-business/international-business/nigerias-capital-feels-the-pinch-from-the-plunge-in-oil-prices/article22847527/> accessed 20 December, 2017.

Even though individuals have a legal right to sue the companies for environmentally injurious acts arising from their activities and seek a halt to such activities, the regulatory approach restricts this option because these injurious acts are often state-sanctioned activities e.g. gas flaring sanctioned under the AGRA or release of effluents sanctioned under EGASPIN. The companies can, therefore, waive statutory authority as a defence to such suits, leaving the litigant with the only option of seeking compensation for loss suffered while the activity in question continues unabated. In *Okpala v. Shell Petroleum Development Company* (SPDC),[18]a Nigerian Federal High Court refused the claimant's prayer to restrict seismic and other pre-exploratory activities of the defendant which affected the claimant's environmental sanctity. The court upheld the defendant's claim of statutory authority based on an exploratory licence granted it by the government which empowered the defendant to carry out those activities. It was irrelevant that this activity had negative environmental consequences, provided, as in this case, the defendant convinced the court that an environmental impact assessment was carried out and approved by the regulatory body. The regulatory approval was sufficient to confine the claimant to compensatory claims only.

6.2.2 Environmental Rights Framework

To defeat the statutory authority defence, an embedded right in the individual to a clean environment is required to override any permission to pollute deemed necessary by the government. In this sense, an environmental rights framework introduces a bottom-up approach which allows individuals to by-pass and nullify regulatory permissions by governments that are detrimental to the environment. This can be achieved through conventional environmental litigation (through a writ of summons or originating summons) challenging the legality of a regulatory approval issued by government or, more appropriately, judicial review applications seeking an order of certiorari quashing the regulatory decisions made by government officials approving activities that prejudicially impacts or has the potential to prejudicially impact the environment. For instance, in *Minors Oposa v Secretary of the Department of Environment and Natural Resources,*[19] the Philippines' Supreme Court, on an application for judicial review, nullified

[18] (2006) Suit No. FHC/PHC/C5/518/2006 of 29 September 2006.
[19] (1994) 33 ILM 173.

timber licenses granted by the government to companies on the basis of their infringement on the environmental rights of the inhabitants. In *Gbemre v Shell Petroleum,*[20] the only recorded case in Nigeria where the courts denounced a regulatory approval of an environmentally injurious activity, the court, based on an originating summons, derived an environmental right from the constitutional right to life in section 33 of the Nigerian Constitution and relied on it to nullify regulatory approvals for gas flaring issued to companies by the Nigerian government for violating the right to life of the inhabitants.[21]

In this respect, an environmental rights framework focuses on embedding rights in individuals, breaking the strict caste demarcation and empowering individuals to directly regulate and restrict the activities of corporations which impact on their environment, through litigation, without relying on the government. In Nigeria, while the environmental regulatory framework is significantly developed, even if largely cosmetic and unenforced, the environmental rights framework is a sparsely developed, un-structured and largely hollow set of isolated legal instruments without any impact on environmental protection in the country.

Currently, there are only two pieces of isolated legal instruments relating to environmental rights in Nigeria- the African Charter on Human and Peoples Right (ratification and enforcement) Act 1990 (ACHPR) and the Environmental Impact Assessment Act 1992. The former deals with the substantive environmental right while the latter focuses on procedural environmental rights. Even though section 20 of the Nigerian Constitution is often regarded as providing for environmental right in Nigeria, the section does no more than stipulate a lofty governmental aspiration of protecting the environment. The section provides that-

> "The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria."

Two key limitations of this provision make this section unsuitable as an environmental right platform. First, it refers to the regulatory imperative of the government to protect the environment and is, therefore, a constitutional platform for instituting regulatory protections and instruments to protect the environment. It does not, in any sense, refer to any individual right to a clean environment. Even

[20]Jonah Gbemre v. Shell Petroleum Development Company Nigeria, Federal High Court of Nigeria, Benin Division, Judgment of 14 November 2005, Suit No. FHC/B/CS/53/05.
[21] Section 33, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

though it can be jurisprudentially argued that rights are the corollary of responsibilities, and an individual right to a protected environment may be implicitly derived from such constitutional conferment of responsibility on the government, deriving rights through reverse analogy such as this is inherently tenuous and fraught with difficulties. This provision, at best, serves as a constitutional conferment of power on the state to enact and enforce environmental legislation and regulation in order to 'protect and improve' the environment.[22]

Second, and perhaps more important in this context, section 20 is explicitly declared non-justiciable and unenforceable by section 6(6)(c) of the Constitution, rendering it merely platitudinous and hollow. A right loses its relevance if it is expressly unenforceable, as enforceable legal protection of an interest is the cornerstone of such interest being regarded a 'right'.[23] In addition, the potential of utilising a fundamental directive of state policy provision in the constitution, such as section 20, to enforce a governmental obligation to protect the environment as was done by the Supreme Court of India[24] has been unequivocally denounced by the Supreme Court of Nigeria in *NNPC v Fawehinmi* [25]where it held that the provisions of Chapter II of the Constitution are wholly unenforceable under any guise whatsoever and remain mere governmental aspirations. In this sense, section 20 cannot be regarded as a constitutional conferment of environmental rights in Nigeria and the inclusion of Nigeria in the list of countries with constitutional environmental rights on the basis of section 20 in some literature[26] is erroneous and misleading.

[22] See the decision of the Supreme Court of Nigeria in Attorney General of Lagos State v Attorney General of the Federation (2003) 15 NWLR PT 833 pg. 113.

[23] See the jurisprudential discussion on 'rights' in chapter 2.1 of this thesis.

[24] Bharati v State of Kerala (1973) 4 SCC 225.

[25] NNPC v Fawehinmi (1998)7 NWLR pt. 559. See various literature in Nigeria arguing for a reversal of this approach by the Nigerian Supreme Court- Ogugua Ikpeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (2015) 5(18) *Developing Country Studies* 3; Duru Onyekachi, 'The Justiciability of the Fundamental Objectives and Directive Principles of State Policy under Nigerian Law' (2012) available at SSRN: <https://ssrn.com/abstract=2140361> accessed 09 October 2017.

[26] See for instance, D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 3.

6.2.2.1 The African Charter and Substantive Environmental Rights in Nigeria

The African Charter on Human and People's Right (ratification and enforcement Act) (ACHPR Act or 'the Act') is, in effect, the only extant legislative provision containing any semblance of a substantive environmental right in Nigeria. Nevertheless, its application in Nigeria has been fraught with fundamental legal and constitutional hurdles to the extent it has become almost dormant in effect. To understand the role of the Act in this context, a brief background is imperative. The Act is a domestication of the African Charter on Human and People's Right (the Charter) signed by African countries under the umbrella of the then Organisation of African Unity (OAU) in 1979. The charter was effectively a regional rendition of fundamental human rights principles propounded in relevant international instruments such as the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Rights 1966.[27] It contains provisions covering major aspects of human rights including the right to life, dignity, freedom of movement, equality and labour rights

The charter was signed by Nigeria in 1982 and ratified in 1983.[28] However, in line with Section 12 of the then 1979 Constitution of Nigeria (which is framed the same way as Section 12 of the current 1999 Constitution), the ratification of the charter did not make it immediately applicable in Nigeria until it was domesticated through an Act of parliament. The Nigerian parliament, therefore, took the additional step of domesticating the charter through the passage of the ACHPR (ratification and enforcement) Act 1990 whereupon it became enforceable in Nigeria.

Article 24 of the Act which is the only provision touching on environmental rights provides a concise exposition of the right in the following words-

> "24. All peoples shall have the right to a general satisfactory environment favourable to their development."

Illustratively, this article is the shortest of all the articles espousing human rights and duties in the Act (as in the charter from which it derives) and its brevity and

[27] International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

[28] See 'Ratification Table: African Charter on Human and Peoples' Rights' available at <http://www.achpr.org/instruments/achpr/ratification/> accessed 09 June 2017.

absence of particulars of the right has become one of its greatest undoings.[29] There are question marks over the import and qualitative meaning of 'general satisfactory environment': whether this implies an environment conducive to health or merely 'satisfactory from an objective standpoint'. Also, the ascription of 'development' criteria in judging a satisfactory environment further creates doubt on the normative definition of a clean environment as envisaged by the charter. Developmental questions are often difficult to cast in clear descriptive mounds, especially in the context of African countries with poor developmental indices. To link the right to a clean environment to its favourableness to the development of a people that are historically underdeveloped may result in a lower standard of satisfactory environment than in more developed jurisdictions. Linking such right to health would have presented a more objective criterion from which a satisfactory environment can be judged as the conditions necessary for safeguarding human health are essentially the same regardless of location, stage of infrastructural or socio-economic development.

Moreover, linking the right to its favourableness to development may unwittingly be counter-productive as it implies the pre-eminence of developmental considerations over environmental considerations. So long as the current state of the environment is satisfactory to allow a people to develop (i.e. socio-economic development), then the right can be said to have been fulfilled even where the environment is not in its best optimal shape.[30] In addition, there is debate regarding the meaning of 'people' in the provision which suggest a group-collective right rather than an individual right[31] enforceable by private persons for protection of their individual environmental interests.

The above shortcomings of article 24 do not derogate from its role as an environmental rights platform in Nigeria. Upon its domestication in 1990, it became an enforceable environmental rights provision available to all citizens of Nigeria in protecting their environmental interests. Nevertheless, more than two decades after its coming into force in Nigeria, it has been largely ignored and has been generally dormant. The reason for its inefficacy lies in some fundamental

[29] U Umozurike, 'The African Charter on Human and Peoples' Rights' (1983) 77(4) *American Journal of International Law* 902-912.
[30] R Gittleman 'The African Charter on Human and Peoples Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 5.
[31] R Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82(1) *American Journal of International Law* 80-101.

legal and constitutional hurdles within Nigeria's legal system which renders its application untenable. This is asides the ambiguous nature of its provision which has been largely untested in the Nigerian courts in view of its dormancy.

There are two issues beleaguering the application of the Act under Nigeria's legal system. The first, and most fundamental, arises from questions over the constitutionality of its application to the states in view of the constitutional division of powers between the Federal and State governments in Nigeria. Nigeria operates a federal system of governance and the 1999 Constitution delineates the legislative powers between the Federal and State legislature and strictly circumscribes each tier to legislate only within the ambits of powers granted to it.[32] This constitutional principle applies with equal force to the domestication of international instruments by parliament, as section 12 of the Constitution restricts the federal parliament to the domestication of treaties in respect of subjects over which it has exclusive legislative powers. Where a treaty covers a subject outside of the Federal parliament's legislative powers, an Act of parliament to domesticate such treaty cannot become law until it has been ratified by a majority of the Houses of Assembly of the states.[33]

The ACHPR covers several issues outside of the exclusive legislative powers of the Federal Parliament such as property rights, health and education rights. Particularly, 'environment' which is the focus of article 24 is a subject outside the exclusive legislative powers of the Federal Parliament. It is not listed in the exclusive legislative list neither is it explicitly included in the concurrent legislative list shared between the federal and state legislature. Ordinarily, therefore, it should fall within a 'residual' list which is exclusively reserved for the state legislature. This principle has been confirmed by the Supreme Court of Nigeria in *Attorney General of Ondo State v. Attorney General of the Federation*[34] where it upheld the constitutional restriction on the National Assembly to legislate on matters on the 'residual list', holding that any item in a federal statute on such subject will be excised and expunged by the courts.

Although 'environment' is not an item expressly within the federal legislature's constitutional competence, there is room to argue that this power can be inferred

[32] Section 4 and Part I, Second Schedule of the 1999 Constitution.
[33] Section 12(3) Constitution of the Federal Republic of Nigeria 1999 (as amended).
[34] (2002) 9 NWLR (Pt.772) 222.

from the 'Trade and Commerce clause' in item 62 of the Exclusive Legislative List in the Nigerian constitution, akin to the manner the power of the United States' Congress to legislate on environmental matters was derived from the commerce clause in the US Constitution[35] as upheld by the US Supreme Court on the basis of Article 1 Section 8 Clause 3 of the US Constitution.[36] This has been used by Congress to enact the Clean Water Act 1972[37] and other federal environmental legislation.[38]

While it is tempting to apply the US situation to environmental protection in Nigeria, the marked difference between the trade and commerce clauses in both constitutions and relevant judicial decisions in Nigeria makes this prospect unworkable. While Article 1 Section 8 Clause 3 of the US Constitution simply empowers Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes", item 62, Part I of the Second Schedule to the Nigerian Constitution is elaborate in its description of the commerce powers of the federal parliament and provides specific delineation of the extent of such powers covering inter-state commerce, international commerce, standards of goods and prices of essential goods and commodities. It is untenable to conceive any inference of a power to legislate on environmental issues from such provision. In *Attorney General of Ogun State v. Aberuagba,*[39] the Supreme Court of Nigeria interpreted the Trade and Commerce clause in item 62 as one of limited scope covering international commerce, intra-state commerce and the matters specified thereunder. A power to legislate on environmental matters cannot, therefore, be derived from this clause.

Nevertheless, this does not connote an absence of a federal power to legislate on environmental matters under Nigeria's Constitution as the Supreme Court has drawn such power from section 20 of the Constitution. The court, however, held such power to be a concurrent power, thus empowering the Federal and State Parliaments to legislate on environmental matters. This decision arose from the landmark case of *Attorney General of Lagos State v Attorney General of the*

[35] K Sullivan, G Gunther, *Constitutional law*. (14th ed. Foundation Press, 2001) 12.
[36] See Schechter Poultry Corp. v. United States, (1935) 295 U.S. 495.
[37] 33 U.S.C. §§ 1251 (1972).
[38] Clean Air Act 42 U.S.C. §7401 et seq. (1970), the Endangered Species Act 16 U.S.C. ch. 35 § 1531 (1973).
[39] (1985) NWLR (Pt.3) 395.

Federation.[40] In this case, the Lagos State Government challenged the constitutionality of the Nigerian Urban and Regional Planning Authority Decree, No. 88 of 1992, a federal statute regulating environmental issues and urban and regional planning throughout the federation and under which licenses and other environmental permits were issued to local businesses within the states. The Claimant sought an order that the federal legislation usurped the power of states to legislate on environmental matters and urban and regional planning within their jurisdictions. It argued that these matters are residual matters within the exclusive legislative competence of the states. Seeing the constitutional importance of the suit and its potential impact on the legislative division of powers throughout the federation, the Supreme Court ordered all other 35 states in the country to be joined to the suit.

The Federal Government opposed the claim, contending that section 20 of the Constitution empowered it to exclusively legislate on environmental matters in order to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. Majority of the other states joined to the suit sided with Lagos State in seeking a nullification of the federal legislation.

In a split decision of 4 to 3 Justices, the Supreme Court agreed partly with both the Claimant and the Respondent, adopting a middle ground solution in the constitutional battle for legislative supremacy. The apex court first drew a distinction between 'environmental' matters and 'urban and regional planning' matters under the Constitution. It held that while section 20 covers environmental matters, it does not extend to urban and regional planning matters. Consequently, in the absence of any reference in the constitution to urban and regional planning, it is a residual matter within the exclusive legislative competence of the states. To this end, the court nullified Decree, No. 88 of 1992 to the extent it regulated urban and regional planning.

On environmental matters, however, the court held that section 20 is a constitutional conferment of power on 'the state' to legislate on environmental matters. It adopted the definition of 'state' in section 318 of the Constitution which includes the federal and state governments and declared that both the federal and state governments are empowered to protect the environment under the

[40] (2003) 12 NWLR (Pt.833) 113, 175.

constitution and can, therefore, both concurrently legislate on environmental matters. Aware of the potential conflict from this pronouncement, the court went further to declare that the Federal Parliament can only legislate on environmental matters within the Federal Capital Territory or inter-state environmental issues such as federal air quality measures and environmental issues on interstate waterways. This removes the potential applicability of the doctrine of covering the field, as federal power in this respect is confined to a narrow field and cannot override state legislation on similar subjects within state jurisdictions. In respect of federal lands within states, it declared that the Federal legislation can only regulate the immediate environment within such lands and no more, as ownership or possession of lands cannot be utilised as a cover to usurp state legislative regulation.

Although this decision answered a burning question of legislative powers on environmental matters under the Nigerian Constitution, it still left some grey areas. For instance, while declaring that environmental legislative power under section 20 is a concurrent power, the court did not clarify whether federal legislation will apply to states that have not enacted state environmental legislation to protect the environment. Even though the claimant in this case, Lagos State, had enacted a number of environmental and regional planning legislation, most of the other 35 states do not have state legislation protecting the environment. It becomes unclear whether federal environmental legislation such as the Federal Environmental Protection Act 1992 and the ACHPR Act will apply to such states until when such states enact legislation on the subject in other to avoid a vacuum of environmental protection. Although it is logical to assume affirmatively, the declaration by the court that federal legislation only applies to 'inter-state environmental matters' may lead to the conclusion that it does not apply within the states to fill any vacuum. This is an area of marked distinction from the federal environmental power in the US under which federal legislation regulates environmental matters within all the states in the US. The difference in both cases is that while the federal environmental power in the US derives from a provision conferring exclusive federal power (the commerce clause), in Nigeria, the power derives from a provision interpreted by the court as conferring concurrent power on the federal and state legislature. Each tier, therefore, is required to operate strictly within its boundaries.

To buttress this point, an analogy can be drawn with the Child Rights' Act 2003 (CRA), a federal legislation which implements section 17(3)(f) of the Nigerian Constitution obliging the state to protect and promote the rights of children. The CRA is also a domestication of an international instrument – the Convention on the Rights of the Child 1989- similar to the ACHPR. Notwithstanding, because the legislative power on child rights derives from the fundamental directive of state policies which the Supreme Court has declared to confer concurrent legislative powers on the Federal and State parliament, domesticating the Convention in Nigeria required the ratification of the State Houses of Assembly before the Act can apply to the states. Since this was not done, the Act only applies within the Federal Capital Territory even though a majority of states lack similar legislation protecting children and young persons within their jurisdictions in breach of the constitutional obligation in section 17. Since 2003, several states have enacted different versions of Child Rights laws within their jurisdictions while other states predominantly in the Northern region have vehemently opposed any idea of such legislation on account of their strict adherence to Sharia law which they consider inconsistent with the idea of women and children rights.[41] Such vacuum in protecting child rights within these states has not resulted in the application of the Child's Rights Act within these states as these states continue to apply various versions of Sharia Codes that are prejudicial to women and children rights. It is doubtful if there is any constitutional principle under which a legislative vacuum can be used to justify federal legislative usurpation of a state's constitutional power.

Applying these discussions to the ACHPR Act, although the Act domesticated the ACHPR charter at a time when Nigeria was under military rule and the 1999 constitution was not in force, its current status as a federal legislation domesticating a treaty without ratification by the states in compliance with section 12(3) of the 1999 Constitution renders it inapplicable to the states under the current Constitution. The sum effect, therefore, is that the environmental right under article 24 of the Act, being a subject outside of exclusive federal competence, is not applicable to the states in the absence of the ratification of its provisions by majority of the Houses of Assembly of the States in line with section

[41] D Loteta, 'The Role and Place of Women in Sub-Saharan African Societies' (2004) Global Action on Aging, <http://www.globalaging.org/elderrights/world/2004/subsaharan.htm> accessed 09 June 2017.

12(3) of the Nigerian Constitution. As stated earlier, a similar situation occurred in respect of the Convention on the Rights of the Child 1989 which only applies within the Federal Capital Territory with the states individually entitled to pass their versions of the Act for application within their jurisdictions. Although the constitutionality of the ACHPR's application to the states has not been judicially tested, seeing its largely dormant nature, article 24 has, in practice, never been a factor in environmental issues within the states.

Stripping article 24 of the ACHPR Act of its applicability to environmental protection in the states in Nigeria deals a debilitating blow to the environmental rights framework in Nigeria as it implies that only residents of the Federal Capital Territory or occupants of federal lands throughout the country can resort to article 24. Fortunately, it can be argued that article 24 applies to lands affected by environmental pollution from oil and gas production as oil and gas matter is a subject within federal exclusive legislative powers and pollution can be considered incidental or ancillary to oil and gas production under item 68 of the legislative list in the Constitution. This explains why the only recorded suit utilising article 24 arose from a claim against Shell for environmental pollution arising from oil production activities affecting a group of communities in the Niger Delta region.[42]

Although this may appear to work in favour of relying on article 24 to protect the Niger Delta environment which is generally afflicted by pollution from oil and gas activities, there is a potential conflict with Section 1 of the Land Use Act 1978 which vests all lands within a state on the state government. In effect, under the Land Use Act, except for lands specifically designated as Federal Lands, all other lands and surrounding ecosystems are vested in the state government. In the Niger Delta context, therefore, only lands specifically allocated to the oil companies by the Federal Government for oil exploration can be considered federal lands and, therefore, subject to federal environmental regulation and the application of article 24. This position was confirmed by the Supreme Court in *AG Lagos v Ag Federation*[43]where the court held that ownership of federal lands cannot be used as a disguise to usurp state legislative powers over surrounding environment. This raises serious legal questions regarding the extent to which article 24 can be applied to the Niger Delta environmental situation seeing that a

[42] Gbemre v Shell Petroleum Development Company Nigeria, supra, n 15.
[43] Attorney General of Lagos State v Attorney General of the Federation, supra, n 35.

large part of the pollution across the region occur outside the immediate environment utilised for oil activities (federal lands) and the states within the Niger Delta region do not have individual environmental rights statutes of any kind. Most pollution is widely felt in the farmlands, rivers, creeks, streams and swamplands covered by private property claims outside of Federal regulation.[44]

In the absence of state environmental rights' laws in these Niger Delta states, the residents are confined to tortious claims seeking compensation for these environmental pollution as the only available judicial remedy. As a result, aside from *Gbemre's case,* all other environmental litigation in the region have been based on tortious claims against the multinational oil companies for compensation without any hope of effectively stopping the state-sanctioned pollution activities of the companies.[45]

The second issue beleaguering the application of the ACHPR Act is the existence of several legislation in Nigeria's legal system with conflicting and contradictory provisions to the guarantee of the right to a clean environment in article 24. Though the ACHPR Act derives from a regional charter, its domestication transforms it into a regular statute in the hierarchy of laws in Nigeria's legal system and it operates as such. Article 24, therefore, does not override conflicting provisions in other statutes which contain several state sanctions of polluting activities such as the Associated Gas Reinjection Act (AGRA) and EGASPIN. While article 24 guarantees the right to a clean environment, section 3 of AGRA empowers the Minister of Petroleum to grant a license to an oil company to flare gas which threatens a clean environment while EGASPIN empowers the Minister to grant a license to release effluent into the environment. This undermines the effectiveness of article 24 as it is an isolated provision in favour of environmental protection in the midst of a host of other statutory provisions which undermine environmental protection. The courts cannot nullify the latter provisions on the basis of the former, as it requires a provision with a higher, more fundamental status to override these latter statutory provisions.

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[44] See J Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment,'(1997) 15 *Boston University International Law Journal* 261-571.

[45] See the discussion on environmental litigation and judicial attitude in Nigeria in M. Ladan, 'Nigeria' in L Kotzé, A Paterson, *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International, 2009) 215.

Although the constitutional protection of the right to life in Section 33 of the Nigerian Constitution can be utilised to nullify these statutory provisions, as was done by the Supreme Court of India[46] and in *Gbemre,* the general conservative nature of the Nigerian judiciary has seen the courts shy away from attempts to stretch constitutional provisions beyond a strict narrow scope. An illustrative example of the conservative judicial attitude in Nigeria can be gleaned from the decision of the Federal High Court in *Okpala v. Shell Petroleum Development Company*[47] where the Applicant filed a fundamental human rights claim challenging the continued environmental pollution in some communities in the Niger Delta by the Respondent, arguing that it violates his fundamental right to life and dignity under sections 33 and 35 of the Constitution and article 24 of the ACHPR Act.

This case presented an opportunity for the court to invoke constitutional human rights to nullify environmentally injurious activities and toe the line adopted by the same Federal High Court in *Gbemre* decided just a year earlier. However, the court declined to pronounce on the question of whether there is a right to a clean environment under the constitutional right to life and dignity, instead deciding that the Applicants could not sue on behalf of the community or in a representative capacity, restricting standing in fundamental rights cases to individuals bringing suits on their own behalf. The reliance on technical principles to dismiss a serious environmental issue, in this case, is symptomatic of the general attitude of the Nigerian judiciary to environmental rights issues.

Although section 33 of the Constitution was utilised in *Gbemre* to nullify state sanction of gas flaring in section 3 of the AGRA, the Court of Appeal has put on hold the decision pending an appeal by Shell Petroleum and the Federal Government of Nigeria. This has allowed the oil companies to continue flaring gas and the Nigerian government to continue issuing flaring licenses for the past 12 years since the 2005 decision in *Gbemre* while the appeal stalls in the slow judicial process in Nigeria.[48] The Court of Appeal granted a stay of execution of the decision in *Gbemre* only because it felt there was an arguable point in the appeal

[46] Bharati v state of Kerala (1973) 4 SCC 225.
[47] Okpala v. Shell Petroleum Development Company (SPDC), No. FHC/PHC/C5/518/2006 of 29 September 2006.
[48] See K Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited' (2007) 16(3) *Review of European, Comparative & International Environmental Law* 312–320.

by Shell challenging the reliance on what it considered an unrelated fundamental right not inferring environmental protection rights. In Nigerian civil jurisprudence, the decision of a lower court on a point of law is only suspended by an appellate court pending appeal where the appellant shows an arguable point of law and the possibility of succeeding in the appeal, as confirmed by the Nigerian Supreme Court in a plethora of decided cases.[49] The Court of Appeal's decision to suspend the enforcement of the judgment is, therefore, an indication that the court agrees with the respondents that the decision to infer a constitutional right to a clean environment from the right to life and dignity provisions in the constitution is of doubtful validity and would require further judicial scrutiny by the appellate courts. An explicit constitutional right to a clean environment will present a straightforward right not subject to interpretative deductions by the courts and will, therefore, not present an arguable point on appeal allowing the oil companies to put a decision on hold while it continues its adverse environmental practice.

An attempt was made by the Chief Justice of Nigeria to give impetus to the ACHPR Act and creatively elevate the rights contained therein beyond ordinary statutory provisions, but this was technically shot down by the courts. In 2009, the Chief Justice of Nigeria promulgated the Fundamental Rights Enforcement Procedure Rules (FREPR) in pursuant of the power under Section 46(3) of the Constitution. The FREPR 2009 is intended to institutionalise abridged procedures for enforcing fundamental rights under the Constitution by bypassing most of the technical requirements, procedures and principles inherent in general civil litigation and ensuring that claimants have easy and quick access to courts to redress infringement of their fundamental rights in a fraction of the time it takes to conclude general civil cases.[50] Most importantly, the FREPR remove the *locus standi* requirement which is the bane of civil litigation in Nigerian civil jurisprudence. Order XIII of the Rules entitles any 'concerned' person to bring an application under the Rules whether or not he/she has a personal interest in the matter thus entitling NGOs, advocacy groups and other activist bodies to file claims on behalf of individuals or to advocate matters of general welfare concerns.

[49] Integration (Nig.) Ltd. v. Zumafon (Nig.) Ltd. (2014) NWLR (Pt. 1398) 479 SC; Ajuwa v. S. P. D. C. N. Ltd. (2011) 18 NWLR (Pt. 1279) 797 S. C.

[50] Paragraph 3 of the Preamble to the Fundamental Rights Enforcement Procedure Rules 2009.

Importantly, Order II of the Rules explicitly includes human rights under the ACHPR Act amongst the fundamental rights that can be enforced pursuant to the rules. As a result, article 24 of the ACHPR could be summarily enforced through the FREPR without hindrance from the *locus standi* principle and, being enforced alongside constitutional human rights, there is the possibility of relying on it to override adverse provisions in other statutes such as AGRA and EGASPIN. The applicant in *The Reg. Trustees of the Socio-Economic Rights & Accountability Project v Attorney General of the Federation*[51] sought to take advantage of this provision by including provisions of the ACHPR in its fundamental right claim before the Federal High Court challenging adverse practices by the Federal Government of Nigeria. However, the court relied on a technical, restrictive interpretation of section 46 of the Constitution and nullified the inclusion of the ACHPR Act rights in the FREPR, holding that section 46 should be strictly interpreted to cover only the fundamental rights in Chapter III of the Constitution. Section 46(1) of the Constitution which provides for the promulgation of the FREPR stipulates that –

> "Any person who alleges that any of the *provision of this Chapter* has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress."

Technically, therefore, the court cannot be faulted for interpreting the FREPR as restricted to only fundamental rights in Chapter III of the constitution. However, a more liberal and expansive interpretation could have expanded the provision to cover other basic fundamental rights in human rights instruments that are essential to the protection of the rights of citizens in the country, such as the ACHPR. This was the interpretation given to the provision by the Chief Justice of Nigeria leading to the inclusion of the ACHPR rights in the FREPR. An activist judiciary could have upheld such inclusion in the overriding interest of ensuring better protection of human rights which section 46 and Chapter III sought to achieve, as there is no word in section 46(1) which imply that the rights in Chapter III are the *only* rights that can be enforced through the summary procedure it sought to institute. Even though the provision states 'this chapter', the specification does not necessarily imply exclusion, as the absence of a word of

[51] Suit No. FHC/ABJ/CS/640/2010, Judgment of the Federal High Court, Abuja, delivered on 29th November 2012.

exclusion of other human rights can be relied upon to allow the inclusion of human rights in other instruments. As it stands, the ACHPR Act cannot be enforced through the FREPR and must be interpreted alongside other statutory provisions, some of which undermine environmental rights in the country. Furthermore, the inability to enforce the ACHPR through the FREPR means that any attempt to enforce environmental protection through the Act must go through the slow and cumbersome civil litigation process in Nigeria, where it can take years or decades to conclude a civil suit, as currently witnessed in *Gbemre.*

Consequently, in the absence of an explicit constitutional right to a clean environment, the Nigerian courts remain reluctant to extrapolate such right from basic human rights under the constitution, preferring to hide behind technical obstructionist doctrines such as the *locus standi* doctrine and strict technical restrictive interpretations. A constitutional environmental right will obviate any interpretative equivocation about the scope of environmental protection recognised by the constitution and, more importantly, will allow for the summary enforcement of such environmental right through the FREPR 2009. This will strengthen environmental protection in the country.

6.2.2.2 EIA Act and Procedural Environmental Rights in Nigeria

Environmental legislation in Nigeria is predominantly regulatory in nature, evincing the government's intention to use command and control mechanisms to monitor and direct the activities of environment-impacting industries. While the ACHPR Act exists as the only legislation with any form of substantive environmental right in the country, the Environmental Impact Assessment Act 1992 ('The Act') operates as the only instrument providing for procedural rights of the citizens with respect to environmental activities. The Act is intended to incorporate basic participatory rights in environmental decision-making process including access to environmental information, public participation concerning plans, programmes and policies relating to the environment and access to justice in environmental matters.

To this end, section 1 of the Act states the objective to include encouraging "the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to

have significant environmental effects". Procedural environmental rights are vital for ensuring adequate protection for the environment as improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. They also allow for citizens to assert their substantive environmental right and observe their duties to the environment. Principle 10 of the Rio Declaration[52] and paragraphs 8 and 9 of the Preamble to the Aarhus Convention[53] emphasize the importance of instituting procedural rights for citizens with respect to environmental matters in a country. Adopting legislative protection of these procedural rights is, therefore, imperative and a hallmark of a sustainable environmental rights framework within a jurisdiction.

The Act attempts to institute procedural environmental rights in Nigeria by mandating public consultation prior to conducting any environment-impacting activities. It goes further to explicitly make provisions for access to relevant information relating to all nature of environmental activities by establishing a public registry where all documents relating to environmental activities should be deposited and openly accessible to the public at no fee.[54] It further subjects the approval of any environment-impacting activities to public control through an elaborate environment impact assessment procedure instituted in the Act which includes review panels, public hearings and submission of memorandum by potentially affected individuals. Essentially, this procedure is targeted at ensuring that an approval for any environment-impacting activity is only granted where it is proven, from the assessment, that it has minimal environmental impacts or significant environmental impacts that can be mitigated or justified in the circumstances.[55]

While the Act has good intentions and, cosmetically, appears to be an elaborate procedural framework, it is undermined by three fundamental legal and

[52] Report of The United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> accessed 14 November 2017.
[53]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Done at Aarhus, Denmark, On 25 June 1998.
[54] Section 57, EIA Act 1992.
[55] See Part II of the EIA Act 1992.

constitutional shortfalls which render it hollow, ineffectual and lacking any impact on environmental protection in the country. The first shortfall relates to the scope of its application to environments within the jurisdiction of states of the Federation under the current constitutional framework in the country. As discussed in the preceding section relating to the ACHPR Act, environmental protection as a subject is outside the exclusive legislative control of the Federal legislature. Consequently, federal enactments on the subject do not apply to environments within the states of the federation but only to environments in the Federal Capital Territory and other federal lands within the states of the federation. The Act, as a federal enactment, therefore, does not regulate procedural environmental issues within the states but only federal lands within these states. 'Federal lands' is defined by section 63 of the Act to mean lands that belong to the Federal Government of Nigeria in which Nigeria has a right thereon or has the power to dispose of and all waters on and airspace above those land.

Although the Act does not explicitly restrict its application to only federal lands (and several sections in Part II refer to state and local government areas),[56] any interpretation of its provisions as extending to environmental activities in the states and local governments will be unconstitutional. In reality, its application is restricted to the federal lands as defined in section 63. This is a significant blow to the environmental rights framework in the country as it leaves a gaping hole in respect of procedural environmental rights for activities within the states, where most degraded environments are found. This is further worsened by the fact that there are no statutes providing procedural environmental frameworks in any of the 36 states in the country.

Notwithstanding this shortfall, the Act can largely be utilised for the Niger Delta environmental situation as it applies to lands used for oil and gas development (being federal lands) from which most of the environmental pollution activities in the region occur. Therefore, public participation of the inhabitants of the host

[56] This is unsurprising considering that the Act was enacted as a Decree by the Military Regime in 1992, at a time when the Constitution was suspended and the country was effectively organised in a Unitary system of government with statutes from the Central government applicable throughout the component units in the country. However, with the transition to democratic governance under a federal system of governance in 1999 and the promulgation of the 1999 Constitution, the applicability of the Act must be judged based on the current constitutional delineation of legislative powers and any excess of legislative power excised from the Act.

communities in the approval of oil and gas fields development in the region is guaranteed under the Act. Even though the lands where the individuals in the region reside are state lands, the fact that they will be potentially affected by the proposed oil and gas activity on the federal land qualify them as 'interested persons' entitled to participate in the approval process for such activities. Consequently, while the Act falls short as a legal framework for environmental rights throughout the country, it has its relevance as a framework for procedural environmental rights for the Niger Delta region.

Nevertheless, the relevance of the EIA Act in environmental matters in the Niger Delta is undermined by the second shortcoming of the Act relating to fundamental flaws in its provisions which render it ineffective and hollow as a procedural framework. The most important of this shortcoming is the conferment of overriding power on the President to exclude any proposed activity from the requirement of an environmental impact assessment. Section 15(1)(a) of the Act provides that an environmental impact assessment shall not be required to be carried out in respect of any proposed activity where "the project is in the list of projects which the President, Commander-in-Chief of the Armed Forces or the Council is of the opinion that the environmental effects of the project are likely to be minimal".

In other words, the President is empowered to arbitrarily highlight a list of projects for which an environmental impact assessment should not be required. The only condition imposed by the Act for including a project on the list is that, in the opinion of the President, the environmental effects of such projects are likely to be minimal. No statutory criteria are indicated for how the President can come about such a conclusion. The conclusion that a project is likely to have only minimal environmental effects can only be reached after an impact assessment has been done and not before, so it defies logic that the President is empowered to determine that minimal effects are likely to result before an impact assessment is done and use that as a basis for exempting an impact assessment on a project. A clear case of putting the cart before the horse.

This power is also conferred on the Federal Environmental Protection Council (FEPC) by section 15 without any statutory criteria specified for such conclusion. Even if a criterion (or criteria) is specified, it will still defy logic that a conclusion which can only be reached after an impact assessment has been done can be used to exclude an impact assessment. Such inverse logic is detrimental to the

effectiveness of environmental impact assessment in Nigeria and is a pointer to the lopsided environmental regulatory framework in the country. What this means is that on the arbitrary determination of the President or the FEPC, citizens and individuals potentially affected by environment-impacting activities will be deprived of access to information regarding such projects and the opportunity to participate in the decision making regarding the approval of the project.

Another regulatory shortcoming in the textual analysis of the Act stems from the approval process of a project after the conduct of an EIA. The essence of an EIA is to determine the potential impact of an activity on the environment and the treatment of the EIA report is central to the effectiveness of the process.[57] Where the report indicates potentially significant adverse environmental effects, it is expected that the project will not be approved in other to protect the environment except where cogent and convincing measures are produced by the project sponsor to show how these effects can be satisfactorily mitigated or minimised. That is the whole essence of the EIA process.[58]

In consonance with this practice, section 40 of the EIA Act mandates the Federal Environmental Protection Agency (FEPA)[59] not to approve a project where it determines from the EIA report that the project is likely to cause significant adverse environmental effects unless the effects can be *mitigated* or *justified*. The exceptions allowed in section 40 for approving an environmentally adverse activity creates a problem in this instance. The term 'justified' is more worrisome as it implies that environmental pollution or degradation from proposed activities can somehow be rationalised as necessary or acceptable on some grounds. More so, it does not appear to connote that the project sponsor is required to take any steps to mitigate the adverse impacts provided these impacts are considered *justified.* The use of the disjunctive term 'or' in the provision indicates that they are alternative considerations by the regulators and a project with adverse environmental effects can be approved on any of the two criteria.

[57] See Environmental Protection Agency, 'Environmental Impact Assessment' 2017 <http://www.epa.ie/monitoringassessment/assessment/eia/> accessed 09 June 2017.

[58] David Lawrence, 'Environmental Impact Assessment' (2004) *Encyclopaedia of Chemical Technology* 12.

[59] This agency has been replaced by the National Environmental Standards and Regulations Enforcement Agency (NESREA) established under the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007.

When placed in the context of oil and gas exploration in the Niger Delta, this provision is often used to approve oil and gas developments which impact the environment because these projects are necessary for the economic survival of the country and are, therefore, justified. For instance, in *Gbemre,* Nigeria's Federal Government refused to implement the court's order to end flaring and joined the appeal by Shell because it argued that completely ceasing flaring will significantly affect oil exploration owing to lack of gas utilisation activities which will effectively mean shutting down most oil facilities to comply with the decision. In effect, gas flaring is justified for the time being seeing that it is necessary for continued oil exploration pending when the companies acquire the necessary gas utilisation facilities. Since section 40 does not define the criteria for ascertaining when significant adverse environmental effects are justifiable, it is left for the government and regulators to do so and this often means approving projects which are important for the economy even if they negatively impact the environment. As a result, most of the oil and gas projects in the Niger Delta which carry out gas flaring are approved by the regulators despite the significant adverse environmental impact of such projects.

Environmental pollution or degradation is never justifiable on socio-economic (or any other) grounds neither is it acceptable for the importance of a project to override the sanctity of the environment it impacts. The only acceptable solution for such projects is clear and convincing mitigation of the adverse environmental effects it is likely to create. Mitigation as a criteria for approving environmentally injurious activities under the EIA Act is also unsatisfactorily defined in section 63 to mean "the *elimination*, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement restoration, *compensation or any other means*". The inclusion of 'compensation or any other means' as a form of restitution for any damage to the environment undermines the relevance of EIA in Nigeria. It implies that the regulator can (and they often do) approve environmentally adverse projects once the project sponsor shows a clear plan to compensate the affected individuals for the adverse effects or is willing to palliate their environmental sufferings through *any other means.*

Thus, the major focus of the oil companies in the Niger Delta is ensuring effective compensation for the affected inhabitants for the environmental suffering brought

about by their exploration activities either through direct financial compensation or such diversionary measures like building hospitals, schools and roads so the people can overlook their environmental suffering.[60] While the impoverished people of the Niger Delta region often view compensatory and other financial rewards as sufficient, environmentalist and other stakeholders consider such approach a catastrophe as it monetises a serious problem and its long-term effects on the environment are monumental.

The only acceptable form of mitigation which should be sufficient is the elimination of the adverse environmental effects or the restitution of the affected environments. The EIA Act, through its provisions on the approval process of projects, creates a conducive environment for the Niger Delta inhabitants to sell their birth-rights (right to a clean and safe environment) for a pot of porridge (financial compensations or building of schools and hospitals). The essence of law is the protection of the vulnerable members of the society and not creating a framework for these members to be exploited by corporate behemoths with active government connivance and implicit support. Where statutory instruments such as the EIA Act institutionalises such practice, it becomes imperative for constitutional intervention to protect the vulnerable citizens and restore basic human rights to the inhabitants of the affected environments.

The effect of the textual flaws in the EIA Act is that although most oil companies carry out environmental impact assessments prior to developments in the Niger Delta, they are mostly done to satisfy the dry letters of regulatory provisions for the purpose of obtaining operational permits.[61] The genuine lack of desire by the regulatory bodies to enforce the EIA reports or even monitor the quality of the process is compounded by the permissiveness with which the Act treats projects with adverse environmental impacts.

The third shortcoming of the EIA Act as an environmental rights framework stems from judicial attitude to its enforcement by citizens in Nigeria. The conservative Nigerian judiciary relies on restrictive legal principles such as the *locus standi* principle to defeat claims by concerned individuals and organisations seeking to

[60] A Adedeji and R Ako, 'Hindrances to effective legal response to the problem of environmental degradation in the Niger Delta' (2005) 51 *UNIZIK Law Journal* 415–439.

[61] Ingelson, Allan & Nwapi, Chilenye, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10 *Law, Environmental and Development Journal* 35-56.

enforce quality EIA processes and this undermines any attempt to instil effective procedural environmental rights framework in the country. In *Oronto Douglas v Shell Petroleum & Ors,*[62] the claimant was an activist in the protection of the environment actively involved in the protection of the environmental rights, promotion of waste management and generally safe and sustainable environment. The respondents were jointly engaged in a project for the production of liquefied natural gas in a community in the Niger Delta. For the project to take off the respondents were required to do preliminary studies on the impact of the project on the environment in compliance with the EIA Act. The claimant was not satisfied that the respondents had satisfactorily adhered to the provisions of the EIA Act in their impact assessment hence he took an action in the Federal High Court against the respondents and the Federal Environmental Protection Agency seeking to block the project until a valid EIA had been carried out by the respondents. However, this important challenge was thrown away by the courts on the ground that the claimant lacked sufficient locus standi to file the suit challenging the EIA process as he lacked personal interest in the affected lands.

In *Shell v Isaiah,*[63] the Nigerian Supreme Court reversed a judgment of the trial court which held the appellant liable for environmental pollution and ineffective impact assessment merely on technical grounds, holding that the suit was improperly filed by the claimant and thus liable to be dismissed without a consideration of the merits of the complaint. Access to justice in environmental matters is one of the pillars of procedural environmental rights and by restricting the citizens' access to the courts to ventilate environmental concerns on technical grounds, these decisions render the environmental rights framework in the country ineffective. If citizens cannot challenge environmental decisions without facing these technical hurdles by the judiciary, then their environmental rights are left unprotected and exposed to governmental and corporate infringements in the course of oil and gas exploratory activities. In the Niger Delta, this is the common narrative that has led to the present widespread degraded state of the environment.

[62] Oronto Douglas V. Shell Petroleum Development Company Ltd. & Ors (1998) LPELR-CA/L/143/97.
[63] Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah (2001) 11 NWLR (Pt.723)168.

Constitutionalising environmental rights has the potential to address these challenges by removing the procedural and technical difficulties encountered in accessing environmental justice. For instance, a constitutional environmental right in Nigeria will allow a claimant to utilise the FREPR mechanism with its quick, truncated procedure to obtain environmental redress without facing technical hurdles including the locus standi principle which is inapplicable to FREPR proceedings. The simplified nature of pleadings and filing in FREPR proceedings also dispense with challenges in adopting the appropriate procedure for civil claims which undermines many environmental litigation in Nigeria. Even the often intricate jurisdictional issue of whether to institute a claim at the Federal High Court or State High Courts is obviated in FREPR suits as the Supreme Court has held that both courts have concurrent jurisdiction in fundamental rights cases and applicants can file a claim in either court of their choice.[64] Thus, the claimant in *Shell v Isaiah* would not have been prejudiced by filing his environmental claim at the State High Court rather than the Federal High Court as decided by the Supreme Court leading to the dismissal of his claim.

6.3 Constitutionalising Environmental Rights in Nigeria

From the foregoing discussions, it is evident that the shortfalls of the environmental regulatory framework in Nigeria necessitate a paradigm shift towards an environmental rights framework to curb the state sanctioning of pollution and wilful governmental neglect pervasive under the regulatory approach. However, the present environmental rights framework in the country is grossly insufficient in protecting the environment from regulatory failures. To be effective, environmental rights should be elevated to a higher, fundamental platform through incorporation into the Nigerian constitution as a means of guaranteeing their inviolability and supremacy over statutory drawbacks.

Not only that, constitutionalization places environmental rights in an elevated judicial position which trumps the various technical, restrictive principles and procedures bedevilling civil rights enforcement in Nigeria. It further creates a re-ordering of social values by attaching fundamental importance to environmental

[64] Jack v. UNAM (2004) 5 NWLR (Pt. 865)208 SC.

protection, sending a signal to individuals, corporations and the government to prioritise measures geared towards ensuring environmental sanctity over property interests (for individuals), economic incentives/short-term corporate goals (for corporations), and socio-development needs (for government bodies).

To achieve these goals, the nature of the normative constitutional right and placement of the rights within the constitution is essential in determining the effective level of a constitutional environmental right in Nigeria.

6.3.1 Normative Contents of the Constitutional Environmental Right

Formulating the normative contents of constitutional environmental rights in Nigeria is the consummation of the arguments in this thesis as it brings to fruition the clamour for the elevation of environmental rights in Nigeria's legal framework. The normative contents of rights in legal instruments, whether statutory or constitutional, play a major role in determining their legal enforceability. Framed tamely, improperly or with ambiguity and there is a risk of the right lacking legal bite and becoming redundant; framed too strongly or in utopian terms and there is a risk of the right conflicting with other important rights or being considered merely aspirational and subjected to a 'progressive implementation' interpretation by the courts, especially in countries with poor socio-economic development facing infrastructural challenges such as Nigeria. It is imperative, therefore, that the normative contents of the environmental right to be incorporated into the Nigerian constitution takes cognizance of the unique environmental circumstances in the country, particularly in the Niger Delta, and other surrounding circumstances necessary for making the right sufficiently enforceable and effective in curbing environmental pollution in the Niger Delta region.

Quintessentially, constitutional environmental rights in Nigeria should be based on the *coalesce anthropocentrism* model developed in this thesis as this ensures that the right addresses the three important rights' holders affected by environmental degradation – present humans, future generations and mother earth. As evidenced in the global constitution study in the Appendix, none of the 81 countries with explicit constitutional environmental rights addresses all three pillars of *coalesced anthropocentrism* in their constitutions; rather these

constitutions address mostly the human aspect of environmental rights and, in rare instances, nature's environmental interests (Ecuador and Bolivia's constitutions). Ecuador's Constitution which incorporates nature's environmental rights omits recognition of the environmental rights of future generations. Bolivia's Constitution comes closest to incorporating all three pillars of *coalesced anthropocentrism* as it incorporates the environmental rights of future generations and some aspects of nature's environmental rights but restricts the latter to rights for 'living things' in the environment, thus adopting a biocentric view of nature's environmental interests rather than an ecocentric view which covers the non-living components of the ecosystem such as rivers and lakes.[65]

Considering that Nigeria has so far not incorporated any form of environmental rights in its constitution, taking such step at this point should not be based on the anthropocentric antecedents of other countries but should adopt and reflect contemporary understanding of the interconnection and interdependence of present humans, future generations and nature in environmental protection.

The advancement of knowledge in environmental studies has presented an improved understanding of the need to shift the focus from environmental protection based on anthropocentric chauvinism to a broader view of environmental protection which is cross-species, trans-generational and centred around the pivotal role of the natural environment in sustaining all life species including humans and, therefore, worthy of legal protection of its intrinsic worth. This contemporary view of environmental protection should form the platform for greening Nigeria's constitution. Apart from instituting a formidable platform for reforming environmental protection in Nigeria, adopting this approach will set the Nigerian Constitution apart as a model for other countries seeking to better reflect the growing recognition of the natural environment in their constitutional set up.

Beyond the philosophical and ideological basis for canvassing the adoption of *coalesced anthropocentric* approach, there is also the practical impact of such constitutional reformatory approach particularly as it relates to addressing the environmental situation in the Niger Delta. The practical impacts will be analysed

[65] Article 33 of Bolivia's Constitution 2009 provides that "Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of *present and future generations, as well as to other living things*, so they may develop in a normal and permanent way."

by highlighting the individual impact each of the three pillars of coalesce anthropocentrism can have in the Niger Delta context.

6.3.1.1 Substantive Constitutional Environmental Rights in the Niger Delta

The conferment of an enforceable right to a clean and habitable environment creates a legal bulwark that can be relied upon by inhabitants of the region to restrict or prohibit environmentally polluting activities in the region already ongoing or before they are even commenced by the oil companies. This right can be utilised to restrict or prohibit oil and gas productions and developments approved by the government, asa constitutional right to a clean environment trumps economic considerations focused upon by the government in approving a majority of the oil prospecting activities in the region which pollute the environment.

Nevertheless, there is no gainsaying the fact that this will present implementation difficulties considering the excessive reliance by the country on oil and gas revenue for economic sustenance. The implementation difficulty is further compounded by the challenges of immediately requiring oil and gas corporations to upgrade their production facilities within a short time frame, considering the intensive capital requirements involved. It can be argued that it will be unrealistic to expect an immediate halt to environmentally injurious activities by oil and gas corporations in the short term, considering decades of investments by these corporations on their production facilities within this region.

In several cases, some of the oil and gas corporations have challenged statutory moves by the government to impose excessively strict environmental policies. In *Shell Nigeria Ultra Deep Limited v. the Federal Republic of Nigeria,*[66] Shell claimed 180m$ from the Nigerian government at the International Centre for Settlement of Investment Dispute (ICSID)[67] for revoking oil mining licences for non-compliance with environmental guidelines. In cases such as *Interocean Oil*

[66]ICSID Case No. ARB/07/18 <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/18> accessed 12 January 2017.

[67] Nigeria ratified the International Centre for Settlement of Investment Disputes (ICSID) Convention as far back as August 23 1965. The ICSID Convention has been implemented in Nigeria through the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act (Cap 120, Laws of the Federation of Nigeria, 2004).

Development Company and Interocean Oil Exploration Company v. The Federal Republic of Nigeria[68]and *Guadalupe Gas Products Corporation v. The Federal Republic of Nigeria,*[69]Nigeria was subjected to investor claims by foreign MNCs for regulatory activities which threatened their profits. The plight of the oil and gas corporations can be understood, as a shift in the nature of their production activities requires a gradual change, not just in the legal framework, but in associated subjects necessary to make this transition feasible, e.g. a reduction of gas flaring necessarily requires the opening up of the domestic gas market by the government to enable these oil companies market the associated gas domestically rather than flare it. Thus, the government cannot realistically leave the domestic gas market undeveloped in its current form and then mandate the oil companies to stop flaring gas but continuing oil production. It is an unrealistic expectation as there is no solution for the utilisation of the associated gas by the oil companies.

There is, therefore, some merit in advocating for a gradual implementation of the constitutional environmental right in Nigeria in view of the deeply entrenched economic reliance on oil and gas production in the country and the challenges of requiring an immediate shift from these oil production activities or ordering an immediate halt to these activities as a result of the resultant flaring of gas or potential for pollution arising from their use of outdated equipment. Where such orders are made, the chances of their implementation are quite slim and they are likely to be ignored by the executive charged with enforcing these orders. In *Gbemre v Shell*[70].the Federal High Court ordered an immediate halt to gas flaring by oil companies throughout the country. Considering that oil companies in the country flared more than 50 percent of their associated gas and to immediately halt flaring will mean halting oil production throughout the country entirely, this order was unrealistic leading to it being disregarded by the Federal Government and oil companies.

[68] ICSID Case No. ARB/13/2013. <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/20> accessed 01 May 2019.

[69]ICSID ARB/78/1 <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/78/1> accessed 01 May 2019.

[70] Jonah Gbemre v. Shell Petroleum Development Company Nigeria, Federal High Court of Nigeria, Benin Division, Judgment of 14 November 2005, Suit No. FHC/B/CS/53/05.

It is likely that if constitutional environmental rights are stringently utilised in the short term to excessively restrict or prohibit environmentally polluting activities, it will create a vicious circle where these judicial orders are ignored by the government and oil corporations and each disregard increases the likelihood for more judicial attempts to clamp down on the polluting activities leading to even more stringent (and likely unrealistic) order which will then be ignored by the government (without repercussions). Consequently, constitutional environmental rights are better utilised as gradual tools to hold the government accountable for environmental management, press the government towards a holistic review of environmental management systems and the introduction of environmental protection mechanisms that incrementally reduces the avenues for pollution by the oil corporations.

While it can be argued that participation in environmental decision making by the inhabitants as guaranteed under the Environmental Impact Assessment Act 1992 provides a pre-emptive tool for inhabitants to restrict potential polluting activities by submitting oppositions to such projects, this process significantly fails to protect the environmental interests of the inhabitants for two main reasons. First, the legal impediments embedded in the Act and constitutional limitations of its application discussed earlier in this chapter renders the process largely ineffective and mostly a mere administrative compliance mechanism without any impact. Second, the final decision on approving a project still rests with the government – the environmental regulator – and an approval for a project can be granted notwithstanding meritorious oppositions to the projects provided 'due process' in the EIA process was complied with. The inhabitants' right to challenge the process largely rests on non-compliance issues with the procedure and not the substantive outcome of the decision to approve a project, which is statutorily conferred on the regulatory body, as the Nigerian courts have held that they cannot substitute the expert regulatory body's assessment with that of the court.[71]

Consequently, in the absence of a procedural flaw in the EIA procedure or process for grant of a regulatory license or approval, the Nigerian courts will not interfere with an environmental project notwithstanding its potential consequences on the environment.[72] This principle which is the major flaw of the regulatory approach

[71] Okpala v Shell, supra, n 13.
[72] ibid.

as an environmental protection framework is the primary reason why a substantive environmental right is required, as instituting democratic and other procedural processes for environmental decision making is not sufficient if the final outcome cannot be substantively impeached. Boyle rightly asserted that-

> "Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption…The point is that procedures alone cannot guarantee environmental protection."[73]

Boyle's assertion indicates the need to supplement procedural rights in environmental protection with significant substantive rights which can be utilised to nullify democratically approved environmentally injurious projects. In the Niger Delta, the EIA Act which has been implemented since its promulgation in 1992 has not in any way changed the environmental pollution outlook in the region neither has it prevented the development of environmentally injurious oil projects in the region. Most of the recent cases of pollution in the region, such as the Bonga Oil Spill in 2011,[74] arose from projects which were granted regulatory approval under the EIA process. The inability of the inhabitants to substantively challenge the regulatory approvals left them helpless to prevent the implementation of the projects.

However, with a substantive constitutional environmental right, the inhabitants will be empowered to challenge the substance of these regulatory approvals even where they comply with the procedural steps. In such cases, the question before the court will no longer be on whether the procedure was complied with, but whether, despite the regulatory approval, the prospective project can potentially infringe on the claimant's constitutional right to a clean environment. To support this, the claimant can bring expert evidence in with conflict the expert findings and conclusions of the regulatory body in its approval or grant of licence decision. The constitutional right will, therefore, become a protective tool against 'democratic environmental destruction' and regulatory approvals will no longer be the

[73] A Boyle, 'Human Rights or Environmental Rights?: A Reassessment' <http://www2.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf > accessed 02 December 2015.

[74] A Omafuàire, 'Bonga Oil Spill: Group drags Shell to UK Court over $4bn compensation' *Vanguard,* 02 November 2017, <https://www.vanguardngr.com/2017/11/bonga-oil-spill-group-drags-shell-uk-court-4bn-compensation/> accessed 02 December 2017.

determinative factor in the commencement of prospective environmentally injurious projects in the Niger Delta.

This is a potentially huge transformative step towards protecting the Niger Delta environment, as the ability to restrict oil and gas development activities from commencing until such projects have implemented all relevant steps to prevent environmental pollution to the court's satisfaction becomes one of the criteria for oil companies to carry out activities in the region. Screening prospective energy production activities for environmental compliance will be a more effective tool in the short term than seeking an immediate halt to ongoing oil and gas production facilities which is best handled by obtaining judicial orders to compel tighter regulation of such activities to protect the environment. In this vein, the environmental regulator will no longer be able to grant exploratory and prospecting licenses/approvals to oil companies which have not instituted satisfactory plans and investments for gas utilisation to prevent gas flaring completely. In addition, regulatory approvals/licenses granted under the AGRA to oil companies to flare gas during oil production and regulatory approvals granted for limited effluent release into the environment under EGASPIN can be challenged and quashed by the courts for infringing on the constitutional right to a clean environment.

Further, government can be compelled through judicial orders to impose tighter environmental regulation of existing oil and gas production facilities which continue to produce gas flaring or release effluents into the environment. Through judicial enforcement of the constitutional environmental right, these corporations willhave their activities appropriately regulated, monitored and restricted to achieve a reduction of flaring or other forms of pollution by an order of court. The Nigerian government and environmental regulators have clearly shown an unwillingness to effectively regulate such activities, but rather grant regulatory approvals for their continuation. As a result, the inhabitants are left with only reactive compensatory reliefs when these facilities create the inevitable and foreseen environmental degradation. Substantive constitutional environmental rights remove the 'inevitability' about environmental pollution in the region by creating a preventive and proactive judicial platform for ensuring these facilities are rendered un-operational until they are satisfactorily shown not to possess any threat to the environment.

The efficacy of this substantive right in restricting environmentally polluting projects and shutting facilities creating pollution derive from its status as a constitutional right which prevails over every statutory regulatory process, rights, procedures, socio-economic considerations and developmental policies of the government. Thus, even though the potential closure of important oil and gas facilities on this basis may have significant economic impacts on the country's revenue, the courts will be constitutionally obliged to protect the fundamental right to a clean environment over such considerations. The decisions of the Costa Rican Supreme Court in *M.M Levy y Asociacion Ecologista Limonense v Ministerio del Ambiente y Energia*[75] and the Chilean Supreme Court in *Pablo Orrego Silva v. Empressa Pange SA*[76] are examples of how the courts accord constitutional environmental rights priority over developmental and economic considerations by respectively striking down an economically significant oil and gas deal entered into by the government and halting an important hydroelectric dam on environmental grounds. In these examples, the courts' intervention were preventive – halting potentially environmentally injurious activities before they have even commenced – and did not target the shutting down of ongoing production activities, even though their orders will steer the government towards tighter regulation of these ongoing activities adversely impacting the environment. In this regard, constitutional environmental rights in the Niger Delta will be useful in screening prospective oil and gas projects for environmental compliance and judicial remedies will be available to halt or restrict any prospective project that has negative environmental impacts. Judicial remedies can also be obtained to compel tighter environmental regulation by the government of existing oil and gas activities to protect the environment.

In effect, the primary impact of constitutionalising environmental rights in the Niger Delta goes beyond excessively seeking to restrict oil and gas production activities on account of environmental pollution, as this presents implementation challenges. Rather, it provides a platform for a more comprehensive approach to instituting mechanisms for protecting the environment by the courts while ventilating the right to a clean environment. This approach was adopted by the

[75]Supreme Court of Colombia Decision 2001-13295, Expediente 00-007280-0007-CO, 21/12/2001.

[76] Pablo Orrego Silva v. Empressa Pange SA Supreme Court of Chile 5th August 1993.

Supreme Court of Argentina in 2008 in *Beatriz Silvia Mendoza v. Argentina, M.*[77] The court issued a comprehensive decision based on the constitutional right to a healthy environment in which it ordered - regular inspections of all polluting enterprises and implementation of wastewater treatment plans; closure of all illegal dumps, redevelopment of landfills, and cleanup of the riverbanks; improvement of the drinking water, sewage treatment, and storm-water discharge infrastructure in the river basin; and development of a regional environmental health plan, including contingencies for possible emergencies. Importantly, the court ordered that any violations of the timelines established by the Court would result in daily fines against responsible politicians.[78]

Also, in the Peruvian case of *Pablo Miguel Fabián Martínez and Others v. Minister of Health and Director General of Environmental Health,*[79] the Constitutional court, relying on the constitutional right to a clean environment, ordered the government to ensure that people in the Peruvian village of La Oroya finally received medical treatment for their long-term exposure to lead and other heavy metals emitted by a nearby smelter.

6.3.1.2 Constitutional Rights of Future Generations in the Niger Delta

The environmental challenge in the Niger Delta, as in every other environmental context, is trans-generational, affecting future generations of the inhabitants in the region. The problem began in the region shortly after the commencement of commercial exploitation of oil in the region in 1958 and since then, different generations of the inhabitants have had the same problem passed down to them by their parents. Protecting the environment for future generations of the region is, therefore, an important pillar of a potential constitutional environmental right encapsulated in *coalesced anthropocentrism* model. Weiss argues strongly in favour of incorporating intergenerational equity and protection of future generations in constitutional and legal instruments. She opined that-

> "Future generations really do have the right to be assured that we will not pollute groundwater, load lake bottoms with toxic wastes, extinguish

[77] Beatriz Silvia Mendoza v. Argentina, M. 1569 (Supreme Court of Argentina, 2008).
[78] Ibid.
[79] Exp. No. 2002–2006-PC/TC (Constitutional Court, 2006).

> habitats and species or change the world's climate dramatically—all long-term effects that are difficult or impossible to reverse—unless there are extremely compelling reasons to do so, reasons that go beyond mere profitability."[80]

Weiss' argument, however, creates a little difficulty in reconciling the environmental interests of future generations with the environmental needs of present generations seeking to harness the benefits of the environment to satisfy current human needs. Although she proposed that future generations' environmental interests can be sacrificed for 'extremely compelling reasons…beyond mere profitability', the ambiguity of this description does little to address this concern. In this regard, Skagen Ekeli's proposition that the environmental interests of future generations should be restricted to 'bio-physical needs' essential to their survival creates a clearer evaluative criterion for protecting the interests of future generations as it is easier to determine the biological and physical ('biophysical') needs of future generations based on the essential characteristics and conditions necessary for human survival.[81] Weiss conceded the need for a more restrictive view of the normative rights of future generations in order not to undermine the rights of the present generations, stating that-

> "[L]imitations [on the present generation] should be applied very narrowly, lest the rights of future generations develop into an all-purpose club to beat down any and all proposals for change."[82]

Applying a narrow scope of future generations' environmental rights is best achieved by adopting Skagen Ekeli's proposal for restricting it to bio-physical needs. In this sense, the concern is not on aesthetics of the environment which present generations will leave to future generations but leaving an environment which is safe and healthy for future generations to live and thrive in. Therefore, a safe and healthful environment to meet the biophysical needs of future generations will focus on ensuring clean air, clean water (groundwater, rivers and lakes) and non-polluted soils which will enable future generations to easily obtain

[80] E Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *Am. J. Int'l L.* 206.

[81] Kristian Skagen Ekeli, 'Green Constitutionalism: The Constitutional Protection of Future Generations' (2007) 20(3) Ratio Juris 378–401.

[82] E Weiss, 'Our Rights and Obligations to Future Generations for the Environment' supra, n 80, 206.

basic environmental goods (farm produce, crops, fishes) for their sustenance and survival.

The principle of sustainable development frequently referenced in international and domestic legal instruments exemplifies the consideration given to the needs of future generations by governments and policymakers around the globe. The Brundtland Report, which offers the most accepted definition of sustainable development, describes it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[83] and the Rio Declaration reinforced this concept of owing a duty to all people, both today and in the future, stating, 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'[84] The proclamation of the 17 Sustainable Development Goals 2015[85] is also geared at ensuring developments that protect the trans-generational interests of humankind.

Some binding international legal instruments also oblige signatories to protect the interests of future generations. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides that "water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs."[86] At the domestic levels, the Constitutions of several countries such as Bolivia,[87] Norway[88] and South Africa[89] provide enforceable environmental rights for future generations.

Three different models of enshrining the environmental interests of future generations have been proposed and debated in the literature – the courts,

[83]Report of the World Commission on Environment and Development, ch.2(1), U.N. DOC.A/42/427 (1987), available at <http://www.worldinbalance.net/agreements/1987-brundtland.html> accessed 14 July, 2016.

[84] Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

[85] See UN, 'Sustainable Development Goals 2015', available at <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 14 July, 2018.

[86]Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 2(5)(c), Mar. 17, 1992, 31 I.L.M. 1312.

[87] Article 33, Constitution of the Plurinational State of Bolivia 2009.

[88] Article 112, Constitution of Norway, 1814 as amended in 2014.

[89] Section 24, Constitution of South Africa 1996.

ombudsmen and guardianship (trustees) system.[90] The courts act as a model for protecting the interests of future generations through its judicial orders and mechanisms which are deployed to restrict acts that impinge on the interests of future generations. In some countries, the courts have instituted measures permitting present generations to commence proceedings as representatives of the interests of future generations. In the 1994 case of *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources*,[91] the Supreme Court of the Philippines granted standing to 44 minors to sue on behalf of themselves and future generations because of concerns about unsustainable logging in the country which, it was claimed, could affect the ability of future generations to benefit from the natural resources of the vast forests in the country.[92] In the United States, the 2015 decision of a US Federal District Court in Oregon to grant standing to a group of children to sue on behalf of the environmental interests of future generations in respect of climate change concerns in *Juliana v United States*[93] has opened a new vista of litigation for future generations in the country. The court opined that climate change concerns affect the environmental interests of future generations and judicial mechanisms should be available for present generations to protect such interests.[94]

The second model relies on the institution of an ombudsman by governments to represent the interests of future generations and ensure that regulatory policies and decisions do not infringe on such interests. These ombudsmen, sometimes

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[90] Science and Environmental Health Network, 'Models for Protecting the Environment for Future Generations' (2008) The International Human Rights Clinic at Harvard Law School <http://www.law.harvard.edu/programs/hrp> accessed 08 November 2017.

[91] Minors Oposa v. Secretary of the Department of the Environment and Natural Resources (S.C., January 1994) (Phil.), 33 I.L.M. 173 (1994).

[92] In granting standing to sue, the court stated that 'We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned. . . ". ibid, 835.

[93] United States District Court, D. Oregon, Eugene Division, 217 F.Supp.3d 1224 (D. Or. 2016). Judge Aiken, delivering her ruling in the case stated that "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."

[94] Similar litigation on behalf of future generations are also sprinting up in several places. For instance, Greenpeace and the Nature and Youth environmental group recently filed a lawsuit in November 2017 over Norway's failure to abide by its constitutional obligation to safeguard the environment for future generations. The lawsuit challenges 10 licenses issued by the Norwegian government for exploration in the Barents Sea and seek to nullify them in order to protect the interests of future generations. See David Leestma, 'Groups Sue Norway Over Failure to Protect Environment for Future Generations', *Ecowatch,* 17 November 2017 <https://www.ecowatch.com/norway-climate-lawsuit-2510288916.html> accessed 08 December 2017.

appointed as commissioners, serve as compliant mechanisms for redressing areas of concern for sustainable development issues and are other times a branch of the executive established for developing governmental policies that accord with sustainable development. They, therefore, come in different forms. The U.K. Sustainable Development Commission and the Israeli Commission for Future Generations[95] are examples of executive commissions established to develop sustainable development policies that protect future generations. On the other hand, the Canadian Commissioner of the Environment and Sustainable Development and the Parliamentary Commissioner for Future Generations established by the Hungarian Parliament in November 2007[96] are examples of Ombudsmen system for protecting the interests of future generations using single commissioners rather than a government department or agency. In whatever form they take, the ombudsman system provides a layer of review to ensure that the executive and legislative branches take into account the interests of future generations in a healthy environment.

The guardianship or trustee system utilises the appointment of specific guardians to act as representatives of future generations in different contexts and to propagate programmes or projects that ensure their interests are adequately protected. Guardianships require present generations (the guardians) to protect the best interests of future generations (the wards). Trusteeship is a concept similar to a guardianship but is governed by a fiduciary duty.[97] Guardians or trustees usually accomplish their task through litigation on behalf of future generations as they are conferred with the legal personality, power and responsibility to institute proceedings on behalf of future generations.

Ekeli proposes an additional model outside of the above three - the democratic representation model- whereby future generations will be reserved a fixed number of parliamentary seats in the federal and regional legislature to promote the passage of laws for the benefit of future generations.[98] This model seeks to address concerns over the adverse impact that legislation passed by present

[95] Commission for Future Generations operated pursuant to enabling legislation passed by the Knesset, Knesset Law (Amendment No. 14), 5761-2001.
[96] Law CXLV of 2007, § 10, 164/2007 Magyar Közlöny [MK.] 12426-12429 (Hung.) (amendment to Law LIX of 1993).
[97] 'Models for Protecting the Environment for Future Generations', supra, n 77, 9.
[98] K Ekeli, 'Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People' (2005) 18 *Journal of Agricultural and Environmental Ethics* 429–450.

generations affect the environmental interests of future generations. By having democratic representatives in legislative bodies, therefore, it is expected that such interests will be protected by such representatives in every legislative instrument. Challenges over the modalities for incorporating this model into current political electoral systems in most democracies is a likely obstacle to the implementation of this model which holds good prospects for protecting future generations' environmental interests. Additionally, it is doubtful the impact that a few representatives in large legislative bodies can have in advancing environmental interests of future generations, seeing they can very easily be out-voted by the majority of present generations' representatives who may, in all likelihood, consider their proposals as utopian, excessively idealistic and an unworkable restraint on the enjoyment of environmental goods by the present generation.

In the Niger Delta context, enshrining the rights of future generations in a prospective constitutional environmental right will create a legal obligation on the executive and legislative bodies in the country to institute necessary measures to protect the environment for the future generations of the inhabitants of the region. These measures can include the adoption of any of the above-mentioned models for protecting the rights of future generations – particularly the ombudsman and guardianship models- and the incorporation of such considerations in environmental impact assessment criteria by the regulatory bodies. Currently, environmental impact assessments for projects in Nigeria (majorly oil and gas development projects in the Niger Delta) do not include any consideration of the potential environmental impacts on future generations. There is no legal or constitutional obligation for such consideration to be included in EIA criteria. Constitutionalising the rights of future generations will create such legal obligation on the regulatory body and the relevant corporations executing environmental-impacting projects which, if not fulfilled, can be compelled through the courts by individuals and concerned environmental groups.

Further, all future environmental legislation will be constitutionally obliged to incorporate protective mechanisms for the rights of future generations. Importantly, legislation on different subjects which in any way undermine the sustainable development of the environment for future generations can be challenged on constitutional grounds and overturned to such an extent. The same result goes for any regulatory approvals/licenses/policies/projects which fail to

incorporate sustainable development principles as a means of preserving the environment for future generations. Seeing the inextricable links between the concept of sustainable development and the environmental rights of future generations, this will constitute a constitutionalization of the concept of sustainable development in the Niger Delta region and the rewards will be reaped by future generations through the actions of concerned persons in the present generation.

Regarding the appropriate model to be adopted, the courts will remain the predominantly effective model for protecting such interests as the arbiter of the rights and liabilities of the present and future generations.[99] As revealed in the discussions in this chapter, the Nigerian judiciary is conservative and generally adopts technical, restrictive doctrines, principles and interpretations with respect to environmental claims (as in other areas). Decisions such as *Minor Oposa* and *Juliana v US* cannot be expected of the Nigerian judiciary, as it difficult to see the courts granting standing to sue for the interests of an unascertainable future generation seeing how it even denies standing to living humans in the present generations to sue over environmental concerns.[100] But with an explicit constitutional right for future generations, there is a clear enforceable right which can be enforced through the courts by concerned individuals and environmental groups acting on behalf of future generations. The problematic issue of standing is also consequently obviated by the Fundamental Rights Enforcement Procedure Rules exclusively applicable to fundamental rights in the constitution which obliges the court to entertain suits from all concerned persons regardless of their interests or connection to the claimant. On this basis, environmental groups and individual activists can constitute themselves into guardians for the interests of future generations and embark on rigorous litigation to guard against any encroachment on such rights. The combination of the court and guardianship models to protect the rights of future generations creates an effective framework for guarding these rights.

The ombudsman model is also another approach that can arise from the government's discharge of an ensuing constitutional obligation to protect the

[99] B Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7(1) *Transnational Environmental Law* 69-87.
[100] Oronto Douglas v Shell BP, supra, n 57.

environment for future generations. However, considering the regulatory nature of this model and the experience of poor regulatory effectiveness in Nigeria, its potential effectiveness is doubtful, particularly with the difficulty in reconciling its potential role alongside other existing regulatory bodies in the environmental sector in Nigeria.

In summary, incorporating the rights of future generations as part of a prospective constitutional environmental right in Nigeria will ensure that future generations in the Niger Delta region have enforceable constitutional rights protectable in the present times by appropriate persons and organisations. Legal proceedings can be instituted by activists and environmental groups to compel the government to implement tighter regulatory controls of activities, especially in the oil and gas sector, which have the potential to affect the future environmental viability of the region even if not presently harmful to the present generation.[101]

6.3.1.3 Constitutional Rights of Nature in the Niger Delta

Nature and its complex, inter-woven ecosystems play an important role in sustaining all life forms within an environment. Protecting the environment, therefore, includes the recognition of the intrinsic rights of the natural environment[102] and the incorporation of such rights in every legal expression of the environmental rights of humans. Constitutionalising environmental rights should, as a result, include the constitutional recognition of the rights of mother earth. In the Niger Delta context, protecting the natural environment through constitutional environmental rights is just as important as protecting the environmental rights of the human inhabitants.

While attention is often focused on the human cost of environmental degradation in the Niger Delta, the natural ecosystem in the region and its sustainability is equally severely affected as entire swamps, mangrove forests and other naturally occurring features of the natural environment are constantly eroded by pollution in the region. The scale of the threat of environmental degradation to nature in the

[101] Science and Environmental Health Network, 'An Environmental Right for Future Generations: Model State Constitutional Provisions & Model Statute' (2008) The International Human Rights Clinic at Harvard Law School <http://www.law.harvard.edu/programs/hrp> accessed 08 November 2017.

[102] The natural environment is referred to as 'Mother Earth' in legal instruments such as the Universal Declaration of the Rights of Mother Earth 2010.

Delta region was brought to the fore by the United Nations Environment Programme (UNEP) Report on environmental assessment in the region 2009 - 2011.[103] The report highlighted the deleterious impacts of degradation in the region on two important components of nature- animals (fishes and wildlife); and bio-diversity including the delicate mangrove forests and ecosystem in the region. Recounting the destruction of wildlife by environmental degradation in the region, the report stated that-

> "Physical contact with oil destroys the insulation properties of fur and feathers, causing various effects in birds and fur-bearing mammals. Heavily oiled birds can also lose their ability to fly, as well as their buoyancy, causing drowning. In efforts to clean themselves, birds often ingest oil, which may have lethal or sub-lethal impacts through, for example, liver and kidney damage."[104]

Fishes and other sea-based creatures in the region are also destroyed by the severe pollution of the surface waters in the region, depriving them of their natural habitat and resulting in the depletion of their numbers and ability to reproduce and replenish their stock.

Bio-diversity in the region is similarly affected by the degradation with swamps and mangrove forests often destroyed by pollution. These mangrove forests are an important aspect of the natural ecosystem and are crucial to the maintenance of biodiversity in the region. The UNEP report stated that-

> "Mangrove ecosystems, together with seagrasses and coral reefs, are among the world's most productive natural ecosystems…Consequently, mangroves are not just ecologically significant but are critical to the livelihood and food security of the Delta community".[105]

The Niger Delta has the third largest mangrove forests in the world and the largest wetland ecosystem in Africa[106] which are strategically important for sustaining

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[103] 'Environmental Assessment of Ogoniland', United Nations Environment Programme 2011, <https://postconflict.unep.ch/publications/OEA/UNEP_OEA_ES.pdf> accessed 09 November 2016.

[104] ibid, 39.

[105] ibid, 152.

[106] United Nations Development Programme (UNDP), 'Niger Delta Biodiversity Project', 2007 Global Environment Facility (GEF) The GEF's Strategic Programme for West Africa (SPWA) – Sub-component Biodiversity, UNDP GEF PIMS no.: 2047 GEFSEC Project ID: 4090.

humans in the Delta region. Nevertheless, the constant environmental pollution in the region results in –

> "smothering of fringing mangroves, alteration of surface topography and hydrology, acidification, accumulation of heavy metals and water contamination, which together in the Niger Delta have resulted in damage to vegetation and killing of fish…Importantly, hydrological changes, such as increased salinity or lack of regular influx of freshwater to mangrove communities, may lead to degradation and ultimately destruction of the mangrove community".[107]

The impact of such degradation on nature's delicate systems can be seen in photographic evidence recorded by the UNEP assessment team in Figures 15 and 16 below-

Figure 15- Destroyed portions of a mangrove forest by oil exploration activities

Source: UNEP Ogoniland Report 2011

[107] UNEP Report, supra, n 103, 153.

Figure 16: Destroyed portions of a swampy vegetation by oil exploration activities

Source: UNEP Ogoniland Report 2011

The infringement on the sanctity of the natural environment in these forms can be unconnected with the infringement on the rights of the resident human population to a clean environment, as the affected mangrove forests and ecosystem are often remotely located away from human habitations. Additionally, the right of the wildlife (such as birds and fishes) in the region to survive and thrive in their natural habitat may not be adequately covered in an expression of the human right to a clean environment in a prospective constitutional environmental right. While a human right to a clean environment can be liberally interpreted to include the protection of other components of the ecosystem vital for human sustenance, such interpretation is unlikely to be made by the conservative Nigerian judiciary. Moreover, even where such interpretation is adopted, the anthropocentric nature of the right will only protect these aspects of the natural environment to the extent of their relevance to human satisfaction and not necessarily to the extent required for their own intrinsic sustenance. Yet, these essential components of the natural environment cannot be left fundamentally unprotected from the same source of environmental degradation as those suffered by humans, seeing the inter-dependence of humans on them.

In this regard, it is essential that a prospective constitutional environmental right should incorporate an explicit recognition of the rights of the natural environment

to sanctity, sustenance and protection from all forms of degradation from environment-impacting activities. Conferring such constitutional right on nature will empower environmental activists and non-governmental organisations to take up active roles in ensuring the protection of the natural ecosystem in the region primarily through litigation challenging regulatory licenses, approvals or oil field developments prejudicial to the natural environment.

Additionally, nature's intrinsic interests will become an integral criterion in every environmental impact assessment procedure for oil field developments. This will be achieved in either of two ways- the legislature amends the EIA Act 1992 to incorporate nature's environmental interests as mandatory criteria to be considered by the regulatory body and oil companies in EIA procedures in compliance with the constitutional mandate on nature's rights; or a court order is obtained through appropriate litigation declaring nature's interests an inviolable consideration in every EIA procedure in compliance with the constitutional mandate on nature's rights. In both instances, constitutionalising nature's rights in Nigeria will open a new vista for the protection of the natural environment in the region from degradation arising from oil producing activities.

Finally, the constitutional obligation on the government arising from nature's constitutional rights can be used as a platform to compel the Nigerian government to establish institutional mechanisms for protecting the natural ecosystems in the Delta region. This institutional mechanism may include setting up a commission or government parastatal charged with the responsibility of overseeing the preservation of nature's sanctity in the course of oil and gas exploration in the Niger Delta and elsewhere around the country. The government can be compelled to institute such mechanisms through legislative instruments implementing the new constitutional right or public interest litigation seeking such remedy from the courts. In *MMDA v. Concerned Citizens of Manila Bay,*[108] the Supreme Court of the Philippines ordered the setting up of the Manila Bay Advisory Committee to oversee the environmental protection of the Manila Bay for the benefit of the residents around the bay. This decision demonstrates the use of judicial powers to compel regulatory reforms and institute regulatory mechanisms by the executive arm of government to protect, preserve and fulfil important

[108] G.R.No. 171947-48, Supreme Court of the Philippines, 18 December 2008.

constitutional rights. Constitutionalising nature's rights will enable the Nigerian courts to adopt the *Manila Bay* approach with respect to the protection of the natural environment as there will be an enforceable constitutional platform to base such judicial coercion of regulatory reforms by the government.

6.3.2 Placement of the Constitutional Environmental Right

The placement of a prospective constitutional environmental right within the constitutional document is equally as important as the normative contents of the rights in the Nigerian context. The Nigerian constitution is an amalgam of enforceable and non-enforceable rights and obligations with different chapters of the constitution carrying slightly different weights in relation to their justiciability before courts of law, the alteration process and enforcement mechanisms/procedures. As a result, deciding which chapter to place a prospective environmental right is an important task with bearings on its potential effectiveness and sustainability as an environmental rights framework in the country.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) comprises eight Chapters and seven Schedules. Essentially, seven of the eight chapters (Chapters I, III, IV, V, VI, VII and VIII) provide substantive and enforceable provisions relating to governance, civil and political rights/procedures and judicial matters while one chapter (Chapter II) provides aspirational objectives and policy foundations for governance in the country which are explicitly declared non-enforceable by the Constitution.[109] Out of the seven enforceable chapters, only Chapter IV (sections 33-46) dealing with fundamental rights has an instituted fast-track mechanism for judicial remedies for aggrieved persons[110] while enforcement of the rights in the other chapters are subjected to the normal cumbersome civil litigation procedures in the country.[111] As a result, only the rights in Chapter IV are capable of expeditious enforcement through the courts.

[109] Section 6(6)(c).

[110] Section 46 of the Constitution and the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 made pursuant to section 46.

[111] Although Chapter VII provides for Election Petition Tribunals for election disputes distinct from the conventional civil litigation procedure, this process is technical and cumbersome in its own way, even though the constitution imposes strict timelines for resolution of the disputes. See Section 285 and the Sixth Schedule of the Constitution and the Electoral Act 2010 (as amended).

In terms of alteration of the constitution, although the procedure is the same for all chapters in the constitution, there is a bifurcation of the approval threshold by parliament between Chapter IV and the other chapters. Section 9 of the constitution stipulates the procedure as requiring a bill for alteration to be passed by the votes of not less than two-thirds majority of all the members of both houses of the National Assembly – the Senate and House of Representatives- and approved by resolutions of the Houses of Assembly of not less than two-thirds of all the States.[112] However, for an alteration of Chapter IV dealing with fundamental rights, the bill must be passed by the votes of not less than four-fifths majority of all the members of both houses of the National Assembly before ratification by a two-thirds majority of the Houses of Assembly of the States. Mathematically, this means that at least 85 of the 109 members of the Senate and 288 of the 360 members of the House of Representatives must vote in support of an alteration to Chapter IV as against 72 and 240 votes respectively. The higher threshold of four-fifths majority for altering Chapter IV makes the rights engrained therein more secure and less susceptible to tinkering by the political elites through the legislature charged with constitutional alteration responsibilities.

In deciding the chapter to place a prospective environmental right, the current framework of the Constitution narrows the options to only three chapters- Chapters II, III and IV- which are the only chapters dealing with civil, political and socio-economic rights in the Constitution. Chapter III focuses exclusively on citizenship acquisition, dual citizenship and denunciation of citizenship and is thus not suitable for placing environmental rights. Placing the rights in Chapter II will not be novel as the only reference to environmental matter in the Constitution is found in this chapter in section 20. Moreover, this chapter includes several extensive provisions on socio-economic rights and principles including freedom, equality and social justice;[113] economic development;[114] educational opportunities;[115] non-discrimination and promotion of cultural rights and practices.[116] Therefore, one option is to expand section 20 by incorporating explicit provisions relating to the right to a clean environment and the other elements of *coalesced anthropocentric* environmental rights. The major problem

[112] Section 9(2).
[113] Section 17.
[114] Section 16.
[115] Section 18.
[116] Section 21.

with this option is that all the rights and duties in Chapter II are wholly unenforceable and are merely declaratory and environmental rights incorporated therein will become hortatory, symbolic and mostly irrelevant.[117]

As a result, environmental rights are best placed amongst the fundamental rights provisions in Chapter IV of the Constitution for several reasons. Placing environmental rights amongst the other fundamental rights in Chapter IV evinces the high importance attached to the right and renders it equal in significance to the traditional fundamental rights in the constitution. In addition, it renders the right more secure and less susceptible to tinkering by the political elites when environmental rights become an obstacle to the unrestricted pillaging of the environment in the Niger Delta region to satisfy short-term economic and developmental goals. Further, and perhaps more importantly, inclusion in Chapter IV grants access to expeditious judicial relief for environmental concerns through the FREPR Rules and enables environmental matters to bypass the cumbersome civil litigation procedure that is the bane of rights enforcement in Nigeria.

Importantly, also, there is the resultant judicial liberalism in interpreting environmental rights as part of the fundamental rights in the Constitution by the Nigerian courts. Although the Nigerian courts are generally conservative in interpreting civil rights, fundamental rights in Chapter IV constitute an exception to this approach as the courts adopt a liberal, generous and proactive approach in interpreting Chapter IV rights. This approach was reiterated by the Nigerian Supreme Court in the 2017 case of *Nweke v State* involving fundamental rights in Chapter IV, where the court stated that-

> "it is a formidable prescription that their provisions should not be subjected to 'the austerity of tabulated legalism.' On the contrary, they [their provisions] ...call for a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to...,"[118]

The 'austerity of tabulated legalism' refers to technical, restrictive legalistic principles that are unduly relied upon by the Nigerian courts to restrict many rights enforcement processes brought before them. While such austere 'tabulated legalism' continues to hold sway in regular civil proceedings, and even in the

[117] Section 6 (6) (c). See NNPC v Fawehinmi (1998)7 NWLR pt. 559.
[118] Nweke v. State (2017) LPELR-42103(SC). See also Odubu v. Stephen & Ors (2012) LPELR-19792.

enforcement of other constitutional rights,[119] Chapter IV rights benefit from a break from this tradition in favour of more liberal interpretative stance by the courts. This is brought about partly by the liberal principles introduced by the FREPR Rules which enjoin the courts to expansively and liberally interpret and apply the fundamental rights with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.[120]

The FREPR Rules further calls for the court to proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.[121] These principles have steered the courts towards a liberal approach to fundamental rights which constitutional environmental rights will benefit from. A liberal approach to interpreting constitutional environmental rights will see the court willing to liberally expand the right to cover every sinew of environmental preservation measures possible in interpreting the rights and in handing down orders and declarations upon suits brought to enforce these rights.

6.4 Conclusions

This chapter has examined the environmental regulatory and environmental rights framework in Nigeria and made a case for the introduction of constitutional environmental rights in the country as a way of addressing the deep-rooted environmental issues in the Niger Delta region. The chapter argues that for constitutional environmental rights to be effective in solving the Niger Delta environmental challenges, they should be framed in the *coalesced anthropocentrism* model developed in this thesis. This will ensure that the constitutional right addresses the rights of present and future generations of people in the Niger Delta as well as recognise and protect nature's intrinsic rights in the region covering the mangrove forests, swamps and other non-human habitations in the region.

[119] See, for instance, the Supreme Court's legalistic interpretation of Section 285(6) & (7) of the Constitution relating to the election petition rights of an aggrieved candidate in an election in PDP & Ors v Shettima & Ors (2012) 6 NWLR Pt 1232 pg. 15.
[120] Paragraph 3(a) FREPR Rules 2009.
[121] Paragraph 3(d).

The chapter also identified the implementation challenges facing the utilisation of constitutional environmental rights in enforcing environmental compliance, particularly in the oil and gas sector, considering its vital role in the economic sustenance of the country. The chapter, therefore, emphasises the capacity of constitutional environmental rights to be used as a tool for ensuring environmental accountability by screening prospective environment-impacting activities for compliance with environmental standards and compelling the government to impose tighter regulatory controls in the oil and gas sector in order to protect the environment.

While environmental laws have become commonplace across the globe, too often they exist mostly on paper because implementation and enforcement is irregular, incomplete, and ineffective. In developing countries, this irregular and ineffective implementation and enforcement is mainly due to the prioritisation of economic and developmental needs over environmental protection. Attempting to use constitutional environmental rights in the Niger Delta to directly undermine economic development of the country through excessively restricting oil and gas production activities will be counter-productive as it will lead to even less implementation and enforcement of the constitutional environmental rights. To ensure effective implementation and enforcement, therefore, the constitutional environmental right should be utilised in such a way that it is compatible with economic development of the country while still promoting environmental accountability and protection. Seeking to use environmental constitutionalism to directly challenge economic development in a developing country is a counter-productive strategy with very minimal chances of success.

Having established a clear picture of how constitutional environmental rights can be implemented in Nigeria, including the normative contents and placement within the constitution, chapter 7 will narrow down the analysis to a discussion of how constitutional environmental rights can potentially address the specific fundamental environmental challenges in the Niger Delta discussed in Chapter 1. This will reveal how constitutionalization is an effective solution to the environmental degradation in the region as it provides cures for the root causes of the problem, rather than merely treating the symptoms, as other solutions tend to do.

CHAPTER SEVEN

IMPACTS OF CONSTITUTIONALIZATION ON THE NIGER DELTA ISSUES

7.1 Introduction

As discussed in Chapters 4 and 5 of this thesis, there is a link between constitutionalization of environmental rights and the ecological footprint of a country.[1] While the environmental problems in the Niger Delta transcend concerns about Nigeria's ecological footprints – Nigeria has a relatively low ecological footprint[2]- the unique environmental problems facing the region can be similarly impacted by constitutionalising environmental rights. Constitutionalising environmental rights has the potential to redress the fundamental causes behind the continued environmental despoliation in the region as identified and discussed in Chapter 1. This chapter analyses the nature of these impacts and how they contribute to redressing the environmental problems in the region.

7.2 Impact on the Weak Environmental Legal Framework

Nigeria's environmental law framework is critically weak, disjointed and unsustainable as a protective framework for securing an ecologically balanced environment and this is one of the root causes why the environment in the Niger Delta is left largely unprotected. The absence of a concrete framework for regulating environment-impacting activities throughout the country is particularly felt in the Niger Delta where oil and gas activities are carried out, as few activities have a destructive environmental impact as much as oil and gas exploration. This shortfall in the environmental law framework has a constitutional root as the absence of any clear delineation of environmental powers between the federal and state governments creates several cracks through which environmental pollution activities continue to escape regulatory policing.

[1] See the discussions in Chapter 5.

[2] Nigeria ranks 18th out of 140 countries in terms of countries with low ecological footprint. See the Happy Countries Index 2018, <http://happyplanetindex.org/countries/nigeria> accessed 06 February 2018.

Faced with this critically weak legal framework, residents of affected communities, environmental activists and the judiciary have an uphill task holding the government environmentally accountable as they are handicapped by statutory bottlenecks/approval of these activities and an unenforceable constitutional obligation on the government to protect the environment in section 20 of the constitution. This leaves tort law litigation for resultant environmental damage or a resort to environmental violence[3] by the inhabitants of the communities as the only options for addressing the problem.

Constitutionalising environmental rights in Nigeria addresses this shortcoming by engendering stronger environmental laws, nullifying statutory/regulatory approvals of pollution in any form, instituting enforceable constitutional obligations on the government to protect the environment and creating a sustainable platform for citizens, environmental activists and the judiciary to hold the government and oil companies environmentally accountable for any activity that impinge on environmental sanctity. As Boyd argues, one of the greatest measurable impacts of constitutional environmental rights is in relation to stronger environmental laws that follow the introduction of environmental rights into the constitution.[4] This is based on the resultant constitutional obligation on the government to take relevant steps to protect and fulfil these rights which require introducing, revising and upgrading legislation to tackle environmental degradation in its various forms. This outcome can be seen in several examples of countries where constitutionalising environmental rights has seen an immediate upgrade on the existing environmental legal frameworks. In South Africa (1996)[5] and Kenya

[3] A lot of violence has erupted in the Niger Delta region over the past decades spurred by the poor environmental situation in the region. The rise of various militant groups, the blowing up of oil pipelines and platforms and various ethnic revolutions have been witnessed in the region all protesting the environmental neglect of the region. Also, various human rights violations have resulted from the government and oil companies seeking to quell the environmental uprisings in the region such as the execution of Ken Saro wiwa and the 9 Ogoni environmental activists in the region in 1993. For an extensive discussion of the cycle of environmental violence in the region, see Joshua Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 B.U. INT'L L.J. 261, 297.

[4] D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 3.

[5] The immediate aftermath of the introduction of constitutional environmental rights by section 24 of the Constitution of South Africa 1996 saw the enactment of the National Environmental Management Act (NEMA) 107 of 1998. A flurry of other enhanced sector-specific legislation also followed the post-1996 constitutionalization of environmental rights in South Africa.

(2010),[6] for instance, environmental legislation and regulations were enacted, revised and upgraded in the immediate aftermath of constitutionalising environmental rights.

The examples of South Africa and Kenya show the potential impacts constitutional environmental rights have on strengthening the environmental legal frameworks in a country. This impact is not limited to these two countries as Boyd, who studied the environmental legislation of 92 countries with express constitutional environmental rights, found that environmental legislation has been improved in 78 of those countries in the immediate aftermath of the constitutionalization of environmental rights. In Africa, environmental legislation was strengthened in 23 of the 32 countries with constitutional environmental rights in the aftermath of such constitutionalization.[7]

Constitutionalising environmental rights in Nigeria will impose a constitutional mandate on the Nigerian government to repeal the AGRA and EGASPIN and replace them with statutes complying with the citizens' right to a clean environment. It will also oblige the legislature to enact a comprehensive environmental statute that provides basic environmental rights for the citizens by expanding on the constitutional baselines and addressing other administrative protocols and procedural elements necessary for giving effect to the implementation and advancement of the substantive environmental rights.

Although there is a flurry of environmental statutes in Nigeria, they are majorly regulatory mechanisms instituting procedures, standards and approval processes for oil and gas exploratory activities or procedure for compensations or cleaning up polluted environments resulting from the activities of oil companies in the Niger Delta region. None of them addresses the rights of the host communities in the Niger Delta to have a safe, clean, healthy and habitable environment for present and future generations akin to the National Environmental Management Act (NEMA) 1998 of South Africa or the Environmental Management and Co-ordination Act (EMCA) 2015 of Kenya.

[6] The constitutionalization of environmental rights by the Kenyan Constitution of 2010 saw the revision of several environmental legislation in its immediate aftermath. These include the establishment of a specialised environmental court by the Environment and Land Court Act No. 19 of 2011 and the Environmental Management and Co-Ordination Act (EMCA) (amendment) Act No. 5 of 2015

[7] D Boyd, *The Environmental Rights Revolution,* supra, n 4.

In the aftermath of constitutionalising environmental rights in Nigeria, the government will be constitutionally obliged to act in favour of improved environmental legislation or be compelled through judicial orders to institute the necessary mechanisms for protecting environmental rights. It is by contributing to stronger environmental legislation and strengthening the legal framework that constitutional environmental rights will have their greatest impact in Nigeria and in the Niger Delta.

7.3 Impact on Ecological Imperialism in the Niger Delta

Ecological imperialism is a subtle form of environmental subjugation suffered by the inhabitants of the Niger Delta region. It is characterized by the inequitable placing of the environmental burdens and hazards from oil and gas exploitation on the people of the region for the benefits of people in other regions in the country.[8] It manifests itself through the socio-political domination of the weaker ethnic groups in the Niger Delta region by the more powerful and dominant ethnic groups in the other regions in Nigeria mostly through democratic means permitted by a lopsided political structure in the country.

The clearest manifestation of ecological imperialism in the Niger Delta is the enactment of legislation and regulations which consider the health and environmental well-being of the people of the region as viable trade-offs for resource exploitation.[9] These legal instruments are enacted by the political elites from the other dominant ethnic groups and regions in the executive and legislative structures which are then imposed on the people of the Niger Delta region. The Niger Delta people are too weak politically and economically to resist the imposition of the legal instruments which are promulgated in accordance with the constitutional mandates for the executive and legislative powers and cannot, therefore, be legally impeached.

The major environmental legislation with regulatory systems permissive of pollution such as EGASPIN, the National Oil Spill Detection and Response Agency Act (NOSDRA) and the Associated Re-Injection Gas Act 1984 were

[8] The concept of 'ecological imperialism' in the Niger Delta context has been discussed extensively in Chapter 1.

[9] K. Higgins, 'Regional inequality and the Niger Delta' (2009) Policy Brief No. 5, Overseas Development Institute <www.odi.org.uk/resources/download/2507.pdf> accessed January 16, 2017.

promulgated by political elites from the dominant ethnic groups to perpetuate optimal oil exploitation from the Niger Delta region while imposing the resultant environmental burdens on the people of the region. Other statutes such as the Land Use Act 1978, the Petroleum Act 1969 and the National Environmental Standards and Regulatory Agency Act 2005 (NESREA) which appropriate the oil and gas resources of the region for the benefit of the other regions or, in NESREA's case, exempt environmental issues arising from oil and gas exploitation from regulatory supervision by the major environmental regulator in Nigeria, continue to be perpetuated because the environmental burdens are felt exclusively in the Niger Delta region, distantly removed from the cities and villages of the dominant ethnic groups.

It is, therefore, convenient for the political elites to turn deaf ears to the cries of the Niger Delta inhabitants regarding the severe environmental consequences because they do not feel the consequences in their immediate communities. It is arguable that the AGRA which permits gas flaring when it is convenient for optimal oil exploitation or EGASPIN which permits some release of effluents into the environment will not remain in the statute books if the real-life environmental hazards suffered from it were not felt in Bayelsa, Rivers or Delta (major Niger Delta states) for instance, but in Kano, Sokoto, Kebbi or Lagos (major states in the other regions of the country). For instance, the Federal Government recently ordered an immediate halt to mining actviities in Zamfara state, in Northern Nigeria (part of the dominant geographic zone) due to the adverse health effects and associated violent conflicts that have erupted in the region recently despite the huge financial potentials from the discovery of gold in commercial quantity in the region.[10] However, in the Niger Delta, despite the extreme adverse health effects from pollution and the violent conflicts and countless deathst that has resulted from energy exploitation, little has been done to curb oil and gas production or even impose stricter environmental regulations to protect the people of the region.

The Land Use Act 1978, for instance, has been criticised for its perpetuation of environmental injustice on people of the Niger Delta as it appropriates ownership

[10] '*Nigeria bans mining activities in the northern state of Zamfara'* (*CGTN Africa*, 8 April 2019) <https://africa.cgtn.com/2019/04/08/nigeria-bans-mining-activities-in-the-northern-state-of-zamfara/> accessed 09 May 2019.

of land from the citizens and vests same on the government.[11] Despite the adverse impacts of the Act on the Niger Delta region, it has remained untouched since 1978 and was even inserted in the 1999 constitution as a means of perpetuating its continued existence by making its alteration process the same with the constitution amendment procedure.[12]

To understand the lopsided socio-political structure which places the Niger Delta at a disadvantage in relation to environmental laws, it is imperative to analyse the political representation system in Nigeria's constitutional framework. Currently, the bicameral National Assembly at the federal level consists of 109 members of the Senate (the Upper House) - three from each of the 36 states and one from the Federal Capital Territory-[13] and 360 members of the House of Representatives (the Lower House) based on federal constituencies of fairly equal sizes.[14] Laws are passed by each house by a simple majority of votes[15]and this results in the passage of laws based on the interests of the regions that collectively muster a majority of representatives in the legislature. Based on this setting, the nine states of the Niger Delta collectively produce 27/109 Senators[16] and 82/360 members of the House of Representatives[17] representing 25percent and 22percent of the members of each house respectively.

This share of representation in the legislature gives the region insufficient voice or control over resultant legislation affecting the region as the representatives from the other dominant regions easily pass through legislation prejudicial to the environmental interests of the region without significant opposition from the Niger Delta representatives. Equally, this results in the inability to repeal or amend environmentally prejudicial statutes like AGRA, the Petroleum Act 1969 and the

[11] See R Ako., 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice' (2009) 53(2) Journal of African Law 289-304; K. Ebeku 'Oil and the Niger Delta people: The injustice of the Land Use Act' (2001) 9 (14) CEPMLP Internet Journal < http: www.dundee.ac.ukcepmlpjournal> accessed 09 May 2017.

[12] Section 315(5) of the Constitution inserts the Land Use Act, along with three other Acts, in the Constitution and make their alteration process the same with the constitution alteration process, thus enshrining their existence.

[13] Section 48 of the 1999 Constitution.

[14] Section 49.

[15] Section 58.

[16] There are 9 Niger Delta states (9 x 3 = 27 Senators).

[17] There are 36 states in Nigeria with each state having between 8 – 10 Federal Constituencies as determined by the Independent National Electoral Commission (INEC). There are currently 82 federal constituencies from the 9 Niger Delta states based on the current delineation of federal constituencies by INEC. See <https://nass.gov.ng/mp/house> accessed 19 July 2018.

EIA Act or enact statutes creating an effective environmental regulatory framework for managing the environmental issues in the Niger Delta.

A clear illustration of ecological imperialism through democratic legislative domination in the Niger Delta can be derived from the failure of the Petroleum Industry Bill (PIB)[18] which has set the record as the longest bill to be debated before the Nigerian legislature. The bill, which was first introduced in the federal legislature in 2000, has continued to be debated, defeated, reintroduced and regurgitated in various fragmented forms over the past 18 years without any significant progress made on its passage. The key sticking point with the bill is that it seeks to reform the environmental regulation of oil and gas exploitation in the Niger Delta and institute better control and prevention of environmental degradation by the oil companies operating in the region.[19] Most importantly, the PIB seeks to specifically repeal prejudicial legislation affecting environmental matters in the Niger Delta, notably the AGRA and the Petroleum Act 1969. Section 354(1) of the PIB specifically itemizes the AGRA and a host of other obsolete legislation prejudicial to the environmental interests of the Niger Delta for repeal and replacement with the provisions of the bill. Fearing that the passage of the PIB would affect optimal oil exploration in the Niger Delta, the bill has been opposed and shot down by representatives from the other dominant regions for over 17 years,[20] preferring to stick to the status quo and institute palliative measures to compensate people of the region for the adverse environmental consequences suffered.[21] Such palliative measures come in the form of compensatory institutional arrangements established through legislative instruments such as the enactment of the Nigerian Local Content Act 2010[22] to provide more jobs for inhabitants of the region by compelling the oil companies to preferentially engage local staff and indigenous services in their exploration activities.

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[18] Detailed information and draft of the PIB can be found on <http://www.petroleumindustrybill.com/> accessed 02 May 2018.

[19] O Ogri, 'A Review of the Nigerian petroleum industry and the associated environmental problems' (2001) 21(1) *Environmentalist* 11–21.

[20] S Obasi, 'PIB: A game of numbers, interests' Vanguard, 05 February 2013. <https://www.vanguardngr.com/2013/02/pib-a-game-of-numbers-interests/> accessed 07 December 2017.

[21] *PIB: Trudging through legislative tunnel,* Business Day, 16 December 2013 <https://www.businessdayonline.com/opinion/analysis/features/article/pib-trudging-through-legislative-tunnel/> accessed 07 June 2016.

[22] Nigerian Oil and Gas Industry Content Development Act 2010.

Other legislative measures include the establishment of a commission responsible for ensuring environmental clean-up arising from oil spills- the National Oil Spill Detection and Response Agency (NOSDRA) and the establishment of the Niger Delta Development Commission (NDDC) to institute projects to improve the social and infrastructural needs of the Niger Delta inhabitants. While these measures help to alleviate the sufferings of the region by improving their economic power, providing jobs and infrastructural facilities, it is diversionary as it fails to institute measures to prevent pollution, ensure better environmental practices by the oil companies and stop government from issuing regulatory approvals to oil companies to pollute or flare gas in the region.[23]

Following intense pressure from the Niger Delta representatives in the legislature and other local and international environmental activists, the Nigerian legislature finally bowed to the passage of the PIB in 2017 in a fragmented form with the omission of vital provisions for environmental protection in the region. The new bill, now known as the Petroleum Industry Governance Bill (PIGB) 2017,[24] omits the repeal of the AGRA and Petroleum Act which are the key legislation prejudicially affecting environmental matters in the region. It also omits the subject of environmental regulation in the region but focuses on governance issues relating to the management of oil contracts, production and pricing of oil by the Nigerian National Petroleum Corporation (NNPC) and the Petroleum Products Pricing and Regulatory Authority (PPPRA).[25] Thus, despite the passage of the PIGB, the environmental situation in the Niger Delta is unaffected by the new legislation but remains in its pre-2000 state before the PIB was first introduced.

Ecological imperialism in the Niger Delta, therefore, results in the domination and control of the environmental future and fortunes of the various ethnic groups in the Niger Delta by politically stronger 'foreigners' – i.e. ethnic groups outside of the region. While imperialism generally features the political control of the affairs

[23] O Iledare, 'Evaluating the Impact of Fiscal Provisions in the Draft Petroleum Industry Bill on Offshore E&P Economics and Take Statistics in Nigeria' (2010) Nigeria Annual International Conference and Exhibition, 31 July - 7 August, Tinapa - Calabar, Nigeria.

[24] The Bill is not yet an Act as it is yet to receive presidential assent. In recent developments, the President has refused assent to the Bill claiming that it 'whittles down his powers'. See Adeoye Adefulu, 'PIGB Assent: What has Happened Since?' 04 September, 2018 <http://www.petroleumindustrybill.com/2018/09/04/pigb-assent-what-has-happened-since/#more-1074>

[25] See Section 87 of the PIGB 2017, available at <http://www.petroleumindustrybill.com/wp-content/uploads/2017/05/final-copy-of-petroleum-industry-governance-bill-2017-May-15.pdf> accessed 07 November 2017.

of a people by stronger foreign powers, usually from a different country, ecological imperialism features the environmental control of the affairs, impacts and future of the Niger Delta people by stronger ethnic groups within the same country but from different geographical settings unaffected by the environmental situation created in the Niger Delta. While political imperialism is usually orchestrated through military or other forms of non-consensual political power imposed on the colonised people, ecological imperialism is orchestrated through democratic and generally constitutional means within a legal framework which allows for such subtle domination. This buttresses Boyle's argument that democracies are entirely capable of environmental destruction.[26]Left unchecked, the cardinal principles of democratic governance can be utilised to environmentally subjugate a people in a prejudicial way through 'tyranny of the majority' as witnessed in the Niger Delta.

It is easy to understand the perpetuation of ecological imperialism through democratic means as the Niger Delta region is responsible for over 80% of Nigeria's revenue source through oil and gas reserves[27] but only has 25% or less representatives at the democratic structure responsible for decision making for the whole country. In effect, all the other regions depend on the resources of the Niger Delta for their economic and infrastructural development and will seek to protect this interest through any means including consigning the Niger Delta to a dump yard for environmental hazards if it guarantees the unhindered flow of oil and gas revenues from the region. This means that, in the absence of a fundamental constitutional protection of the environmental interests of the Niger Delta, meaningful progress may not be made towards improved environmental protection for the region, because the regions with the democratic majority to institute such regulatory frameworks consider such progress antithetical to their economic and developmental interests.[28]

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[26] A Boyle, 'Human Rights or Environmental Rights? A Reassessment' 12 <http://www2.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf> accessed 2 December, 2015.

[27] International Monetary Fund, 'Nigeria: Selected Issues' (2017) IMF Country Report No. 17/81 <https://www.imf.org/~/media/Files/Publications/CR/2017/cr1781.ashx> accessed 09 December 2017.

[28] P Olalere, 'Nigeria: When Stepping Back is a Panacea to Moving Forward: The Legislative Story of the Nigerian Petroleum Industry Bill' November 2017 <http://www.mondaq.com/Nigeria/x/649902/Oil+Gas+Electricity/httpwwwmondaqcomarticleasparticleid649878> accessed 08 January 2018.

Constitutionalising environmental rights plays a vital role in halting the ongoing ecological imperialism in the Niger Delta by entrenching a fundamental protection of the environmental interests of the Niger Delta people from a democratic majoritarian oppression by the other regions. A constitutional right to a clean environment, coupled with an enforceable governmental obligation to protect the environment for present and future generations, will act as a fundamental protective bulwark from any legislative or executive instrument by the legislative or executive arms, dominated by the other regions, which prejudicially affect the environmental sanctity of the Niger Delta. The validity of these legal instruments become assessed against the background of their compliance with the constitutionally entrenched right to a clean environment and not merely on their compliance with the democratic/constitutional mechanisms for enacting the instruments. The constitutional environmental right, therefore, acts as a check on democratic environmental destruction by a democratic majority/political elite focused purely on economic/developmental objectives.

One importance of constitutionalization of rights, as discussed in Chapter 4, is its role as a counter-majoritarian policy in a society for the protection of vulnerable groups and individuals vis-à-vis the potential tyranny of political majorities in a democratic setting. Under the evolutionist theory, rights are entrenched in the constitution to protect special interest groups by restricting manoeuvring of policymakers and limit the power of majorities in legislatures.[29] Various examples abound of the utilisation of constitutional rights to protect vulnerable minority groups in a society, including the entrenchment of the aboriginal and treaty rights of the aboriginal people in Canada's Constitution of 1982 as a means of protecting these rights from infringement by the majority population. In the United States, the recent US Supreme Court decision in *Obergefell v. Hodges*[30] nullified California's majority voter-approved Proposition 8[31] prohibiting the rights of same-sex couples to marry on the ground that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause[32] of the Fourteenth Amendment to the United States Constitution. Without these

[29] G Tsebelis, 'Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism' (1995) 25 *British J Pol Sci* 289, 323.
[30] Obergefell v. Hodges (2015) 576 U.S.34.
[31] Proposition 8 - which eliminated the right of same-sex couples to marry- was a statewide ballot proposition in California passed through a referendum on November 4, 2008, whereby voters approved the prohibition of same-sex marriages in California.
[32] Section 1 of the Fourteenth Amendment to the US Constitution.

constitutional protections, the rights of sexual minorities to marry throughout the United States would have remained determinable by the democratic majority in the various states which were opposed to such rights on religious, cultural and social grounds.

Similarly, the absence of constitutional environmental rights in Nigeria will leave the environmental future of the Niger Delta to remain determinable by the democratic majority of the other regions opposed to any form of sustainable environmental regulation in the region as a means of securing the unhindered exploitation of oil and gas resources from the region.

There are various ways constitutional environmental rights will impact ecological imperialism in the Niger Delta. First, it will render statutes such as AGRA, Petroleum Act, EIA Act, Land Use Act and EGASPIN invalid to the extent they permit state grant of licenses/regulatory approvals for pollution/flaring or other environmentally injurious activities. Second, it will restrict the scope of legislation that can be passed by the democratic majority in the legislature or executive policies implemented by the government (controlled by the majority from the other regions) which do not promote the constitutional right. Third, it will mandate the executive and legislature to pass laws/introduce policies to implement the constitutional right. Where the constitutional environmental right is couched in a *coalesced anthropocentric* manner proposed in Figure 10 of Chapter 4, an enforceable obligation is imposed on the government to actively take measures to alleviate the environmental sufferings of the Niger Delta people. This will create a constitutional platform for Niger Delta representatives in the legislature to push through legislation to protect the environment in the region and also a constitutional platform for environmental activists to successfully lobby for improved environmental accountability by government and corporations involved in oil and gas exploitation in the region.

In summary, constitutional environmental rights address ecological imperialism by instituting environmental restrictions on the democratic majority from prejudicially exploiting the region's environment through legislative instruments. Currently, there is no constitutional right that can serve the purpose of restricting environmental despoliation through legislative instruments by the democratic majority in the country. Although the constitutional right to life in section 33 can

be utilised to impose restrictions on legislation that permit pollution,[33] the Nigerian courts have proven unwilling to expand this right to cover environmental sanctity and have instead relied on 'austerity of technical legalisms' to circumvent this approach.[34] Therefore, an explicit constitutional environmental right is an effective solution to this problem as it presents a guaranteed way of nullifying legislative instruments unfavourable to environmental protection and the courts will be obliged to enforce the constitutional right.

7.4 Impact on Access to Environmental Justice in the Niger Delta

Environmental injustice in the Niger Delta is an offshoot of ecological imperialism whereby external parties reap the economic benefits of natural resources exploitation without bearing the consequent skewed environmental burdens because their communities are insulated by distance from the direct sources of toxins.[35] The definition and circumstances of environmental injustice in the Niger Delta have been extensively discussed in Chapter 1. To a large extent, constitutional environmental right addresses this problem in a similar way as it does to ecological imperialism- by creating a fundamental protection of the environmental interests of the Niger Delta people from exploitation by the government, corporation and vested interests in the other regions.

Nevertheless, a peculiar sub-theme in environmental justice worthy of a separate consideration in this context is the concept of 'meaningful participation' in environmental decision making by the Niger Delta people. This is an important feature of environmental justice necessary in the Niger Delta context because of the exclusion of the region from decision making affecting their environment by the EIA Act discussed in Chapter 4. The United States Environmental Protection Agency (EPA) defines environmental justice as 'the fair treatment and *meaningful involvement* of all people, regardless of race, colour, national origin, culture, education or income, with respect to the development, implementation and

[33] See Jonah Gbemre v. Shell Petroleum Development Company Nigeria, Federal High Court of Nigeria, Benin Division, Judgment of 14 November 2005, Suit No. FHC/B/CS/53/05.
[34] See Oronto Douglas v Shell, (1998) LPELR-CA/L/143/97 and Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah (2001) 11 NWLR (Pt.723)168.
[35] R. Ako., 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice', (2009) 53(2) *Journal of African Law* pp 289-304.

enforcement of environmental laws, regulations and policies'.[36] The four pillars of meaningful participation identified by the EPA are the provision of 'appropriate opportunity' to affected communities to participate in the environmental decision-making; the contribution of these communities should be capable of influencing the outcome/decision rather than cosmetic and irrelevant; the concerns of the affected communities should be given considerable weight in the decision-making process; and the decision makers should seek out and facilitate the involvement of those potentially affected.[37]

These pillars of meaningful participation are well represented within the realm of procedural environmental rights covering access to justice, access to information relating to environmental matters and participation in environmental decision making. Currently, the rights of the Niger Delta people to access information relating to environmental matters affecting them and participate in environmental decision making is insufficiently protected by extant laws in Nigeria. Although the EIA Act provides for these two rights, the procedures and outcomes are structurally flawed rendering it insufficiently expressive of the procedural environmental rights of people of the region.[38] Furthermore, access to justice for environmental wrongs is deeply lacking in Nigeria's legal framework as the Nigerian judiciary generally adopt restrictive technical doctrines to defeat environmental claims.[39]In this regard, environmental injustice continues to be perpetuated in the Niger Delta through the systemic restriction on the participatory rights of the region in environmental decision making and by curtailing their access to courts for environmental justice.

Constitutionalising environmental rights addresses this feature of environmental injustice by instituting fundamental procedural environmental rights for people of the region through the incorporation of explicit provisions recognising and guaranteeing such rights. Adopting a *coalesced anthropocentric* constitutional right as shown in the sample draft in Figure 10 of Chapter 5 will ensure that comprehensive procedural environmental rights are guaranteed for people of the

[36] United States Environmental Protection Agency (EPA), 'Environmental Justice 2020 Action Agenda: EPA's Environmental Justice Strategy', <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy> accessed 10 July, 2017.
[37] ibid.
[38] The shortcomings of the EIA Act as a framework for procedural environmental rights have been discussed in chapter 6.
[39] See Oronto Douglas v Shell, supra, n 33 and Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah, supra, n 33.

region. This will include the right to have access to information pertaining to the environment in the possession of public bodies, participate in the public decision-making process likely to affect their environment and the right to easy access to the courts for the ventilation of environmental rights and concerns without the need to demonstrate that any person has incurred loss or suffered injury will ensue.

The cognisable impact of this constitutional right will be felt in terms of the EIA Act provisions and other legal instruments regulating access to courts including the civil procedure rules of the various superior courts in Nigeria. Importantly, the EIA procedure instituted by the Act which permits executive waiver of EIA procedures for environment-impacting activities and considers compensatory measures as an adequate remedy for adverse environmental impacts will become inconsistent with the constitutional provision and will consequently be invalidated. The Niger Delta inhabitants will be conferred with a constitutional right of unrestricted access to information held by government agencies relating to matters arising from oil and gas licensing, petroleum sharing contracts and transactions relating to the industry. Currently, there is a lack of transparency by the government regarding affairs in the oil and gas sector notwithstanding the Nigeria Extractive Industries Transparency Initiative Act (NEITI) 2007 under which the government is committed to transparency in the extractive industries in line with the international Extractive Industries Transparency Initiative (EITI).[40] Complying with the constitutional guarantee of access to information ensures transparency by government authorities, allows effective monitoring of government's regulatory activities by Niger Delta inhabitants and environmental activists and ensures environmental accountability by government agencies and oil companies in the region.

Procedural environmental rights are important for the achievement of environmental rule of law, as it ensures the involvement of individuals, civil society and other interested stakeholders in the implementation and enforcement of environmental rights.[41] Thus, effective procedural environmental rights are central to the attainment of environmental justice in the Niger Delta as it enables the

[40] Okeke, V.O, 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 in Nigerian Oil and Gas Sector' (2013) 14 *British Journal of Arts and Social Sciences* 3.

[41] UNEP First Global Report on Environmental Rule of Law, January 2019.

people of the region have access to information regarding developments and activities likely to affect their environment within the region; involves them in the decision making process thereby allowing them influence the mode and manner activities withinthe region impact their environment.

Environmental injustice in the Niger Delta is sustained by the poor access to courts to redress environmental wrongs in the region. Access to courts provides a means to enforce environmental laws, correct erroneous administrative acts, decisions and omissions and to push competent authorities to do their job.[42] Several procedural hurdles in the civil procedure rules of the superior courts in Nigeria help to frustrate aggrieved litigants from the region from ventilating their claims before the courts. These hurdles include the locus standi principle which defeat claims by environmental activists on the basis of lack of personal interests affected in the environmental pollution complained against; the untenable burden of proof placed on litigants to substantiate their claims, undue delay in the judicial process for civil claims leading to most cases taking up to a decade to be concluded and bulky paper filing systems and attendant costs which discourage indigent claimants from seeking redress before the courts.[43]

Environmental Rights Action, an environmental NGO, conducted a survey of several cases filed on behalf of litigants seeking environmental reliefs in the region and found that the structural deficiencies in the court system in Nigeria (identified in the preceding paragraph) results in much resources and energy being dissipated in pursuing these claims with minimal results.[44] As Mmadu argues, "the war against environmental degradation is too important to be clogged in a web of legal technicalities else man would have no environment to live in."[45]

Legal technicalities in Nigeria's judicial system result in the increasing number of transnational environmental litigation pursued by aggrieved inhabitants of the region in foreign courts in the US, UK and Netherlands.[46] Popoola argues that the

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[42] J Ebesson, "Access to Justice at the National Level," in Marc Pallermaerts, ed. *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), 247.

[43]R Mmadu, 'The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How Kiobel added Salt to Injury' (2013) 1(1) *Journal of Sustainable Development Law and Policy* 73-85.

[44] G Ojo, 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice', Environmental Rights Action/Friends of the Earth publication, October 2016.

[45] R Mmadu, 'The Search for Environmental Justice in the Niger Delta', supra, n 45, 25.

[46] See the US case of Kiobel v. Royal Dutch Petroleum Co. et al., No. 06- 4800, 2010; the UK case of Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd

transfer of environmental lawsuits from Nigerian courts to foreign courts is a means of circumventing legal obstacles and multiple barriers at the national level which communities in the Niger Delta face when suing multinational oil companies in Nigerian courts.[47]

While a convenient strategy, transnational environmental litigation is unsustainable as a means of entrenching environmental accountability in the Niger Delta. Such form of *forum conveniens*[48] has little or no impact on environmental regulation in Nigeria seeing that the foreign courts cannot grant orders regarding regulatory reforms by the government of Nigeria to comply with environmental protection. Such suits are exclusively compensatory in nature without any long-term impact on the ongoing environmental degradation in the region in terms of preventing or reducing their occurrences. Moreover, in recent times, foreign courts are increasingly considering such strategy as *forum non-conveniens.*[49] In *Kiobel v Shell*[50] where the claimants sued Royal Dutch Shell in the US for environmental wrongs and consequent human rights abuses in the Niger Delta, the US Supreme Court ruled against the extra-territorial application of the Alien Torts Act to activities occurring in the Niger Delta in Nigeria and dismissed the suit. Effectively, the decision rendered the US a *forum non-conveniens* for such environmental claims arising from the Niger Delta because of the danger of judicial interference in the foreign policy of another country-Nigeria.[51]

Similarly, the UK Court of Appeal in the most recent case in February 2018 rejected a suit by communities in the Niger Delta against Shell Petroleum filed in the High Court of England for environmental wrongs committed in the region.[52] The court reasoned that 'claims by Nigerians against a Nigerian company about

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[2014] EWHC. 1973 and the Dutch case of Milieudefensie v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, District Court of The Hague [2013] ECLI.NL.RBDHA.BY9854.

[47] Ebunoluwa Popoola, 'Moving the Battlefields: Foreign Jurisdictions and Environmental Justice in Nigeria' (2017) SSRC 2 <http://items.ssrc.org/moving-the-battlefields-foreign-jurisdictions-and-environmental-justice-in-nigeria/> accessed 09 February 2018.

[48] The court or forum most suitable for the ends of justice.

[49] A legal doctrine whereby courts refuse to take jurisdiction over foreign matters where there is a more appropriate forum available to the parties, usually the local courts of the country from which the case arose.

[50] Kiobel v. Royal Dutch Petroleum Co. et al., 133 S.Ct. 1659 (2013).

[51] Kearney Colin, 'Corporate Liability Claims Not Actionable Under Alien Tort Statute', (2013) *Suffolk Transnational Law Review*, 2.

[52] Okpabi & Ors v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd (2017) EWHC 89 (TCC).

events in Nigeria, governed by Nigerian law, should be heard in a Nigerian court.' Declaring the English High Court as *forum non-conveniens* for such transnational environmental suits, the High Court judge, Justice Fraser, ruled-

> "There is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigerian company."[53]

The affirmation of this decision by the English Court of Appeal is a restatement of the need for the reliance on domestic judicial mechanisms for resolving environmental matters arising from the Niger Delta rather than 'outsourcing' environmental justice to foreign courts. While it is convenient for indigenous communities to argue, as the Billie and Ogale communities argued in the above case, that the foreign courts are the only effective forum for securing environmental justice from the oil companies operating in the region,[54] the long-term effect of such outsourced environmental justice is unfavourable to the environmental interests of the communities involved. Such suits serve to undermine confidence in the Nigerian judiciary in the eyes of foreign courts as the litigants will have to disparage the domestic judiciary in order to convince the foreign courts to entertain the case. Also, the outcomes of such suits will likely be met with strong opposition by the Nigerian government and its agencies seeking to protect the country's sovereignty from foreign interference. In the above case, for instance, the National Oil Spill Detection and Response Agency (NOSDRA), the Nigerian government agency responsible for ensuring companies clean up oil spills, joined the suit on Shell's behalf and defended the latter's position, arguing that local judicial remedies were sufficient to address the dispute and opposed any attempt by the English courts to interfere in a domestic environmental problem in Nigeria.[55]

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[53] ibid, 123.

[54] Chief Temebo, spokesman for one of the communities involved in the case, said he could not get justice in Nigeria, stating that "If the claim does not continue in the English courts, we have no hope that the environment will ever be cleaned up and the fish will ever return to our waters. Shell will do nothing unless they are ordered to by the English courts." Adam Vaughan, 'Nigerian oil pollution claims against Shell cannot be heard in UK, court rules', *The Guardian,* 26 January 2017 <https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations> accessed 15 June 2017.

[55] Okpabi & Ors v Royal Dutch Shell Plc, supra, n 50.

Transforming an environmental dispute into a foreign policy and sovereignty dispute is unlikely to be beneficial for the environmental interests of the region as it diverts attention from the need to address the genuine environmental concerns of people of the region. Moreover, as stated earlier, no enforceable regulatory reforms orders can be gotten from such transnational suits but only compensatory financial reprieve are available as remedies.[56]

Utilising the domestic judicial forum can result in enforceable judicial orders against the government that transcends merely compensatory measures but can extend to wide-reaching regulatory reform orders directed at the Nigerian government and its agencies which can have a meaningful impact on environmental justice in the region. The Nigerian courts can, for instance, nullify provisions of the EIA Act and other statutory and regulatory instruments that restrict the participatory rights of the indigenous people or restrict their access to courts to redress environmental wrongs. This role can be effectively played by establishing specialised environmental courts for adjudication of environmental disputes in Nigeria.

Constitutionalising environmental rights obviates the outsourcing of environmental justice by strengthening the access to the domestic courts with the institution of a fundamental provision which renders the restrictive, technical legalisms that bedevil the judicial process in Nigeria inoperative and invalid. By becoming a fundamental right enforceable through the FREPR procedure, several restrictive legal principles such as the locus standi rule, statute of limitation and the inordinate burden of proof in civil cases will cease to be applicable to suits seeking to enforce the constitutional right to a clean environment. As discussed above, the availability of the FREPR Rules for enforcing environmental rights will positively transform the access to justice situation in redressing environmental wrongs and entrench the procedural environmental rights of people of the region. Therefore, while aggrieved persons from the Niger Delta and environmental activists currently view foreign courts as their best shot at having access to

[56] While a few transnational environmental suits against Shell Petroleum have been successfully pursued in Dutch Courts, this is due to the fact that Royal Dutch Shell, its parent company, is domiciled in the Netherlands and, therefore, subject to the jurisdiction of the Dutch courts. In such cases, the decision of the Dutch Courts to entertain the cases hinged on the ascription of responsibility to the parent company for the actions of its subsidiary operating in Nigeria. See the Dutch case of Milieudefensie v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, District Court of The Hague [2013] ECLI.NL.RBDHA.BY9854.

environmental justice, a view which has support in some literature,[57] constitutionalising environmental rights is a more sustainable, effective home-grown solution to the problem of access to environmental justice in the Niger Delta.

7.5 Impact on Incorporation of International Environmental Treaties and Principles

International environmental law recognises the inviolable right of people to live in a clean and healthy environment[58] and this is evidenced by the fact that all proclamations of environmental rights beginning from the Stockholm Declaration on the Human Environment of 1972[59] and the Brundtland Report of 1987[60]have reiterated the inexorable link between human rights and environmental protection. In addition, various rendition of international environmental law principles reinforces the protection of the environment as a primary objective for sustaining human health as recognised in the Draft Declaration on Human Rights and the Environment.[61] Other international conventions such as the UN Convention on Biological Diversity,[62] the United Nations Framework Convention on Climate Change (UNFCCC) 1992[63] and the Convention on Long-Range Transboundary Air Pollution 1979[64] provide for the protection of the ecosystem, the ozone layer and managing climate change as a necessary condition for advancing human rights and interests.

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[57] See Ebunoluwa Popoola, 'Moving the Battlefields: Foreign Jurisdictions and Environmental Justice in Nigeria' supra, n 45; Rufus Mmadu, 'The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How Kiobel added Salt to Injury', supra n 41); Godwin Uyi Ojo, 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice', supra, n 41.

[58] Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (OUP, 2009) 3.

[59]U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Report of the UN Conference on the Human Environment, 2-7, U.N. Doc. A/Conf.48/14/Rev.1 (1973).

[60] World Commission on Environment and Development Report, 1987 <http://www.un-documents.net/our-common-future.pdf > accessed 02 December 2015.

[61] The Draft Declaration on Human Rights and The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

[62] UN Convention on Biological Diversity, 1992 available at <http://www.cbd.int/doc/legal/cbd-en.pdf > accessed 02 December 2015.

[63] The UNFCCC was adopted on 9 May 1992, and opened for signature on 4 June 1992. The UNFCCC has 197 parties as of December 2015.

[64] The convention opened for signature on 1979-11-13 and entered into force on 1983-03-16. The convention has been ratified by 51 countries.

Despite the proliferation of various international law instruments on environmental protection, this has not had any meaningful impact in the environmental situation in the Niger Delta neither have the people of the region benefitted in any way from the rights and principles enunciated in any international convention or protocol that Nigeria has ratified. Presently, Nigeria is a signatory to at least 14 international environmental conventions[65] and several African regional instruments on environmental conservation and protection[66] but these instruments have not had any direct impact in the environmental situation in Nigeria owing to a fundamental legal hurdle in Nigeria's constitutional framework. Section 12 of the Nigerian Constitution renders treaties and conventions ratified by the government inoperative in the country until they have been domesticated by an Act of parliament. As a result, the rights, obligations and principles enunciated in these important international conventions ratified by Nigeria cannot be relied upon in seeking environmental redress before the Nigerian courts and no enforceable rights can be drawn therefrom.

This means that treaties relevant to the Niger Delta situation, such as the Convention on Biological Diversity, the Basel Convention on Movement and Disposal of Hazardous Wastes, the Stockholm Convention on Persistent Organic Pollutants (POPs) and the African Convention on the Conservation of Nature and Natural Resources, cannot be relied upon within Nigeria's domestic judicial forum to ensure environmental accountability of the government. Suits cannot be brought within the domestic forum to compel the government to act in accordance with its obligations under these instruments to protect the Niger Delta environment from pollution. Although the inaction by the government is a breach of its obligations under these instruments, the remedy for such breach only lies in public international law by other states/international bodies, not individuals affected by

[65] They include the Convention on Biological Diversity 1992, Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) 1990, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1987, International Convention on Civil Liability for Oil Pollution Damage 1981, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1976, International Convention on Oil Pollution Preparedness, Response and Cooperation 1995, the Stockholm Convention on Persistent Organic Pollutants 2001 and the UN Framework Convention on Climate Change 1992.

[66] They include the Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981, the African Convention on the Conservation of Nature and Natural Resources 1968 and the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1998.

environmental pollution in the region or environmental activists pursuing such claims.[67] As Dixon states, 'a subject of international law is a body or entity recognized or accepted as being capable of possessing and exercising international law rights and duties'.[68] States are the primary subjects of international law and individuals, corporations and other organisations cannot sue states before international judicial bodies like the International Court of Justice as they are not recognised as having international legal personalities before these judicial bodies.[69]

In terms of domestication of international environmental treaties, Nigeria has only domesticated two environmental treaties – the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1987[70] and the International Convention on Civil Liability for Oil Pollution Damage 1981.[71] These domesticated treaties have a common theme- compensation for oil pollution- and this evinces the focus of the government on pursuing compensation for affected communities and individuals rather than preventive actions to protect the environment from pollution in the first place.

In the same vein, international environmental law principles have not found their way into the Nigerian domestic judicial system except the polluter pays principle[72] (again focused on compensatory reprieve). This is because there is no domestic legal basis for the application of international environmental law principles by the Nigerian courts, seeing the inapplicability of the international legal instruments. In the absence of any domestic legal platform for the courts to adopt international environmental law principles like the precautionary principle,[73] the courts are content to rely on domestic legal instruments on environmental protection which, as has been repeatedly shown, are unfavourable to safeguarding the environmental rights of the Niger Delta people.

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[67] See M Dixon, *International Law* (Oxford University Press, 7th Edn, 2013) 113.
[68] ibid, 116.
[69] G Ignatenko and S Marochkin, 'Subjects of International Law' (2008) 2 *Russian Law: Theory and Practice* 13.
[70] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (Ratification and Enforcement) Act 2006.
[71] International Convention on Civil Liability for oil Pollution Damage (Ratification and Enforcement) Act, 1992.
[72] See Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah, supra, n 33.
[73] T O'Riordan, *Interpreting the Precautionary Principle* (Routledge: 2nd Edn, 2013).

The precautionary and preventive[74] principles are important principles of international environmental law as they shape responses to environmental protection issues by governments and stakeholders. They also influence the drafting of the major international environmental treaties. For instance, the prevention principle, which postulates that preventing environmental harm is cheaper, easier, and less environmentally dangerous than reacting to environmental harm that already has taken place, is the fundamental principle behind international instruments regulating the treatment, storage, and disposal of hazardous waste and pesticides. The principle was the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which sought to minimize the production of hazardous waste as a means of preventing its dumping in the environment.

The precautionary principle, on its part, focuses on a cautious approach to activities which has uncertain impacts on the environment. The principle advocates for restraints in carrying out activities with unpredictable environmental impacts until scientific proof exist of its actual impact. This principle finds expression in Principle 15 of the Rio Declaration which stipulates that where there are "threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[75] At the national level, the precautionary principle is enshrined in France's Environmental Charter 2005 by obliging public authorities to adopt due respect for the principle of precaution when the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment.[76]The precautionary principle has become so fundamental to environmental protection and widely accepted by states in the international community that the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) held that the precautionary principle could be considered today as 'part of customary international law'.[77]

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[74] P Sands and J Peel, *Principles of International Environmental Law* (Cambridge University Press, 2012)

[75] Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992).

[76] Article 5, Charter for the Environment 2005 of France.

[77] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Request for Advisory Opinion submitted to the Seabed Disputes Chamber on "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area", February 2011,

Implementing the provisions of international treaties and other principles of international environmental law in Nigeria can help to enshrine better environmental protection for the Niger Delta by instituting sustainable environmental practice which the government is obliged to adopt and which can be judicially enforced in cases of default by the government. Constitutional environmental rights can be used to enshrine international environmental law in Nigeria by making international environmental treaties directly applicable and enforceable in Nigeria and by empowering the courts to adopt and apply international environmental law principles relevant to environmental protection in adjudicating environmental claims.

The first approach - making international environmental treaties directly applicable in Nigeria - has been adopted in relation to constitutionalising labour rights in the Third Alteration to the Nigerian Constitution in 2010. Section 254C (2) of the amended constitution conferred the National Industrial Court (NIC) with the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith. This provision circumvents section 12 of the Constitution by rendering treaties related to labour and employment applicable and directly enforceable by the NIC with or without their domestication under section 12. This was done to side-step the reluctance of the Nigerian government to domesticate relevant labour treaties and ensure that the NIC implements contemporary labour principles and international best practices in adjudicating labour matters in Nigeria. In *Maduka v. Microsoft Nigeria Limited & Ors*[78] the NIC held that section 254C (2) empowers it to adopt and apply any labour treaty Nigeria has ratified even where it has yet to be domesticated under section 12.[79]Adopting a similar approach in constitutionalising environmental rights in Nigeria will ensure that the courts are able to directly apply the provisions of all environmental treaties that

<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf> accessed 09 December 2017.

[78] Ejieke Maduka v. Microsoft, 19 December 2013, Case No. NICN/LA/492/2012, National Industrial Court of Nigeria.

[79] The NIC relied on the General Recommendation No. 19 on violence against women of the UN Committee on the Elimination of Discrimination against Women (CEDAW), ILO Termination of Employment Convention 1982 (No. 158) and ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), all of which have been ratified but not yet domesticated by Nigeria, in deciding that sexual harassment amounts to a breach of an employee's fundamental right to dignity of person.

Nigeria has acceded to without limitations based on their non-domestication by the government.

For the second approach – empowering the courts to apply international environmental principles- the framing of a constitutional environmental right in accordance with the sample draft in Figure 10 of Chapter 5 will provide a domestic platform which ensures that the Nigerian courts are empowered to adopt and apply these principles to environmental claims before them. Section 2(b) of the sample draft provides that 'general principles of international environmental law recognised by the community of nations shall be applicable to redressing environmental concerns and environmental management procedures.' Incorporating this provision as part of a constitutional environmental right will create a broad platform for the courts to adopt and apply international environmental principles in adjudicating environmental claims arising from the Niger Delta situation. This will broaden the scope of remedy and redress that can be obtained from the courts by aggrieved environmental claimants in the region.

7.6 Impact on the 'Full-Belly' Syndrome

Constitutionalization also has potential impacts on the 'full-belly' pursuit of the Niger Delta inhabitants which degrade the environment as discussed in Chapter 1. The impoverished inhabitants engage in these prejudicial activities in order to either claim compensation from the oil companies which will then be used to provide food and other basic necessities for their family or gain financial rewards from selling the oil obtained from the vandalised pipelines or illegal crude oil factories on the black market for significant sums. Either way, the aim is to satisfy their 'full-belly' and gain immediate rewards to the detriment of the sanctity of their environment.

This is a difficult type of environmental problem to address through legal mechanisms. If the inhabitants were simply passive towards environmental rights while pursuing their sustenance, it is easier to renew their enthusiasm in protecting their environment in the medium term when they begin to see how a clean environment provide foods, economic and health benefits through a reformed legal framework which ensures environmental sustainability. However, where the inhabitants are actively undermining environmental sanctity

themselves and reaping immediate financial rewards from the process, it is difficult to encourage them to adopt a rights'-based approach in circumstances where they are, themselves, part of the environmental oppressors whose criminal environmental activities the reformed legal framework seeks to suppress in order to protect the environment. Further, they are likely to be less patient to wait for medium-term benefits when they are already used to successfully reaping short-term financial benefits from their environmentally injurious activities.

The challenge for advocates of environmental rights and constitutionalization is, therefore, how to ensure that constitutionalization creates a platform for the impoverished inhabitants to trust in the environmental rights framework as a rights'- based approach that will address their immediate quest for food, health care and sustenance. In this respect, constitutionalization can create and sustain a multi-stakeholder platform which addresses the various perspectives of environmental degradation in the region. It also presents the inhabitants with tangible environmental benefits that will, over time, discourage the resort to destructive self-help measures as they become able to once again provide food and sustenance from their agricultural lands, fishing industry and other subsistence industries which have been negatively impacted by environmental degradation over the past decades.

The multi-stakeholder platform will consist of government, the multinational oil companies, environmental NGOs, civil society organisations and individual activists in the region that will embark on litigation and other forms of political pressure on the government to comply with the new constitutional environmental right. The government will be obliged to reform environmental legislation in the country to align with the constitutional right and institute institutional and policy mechanisms to protect and promote this right. In the event of failure to do so, this can be judicially compelled through litigation. Existing legislation can also be judicially restructured by expunging environmentally prejudicial provisions and interpreting other provisions in accordance with the constitutional environmental right.

Oil companies and other corporations involved in environment-impacting activities will be compelled to revise their operational processes and introduce facilities that ensure their activities do not negatively impact the environment as statutory licenses/regulatory approvals that allowed them to circumvent

environmental protection become invalid. The UN Business and Human Rights resolutions[80]aim to encourage corporations to revise their activities in line with environmental protection objectives. The constitutional environmental right will, therefore, create platforms that will push them closer towards achieving this mandate espoused under international environmental law. Environmental NGOs and individual activists will play their role as watchdogs over compliance with the constitutional right by the government and corporations utilising litigation and political pressure as useful tools. A key factor in achieving the aim of constitutional environmental rights in relation to the full-belly syndrome is the changing of the perception of the communities about the oil and gas corporations; a change from the perception of these corporations as environmental abusers to a perception as corporate entities that can be engaged as partners for environmental protection. The negative perception of these oil corporations leads the indigenous communities to attack, vandalise and sabotage the corporations' oil and gas facilities as a means of payback for their environmentally injurious activities, in the process further damaging the environment as a result of spills from these vandalised facilities.

The environmental civil society groups and activists can ensure that this negative perception is gradually erased in favour of a perception of the corporations as potential partners in protecting the environment. That way, more co-operative alliances can be formed between the corporations and the people in the communities towards policing and safeguarding the oil facilities against vandalisation by criminal elements within the communities. This achieves a mutually beneficial environmental outcome for the communities and the oil corporations as the reduced vandalisation reduces the environmental damage for the communities and also reduces the corporations' liability to clean up these environmental damages.

Even though the impoverished individuals in the region may, in the short term, continue their 'full-belly' pursuit, their activities can be checkmated by the introduction of stringent legislation on these activities and comprehensive education and enlightenment campaigns by environmental NGOs and individual

[80]Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework 2011 HR/PUB/11/04 <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 29 April 2019.

activists from the region who the inhabitants know and trust to represent their best interests.

It is, however, pertinent to point out that the positive impacts of constitutionalization on the full-belly syndrome will be painstakingly slow, but steady, for several interconnected reasons. First, the current levels of environmental degradation in the region will take some time to clean up and for any reclamation effort to be felt. As a result, the inhabitants will not see an immediate change in their environment and they will not be immediately able to return to their farming, fishing and other subsistence industry they need to sustain their full-belly. This will likely lead to a reluctance to give up their injurious environmental activities for full-belly sustenance in the interim until they are able to reliably shift back to the alternative i.e. fishing, farming etc. Second, education and enlightenment campaigns to positively change the orientations of the inhabitants will take a little while to gain any reasonable foothold. Third, environmental litigation on the constitutional right will also take a little time to achieve meaningful results in ensuring environmental accountability by the government and corporations. Even though enforcing the constitutional right is guaranteed an expedient judicial process under the FREPR, enforcing judicial orders on issues involving significant government resources/policies do not take place overnight, especially where it involves legislative restructuring or institutional mechanisms to be instituted by the government. Also, judicial orders directed at the oil corporations may require a little time to be implemented, especially where it involves the closure of large or significant oil and gas processing facilities causing pollution e.g. flare producing facilities. Such facilities have to be safely shut down in accordance with procedural safety requirements which may take a while to implement.

7.7 Conclusions

Constitutionalization is not the panacea to the environmental challenges in the Niger Delta, but it has the potential to address the root causes of the environmental degradation in the region as examined in this chapter. By addressing these root causes, it opens room for meaningful efforts to be implemented towards the actual clean-up of the environment and reform of the

environmental policies of the oil and gas sector which is majorly responsible for a significant part of the pollution in the region.

By addressing the 'full-belly' tendency of the inhabitants which undermine the environment, constitutionalization removes an important hurdle to the institutionalisation of sustainable environmental clean-up and remediation because it is futile for the MNCs to commit resources to clean up the environment while the inhabitants are themselves polluting the same environment through vandalising oil pipelines and operating illegal crude oil factories. Constitutionalization, therefore, ensures synchronization of efforts between the MNCs and the inhabitants towards achieving environmental sanctity. It then compels the government to exercise its regulatory duties in ensuring the entrenchment of proper environmental protection strategies through legislation and improved regulatory control of MNCs.

While the impacts of constitutionalization of environmental rights in the Niger Delta may be slow in manifesting, it will create an enduring legal platform upon which a strong and virile environmental ethics can be built by stakeholders in the region. Its impacts will, therefore, reverberate throughout the existing legal and socio-economic frameworks in the country, and the Niger Delta in particular, and reposition environmental sustainability as a fundamental objective overriding all socio-economic and developmental objectives.

CONCLUSION

The thesis focused on providing answers to the key research question set out in the introduction - Should environmental rights be constitutionalized in Nigeria's legal framework? From this central question, two sub-questions were distilled –

i. Will constitutionalising environmental rights address the key problems of environmental protection in the Niger Delta region?
ii. How should the constitutionalised environmental rights be normatively framed to achieve the desired objectives?

In answering these questions, the arguments in this thesis has been developed across seven chapters building on the conceptual nature of environmental rights and its preference over the regulatory and civil liability approaches, the importance of constitutionalization of rights and how constitutional environmental rights can be implemented in Nigeria. These theoretical discussions were then applied to the Niger Delta environmental situation and critically examined the practical ways constitutional environmental rights address the key environmental challenges in the region.

Chapter 1 set the scene for the discussions by mapping the geopolitical and environmental situation of the Niger Delta and analysed the root causes of the intractable nature of environmental degradation in the region. Chapter 2 established the theoretical basis of environmental rights and developed the *coalesced anthropocentrism* model as an effective environmental rights paradigm for protecting the inter-dependent interests in the environment (humans, future generations and Mother Nature).

Chapter 3 established the first general premise of the argument in this thesis - that an environmental rights approach to protecting the environment is more effective than the regulatory and civil liability approaches. This is based on the fact that - a) a rights' approach removes environmental protection from the realm of mere policy objectives of government; b) it makes environmental protection no longer an easy trade-off for socio-economic and developmental goals; and c) unlike the civil liability approach, it does not focus on the monetisation of environmental concerns but on proactive and preventive methods of stopping environmental harms before they even occur or restrain further occurrences.

Chapters 4 and 5 established the second general premise of the argument in this thesis – that elevating environmental rights to a constitutional platform (i.e. constitutionalization) is an effective way of ensuring better environmental protection in a country as it will create a fundamental platform that will lead to improved environmental legal framework, better access to environmental justice and protection of the vulnerable minority subject to environmental oppression. The supremacy of the constitution over statutory and regulatory instruments ensures that constitutionalised environmental rights are not subject to political manoeuvrings or drawbacks by statutory or regulatory instruments.

However, the normative content of the constitutionalised environmental right is essential in achieving this goal, as the global study of constitutions in Appendix 1 showed that some countries have constitutionalised environmental rights couched in normative structures that render than cosmetic and ineffective. To ensure its effectiveness, therefore, chapter 4 established the essential constituents of an effective constitutional environmental right incorporating the *coalesced anthropocentrism* model. This was graphically captured in Figure 9 and a sample draft of an effective constitutional environmental right clause incorporating this model was made in Figure 10.

Chapter 6 established the two particular premises on which the argument in this thesis is based – a) that the poor environmental rights framework in Nigeria is responsible for the inability to effectively tackle environmental degradation in the Niger Delta, and b) constitutionalising environmental rights in Nigeria in a *coalesced anthropocentrism* structure will improve the country's environmental rights framework and create an assured platform to tackle the environmental problems in the Niger Delta because it will ensure environmental protection trumps the quest for unbridled resource exploitation by the Nigerian government at the expense of the environment. Specifically, it will result in environmentally prejudicial legislation like the AGRA, the Petroleum Act, EGASPIN and the EIA Act becoming invalidated to the extent they restrict the enjoyment of the constitutional right to a clean environment.

Chapter 7 provides the deduction to the premises in the thesis – that constitutionalising environmental rights in Nigeria will solve the root causes of the intractable environmental degradation in the Niger Delta region and ensure a sustainable ecological protection in the region. It analyses the specific ways that

a constitutionalised environmental right will address the key issues identified in Chapter 1 and show that the solution to these issues can be derived from a constitutional environmental rights platform.

Consequently, the logic of the arguments of this thesis is developed on the basis of two general premises, two particular premises and a deduction arising from the premises as follows-

General Premise 1- an environmental rights approach to protecting the environment is more effective than the regulatory and civil liability approaches; (chapter 3)

General Premise 2- elevating environmental rights to a constitutional platform (i.e. constitutionalization) is an effective way of ensuring better environmental protection in a country; (chapters 4 and 5)

Particular Premise 1- the poor environmental rights framework in Nigeria is responsible for the inability to effectively tackle environmental degradation in the Niger Delta; (chapter 6)

Particular Premise 2 - constitutionalising environmental rights in Nigeria in a *coalesced anthropocentrism* structure will improve the country's environmental rights framework and create an assured platform to tackle the environmental problems in the Niger Delta; (chapter 6)

Deduction - therefore, constitutionalising environmental rights in Nigeria will solve the root causes of the intractable environmental degradation in the Niger Delta region and ensure a sustainable ecological protection in the region. (chapter 7).

Chapter 6 answers the central research question whether constitutional environmental rights should be adopted in Nigeria in the affirmative by establishing the weaknesses of Nigeria's environmental legal framework and the extent of improvements that can be gained by constitutionalising environmental rights. Chapter 6.2 examined the structural defects in Nigeria's environmental legal framework and chapter 6.3 analysed the benefits that can be derived from

constitutionalising environmental rights in Nigeria, showing that its impact will be positively significant.

Chapter 7 answers the first sub-question in the affirmative by sequentially demonstrating the specific impacts of constitutionalising environmental rights on the key environmental challenges in the region.

The answer to the second sub-question is provided by chapter 4.3 which examined the formulation of the normative structure of an effective constitutionalised environmental right based on the *coalesced anthropocentrism* model developed in this thesis. A draft sample of an exemplar constitutional environmental right was done in Figure 10 (Chapter 4.3.3) to provide a guide on the ideal normative formulation of such right. Chapter 6.3 narrows down the answer to this sub-question by examining specifically how a prospective constitutional environmental right should be formulated in the Nigerian constitution in other to achieve the desired objectives. Chapter 6.3.1 examined the three pillars of the desired normative structure while 6.3.2 examined the prospective location of the right in the constitution which will give it maximum effectiveness.

In summary, seeing the repeated failure of the regulatory and civil liability approaches to quell environmental degradation in the Niger Delta, this thesis proposes a shift towards a rights' based approach in tackling the problem as a way of empowering the people to take control of their environmental destiny. Beyond merely enthroning an anthropocentric environmental right, this thesis argues for a merger of the various environmental interests under a *coalesced anthropocentrism* model which appropriately represents the tripod interests in an environment and ensures an inclusive approach to ecosystem protection around the globe and in the Niger Delta.

More importantly, the thesis canvasses for this environmental right to be given a fundamental platform by incorporation into the Nigerian constitution as a way of fortifying the protection afforded by the right and removing its susceptibility to political manoeuvring and rollbacks on the basis of other socio-economic and developmental pursuits. Seeing that constitutional rights trump all statutory and regulatory instruments, constitutionalising environmental rights will elevate it above other considerations which have over the years taken priority over

environmental protection and can be used to nullify all statutory approvals of environmental pollution, such as that in the Associated Gas Reinjection Act 1984. In addition, incorporating the constitutional right amongst the fundamental rights provision will enable litigants to utilise the expeditious process for ventilating fundamental human rights in the constitution and obviate the various restrictive civil procedure rules and principles which have been the bane of the judicial process in Nigeria.

The originality of this thesis stems from its analysis of the little known fundamental issues of ecological imperialism and the 'full-belly' syndrome within the context of the Niger Delta environmental situation and the analysis of how constitutional mechanisms can be utilised to solve these challenges.

Also, the *coalesced anthropocentrism* model developed in this thesis represents an improvement on the existing environmental rights paradigms that focus on anthropocentrism and its different variations (Regwell's *dilute anthropocentrism*[1] and Nickel's *accomodationist* approach[2]). The analysis of the constituents of a *coalesced anthropocentrism* approach to environmental protection and how this can be incorporated in a constitutional structure is a contribution to existing knowledge on the subject.

In addition, the global study of constitutions in the Appendix represents an essential addition to existing knowledge as it provides detailed guidance on the shortcomings of constitutional protection of environmental rights across states globally. It expands Boyd's global study of constitutions[3] by going deeper into the normative contents of the constitutional environmental rights and classifying the constitutions according to their compliance with the identified markers of the *coalesced anthropocentrism* model.

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[1] C. Redgwell, 'Life, the Universe and Everything: a Critique of Anthropocentric Rights' in Alan Boyle and Michael Anderson (Eds), *Human Rights Approaches to Environmental Protection* (OUP 1996).

[2] J. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification' (1993) 18 *YALE J INT'L L* 281–85.

[3] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 3.

Environmental Constitutionalism and the Nigerian Judiciary

Constitutionalising environmental rights in Nigeria will be less effective if not matched with a robust and independent judiciary willing to enforce this constitutional right. Fortunately, while the Nigerian judiciary is generally conservative, in cases bordering on enforcement of constitutional rights, the judiciary in Nigeria has been noticeably more liberal and activist, refusing to adopt restrictive interpretations that undermine access to courts and protection of constitutional rights.

This posture in constitutional cases is more pronounced in respect of cases bordering on fundamental human rights in Chapter IV of the Constitution. Even though the existence of FREPR 2009 has set the stage for the abandonment of conservatism by explicitly removing technical doctrines like locus standi and limitation of statues, the court has also played its role by adopting a liberal interpretative stance which disregards technicalities in the enforcement of these rights. This approach was espoused by the Nigerian Supreme Court in the 2017 case of *Nweke v State*[4] involving fundamental rights in Chapter IV where the court advocated for generous interpretations in respect of fundamental rights provisions in the constitution.

'Generous interpretation' in this context refers to a liberal, non-strict constructionism approach as opposed to 'tabulated legalism'. The Supreme Court had earlier adopted this liberal stance in *Grace Jack v University of Agriculture*[5] where it removed the jurisdictional hurdles to enforcing fundamental rights in the constitution.

What emerges from a review of the Nigerian judiciary's posture in constitutional cases is the abandonment of the strict constructionism approach in favour of a liberal interpretative stance. Based on this, it can be deduced that constitutionalising environmental rights as one of the fundamental human rights will be subjected to an activist and courageous interpretation by the Nigerian

[4] Nweke v. State (2017) LPELR-42103(SC). See also Odubu v. Stephen & Ors (2012) LPELR-19792.

[5] Grace Jack V University Of Agriculture, Makurdi (2004) 14 WRN 91-103.

judiciary which will enshrine environmental constitutionalism based on the explicit constitutional environmental rights.

Nevertheless, enshrining environmental rule of law is essential for the Nigerian judiciary to play an effective role in implementing the potential constitutionalization of environmental rights. Consequently, beyond merely incorporating the constitutional environmental rights on paper, efforts must be made to improve other associated factors like the independence of the Nigerian judiciary, the obedience of judicial orders and making it easier for civil societies and other environmental defenders to have access to the courts without restriction or governmental oppressions.

Another issue to be considered is the possibility of constitutionally enshrining specialised environmental courts in Nigeria for effective adjudication of environmental disputes in the country. Part of the clamour for improving environmental protection in Nigeria has featured strong arguments in favour of establishing a specialised court to handle environmental matters in the country.[6] Proponents argue that this will institutionalise a specialised forum for environmental justice and ensure the adjudication of environmental claims by persons with sufficient knowledge/expertise in the field. [7]Several countries around the world have established specialised environmental courts including India, Brazil, Chile, Kenya, Tanzania, New Zealand etc.[8]

The arguments for and against the establishment of specialised courts is one that is based on perspectives, as there are equally valid points to support both sides of the debate. Dreyfuss[9] highlights some of the pros of a specialised court as including the use of experts in judicial administration, efficiency in adjudication, administrative benefits arising from reduction of the workload on the regular

[6] See Environmental Rights Action/Friends of the Earth, 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice' (2016) <https://www.foei.org/wpcontent/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf> accessed 08 March 2018.

[7] See George Pring & Catherine Pring., 'Environmental Courts & Tribunals: A Guide for Policy Makers', (2016) UNEP Publication, <http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courtstribunals.pdf?sequence=1> accessed 19 March, 2018: George Pring & Catherine Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals', <http://www.accessinitiative.org/resource/greening-justice> accessed 19 March, 2018.

[8] B Preston, 'Benefits of Judicial Specialisation in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental* 395–440.

[9] R Dreyfuss, 'The Federal Circuit: A Case Study in Specialized Courts', (1989)64 N.Y.U. L. Rev. 1.

courts, injecting doctrinal stability into the area of law and more sympathetic judicial officers who understand the unique plights of the subjects in that area. Revesz[10] identifies some of the drawbacks of specialised courts to include administrative duplicity of courts and horizontal proliferation of courts and resultant judicial incoherence from conflicting decisions of the specialised court vis-à-vis the regular courts. Others object to specialised courts claiming that specialization will produce a court with tunnel vision, with judges who are overly sympathetic to the policies furthered by the law that they administer or who are susceptible to "capture" by the bar that regularly practices before them.[11] As Dreyfuss contends, 'when faced with difficult policy choices intermingled with complicated technical issues, these courts will hide their biases behind impenetrable specialized jargon.'[12]In essence, specialised courts are highly likely to have difficulty interfacing appropriately with the regular courts and inculcating wider socio-economic and political factors in their decision making.

The actual necessity of establishing a specialised court in a particular sector and lack of a viable alternative is the key factor in assessing its merits as there are strong arguments on both sides. In some cases, the argument for its establishment can be managed by adopting a minimal approach which results in mere differentiation of different units of an existing court rather than a full-blown establishment of another separate court. As Dreyfuss puts it, 'if courts cannot grow out, and if growing up is unhelpful, what is left is differentiation'.[13] This obviates the need for institutionalising new administrative systems and protocols where simple delineation of existing administrative judicial systems will address the problem. Pring & Pring added some words of wisdom in this respect, stating that-

> A comprehensive assessment of the existing justice system is the first step in considering if an ECT *(Environmental Court and Tribunal)* is warranted. There is truth in the old adage, "*If it ain't broke, don't fix it"*… Even if the current system is not "just, quick and cheap," there may be avenues for reform within the existing

[10] Richard Revesz, 'Specialized Courts and the Administrative Lawmaking System' (1990) 138 *U.Pa.L.Rev*. 1111.
[11] Rochelle Dreyfuss, 'The Federal Circuit: A Case Study in Specialized Courts' supra (n 68) 3.
[12] ibid; See also Harold Bruff, 'Specialized Courts in Administrative Law', (1991) 43 *Admin. L. Rev*. 329 and Ellen Jordan, 'Specialized Courts: A Choice', (1981-1982) 76 Nw. U. L. Rev. 745.
[13] ibid, 2.

> system, such as mandatory judicial training, more judges or better cost controls".[14]

This assertion emphasises the importance of not establishing a specialised court for the sake of it or merely based on idealistic beliefs and utopian expectations. There must be a real need for the specialised court which cannot be satisfied by reforming the existing judicial system or differentiation of judicial units within the existing system.

In the Niger Delta environmental context, environmental rights protection in the region will be helped by establishing a specialised court exclusively focused on environmental matters. Already, at present there are 10 environmental courts and tribunals in Nigeria at the state and local level. At local level, they are referred to as Environmental Sanitation Courts. These environmental sanitation courts can be used as a blueprint for establishing a national environmental court to handle environmental cases arising from claims under the constitutional right to a healthy environment and under other national and state environmental statutes. There is a strong argument to be made in support of the potential impacts that establishing a specialised court has on a sector, drawing experience from the labour sector in Nigeria where the constitutional establishment of the National Industrial Court has resulted in remarkable improvements in the protection of workers' rights in the country.[15]

Wider Potential of Environmental Rights Constitutionalization

Constitutionalization of environmental rights is an important subject of discussion beyond its impact on environmental pollution and degradation. It is aimed at instituting sustainable environmental protection and management strategies as an integral part of a country's legal framework. As a result, it impacts on other areas of human/corporate activities affecting the environment e.g. other extractive industries outside of the oil and gas industry including large industrial and chemical industries. There are also other contemporary areas of

[14]George Pring and Catherine Pring, 'Environmental Courts & Tribunals: A Guide for Policy Makers', supra (n 7) 64.

[15] I Ukonu & G Emerole, 'The Role of National Industrial Court in Sustaining Harmony in Nigerian Health Sector: A Case of University of Abuja Teaching Hospital', (2016) 6(1) *Journal of Management and Sustainability* 171-181.

environmental concerns such as climate change and fracking where the constitutional set up of the environmental legal framework is an important consideration in determining the national response to these issues.

Fracking,[16] for instance, is a controversial issue in the UK based on concerns over its environmental impact.[17] Prolonged legal battles between environmental groups and the UK government over the regulatory approval of fracking by the government have sometimes assumed a violent dimension with the government forcefully evicting a protest camp set up by environmental activists to block a prospective fracking site.[18] Constitutional environmental rights can be useful in balancing individual rights to environmental sanctity with resource exploration through fracking and provide the courts with guidance in resolving the plethora of fracking litigation before it.[19]

Beyond the protection of environmental rights, constitutionalization also performs an important function of 'sign-posting' responsibilities, particularly on corporations that are involved in environment-impacting activities. While the primary responsibility for environmental protection is generally conferred on the government, a well-drafted constitutional environmental right such as that in Figure 10 can confer responsibilities on corporations with respect to environmental protection. This constitutional responsibility can constitute the basis for the institution of alternative regulation methods such as Corporate Social Responsibility (CSR) by corporations as they work towards meeting their constitutional obligation.[20] Already, global environmental constitutionalism is influencing the international movement towards ensuring corporate accountability for environmental activities as reflected in the UN Business and Human Rights resolutions.[21]

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[16] Fracking is the process of injecting liquid at high pressure into subterranean rocks, boreholes, etc. so as to force open existing fissures and extract oil or gas.

[17] Adam Vaughan, 'Campaigners celebrate as oil drilling at Surrey Hills site is blocked' *The Guardian*, 04 September, 2018 <https://www.theguardian.com/business/2018/sep/04/michael-gove-oil-surrey-hills-defra-bury-hill-wood> accessed 05 September 2018.

[18] '*Leith Hill oil test protest: Bailiffs begin evictions'* BBC News, 21 June 2017 <https://www.bbc.co.uk/news/uk-england-surrey-40355919> accessed 07 June 2018.

[19] Barclay Nicholson, Kadian Blanson, 'Tracking Fracking Case Law: Hydraulic Fracturing Litigation' (2011) 26 Nat. Resources & Env't 25.

[20] Kathy Babiak, Sylvia Trendafilova, 'CSR and Environmental Responsibility: Motives and Pressures to adopt Green Management Practices' (2011) 18(1) *Corporate Social Responsibility and Environmental Management* 14.

[21] Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework 2011 HR/PUB/11/04

The constitutional obligation ensures that corporations can no longer rely on lax government regulatory systems to shield their environmental impacts but are compelled to seek alternative regulatory systems to ensure they meet the constitutional baseline for environmental protection, even where the government is failing in its duties. This alternative regulation can either be internal, such as integrating environmental protection projects into its CSR strategies, or the setting up of institutional voluntary regulatory frameworks amongst corporations within the industry (oil and gas, chemical, mining or other industries).

In addition, the move towards protecting vulnerable persons from constructive displacement and other unpleasant consequences of compelled relocation as a result of development-based activities is fueling international efforts to update the relevant instruments relating ton refugees and internally displaced persons to include persons suffering environmentallyu induced constructive displacement as a result of loss of sese of place. This forms the basis for the he UN Refugee Basic Principles and Guidelines on Development based Evictions 2018.[22]

Mackie[23] suggests the introduction of financial regulatory schemes for corporations to regulate their impacts on the environment by insurance companies and other third-party financiers. In countries with significant environmental pollution, constitutionalization makes the consideration of alternative regulation schemes by corporations an imperative and reduces the over-reliance on weak government regulations.

Although the analysis in this thesis has focused on Nigeria's Niger Delta, it has a wider application to other countries (majorly developing countries in Africa, South East Asia and Latin America) with significant problems of environmental pollution and degradation. India, Nepal, Bangladesh, Pakistan and Afghanistan are amongst the top 10 most polluted countries in the world[24] and one common denominator is that they all lack constitutional environmental rights. Although

<https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 29 April 2019.

[22]Basic Principles and Guidelines on Development-Based Evictions and Displacement 2018 Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living A/HRC/4/18.

[23] C. Mackie, 'The Regulatory Potential of Financial Security to Reduce Environmental Risk' (2014) 26 *Journal of Environmental Law* 189-214.

[24] Conserve Energy Future, '11 Top Most Polluted Countries in the World as of 2017' <https://www.conserve-energy-future.com/top-most-polluted-countries-world.php> accessed 08 August 2018.

India's Supreme Court has interpreted the constitutional right to life as incorporating the right to a clean environment,[25] this greening of human rights does not substitute the need for a comprehensive constitutional protection of the environment in a *coalesced anthropocentric* structure which protects future generations, Mother Nature and establishes procedural environmental rights. While not definitive, instituting constitutional environmental rights in these countries has the potential to improve their environmental legal frameworks as discussed in this thesis.

Other countries with constitutional environmental rights in Latin America (e.g. Colombia, Peru, Jamaica and Chile) and in Africa (e.g. Kenya and South Africa) do not embody the full spectrum of effective constitutional environmental rights developed in this thesis (only Ecuador and Bolivia come close to embodying *coalesced anthropocentrism* in their constitution). This is an area that will be relevant to these countries in future revisions of their constitutions, as chapter 4 has shown the benefits of embodying *coalesced anthropocentrism* which these countries can aspire to achieve.

Ultimately, however, the effectiveness of constitutional environmental rights may depend on other factors outside sheer constitutionalization. As examined in chapter 3.4, environmental constitutionalism and an independent judiciary are central to the enforcement of environmental rights and protection. Seeing that it is possible to have environmental constitutionalism without a constitution and a constitution without environmental constitutionalism, it is arguable that having an independent judiciary that enforces the rule of law and constitutionalism perhaps trumps mere constitutionalization, as the UK example shows. Nevertheless, having both an independent judiciary and constitutional environmental rights represents the ideal scenario for an effective protection of the environment.

Final Reflections

While there is the potential that amending the Nigerian constitution to incorporate environmental rights may face opposition from the 'dominant' majority fearing environmental liberation by the Niger Delta will be detrimental to their interests,

[25] Subhash Kumar v State of Bihar AIR 1991 SC 420 .

this scenario may not play out in real life owing to the seemingly benign nature of a constitutional environmental right.

Arguing for the incorporation of a right to a clean environment looks non-threatening, as there can hardly be a logical opposition to the assertion that everyone has the right to a clean environment. Coupled with pressures from the international community on Nigeria, the other regions can be convinced to concede to the incorporation of a right to a clean environment in the constitution considering it as a benign exposition of an internationally recognised right. It is in the implementation and interpretation of this right that the full impact of this 'benign' right will begin to be felt by the dominant regions, by which time it will be too late to expunge it from the constitution seeing the extreme rigidity of amending the fundamental rights provisions in the constitution.

The unpleasant experience with the PIB which has been repeatedly shot down by the 'dominant majority' arises from the explicit attempt of the PIB to institute environmental management systems, reform the environmental regulatory framework and give the Niger Delta inhabitants more control of the resources in the region. This apparent attempt at environmental liberation was bound to frighten the dominant majority and increase their resistance. A 'right to a clean environment' in its bare form will not likely have the same effect and can easily pass as a restatement of internationally recognised principles. This is essential to ensuring the environmental liberation of the Niger Delta as the ability to successfully incorporate environmental rights in the constitution is the biggest hurdle the Niger Delta region will face in pursuit of environmental liberation. Without such incorporation, however, discussions about the benefits and potential impacts of constitutional environmental rights on the environmental challenges in the region will remain hypothetical and moot.

There are a number of implementation challenges that will be faced in enshringing environmemntal constitutionalism through constitutionalization of environmental rights in Nigeria. The most prominent of these challenges is the difficulty in enthroning environmebtal rule of law in the country. Nigeria has a rule of law deficit whereby laws are routinely ignored, circumvented or blatantly breached without consequences. Several laws exist mostly on paper as the implementation and enforcement is irregular, incomplete, and ineffective. Part of the challenge with the rule of law in Nigeria is problem with independence of the

judiciary, as although the constitution institutes various mechanisms to insulate the judiciary from executive influences, the executive still unconstitutionally execute undue influence on judicial officers, thereby undermining a crucial element of the rule of law in the country. In February 2019, the President uncermeonially sacked the Chief Justice of the Supreme Court and the head of the judiciary on the basis of an ex parte order unconstitutionally procured from an administrative tribunal.[26]

Despite the brazen illegality of this action which flies in the face of explicit constitutional provision on removal of the head of the judiciary, nothing was done about it and, a few outrage aside, the country moved on like nothing happened with the replacement Chief Justice taking office without any legal resistance. Environmental rule of law is a subset of the general principle of rule of law and the absence of rule of law will undermine any attempt at enthroning environmental constitutionalism in Nigeria.

Another implementation challenge is the difficulty of balancing the economic and developmental needs of the country against the environmental needs. Seeing the overwhelming reliance on oil and gas revenues for economic sustenance, any attempt to utilise environmental constitutionalism in a way that will curtail the conomic benefits from oil and gas exploration is bound to meet with stiff opposition from the government that should be in charge of enforcing these environmental principles. Although adopting a rights' approach circumvents reliance on government's regulatory mechanisms and empowers citizens to directly enforce these environmental standards, government's willingness to act on judicial orders and declaration on environmental issues is still indispensable. The culture of disregard for judicial orders that pervades governance in Nigeria renders it difficult to enforce judicial orders that go against government's economic and developmental pursuits, leading back to the main challenge of enthroning environmental rule of law in Nigeria.

Finally, corruption has remained the bane of socio-political and economic progress in the country, seeping deep into the social fabric of the nation. Corruption of judicial officers and other public officials that are charged with

[26] J Agbakwuru, '*Breaking: Buhari suspends CJN Onnoghen*' (*Vanguard*, 25 January 2019) <https://www.vanguardngr.com/2019/01/breaking-buhari-suspends-cjn/> accessed 14 May 2019.

adjudicating and enforcing these constitutional environmental rights is a significant implementation challenge that must be overcome for effective environmental constitutionalism and the protection of the environment through constitutionzation of environmental rights in Nigeria.

APPENDIX

Breakdown of Environmental Right Provisions in Constitutions

COUNTRY	Humans	Future Generations	Nature
Afghanistan	×	×	×
Albania	×	×	×
Algeria	×	×	×
Andorra	×	×	×
Angola	✓	×	×
Antigua and Barbuda	×	×	×
Argentina	✓	✓	×
Armenia	×	×	×
Australia	×	×	×
Austria	×	×	×
Azerbaijan	✓	×	×
The Bahamas	×	×	×
Bahrain	×	×	×
Bangladesh	×	×	×
Barbados	×	×	×
Belarus	✓	×	×
Belgium	✓	×	×
Belize	×	×	×
Benin	✓	×	×
Bhutan	×	✓	×
Bolivia	✓	✓	✓*(living things)
Bosnia and Herzegovina	×	×	×
Botswana	×	×	×
Brazil	✓	✓	×
Brunei	×	×	×
Bulgaria	✓	×	×
Burkina Faso	✓	×	×
Burundi	×	×	×
Cape Verde	✓	×	×
Cambodia	×	×	×

COUNTRY	Humans	Future Generations	Nature
Cameroon	✓	×	×
Canada	×	×	×
Central African Republic	×	×	×
Chad	✓	×	×
Chile	✓	×	×
China	×	×	×
Colombia	✓	×	×
Comoros	✓	×	×
Congo, Democratic Republic of the	✓	×	×
Congo, Republic of the	✓	×	×
Costa Rica	✓	×	×
Côte d'Ivoire	✓	×	×
Croatia	×	×	×
Cuba	×	×	×
Cyprus	×	×	×
Czech Republic	✓	×	×
Denmark	×	×	×
Djibouti	×	×	×
Dominica	×	×	×
Dominican Republic	✓	×	×
East Timor (Timor-Leste)	✓	×	×
Ecuador	✓	×	✓
Egypt	✓	✓	×
El Salvador	×	×	×
Equatorial Guinea	×	×	×
Eritrea	×	×	×
Estonia	×	×	×
Ethiopia	✓	×	×
Fiji	✓	✓	×
Finland	✓	×	×
France	✓	×	×
Gabon	×	×	×

COUNTRY	Humans	Future Generations	Nature
The Gambia	×	×	×
Georgia	✓	×	×
Germany	×	×	×
Ghana	×	×	×
Greece	×	×	×
Grenada	×	×	×
Guatemala	×	×	×
Guinea	✓	×	×
Guinea-Bissau	×	×	×
Guyana	×	×	×
Haiti	×	×	×
Honduras	×	×	×
Hungary	✓	×	×
Iceland	×	×	×
India	×	×	×
Indonesia	✓	×	×
Iran	×	×	×
Iraq	✓	×	×
Ireland	×	×	×
Israel	-	-	-
Italy	×	×	×
Jamaica	✓	×	×
Japan	×	×	×
Jordan	×	×	×
Kazakhstan	×	×	×
Kenya	✓	✓	×
Kiribati	×	×	×
Korea, North	×	×	×
Korea, South	✓	×	×
Kosovo	×	×	×
Kuwait	×	×	×

COUNTRY	Humans	Future Generations	Nature
Kyrgyzstan	✓	×	×
Laos	×	×	×
Latvia	✓	×	×
Lebanon	×	×	×
Lesotho	×	×	×
Liberia	×	×	×
Libya	×	×	×
Liechtenstein	×	×	×
Lithuania	×	×	×
Luxembourg	×	×	×
Macedonia	✓	×	×
Madagascar	×	×	×
Malawi	×	×	×
Malaysia	×	×	×
Maldives	✓	×	×
Mali	✓	×	×
Malta	×	×	×
Marshall Islands	×	×	×
Mauritania	✓	×	×
Mauritius	×	×	×
Mexico	✓	×	×
Micronesia, Federated States of	×	×	×
Moldova	✓	×	×
Monaco	×	×	×
Mongolia	✓	×	×
Montenegro	✓	×	×
Morocco	✓	×	×
Mozambique	✓	×	×
Myanmar (Burma)	×	×	×
Namibia	×	×	×
Nauru	×	×	×

COUNTRY	Humans	Future Generations	Nature
Nepal	✓	×	×
Netherlands	×	×	×
New Zealand	-	-	-
Nicaragua	✓	×	×
Niger	✓	×	×
Nigeria	×	×	×
Norway	✓	✓	×
Oman	×	×	×
Pakistan	×	×	×
Palau	×	×	×
Panama	×	×	×
Papua New Guinea	×	×	×
Paraguay	✓	×	×
Peru	✓	×	×
Philippines	×	×	×
Poland	✓	×	×
Portugal	✓	×	×
Qatar	×	×	×
Romania	✓	×	×
Russia	✓	×	×
Rwanda	✓	×	×
Saint Kitts and Nevis	×	×	×
Saint Lucia	×	×	×
Saint Vincent and the Grenadines	×	×	×
Samoa	×	×	×
San Marino	×	×	×
Sao Tome and Principe	✓	×	×
Saudi Arabia	×	×	×
Senegal	✓	×	×
Serbia	✓	×	×
Seychelles	✓	×	×

COUNTRY	Humans	Future Generations	Nature
Sierra Leone	×	×	×
Singapore	×	×	×
Slovakia	✓	×	×
Slovenia	✓	×	×
Solomon Islands	×	×	×
Somalia	✓	×	×
South Africa	✓	✓	×
Spain	✓	×	×
Sri Lanka	×	×	×
Sudan	✓	×	×
Sudan, South	✓	✓	×
Suriname	×	×	×
Swaziland	×	×	×
Sweden	×	×	×
Switzerland	×	×	×
Syria	×	×	×
Taiwan	×	×	×
Tajikistan	×	×	×
Tanzania	×	×	×
Thailand	✓	×	×
Togo	✓	×	×
Tonga	×	×	×
Trinidad and Tobago	×	×	×
Tunisia	✓	×	×
Turkey	✓	×	×
Turkmenistan	✓	×	×
Tuvalu	×	×	×
Uganda	✓	×	×
Ukraine	✓	×	×
United Arab Emirates	×	×	×
United Kingdom	-	-	-

COUNTRY	Humans	Future Generations	Nature
United States	×	×	×
Uruguay	×	×	×
Uzbekistan	×	×	×
Vanuatu	×	×	×
Vatican City	×	×	×
Venezuela	✓	✓	×
Vietnam	✓	×	×
Yemen	×[1]	×	×
Zambia	×	×	×
Zimbabwe	✓	✓	×

[1] Yemen's Draft Constitution of 2015 provides for a substantive right to a clean environment in Article 117 but this draft is yet to be ratified and take effect. The current constitution (first adopted in 1990 and amended in 1994, 2001 and 2009) makes no reference to environmental rights.

[2] There are 196 countries in the world today. This total comprises 194 countries that are member states of the United Nations and 2 countries that are non-member observer states: the Holy See and the State of Palestine.

[3] Israel, New Zealand and the United Kingdom do not have written constitutions.

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