MOURNFUL REMEDIES, ENDLESS CONFLICTS AND INCONSISTENCIES IN NIGERIA'S QUEST FOR ENVIRONMENTAL GOVERNANCE:
Rethinking the Legal Possibilities for Sustainability

4th Inaugural Lecture

MOURNFUL REMEDIES, ENDLESS CONFLICTS AND INCONSISTENCIES IN NIGERIA'S QUEST FOR ENVIRONMENTAL GOVERNANCE:
Rethinking the Legal Possibilities for Sustainability

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Foreword

I have read with admiration the succinct exposition of Professor Olanrewaju Fagbohun in the increasingly important area of Environmental Law in this fourth Inaugural Lecture of the Institute. As I would expect from a master of his craft, his analysis are deep, coherent, thought provoking and a clear guide on what Nigeria must do if she is to achieve sustainable environmental governance. As it was put in the Millennium Declaration adopted by the UN General Assembly in September, 2000, the law has an important role to play in freeing 'all of humanity, and above all our children and grand children, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'.

As noted in the lecture, the recognition of the intersections between social and environmental problems and the desire to address the challenges posed by environmental regulations were the factors that informed the concept of 'sustainable development'. The author underscored the fact that while it can be said that the challenges of environmental regulation are to a large extent general, empirical evidence has shown that environmental disaster risk is disproportionately concentrated in developing countries and will continue to be so for reasons of their lack of technological resources to effectively mitigate and/or adapt to environmental risks; lack of funds to develop requisite infrastructure; and non-existent or inadequate governance structures to develop, co-ordinate and mainstream necessary national policies and institutional systems.

With specific reference to the legal framework for environmental governance in Nigeria, the author argues that the inefficiency with environmental regulation is a creation rather than the effect of the law. Under a segment titled, *Patchwork of Environmental Governance Therapies*, he contends that in the absence of a profound reconfiguration of the present regime,

particularly in the way it has guided allocation and monitoring of responsibilities for environmental protection, there is no reason to imagine and/or expect current strategies to succeed in fostering sustainable development. He suggests a roadmap to intergovernmental cooperation and a review of the specter of environmental remedies.

Professor Fagbohun provides incisive analysis of different attempts by Nigeria to subject environment-related issues to various forms of legal and pseudo-legal regulations. His analysis as relate to administrative remedies, criminal sanctions and the civil liability regime reveal some potentially alarming developments to which these attempts have given rise. Premised thereon, Professor Fagbohun presents alternative vantage perspectives from which Nigeria should seek to appropriately regulate environmental issues.

The author identified in clear terms what should be the judicial approach to a green culture, and why those saddled with responsibility for environmental decisions should give more premium to public participation.

The great strength of this lecture is the depth of its coverage. The critical analysis of the author is without doubt invaluable to the development of this area of the law. It is a significant contribution to the field of environmental law in this country. I am particularly glad that this is coming at an important time when the National Assembly is engaged in a holistic review of the Constitution.

I congratulate Professor Olanrewaju Fagbohun on the lecture that he has produced and I commend it not only to those in government, but, also the general public.

Professor Epiphany Azinge, *SAN,Ph.D,LLD*
Director – General
September, 2012.

MOURNFUL REMEDIES, ENDLESS CONFLICTS AND INCONSISTENCIES IN NIGERIA'S QUEST FOR ENVIRONMENTAL GOVERNANCE:
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The Director – General, Professor Epiphany Azinge, *SAN, LLD*,

Your Excellencies, Distinguished Senators and Honourable Members of the National Assembly,

Honourable Members of State Houses of Assembly here present,

My Lords Spiritual and Temporal,

The Institute Secretary and other Principal Officers of NIALS here present,

Distinguished Professors and Heads of Departments,

Senior Advocates of Nigeria and other Distinguished Members of the Bar

Other Members of Teaching and Non-Teaching Staff,

Our Invited Guests and Dignitaries both from within and outside of Government,

Distinguished Ladies and Gentlemen,

Family members here present, both nuclear and extended,

Gentlemen of the Print and Electronic Media,

Our Dear Postgraduate Students and other Students;

All other Protocols duly observed.

Preamble

It is with humility and profound thanks that I give honour and glory to Allah for giving me this special privilege and opportunity to deliver the 4th in the series of inaugural lecture of the Nigerian Institute of Advanced Legal Studies. To me as an environmentalist, the number '4' is quite significant: the number is closely connected to the order of the world (warmth, coldness, dryness and humidity); African traditional jurisprudence regularly makes reference to "the four corners of the earth – North, East, West and South", in the Torah, the first use of the number "4" is found in connection with the water that flowed out of the beautiful Garden of Eden; in the mythology of creation, it signifies fullness and completion of the four stages of creation when God said[1], for My glory, I have created it, I have formed it, and I have made it; there are the four Gospels – Mathew, Mark, Luke and John to the Judeo – Christian; so also, there are the four books in Islam – Torah, Zaboor (Psalms), Injeel (The Gospel), Qur'an; and the four Arch Angels Jibraeel (Gabriel), Mikaeel (Michael), Izraeel (Azrael) and Israfil (Raphael). What all these symbolize for environmental sustainability is not just the organic totality and interconnectedness of our earth, but, also the undoubted linkage of our faiths. I, therefore, see the hand of God in giving me the opportunity to address the subject-matter of Environment and Sustainability as the 4th Inaugural lecturer of this great Institute. I thank Allah for His mercies.

Mr. Director – General, before proceeding with the subject of my lecture, it is pertinent to reminisce on my career in the academia. A number of good friends have asked me that question of why I elected to deliver my inaugural at the Nigerian Institute of Advanced Legal Studies and not at the Lagos State University where I spent upward of nineteen years. Here again, I see the hand of God in the journey of my life. I joined the Faculty of Law of the Lagos State University in

1. Isaiah, 11:11 – 12.

January 1991 as Assistant Lecturer. That same year upon the conclusion of my Masters in Law, I was made a Lecturer II and subsequently a Lecturer I in 1993. I became a Senior Lecturer in 1996 and was appointed Associate Professor in December, 2004.

Around that period, the University Senate approved a new minimum standard for promotion and appointment of lecturers within and into the University. The core of the new set of standards is that possession of a doctorate degree is mandatory for appointment and/or promotion of an applicant from Lecturer 1 and above. Undaunted by the development, I enrolled for my doctoral programme and completed same in November, 2008. I then applied to be appointed a Professor in the Department of Private and Property Law having fulfilled the 3 year maturation period to move from Associate Professor Cadre to Professor. At this point in time, I had over forty (40) publications in local and international journals and extensively served in different administrative capacities within the University. To my utter consternation, I was informed that despite the fact that I had the highest score in the *prima facie* assessment that was done, there is a ten (10) year post – doctoral qualification that I did not meet. I pointed out that neither the Guidelines for Appointment for Academic Staff nor that for Promotion made any mention of ten (10) years post-doctoral qualification. Regrettably, all entreaties that this unwritten condition should not be made applicable was futile. I was advised to wait till 2018 to re-represent my application.

Director – General Sir, when our most central wishes are fulfilled, we often experience joy and delight; when they are facing frustration, we typically feel anguish and grief. But not always. Where the victim is certain that the fond images of those behind his frustration are neither in accord with reality, fairness or an articulate objective assessment, but, more in their fantasy and hapless illusions, the victim's prospect of his goal will blunt the discomfort being endured and strive for his goal.

When eventually good men provide the platform for the attainment of that goal, attaining it provides compensatory elation. It is on this score that I must express my deep and especial appreciation to the Director – General, Professor Epiphany Azinge, SAN, Ph.D, LLD, the Okailolo of Asaba. Under your watch, I was appointed a Professor of Law on the 9th of December, 2009. You provided me the platform and made it unnecessary for me to seek correctness from those behind my travails. Professor Olusegun Yerokun, you stood tall as a lone voice in the wilderness, and forever, I will remain grateful to you sir. Same goes for Professor Bolaji Owasanoye, who upon becoming aware of the quandary in which I found myself, forewarned me of unavoidable intellectual decay if I fail to pursue self-determination.

I believe I have said enough of the unequal inheritance of my career. It is the part that I have been destined to follow and I thank God almighty for guiding me through. I will proceed with my journey into the realm of Environment and Sustainability.

Introduction

It is fairly obvious from my topic that the area of my discourse for this Inaugural Lecture is Environmental Law. This certainly will not catch many by surprise. It is in this area that I have consistently worked in the last 16 years. My first international paper in the field of Environmental Law was presented at the University of Legon, Accra, Ghana in 1996. Since then, I have had the opportunity to consult for the private sector and the government both at the State and Federal levels as lead investigator, lead task leader or lead co-ordinator of consortium. I have also been involved not only in designing curriculum, but, also in extensive teaching of environmental law and policy both at undergraduate and postgraduate levels. I have similarly collaborated with national and international partners both in the

academia and within the fold of non-governmental organizations and civil society groups. As at the last count, I have, in this field, published 52 peer-reviewed articles; presented 48 commissioned papers; co-edited 4 books and wholly authored a book. The field of Environmental Law is one where I can with all humility confidently assert that I have the competence not only to signpost the core issues, but, also proffer practical and workable solutions.

In starting this paper, it is certainly not out of place to seek an understanding of the general perspectives of environmental law. Fifty-five years ago, environmental protection as we know it today was unknown. Since the 1960s, however, the subject of "environmentalism" which has acted as the catalyst for the development of environmental law in its different phases has blossomed. Equipped with new knowledge of the limitation of our environment, activities that were prior to the 1960s regarded as commonplace have now metamorphosed into everyday challenge sufficient enough to engage the attention of policy makers and scholars in environmental studies, political science, law and international relations. It can rightly be said that we are in the middle of an environmental revolution, a transformation of our ideas about how we should relate with our environment and ultimately with nature.

Over the last forty years, minute by minute on a daily basis, both the print and electronic media make sporadic announcements of desertification, deforestation, spread of toxic chemicals, declining fisheries, loss of biodiversity among others, and 'celebrate' isolated national and internationally shared environmental catastrophies and fatalities in different forms. Then, came increased understanding of the effect of climate change in the context of global warming, increased intensity of windstorms, changed rainfall patterns, sea level rise

and other problems.[2] This latter development was the impetus that fuelled the urgency of the quest for a better functioning environmental regime. At this juncture, an idea of the paradigm of conflict, albeit not indepth that goes with environmental regulation is important. The global community has come to realize that an environmental concern is not just about environmental degradation. The spillover effects which vary in magnitude in different locations and different times, are economic inefficiency, political instability and diminished social welfare. For regulation, however, the irony is despite the fact that the persistent cries of enthusiastic champions of environmental protection and their talk that the current approach to environmental regulation is nothing but 'tickets to the graveyard' rings in loud contrast to the whispers of those who see the situation differently, the whisperers still have it.

Environmental activists seek an end to rampant consumerism[3] and stridently argue that business generates a range of significant environmental effects which include greenhouse gas emissions (GHGs), air pollution, noise, waste, acidification of land and water, and site contamination. This premise forms the basis of their contention that government intervention is not doing enough to strike the requisite balance between business efficiency and social efficiency. Business, on the other hand, reminds us that there is no alternative to economic globalization as the only solution to human development. Consequently, while they are not opposed to regulation of the environment, they are concerned about excessive regulation with its attendant cost implication which detracts from the net benefits potentially available to society. On the whole, business have consistently identified unnecessary

2. IPCC Fourth Assessment Report, 'Climate Change 2007: Synthesis Report', <www.ipcc.ch/pdf/special-reports/spm/region-en.pdf> accessed 28 June, 2012.
3. JK Speth and PM Hoas, Global Environmental Governance (Washington, DC: Island Press, 2006) 140.

regulatory burden associated with many environmental regulations.[4] Government on its own part, admits the risks but in her usual character, adamantly maintains that everything that can be done is being done, and to go any further would ultimately result in job loss and possibly a collapse of the economy.

The average citizen understands that a clean and safe environment is in her best interest: anything short of that is a risk. At the same time, the uncertainties of no work, or that of likely disruption of economic activities are too grave consequences. The citizen therefore assures himself that disease does not strike that many after all, and that however less bright the future may be in a violated environment, it is a worthwhile risk to take. With this kind of cost/benefit analysis, the majority of the citizens move on. Several others simply fall back on their religious beliefs to surmise that their lives may have been destined to be cramped and diminished. At the end of the day, only few are left to continue to grapple with how to move forward and build a more effective environmental regime.

The challenges of environmental regulation are without doubt much. For long, policy-makers, regulators, scientists and other stakeholders have tried to understand complex ecosystems and build the much needed consensus to regulate environmental risks.[5] The challenges, most of which are deeply embedded in political, economic, institutional and cultural factors, range from (i) allocation of environmental responsibility to building capacity for compliance; (ii) the dynamics of international relations such as changing geopolitical relations and tensions

4. 'Lanre Fagbohun, 'Law and Policy in Nigeria: The Dilemma of the Concept of Sustainable Development', LASU – CESE Monograph Series No. 2 (1991).
5. See Tania von der Heidt, MD Charles, R Ryan and B Hughes, 'Managing Environmental Regulations, for the 21st Century: Challenges and Opportunities in an Australian Industry Context, 22nd Australian and New Zealand Academy of Management (ANZAM) Conference , Auckland, NZ, 2 – 5 December, 2008, Promaco Convention, Canning Bridge, WA.

among states keen to build and preserve economic competitiveness; (iii) the adaptability of international regimes and institutions to changing circumstances[6]; (iv) institutional capacity in relation to effective co-ordination, monitoring and enforcement; (v) appropriate consultative process through information sharing and public participation; (vi) preventing regulatory hijack in the management of risks; (vii) perception of risk as low or high, short-term or long-term; (viii) priorities of nations vis-à-vis their vulnerability to risks, and a whole lot of other constraints.

The recognition of the intersections between social and environmental problems and the desire to address some of the above challenges were the factors that informed the concept of 'sustainable development'. According to the World Commission on Environment and Development (WCED), the goal of sustainable development is for it to link ecologically sound development with the alleviation of existing poverty through the principles of intra and inter-generational equity.[7] The former principle encompass the idea of meeting the basic needs of all and extending to all the opportunity to fulfill their aspirations for a better life. The latter principle means meeting the needs of the present in a way that does not compromise the ability of future generations to meet their own needs.[8] Not surprisingly, it

6. Carolyn Deere – Birkbeck, 'Global Governance in the context of climate change: the challenges of increasingly complex risk parameters', International Affairs 85:6 (2009) 1173 – 1194.
7. WCED, *Our Common Future,* Melbourne: Oxford University Press, 1990. Sustainable development as understood in the Brundtland Report is the theme of Agenda 21. Principles 3 and 5 of the Rio Declaration on Environment and Development affirm that development should equitably meet the needs of future generations whilst eliminating poverty within this generation. Principle 4 affirms that environmental protection should be an integral part of the development process.
8. As for the reason why the concept of sustainable development has managed to attract so much local, national and international attention, see J Behrens and BM Isamenyi (eds.) *Environmental Law and Policy Workshop: Our Common Future,* Hobart: University of Tasmania, 1991.

was just a matter of time before the promising sentiments of the concept also fell victim of the shifting shoals of politics[9] and economic priorities.

It is beyond the scope of my discourse today to rehearse the sustainable development debate. What is of importance is while it can be said that the challenges of environmental regulation and the confusion that has flowed from the concept of sustainable development are to a large extent general, empirical evidence has shown that environmental disaster risk is disproportionately concentrated in developing countries and will continue to be so for reasons of their lack of technological resources to effectively mitigate and/or adapt to environmental risks; lack of funds to develop requisite infrastructure; and non-existent or inadequate governance structures to effectively develop, co-ordinate and mainstream necessary national policies and institutional systems. Low and middle income countries, particularly those with weak governance, but rapidly growing economies will be more exposed to environmental risks; poorer households and communities, especially those that are poorly planned and managed will be more vulnerable to disaster impacts – the end result for all these is increased poverty outcomes for most developing countries as a result of environmental mismanagement.

Mr. Director – General, I am an environmentalist and environmental law is the turf on which I operate. Premised on the above general, introductory remarks, and guided by my understanding that one of the key essence of an inaugural lecture is to afford the Inaugural Lecturer an opportunity to share with the academia and the public the fruits of his research

9. T O' Riordan, 'The Politics of Sustainable Development', in *Sustainable Environmental Management: Principles and Practice,* I Burton and RW Kates (eds.) Chicago: Chicago University Press, 1988, 31; TO' Riordan 'The new environmentalism and sustainable development', The Science of the Total Environment, 108 (1991) 5 -15, Elsevier Science Publishers B.V Amsterdam.

particularly as it touches on issues of national concern, I now wish to focus on my discourse which is how well Nigeria has fared in her quest to sustainably regulate her environment.

My thesis in this regard is that while it is clear that the momentum of environmental crisis has become quite significant in Nigeria and so also the desire evinced by social movements to confront the crisis, the structure of Nigeria's political and governance process is such that existing policies, laws and institutions are not appropriately positioned to give the requisite leverage. After more than two decades of various regulatory initiatives, accession to international treaties and countless environmental education programmes, Nigeria's regime of environmental regulations has remained dysfunctional and afflicted with what I will call the 'chaos theory'. Supposedly innovative strategies have either ended-up as esoteric schemes that are hard to follow or were simply unable to stray beyond the rhetoric.

I argue that the inefficiency with environmental regulation in Nigeria is a creation rather than the effect of the law. Rather than being central, law is incidental. I further contend that in the absence of a profound reconfiguration of the present regime, particularly in the way it has guided allocation and monitoring of responsibilities for environmental protection, there is no reason to imagine and/or expect current strategies to succeed in fostering sustainable development. I aim to provide an analysis of various attempts by Nigeria to subject environment-related issues to various forms of legal and pseudo-legal regulations, reveal some potentially alarming developments to which these have given rise, and present alternative vantage perspectives from which Nigeria should seek to appropriately regulate environmental issues in Nigeria.

The lecture is divided into eight parts. The first part is my preamble and it is followed by an introduction of the lecture in part two. The third part is a clarification of the core concepts driving my topic, namely: environmental governance,

sustainability, and legal possibilities. The fourth part is a focus on the inescapable facts and realities of Nigeria's environment. The fifth part is an analysis of her patchwork of regulatory therapies. In the sixth part, I summarize my view on the role of the judiciary, while in part seven, I take a look at the bigger picture in public participation and why Nigeria should not continue to undermine it. Part eight is an overview of my contribution to the climate change challenge, and this is followed by my conclusion.

Clarification of Concepts

Since concepts are mental constructs that shape not only what we are willing to think about, but also how we proceed to look at what we are willing to think about, it is appropriate that we clarify the meaning of the key concepts guiding our discourse, namely environmental governance, sustainability and legal possibilities.

(i) Environmental Governance

Political concepts can have alternative meanings, depending on the type of discourse in which they are employed. In this respect, the concept of governance is both empirical and normative. As an empirical concept, it describes the nature of the relationship between the ruled and rulers, and what mechanisms exist for the ruled to hold their rulers accountable. This is often referred to as regime characteristics. As a normative concept, it can imply a value judgment in the sense of a good, bad, unjust or objective governance system.

By the 1980s the concept of governance became a part of the vocabulary of development; in the aftermath of the development crisis in less developed countries (LDCs) which was increasingly being viewed as political in character. As

noted by Hardallu[10], by 1989, the World Bank had come to attribute the weak economic performance in Africa to the failure of public institutions. It declared that, 'underlying litany of Africa's development problems is a crisis of governance'. Governance here, according to the World Bank, is 'the exercise of political power to manage a nation's affairs'. Governance came to denote a broad concept encompassing the organizational structures and the activities of all levels of governance, be they central, regional or local as well as the different organs (executive, legislative, and judiciary) of government. It also came to incorporate institutions and organizations of civil society in their capacity as participants in shaping and influencing public policy that affects their lives.

Ultimately, the content of the understanding implied in the concept of governance is that a country's capacity to formulate, implement and sustain sound policies is enhanced by the country's capacity for good governance and the opportunity and ability of its citizens to participate in decisions affecting their lives. It similarly implied that there is bad governance where a country failed to design and implement programmes that reconcile basic human needs with development strategies conducive to human development, or engendered conditions that made sound governance and civil society participation difficult tasks to achieve.

Flowing from above, then, is the concept of environmental governance to be understood in the context of sustainable development. Again, as noted by Hardallu,[11] the quality of good governance especially public sector management and the interaction of civil society organizations with government, are the key elements for the achievement of sustainable human development whose paradigm calls for an integrated process of

10. Adlan Al Hardallu, 'Environmental Governance', The Environmental Society, Rio+ Review Report, EDGE for Consultancy and Research <www.doc-txt.com/Meaning-ofGovernance.pdf> accessed 02 July, 2012.
11. *Ibid.*

political stability, popular participation, investment in people, a vigorous private sector, reliance on market forces and a concern for the environment.

Governance and politics have enormous influence on the management of the environment. Evidence abounds of how political decisions relating to control over natural resources have degenerated into conflict with serious implication for stability of the political system.

Deterioration of the natural resource base coupled with loss of livelihoods as a result of pollution of land and water have also resulted in the migration of rural dwellers to urban centres. The consequences of this have been the growth of urban slums and in some situations the loss of indigenous knowledge. Government policies, such as tax policy, land tenure system, labour legislation also impact greatly on the environment.[12] Viable development requires the preservation of the instance of unity of man-nature relationship by resolving the major ecological contradictions between, on the one hand, what is needed by man and other living creatures now and in the future, and what is available in nature in quantity and form on the other hand.[13]

Clearly, sustainable development cannot be achieved in the absence of environmental governance. Sound environmental policies, effective environmental laws and a well-functioning judicial system that adequately performs its functions are the key constituents that can bring about efficacy, tangible environmental improvement and meaningful positive movement towards the ultimate goal of sustainable development.

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12. AT Salau, 'Global Environmental Change: A Research Agenda for Africa', Working paper 1992, CODESRIA, pp. 26 – 27. See also OA Fagbohun, 'Reappraising The Nigerian Constitution for Environmental Management', (2002) Ambrose Alli University Law Journal, 24 – 27.
13. Galah EI Din EI Tayeb, 'Some Aspects of Development of Environment in Sudan', PENHA Informal Talks Series, No. 2 p.1, July 1990.

(ii) *Sustainability*

According to Wikipedia[14], the word 'sustainability' is derived from the Latin *sustinere* (which means to hold). The concept is quite broad and capable of achieving multiple purposes. Consequently, it is devoid of a universally accepted definition. Beginning from the 1980s, however, the concept of sustainability has been used more in the sense of human sustainability on planet Earth and this has resulted in its link with the earlier noted concept of sustainable development.

Sustainability creates and maintains the conditions under which humans and nature can exist in productive harmony, in a way that permits fulfilling the social, economic and other requirements of present and future generations. In its breadth and meaning, it is concerned with the viability of ecological, social and economic systems be it of local communities, countries, bioregions, continents or the entire global system. As noted by Pezzey,[15] any infinite-horizon economic process may be said to be sustainable if the welfare of society is non-declining in terms of the present structure of preferences. In this regard, no development process may be said to be sustainable unless the value of both man-made and natural capital is not declining. Similarly, no practice may be said to be environmentally safe and sound if it causes the loss of resilience of those ecosystems on which human life and livelihood depends.[16] Ultimately, a flow of income to an individual

14. WIKIPEDIA, The Free Encyclopedia, 'Sustainability', <en.wikipedia.org/wiki/sustainability> accessed 24 March, 2012.
15. JVC Pezzey and MA Toman, ' Making Sense of Sustainability', Issue Brief 02 – 25. Resources for the Future, Washington DC, 2002. See also RM Solow, 'Sustainability: An Economist's Perspective', the 18th J Seward Johnson Lecture to the Marine Policy Centre, Woods Hole Oceanographic Institution, in: R Dorfman and NS Dorfman (eds.) *Economics of the Environment: Selected Readings, (*Norton, New York, 1991) 179 – 187.
16. Charles Perrings, 'Sustainable Livelihoods and Environmentally Sound Technology: Theoretical and Conceptual Approaches', in I Ahmed and JA

household, community or country will be judged to be sustainable only if it involves no net depreciation in the value of the set of all assets (inclusive of natural assets) affected by the income generating activity

The link between sustainability and environmental degradation is that human society depends on access to a range of environmental services which are supported by the interaction between the organisms, populations and communities – the ecological systems of the natural environment. If these environmental services and ecological systems are impacted, it results in social costs. Regrettably, the users of environmental resources are rarely confronted by the social cost of their use of environmental resources as a result of a range of policy distortions, lack of or incomplete information at the disposal of the public, and poorly functioning laws and regulations. Expectedly, on the part of the resource user, their valuation of the resource is often biased by uncertainty, selfish desire to maximize profit and 'deliberate' ignorance. This invariably results in inefficient and unsustainable allocation of resources, poverty and decline in human welfare and societal conflicts. It is for this reason that Agenda 21 seeks to promote sustainability not just of the development process but also of each aspect of the development process.

(iii) *Legal Possibilities*

The phrase 'legal possibility' is not in itself a legal concept. The noun 'possibility' refers to the quality or condition of being possible. The idea of legal possibility thus centres primarily around what legal and policy choices are feasible and which options are utopian or politically impossible[17]. In relation to

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Doeleman (eds.) *Beyond Rio, The Environmental Crisis and Sustainable Livelihoods in the Third World* (MacMillan Press Ltd., Hampshire, 1995).

17. See Lawrence .B. Solum, 'Legal Theory Lexicon: Possibility and Necessity', Legal Theory Blog <isolum.typepad.com/ legaltheory/…/legal-theory-lexicon-possibility-and-> accessed 01 April, 2012.

environmental regulation, legal possibility stems from the role that law and policy can play within the framework of mainstreaming sustainable development.

As rightly opined by Sandra Paul,[18] since law is an instrument for translating societal goals and aspirations into practice, environmental law must be able to play three critical roles in the creation of and sustenance of society. The first is the regulation and control over the use of natural resources, which is achieved through appropriate measures concerning permits or sanctions, waste disposal regulations, setting standards of emissions and effluents, resource management laws and penal provisions attendant upon violation of regulatory measures. This includes coping with uncertainty. The second is that environmental law must contain anticipatory mechanisms to prevent man-made environmental harm and thereby avoid harmful impact of developmental policies and programmes. The third is that environmental law must be able to take into account trans-boundary causes and implications of environmental regulation.

The Rio Declaration affirmed the pivotal importance of law as a critical tool of sustainable development. It viewed sustainable development as a matter of social justice, premised on the principle of intra and intergenerational equity[19].

The concern of this discourse is with practical legal possibility in an epistemologically, historically and nomologically accessible system,[20] and in the context of what

18. Sandra Paul, 'The Role of Environmental Law Within the Framework of Sustainable Development', paper presented at the Regional Needs Assessment and Planning Meeting of Chief Justices of the English-Speaking Caribbean Trelawny, Jamaica, June 11, 2004.
19. *Ibid*, (n7).
20. Historically and nomologically accessible systems are those that share the history of the actual world (as against some possible worlds) and that shares in the law of nature. In this respect, one of a set of accessible relationships has been found to be especially relevant to legal discourse: these relationships concern human psychology, institutional capacities, social norms, and

normative legal theorists[21] view as not just necessary, but, are also legal options that can be said to exist in feasible choice sets. Significantly, in so far as a legal option is not remote, we shall not be bothered by the fact that the legal possibilities being proffered may be constrained because they are 'agent relative' (individual, institutional or collective). For example, an option will not be viewed as outside the feasible choice set simply because it is not relevant to a particular agency (e.g. an advocacy group), or because it is constrained by the political attitudes of their agents. Following from this, a legal possibility may be agent relative or subject to collective action. Furthermore, and as has been rightly argued,[22] possibility should not be reduced to cost nor equated to probability.

(iv) *Understanding the Linkage in the Concepts Clarified*

The linkage between *environmental governance*, *sustainability* and *legal possibilities* for this discourse is that a country's capacity to formulate, implement and sustain sound environmental policies that will substantially be devoid of conflicts and inconsistencies is enhanced by the country's capacity for good environmental governance and the opportunity and ability of government and citizens to proactively think through feasible legal options. Good

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political attitudes. Some legal options will not work, given what is true about human psychology; they make unrealistic assumptions about what officials or citizens believe is acceptable or unacceptable conduct. Some options make counterfactual assumptions about institutional capacities. And yet, other legal options are politically infeasible. They presuppose political attitude that only exist in some possible worlds that are remote from the actual world – See Lawrence .B. Solum, *Ibid.*

21. One of the most fundamental distinctions in legal theory is that between positive legal theory and normative legal theory. Positive legal theory seeks to explain what the law is, why it is that way and how laws affect the world, whereas, normative legal theory tell us what the laws ought to be. Normative legal theories are by nature evaluative and assumes that minds can be changed and that attitudes are not entirely fixed.
22. Lawrence .B. Solum, *ibid*.

environmental governance depends on the ability to exercise power and to make sound decisions over time across a spectrum of inter-linked sectors and cross-cutting issues. The quality of good environmental governance is a key element for the integration of sustainability and achievement of sustainable development.

Inescapable Facts and Realities of Nigeria's Environment

While it can be said that modern environmentalism dates from Earth Day in 1970, its roots go back a century and more.[23] For Nigeria, the year 1988 marked the watershed in the history of environmental policy development. Prior to 1988, environmental concerns were dealt with by different tiers of government in line with their respective constitutional responsibilities. However, in 1998 the Harmful Waste (Special Criminal Provisions etc) Act was passed in direct response to the Koko toxic waste dump incident. This was followed by the enactment of the Federal Environmental Protection Agency Act (FEPA Act) in 1988. The broad functions of FEPA were the protection and development of the Nigerian environment in general including institution of policy in relation to environmental research and technology. FEPA's main objectives were to administer environmental laws and coordinate governmental actions that affect the environment. The Act itself was a framework legislation and it was meant to

23. In one study, it was noted that men like Henry David Thoreau, Walt Whitman and George Perkins Marsh planted the intellectual seeds in the mid-19th century. These sprouted near the end of the century into the 'conservation' movement in reaction against land plundering in the rubber –baron era. As urbanization spread, inspirational leaders like John Muir, founder of the Sierra Club, helped graft protection of wildlife and wilderness onto the conservation ethic. It wasn't until the 1960's and 1970's that it bloomed into pollution prevention and protection of human health. Only then did the word 'environmentalist' come into widespread use – See Robert .E. Taylor, *Ahead of the Curve: Shaping New Solutions to Environmental Problems*, Environmental Defence Fund (1990).

serve as a comprehensive system for environmental management.

In November, 1989, Nigeria presented to the public its National Policy on the Environment. One of its many goals is to secure for all Nigerians a quality of environment adequate for their health and well being. This was the major step that gave Nigeria the focus and pathway to proceed in meeting the environmental challenges facing the country.[24] There were several other legislation that was enacted to build a common context for Nigeria's environmental policy actions and form the nexus for all her environmental activities. Table A is a highlight of these laws and regulations.

Table A

FEDERAL ENVIRONMENTAL LAWS & REGULATIONS

S/No	Sector	Federal Law/Regulation
1.	**General Frame work**	Constitution of the Federal Republic of Nigeria, 1999
		National Policy on Environment, Act 42 of 1988
		National Environmental Standards and Regulations Enforcement Agency Act (NESREA), 2007

24. Detailed literature on the evolution and development of environmental protection in Nigeria is abundant. See O Fagbohun, 'The Emergence and Development of Environmental Law in Nigeria (1960 – 2010)', in E Azinge and N Aduba (eds.) *Law and Development in Nigeria: 50 Years of Nationhood* (Nigerian Institute of Advanced Legal Studies 2010), EO Aina, 'The Journey So Far', in Aina and Adedipe (eds.), *The Making of Nigerian Environmental Policy*, (FEPA Monograph 1, Lagos, 1991)', OG Amokaye *Environmental Law and Practice in Nigeria* (University of Lagos Press, Akoka, Lagos, 2004); MT Okorodudu – Fubara, *Law of Environmental Protection, Materials and Text*, (Caltop Publications (Nigeria) Limited, 1998).

		National Oil Spill Detection and Response Agency (Establishment) Act, 2006
		Environmental Impact Assessment Act, Cap L12, LFN, 2004
2.	**Air Pollution**	National Effluent Limitation Regulations, Special Instrument No 8, 1991.
		Associated Gas Re-injection Act, Cap A25, LFN 2004
		The Associated Gas Re-injection (continued flaring of Gas) Regulation, LFN, 2004.
		National Environmental Protection (Effluent Limitation) Regulations, 1991
		National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations, 2011
		National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011
3.	**Forestry**	National Forestry Policy, 1988
4.	**Wildlife**	Endangered Species (Control of International Trade and Traffic) Act, LFN, 2004
		Gaming Machines (Prohibition) Act, Cap G1, LFN, 2004
		Hides and Skin Act, Cap H3, LFN, 2004

		Animal Disease (Control) Act, Cap A17, LFN, 2004
		National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011
5.	**Resource Conserva-tion**	Federal National Park Service Act, Cap N65, LFN, 2004
		National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations, 2009
6.	**Water Resources**	National Water Resources Institute Act, Cap N83, LFN, 2004
		Territorial Waters Act, Cap T5, LFN, 2004
7.	**Toxic and Hazardous Substances**	Harmful Waste (Special Criminal Provisions) Act, Cap H1, 2004
		National Environmental (Base Metals, Iron and Steel Manufacturing/ Recycling Industries Sector) Regulations, 2011
8.	**Land Use and Soil Conserva-tion**	Land Use Act, L5, LFN, 2004
		Land Use (Validation of Certain Laws, etc) Act, Cap L6, LFN, 2004
		Land (Title Vesting, etc.) Act, LFN, 2004
		National Environmental (Soil Erosion and Flood Control) Regulations, 2011
		Nation Environmental (Construction Sector) Regulation, 2011

		National Environmental (Desertification Control and Drought Mitigation) Regulation, 2011
		National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations, 2009
9.	**Noise pollution**	National Environmental (Noise, Standards and Control) Regulations, 2009
10.	**Energy Use**	Energy Commission of Nigeria Act, Cap E10, LFN, 2004
		National Atomic Energy Commission Act, Cap N91, LFN, 2004
		National Safety and Radiation Protection Act, Cap N142, LFN, 2004
11.	**Settlements**	Nigerian Urban and Regional Planning Act, Cap N138, LFN, 2004
12.	**Waste Manage-ment**	National Environmental protection (Management of Solid and Hazardous Wastes) Regulations 1991
		Harmful Waste (Special Criminal Provisions) Act, Cap H1, LFN, 2004
13.	**Flora and Fauna**	National Crop Varieties and Livestock Breeds (Regulation) Act, LFN, 2004
14.	**Water Quality, Efficiency and Resources**	National Water Resources Institute Act, Cap W2, LFN, 2004
		Oil in Navigable Waters Act, Cap O6, LFN, 2004
		Water Resources Act, Cap W2, LFN, 2004
		National Environmental (Surface and Groundwater Quality Control)Regulations, 2011

		National Environmental (Wetlands, River Banks and Lake Shores) Regulations, 2009
16.	**Pest Manage-ment**	Bees (Import Control and Management) Act, LFN, 2004
		Animal Diseases (Control) Act, 2004
17.	**Greenhouse Gas Emission**	National Environmental (Ozone Layer Protection) Regulations, 2009
18.	**Mining & Mineral Resources**	National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations 2009
		Minerals and Mining Act, LFN, 2004.
		National Environmental (Non-Metalic Mineral Manufacturing Industries Sector) Regulations, 2011
		Oil Pipelines Act, Cap. 07, LFN, 2004
		Petroleum Act, Cap. P10 LFN, 2004
		Petroleum Regulations, L.N 71 of 1967
		Petroleum (Drilling & Production) Regulations, L.N. 69 of 1967
		Oil in Navigable Waters Act, Cap. 06 LFN 2004
		Oil in Navigable Waters Regulations, L.N 101 OF 1968
19.	**Sanitation**	National Environmental (Sanitation and Wastes Control) Regulations 2009
		Quarantine Act, LFN, 2004

20.	**Marine and Coastal Areas Resources**	National Environmental (coastal and Marine Area Protection) Regulations, 2011
21.	**Noise**	National Environmental (Noise, Standards and Control) Regulations, 2009
22.	**Telecommunications**	National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations, 2011
23.	**Industries**	National Environmental (Domestic and Industries Plastic, Rubber and Foam Sector) Regulations, 2011
		National Environmental (Food, Beverages and Tobacco Sector) Regulations, 2009
		National Environment (Textile, Wearing Apparel, Leather and Footwear Industries) Regulation, 2009
		National Environment (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations, 2009
		National Environment (Electrical/ Electronic Sector) Regulations, 2011
24.	**Permitting and Licensing System**	National Environmental (Permitting and Licensing System) Regulations, 2009

***Source*: Author**

In 2007, and following series of criticisms,[25] the FEPA Act was repealed by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 (NESREA). The objectives of NESREA were similar to that of FEPA and included a broad set of responsibilities.[26] Significantly, beyond guiding federal agencies in assessing the impacts of their actions and coordinating anti-pollution research activities, NESREA has also been responsible for the development and enforcement of national standards,[27] and for the development of national programmes in conjunction with the Federal Ministry of Environment.

On paper, environmental protection and regulation in Nigeria have no doubt received considerable attention. The government has consistently declared its commitment to the pursuit of people-centred sustainable development and an environmentally sound resources management. Regrettably, the laws, regulations and commitment have failed to resonate to effective environmental protection. The rich rhetoric of environmental sustainability have produced nothing but frustration to the advocates of environmental protection. Formulated solutions and strategies have continued to flounder on the shifting and entangled web of a polarized system. Environmental commitments have increasingly whiplash back and forth between the different tier regulators who choose what to enforce or not to enforce, while critical issues are responded to in ways that are incoherent so much that they lose ascendancy

25. For some of the criticisms that were leveled against FEPA Act, see O Fagbohun 'The Emergence and Development of Environmental Law in Nigeria', ibid (n24), pg 336 – 338; O.A Fagbohun, '19 Years After FEPA Act: What Future For The New Environmental Enforcement Agency Act, 2007', Journal of Current Practice (IBA), Vol. 2 No. 2 (2007).
26. S. 7 NESREA Act.
27. It was in pursuance of this that NESREA in 2009 introduced 11 subsidiary legislation pursuant to section 34 of the Act. Additional 13 subsidiary legislation were further introduced in 2011.

in the list of national priorities. What the current system has so far achieved can be said to be disorder, incoherence and disappointment.

Mr. Director – General, permit me to note the position of some of those who should know. In the 2012 Environmental Performance Index[28] which assessed 132 countries globally on 22 performance indicators in 10 policy categories ranging from environmental burden of disease to water and air pollution, forestry, biodiversity, fisheries, agriculture and climate change among others, Nigeria was ranked 130th on environmental burden of disease, 26th on agriculture, 81st on biodiversity and 41st on climate change. Overall, with a score of 40.1 per cent, Nigeria was ranked 119th. Nigeria was also ranked 19th out of 21 sub-Saharan African countries.

Very recently, there was an assessment of oil pollution in Ogoniland by the United Nations Development Programme (UNEP).[29] The assessment report revealed extensive widespread and severely impacting degradation of swampland surface water, mangroves, intertidal creeks, wetlands, outdoor air and drinking water arising from oil spills and oil contamination. The report noted that oil spills continue to occur with alarming regularity despite the fact that the oil industry is no longer active in Ogoniland. Communities are drinking water from wells that are contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) guideline.[30]

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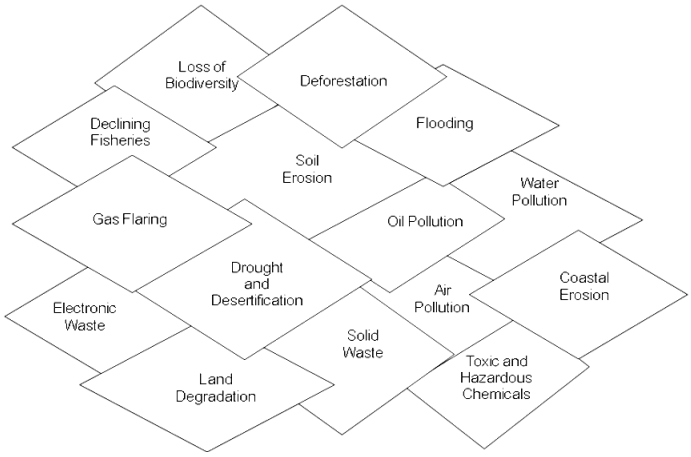
28. A Okpi, 'Nigeria ranks 119th on global environmental index' Sunday PUNCH (Nigeria 04 March, 2012) 6. The Index was compiled from studies done by Yale Centre for Environmental Law and Policy, Yale University Centre for International Earth Science Information Network, Columbia University in collaboration with the World Economic Forum, Geneva, Switzerland and Joint Research Centre of the European Commission, Ispra, Italy.
29. UNEP, *Environmental Assessment of Ogoniland*, (United Nations Environmental Programme, 2011)
30. For a detailed discussion of this report as relevant to resource governance and access to justice for oil pollution victims, see O. Fagbohun and G Uyi Ojo,

Yet in another report of the WHO and United Nations Children's Fund (UNICEF) Joint Monitoring Program, Nigeria was ranked 3rd on the list of countries with largest population without access to improved drinking water and where about 20 percent of the country's population practiced open defecation. The report noted that unlike some countries in sub-Saharan African such as Malawi, Burkina Faso, Ghana, Namibia and Gambia who have already met the target of the Millennium Development Goals in this regard, several other countries of sub-Sahara Africa (including Nigeria) are not on track to meet it.[31]

Table B is indicative of some of the environmental challenges facing Nigeria.



***Source*: Author**

'Resource Governance and Access To Justice: Innovating Best Practices in Aid of Nigeria's Oil Pollution Victims', NIALS Journal of Environmental Law, Vol. 2 2012.

31. A. Okpi, '66 Million Nigerian Lack Access to Potable Water – WHO/UNICEF' Sunday PUNCH (Nigeria 08 April, 2012), 4. The WHO/UNICEF 2012 Joint Monitoring Program Report covered between 1990 and the end of 2010.

In the face of the above facts and prevailing realities, it cannot be denied that Nigeria's efforts at ensuring sound environmental governance have led neither to effective environmental transformation nor to a better quality of life to her citizens. While it can be argued that the number of instruments that have been churned out have contributed to slowing down environmental degradation, a stronger argument can be made premised on the above facts that they have not led to an improvement in the overall situation. A number of great works have been produced in relation to Nigeria's environmental challenges. Several of these scholarly contributors have tried to underscore the *raison d'etre* for the dysfunction in Nigeria's environmental governance.

Among the many reasons that have been given are corruption within regulatory agencies; preference for social affiliations than merit in appointment of officials; irrational support for organs/parastatals of the state; irresponsible exercise of discretion by public functionaries, irrelevant controversies and unending face-offs (conflict and unhealthy competition) between regulatory agencies; lax enforcement; reluctance in the use of criminal sanctions; unrealistic nature of some laws; and absence of procedural and implementation mechanisms.[32] Reference have also been made to other reasons such as lack of financial resources, lack of technical and administrative resources, lack of political will, overlaps and inconsistencies in laws, non-involvement of non-governmental organizations and civil society groups, poverty, and problems of access to justice.

A host of valuable suggestions have also been proffered to meet the above referred challenges. Among others, the following have been suggested: more rigorous and innovative use of enforcement, greater degree of public participation, domestication of all relevant and requisite international treaties,

32. See O Fagbohun, 'The Emergence and Development of Environmental Law in Nigeria (1960 – 2010)', *ibid*, (n24).

adoption of integrated strategies, restructuring of implementing institutions, closing the gap between policymaking and law-making, the need for more environmental co-operation, improving the environmental education system, improving access to environmental information, effectively monitor environmental impact assessment of both public and private projects, reduce rampant consumerism, develop more epistemic communities, make the laws more coherent and cohesive, improve access to environmental justice by removing current judicial hurdles, curb corruption, and regularly update Nigeria's environmental laws to ensure that they are attuned with reality.[33]

Laudable and comprehensive as the above extensive "shopping list" would appear to be, the attitude of policy and law makers have always been that government cannot implement everything at once. Consequently, they advocate for incremental gains and prioritization of solutions. Mr. Director – General, there is a need to appreciate that the above proferred suggestions are complementary solutions and are not just options or alternatives in respect of which choices are to be made. They are also not solutions to be kept on the shelf for implementation only 'when able'. They all must work together if we are to achieve the desired transformation. Consequently, what is required for effectiveness is for Nigeria to build a system of governance that creates a public space for fostering the above solutions in a self-reliant manner. Governance should be envisioned in terms of all stakeholders and joint actors being motivated to act right. The advantage of the above approach is that rather than rummaging through the several complementary solutions on what to implement from time to time, the emphasis of law would be more on identifying the underlying factors that are not allowing them to self implement. Anchored on

33. *Ibid.*

environmental pragmatism,[34] we shall now turn to the fundamentals that will engender self-reliance and self-responsibility.

Patchwork of Environmental Governance Therapies

(i) *Unequal Inheritance in Federalism*

One of the thorniest issues affecting environmental regulation in Nigeria relates to the regulatory issues associated with the federal system of government and its three tiers of government. There is often considerable tension between the various spheres of government, while the potential for regulatory overlap between the various jurisdictional requirements is immense.[35] In defining the lawmaking boarder between the different tiers, environmentalists sometime argue in favour of a stronger federal government overriding state autonomy, while at other times the support is for the authority of states to impose more environmentally protective requirements. Some of the federalism engendered legal issues can be outlined as follows:

a) Deep disagreements over what equity and fairness should prevail in the management and use of natural resources;

34. Environmental pragmatism is a philosophy of environmental action that begins with real-world problems and not abstract theory – dependent questions. It bypasses the theoretically grounded questions of environmental ethics and focuses on learning our way out of uncertainty in particular situations. Pragmatism provides an epistemology adequate to support social learning through experimental adaptation. Pragmatism is forward-looking, thus, it greatly complements the search for sustainable development – see BG Norton, 'The Re-Birth of Environmentalism as Pragmatic, Adaptive Management',<www.law.virginia.edu/pdf/env aw05conf/norton_bryan.pdf> accessed 14 June 2011.
35. See C O'Farcheallaigh, J Wanna and P Weller, *Public Sector Management in Australia: New Challenges, New Directions*, (2nd edn. Macmillan, Melbourne 1999); See also D McTaggart, C Findlay and MM Parkin, *Microeconomics* (4th edn, Pearson Education, Frenchs Forest, NSW 2003).

b) Divergent values of states at different levels of development within the Federation which makes it difficult to agree on burden sharing;

c) Challenges of reconciling states bearing burdens and costs of developmental transactions without corresponding benefits;

d) Challenges of ensuring the effectiveness of cooperation at the different tiers of government;

e) Challenges of developing mechanisms and strategies to promote compliance and enforcement of environmental laws across the board; and

f) Challenges of addressing the tension between the different tiers in situation where economic development imposes risk on ecological protection.

In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (the 1999 Constitution) regulates how responsibilities are shared between the Federal Government, the constituent States and Local Governments. The Federal Government has exclusive jurisdiction on all matters listed in the Exclusive Legislative List,[36] and has concurrent jurisdiction with the States on all matters listed in the Concurrent Legislative List.[37] With respect to matters on the Exclusive Legislative List, any State enactment that purports to touch either directly or by implication on a matter contained in this List shall to that extent be void. Concerning matters on the Concurrent Legislative List on the other hand, both the Federal and State governments can legislate in respect thereof. In the

36. See Part 1 of the Second Schedule to the 1999 Constitution.
37. See Part II of the Second Schedule to the 1999 Constitution. Schedule 4 of the 1999 Constitution also confers functions on the Local Government.

event of inconsistency in a law made by the State and that validly made by the National Assembly, the earlier shall to the extent of the inconsistency be void.[38] The supremacy clause of the Nigerian Constitution further provides[39] that the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

Against the background of the trans-boarder nature of environmental pollution that has necessitated multiple levels of regulation, the pertinent question to ask at this stage is who has the authority to regulate the environment, and who has the right to enforce regulations or impose standards on polluters? Aside of the constitutional imperative contained in section 20 of the 1999 Constitution,[40] there is no express provision or specific reference in the Constitution as to the power of the Federal government or any lower level of government to make laws with respect to the environment. Some commentators have stated that since the word 'environment' is not mentioned in both the Exclusive and Concurrent Lists, environmental protection should be treated as a residual matter and consequently falls within the purview of the state's competence to legislate.

Granted that environmental issues affect States and Local governments more,[41] it is easy to understand the above assertion

38. S. 4 (2) of the 1999 Constitution.
39. S. 1 (1) of the 1999 Constitution.
40. S. 20 provides that 'the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. For a detailed discussion of the debate regarding how directly effective the provision of s.20 can be for the environment, See O.A Fagbohun, 'Reappraising the Nigerian Constitution for Environmental Management', Ambrose Alli University Law Journal, 2002, 44.
41. Environmental issues affect States and Local governments in three different ways. First, a significant portion of pollutants are generated in the states and local communities. Second, the effects of these pollutants have direct impacts on the states and local communities, which need to adapt to the changing

and/or perception. The issue is, however, much more complex. The Exclusive List of the 1999 Constitution arrogates substantial formidable federal powers which following basic principles of interpretation are likely to confer enormous and sweeping powers on the Federal government with respect to environmental management.[42] This will involve the promulgation and enforcement of pollution control and other environmental regulations. In addition, there are also significant powers contained in the Concurrent List and in respect of which the Federal government may on the basis that it had already addressed the issue invalidate a State law on a preemption basis.

On the contrary, and notwithstanding the argument made in favour of the State on the basis that environmental protection is a residual matter, it can also be contended that the power of the State to cognizance environmental matters derive primarily from section 4 (7) of the Constitution,[43] while that of Local Governments derive from Schedule 4 of the Constitution.[44] Section 4 (7) confers power on the State Assembly to make laws for the '*peace, order and good governance of the State or any part thereof*'. This is a phrase that clearly has a wider import. For all the tiers, it is trite that the grant of power carries with it

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situation. Third, linkages and synergies between environmental regulations and sustainable development is more obvious at the local level.

42. For an extensive discussion of some of the Constitutional powers such as Public Order and Public Security, Implementation of Treaties and Provisions Relating to External Affairs, Incorporation of Companies and Regulation of Commerce etc, pursuant to which the Federal government can impliedly regulate the environment, see OA Fagbohun ibid (n 40), 27 – 42.

43 S. 4 (7) confers on the State House of Assembly the power to make laws for the peace, order and good governance of the State or any part thereof and on matters not exclusively reserved in the Exclusive List.

44. By virtue of Schedule 4 of the 1999 Constitution, Local Governments have the responsibility to establish, maintain and regulate slaughter houses, slaughter slabs, markets, motor parks and public conveniences, construction and maintenance of roads, street-drains, public highways, parks, gardens, open spaces, provision and maintenance of public conveniences, sewage and refuse disposal, control and regulation of outdoor advertising and boarding movements and keeping of pets.

an implication that all powers (including incidental, inherent or instrumental) necessary to carry the granted power into effect are also granted.

What implication does the above portend for the pertinent question earlier raised? Deducible from our analysis is that all the tiers of government can effectively regulate the environment and enforce pollution standards. However, against the background that the issues that the different tiers are supposed to regulate are cross-sectional and oftentimes integrated, the undefined ambit of environmental powers ultimately present formidable problems not only for the principle of autonomy as well-known within federal systems,[45] but also for judicial determination of which level of government should make decisions about a particular environmental issue.

For the avoidance of doubt, the point being made here is not to suggest that the constitution should legislate allocation of environmental responsibility. That will amount to an attempt to do the impossible. Rather, the essence of the analysis is to show that where the system is not properly structured on how the different levels of government will responsibly agree on decisions about environmental protection, as is the case with Nigeria, the different tiers will end-up not cooperating with each other in the development of innovative solutions and best

45. The principle of autonomy as operate within a federal system abhors of one tier of government, be it federal or state, encroaching on the functions of another tier or imposing burdens on the functionaries of other tiers without their consent. As stated by Uwaifo JSC in *Attorney-General of Lagos State v. Attorney-General, Federation* (2003) 12 NWLR 1 at 195, '*The National Assembly cannot in the exercise of its powers to enact specific laws, take the liberty to confer authority on the Federal Government or any of its agencies or engage in or be concerned with town planning matters, or to grant permits, licences or approvals which ordinarily ought to be the responsibility of a State Government or its agencies. This is because such pretext cannot be allowed to the Federal Government… to encroach upon the exclusive constitutional authority conferred on a State under its residual legislative power. A law of that type will be declared unconstitutional to the extent of such encroachment…'*

practices. The lower levels of government will also not be motivated to generate the social and technological innovations which can help meet the emerging environmental challenges.[46]

In considering the roles of the different levels of government in environmental protection, two approaches are discernible. The first is the political scientist's perspective which focuses on the constitutional division of power, and which we have said is not appropriate for the reasons earlier noted. The second is the economist's theory of federalism which focuses on how alternative divisions of responsibility will engender increased efficiency.[47] The level of government most likely to make a decision that achieves maximum efficiency is the one with the most potential to make the nation, as a whole, better off.

According to the economic theory of environmental federalism,[48] if the objective is to maximize economic efficiency, then, the primary issue to consider is whether costs and benefits of efforts to protect the environment extend beyond local (or state) boundaries. When the answer to that question is in the negative, economic principles indicate a stronger rationale for allowing localities (or states) to set their own standards.[49] If

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46. One of the core strengths of local actors is that they are more successful in recognizing, and thus promoting solutions for the local specifics of environmental challenge.
47. See TJ Besley and S Coate, 'Centralized versus decentralized provision of local goods: A political economy analysis', Journal of Public Economics, vol. 89, no 12, 2003, pp. 2611 – 37; I Lowe, 'Environment, Economy and State', in SI Bell and B Head (eds.) *State Economy and Public Policy*, (Oxford University Press, Melbourne, 1994); D McTaggart, C Findlay and M Parkin, *Microeconomics* 4th edn. Pearson Education, Frenchs Forest, NSW, 2003).
48. The Congress of the United States Congressional Budget Office, 'Federalism and Environmental Protection: Case Studies for Drinking Water and Ground Level Ozone', (November 1997) <http://www.cbo.gov/ftpdoc/2xx/doc250/drinkwat.pdf> accessed 14 October 2009.
49. Evidence suggests that lower levels of government are often likely to select more efficient methods of control. This is premised on the fact that they often have superior knowledge of variations from one area to another, and are

the answer to the question is positive, a stronger rationale exists for setting the standards at the national level. Other factors that will have a role to play in the decision include which level of government has the most compelling information about underlying costs and benefits and whether centralizing the standard-setting would yield savings in administrative costs.

Another potentially important issue to consider is whether states or localities would be likely to choose less-than-optional standards to attract industry to their area. This particular point will, however, not be so compelling if other mechanisms such as the judiciary and civil society organizations are properly positioned to play their role. How this is to be achieved will engage our attention in subsequent sections of this inaugural lecture. For the moment, let us by way of case study apply the above considerations to the way Nigeria has been regulating environmental protection in relation to the oil industry.

Under current legislation, the Department of Petroleum Resources (DPR) which is an arm of the Ministry of Petroleum Resources is the body saddled with the responsibility of enforcing environmental regulations applicable to the oil industry. Oil pollution has a significant damaging impact not only on the environment but also on human health. In pursuance of its mandate, the DPR (Federal Government) has identified and put in place the environmental standards that every actor

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therefore more able than the federal government to choose cost-effective methods of control. There are two exceptions to this: the first is when the options for control involve economies of scale in production in which case it will be more cost effective for multiple states to establish a control in a coordinated way rather than for individual states to establish varying controls on their own. The second is when selecting a method of control has effects outside the state in which case the state selecting the method of control does not have an incentive to consider the out-of-state effects associated with it. Where these exceptions are present, a more centralized approach may be appropriate – *ibid,* (n.46). See also R Inman and D Rubinfield, 'Rethinking Federalism,' Journal of Economic Perspectives, vol. II, no. 4 (1997) 43 – 64.

operating in the oil and gas sector must meet.[50] In 2003, the National Oil Spill Detection and Response Agency (NOSDRA) was also designated as the body to take responsibility for detection and clean-up of any oil spill in Nigeria. A key question to ask is how efficient is the current federal role in setting the standards and implementing same?

From the report of the UNDP earlier referred which equally documented widespread degradation and pollution of Ogoniland, it is clear that despite stiffer pollution controls, Federal responsibility for setting and implementing standards has not guaranteed the safety of the environment from the hazards of oil exploration and production.

Three arguments can be put forward for the ever-increasing current strong federal role in Nigeria's oil and gas sector.[51] The first is that the very vital importance of oil to Nigeria dictates (or so it would appear to policy makers) the Federal government's total control of the regulation of the sector. The second reason which flows from the first relates to the several years of military rule and the concomitant notion that anything that is of importance to the Federal government must be under its full grip. The third is the assumption that the magnitude of environmental issues associated with the oil industry is far

50. It was in pursuance of its mandate that the DPR established the guidelines for monitoring, handling, treatment and disposal of effluents, oil spills and chemicals drilling mud and drill cuttings by lessess and operators. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) was first issued in 1991 and subsequently revised in 2002. For a discussion of the deficiencies of the DPR and a critique of how it has carried its role, see O Fagbohun, *The Law of Oil Pollution and Environmental Restoration, A Comparative Review* (Odade Publishers, Lagos, Nigeria, 2010).

51. Oil production in Nigeria dates back to 1908, but, it was not until 1958 that the first shipment of crude oil left Nigeria when 4,900 b/d were shipped. Oil is the core revenue earner and sustainer of the Nigerian economy accounting for over 80 percent of the nation's export earnings and about 70 percent of total government revenue. For a discussion of history of oil exploration in Nigeria, see O Fagbohun, ibid, (n50) 153 – 60.

beyond the limited resources of the State. This third argument of course fails to take into cognizance the importance of the polluter pays principle which requires that all expenses incurred in restoration, remediation or rehabilitation shall be borne by the polluter. What this reveals is that the federal government's role in regulating environment protection in the oil industry has not been dictated by a balance of the relevant benefits and costs.

Mr. Director – General, how consistent is the current regime of regulation with the economic theory of environmental federalism? We will, briefly examine this from the perspective of:

i) Setting the standards;

ii) Implementing the standards set; and

iii) Determining whose responsibility is it to fund research in order to expand the knowledge base.

In relation to setting the standards, the most compelling rationale for a decentralized approach to setting standards stems from the fact that most of the cost and health benefits that will result from the standards are local. Since the States are not directly involved in oil spills, oil pollution and the attendant gas flaring, it can be contended that there is a strong incentive for states directly affected to want to go for highly efficient standards.[52] Careful analysis will, however, reveal that in a number of situations there are also externalities (costs and

52. If controls are inadequate, the local communities are the immediate victims of harmful contaminants. Not only would it have effect on their health, it will also have effect on sustainable livelihoods, commerce and tourism. Some analysts are of the view that where the effect is transboundary, the possibility of setting standards through multistate authorities or through negotiated agreements among states should be considered. While this may have the advantage of states being able to leverage on each other to address a linked issue, achieving consensus is not always easy.

benefits that extend beyond local boundaries) which can give rise to the possibility of states putting in place conflicting and inconsistent standards. This obviously offsets the advantages of local standard setting and makes it more appropriate for the Federal government to set minimum safety standards that balance the costs of reducing pollution against the benefit. In this regard, it will be correct to conclude that the current allocation of authority in the federal government to set the standards is generally consistent with the principle of economic efficiency.

This takes us to the next point which is to identify the appropriate level of government to implement the standards set. The primary consideration here is which level of government has the greatest volume of information about the costs and benefits of reducing pollution. Decisions about implementation of standards are most likely to be efficient when they are based on accurate information. Generally, the federal government has more information about the relationship between alternative levels of a standard and individual or environmental risk. It also has more general information on the environmental impact of oil pollution and the consequences of these impacts.[53] The lower levels of government in turn have greater knowledge of the factors that are specific to their locales including factors affecting the physical benefits to a community of meeting a given standard and local preferences and factors affecting the costs to a community of meeting a given standard.

A second consideration relates to the objectives of government. Government officials are most likely to choose efficient standards if they want to achieve maximum welfare for their constituents. Where their other goal, as in the case of the DPR, is to encourage full development of Nigeria's petroleum

53. On the oil industry and its impact on the environment, see OA Fagbohun, ibid, (n 50) 145 – 201.

resources (increase earnings),[54] or where there are other political constraints, officials will most likely not be able to make efficient decisions. The analysis here favours assigning implementation of standards set to the lower level of governments as they are likely to be most efficient in implementing and achieving those standards when both costs and benefits are substantially local. The conclusion flowing there from is that the current allocation of implementation of environmental standards in the oil and gas sector by way of example is inconsistent with the principle of economic efficiency.

The final point here is whose responsibility is it to fund research in order to expand and deepen knowledge base? Effective restoration, remediation and rehabilitation programs[55] require different types of research to assess the effects of contaminants and determine the cost effectiveness of alternative technologies to remove the contaminants. Research is most efficiently conducted by a single state when the problem addressed is unique to that state. Where the result will benefit many states as is the case here, it will be better to be determined and funded at the federal level in order to benefit from the advantage of economies of scale. On this point the current allocation of responsibility is consistent with the principle of economic efficiency.

Overall, one can begin to appreciate why there is a problem of enforcement of environmental regulation in Nigeria's oil and gas industry. The responsibility for enforcement is clearly not where it should be. The case of the oil industry is one of many

54. Wallace E Oates and Robert M Schwab demonstrate that budget-maximizing governments will not have an incentive to choose socially optimal levels of environmental protection. See Wallace E Oates and Robert M Schwab, 'Economics Competition Among Jurisdictions: Efficiency, Enhancing or Distortion Inducing?' Journal of Public Economics, vol. 35, no. 3 (1988) 343 – 345.

55. For a discussion of the difference in the concepts of restoration, remediation and rehabilitation, see O.A Fagbohun, *ibid* (n. 50) 58 – 63.

sectors in respect of which Nigeria urgently needs to revisit its allocation of environmental responsibility in order to achieve effectiveness. In moving forward, there is need to map out the regulatory environment of the laws and policies in each of the main environmental areas such as water pollution, air pollution, biodiversity and energy use among others. Second, there is the need to evaluate the regulations identified with a view to assessing the significance of unnecessary (excessive, redundant, inconsistent and overlapping) regulatory burden. These will provide the basis for developing and implementing appropriate regulatory reforms.

(ii) *The Road to Intergovernmental Cooperation*

While it must be conceded that no legal system, not even the most advanced, can boast absolute effectiveness, particularly when confronted with politically volatile or otherwise intractable issues of public policy as those which pervade the environmental arena, a lot can still be done to align regulations, policies and guidelines, and reduce unnecessary duplication of effort. In this regard, a critical tool of environmental management in a federal system relates to how intergovernmental cooperation is achieved.

The development in many states suggests that municipalities are neither prepared nor fully ready to exploit their authoritative powers of regulation and strategic planning in order to meet environmental deficiencies. While in some situations the actual response of states is constrained by such issues as perception and priority of the state to environmental risks and a state's competence and capacity, in a number of other situations, states do not give support (or are slow in giving support) to laudable national programmes and initiatives because they have not been sufficiently carried along. The real foundation of authority of law in a federal system resides in the fact that the majority of those on whom it is binding recognize it as binding upon them. Beyond the common perspective that the

general will of the community must prevail, the juridical foundation of the duty to obey can be accounted for on the basis of quasi unanimity of states that the law is necessary. This is the core of legitimacy of the law within a federal system.

The first 10 to 11 years of FEPA were part of the military era. Consequently, achieving cooperation with State ministries and local government councils in line with FEPA's objectives was much easier. With the inauguration of democratic government in 1999, the rules of engagement expectedly was to have changed. This, however, was not the case. Decisions that had environmental implication were still taken at the federal level that did not sufficiently involve the states. The result was jurisdictional overlap in relation to matters that gave rise to environmental issues.

It was to guard against the kind of problems highlighted above that His Lordship Uwaifo JSC, in *AG, Lagos v. AG Federation* noted the point that:

> *Section 2(2) of the 1999 Constitution re-enacts the doctrine of federalism. This ensures the autonomy of each government. None of the governments is subordinate to the other. This is particularly of relevance between the State Governments and the Federal Government, each being able to exercise its own will in the conduct of its affairs within the Constitution, free from direction by another government.*[56]

Having made the above point, His Lordship proceeded to note that the National Assembly cannot enact any law, in contravention of the Constitution, imposing any responsibility on a state and expect obedience to such a law. It is a non-controversial political philosophy of federalism that the federal

56. *Ibid*, (n45) 1006 – 1007.

government does not exercise supervisory authority over the state governments.[57]

Mr. Director – General, it is too facile and risky to assume that the inconsistencies, contradictions and conflicts in Nigeria's environmental laws will go away. Far from it; real dangers lurk. The reality is that the more environmental crisis take firm root, the more poverty outcomes deepen, and the more the security of the nation is threatened. Therein lies a basis for serious genuine concern. The point therefore is that Nigeria urgently needs to embrace resolutive mechanisms that can reduce and promote cooperation beneficial to all. The situation calls forcefully on political leaders to agree to strengthen and entrench improved federal – state cooperation and reforms.

The time is ripe for Nigeria to consider putting in place a law akin to the Executive Order No. 13132 – Federalism which was issued by President Clinton of the United States of America on August 4, 1999 and which took effect on November 2, 1999. The Order seeks to guarantee the division of governmental responsibilities between the national government and the states as was intended by the framers of the Constitution, and to ensure that the principles of federalism guide the executive departments and agencies in the formation and implementation of policies. As relevant to the United States Environmental Protection Agency (US EPA), the Agency cannot promulgate two types of rules unless it meets certain conditions.

The two rules are:

1) rules with federalism implications,[58] that impose substantial direct compliance costs on states and local governments, and not required by statute; and

57. *Ibid*, (n45) 1000.

58. Policies that have federalism implications are defined under s. 1(a) of the Executive Order as regulations, legislative comments or proposed legislations, and other policy statements or actions that have substantial direct effects on the States, on the relationship between, the national government

2) rules with federalism implications that preempt states and local government law.

Federalism implications is defined as having substantial direct effects on states or local governments (individually or collectively), on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. US EPA cannot promulgate the first type of rule unless it provides funds necessary to pay direct compliance costs on the state and local governments, or early in the process before promulgation, consult with elected state and local government officials or their representative national organizations. US EPA can also not promulgate the second type of rule until after consultation.

In addition, US EPA is required to adhere to the Fundamental Federalism Principles in section 2, and comply to the extent permitted by law, with the Federalism Policymaking Criteria in Section 3 of the Executive Order. It must also provide in a separate preamble section a federalism summary impact statement; make available to the Office of Management and Budget Systems (the co-ordinating office) any written communication from the states and local governments' officials and include a certification that US EPA has met the requirements of the Executive Order.

Achieving the above requires serious psychological, political as well as economic adjustment. It also requires enlightened commitment of all concerned. It is no answer to say that the process of achieving this may be long drawn or that there will be conflicts. We certainly must disagree to agree. Moreso, a reasonable measure of conflict has been identified as

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and the States, or on the distribution of power and responsibilities among the various levels of government.

a catalyst for development. More importantly, in the event of an unreasonable dispute, the Court will be there to decide.

(iii) *Delimiting the Specter of Environmental Remedies*

The administration and enforcement of environmental remedies is governed by a mix of public, criminal and civil law regimes. The objective of environmental remedies is that the combined and collective operation of these regimes should serve to deliver three key environmental benefits, namely, deterrence, repairs of environmental damage, and compensation for harm done. From the perspective of public law, environmental protection is viewed as primarily the responsibility of the government, its agents and other public bodies. Consequently, the rules of public law prescribe liability to governmental or administrative directions or orders. The criminal justice system on its part assists by providing sanctions for the regulation and control of polluting and environmentally threatening or harmful activities. The civil liability regime for environmental damage provides remedies premised on the rules of tort liability.

Against the growing dissatisfaction with the remedies offered by these mix of regimes, it is intended here to briefly discuss the issues threatening the effectiveness of environmental remedies. Remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. The moment remedial laws are not able to correct imperfections, redress grievance or compel compliance that is conducive to the public good, the situation becomes not only mournful, but, also tragic. It is a recipe for self-help and violent conflicts. To these regimes, we now turn.

a) Administrative Remedies

Regulatory agencies have day-to-day responsibility for administering the relevant controls of environmental regulation and policy compliance with the law. They are given a range of wide administrative powers to enable them fulfill their statutory

obligations.[59] They also possess a wide discretion as to the enforcement action they may take to bring a polluter back into compliance with the law. Of importance, however, is that they must ensure that their decisions, acts and omissions are procedurally correct and not unreasonable failing which they may be subject to an application for judicial review by those with an interest in the decision taken i.e. person with 'standing'.

Two major issues have over the years been highlighted in relation to administrative remedies. The first is that because of the fragmented and unwieldy patch work of separate controls arising from lack of intergovernmental cooperation, which also did not respect the cross-media integrity and indivisibility of the environment, regulatory agencies ended up competing rather than complementing one another. The second relates to what can be labeled as behaviour realities and the 'fudge factor'. Regulatory agencies are most times politically constrained and will not go for anything that will undermine the economic goals of their appointor.[60]

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59. See for instance ss. 7, 8 and 30 of NESREA Act. These powers are especially important in ensuring that licence holders for example continue to comply with the terms of their licences. Regular use is made of such range of notices as Enforcement Notice, Suspension Notice, Abatement Notice, Variation Notice, Prohibition Notice and Revocation Notice. In the area of investigation, regular use is also made of such investigatory powers as entry onto premises, examination, inspection, investigation, measurement, recording, testing, removal of items or evidence, sampling, installation and operation of monitoring equipment.

60. Professor Sax articulated some salient factors that motivate responses/conduct in his five behavioural reality rules. According to him,' conduct can be modified as long as we understand the forces that impel it. We must begin by rooting out legal sentimentality and revising our legal structure to reflect behavioural realities. Here are the five basic rules of the game as I see them: (i) Don't expect hired experts to undermine their employers; (ii) Don't expect people to believe legislative declarations of policy. The practical working rule is that what the legislature will fund is what the legislature's policy is; (iii) Don't expect agencies to abandon their traditional friends; (iv) Expect agencies to back up their subordinates and professional colleagues; (v) Expect agencies to go for the least risky option (where risk means chance of failing to perform their mission)… if we want agencies to change their behaviour, we

In relation to the first issue, it is hoped that if Nigeria embraced the suggestion earlier made in relation to intergovernmental cooperation, she would be able to achieve a more integrated and coherent set of regulatory controls. In relation to the second, it has been noted now again that what will keep regulatory agencies on their toes is the ability of persons with 'standing' to be able to effectively utiltise the remedy of judicial review. Regrettably, the issue of 'standing' can so far not be said to be 'a win for the environment' in Nigeria. I shall examine this in greater depth when I outline the challenge facing civil liability regime and what has been the role of judiciary in the adjudication of disputes arising out of the administration and enforcement of environmental law.

b) Criminal Sanctions

Aside of administrative remedies, sanctions can also be imposed through the criminal process and following a successful prosecution of an environmental offence.[61] Despite practical problems,[62] criminal prosecution has assumed centre stage in environmental enforcement. Federal and state laws covering

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must give the signals that will register' – See Sax 'The (Unhappy) Truth About NEPA', 26 Okla .L. Review, 239, 240, 248 (1973). See also Lanre Fagbohun, 'Foul Fuel in Nigeria's Air: Nigerian Environmental Law', Journal of Energy & Natural Resources Law, Vol. 17 No. 3 251 – 264.

61. Environmental offences can fall into such categories as knowingly permitting pollution, failure to comply with notices, causing pollution, breach of statutory duty, breach of licence conditions, contravention of prohibition, making false statement to regulatory officials, failure to comply with abatement notice, failure to maintain record of or report discharges – see for example the provisions relating to Offences under the various Regulations made pursuant to s. 34 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.

62. For a discussion of these problems, see OA Fagbohun, 'Criminal Sanctions in Aid of Environmental Objectives in Nigeria – the Case for Reasoned Approach', *Landmarks in legal Development* (Faculty of Law, Ambrose Alli University, 2003); also M Fagbongbe, '*Criminal Penalties for Environmental Protection in Nigeria: A Review of Recent Regulations Introduced by NESREA*' NIALS Journal of Environmental Law, vol. No. 2 2012.

hazardous waste, clean air and water among several others now impose criminal penalties for environmental violations. Some scholars have argued that criminal law is not well suited for environmental violations. This is on the premise that environmental crime (unlike 'real' crimes such as murder or theft) is not inherently immoral, but, rather made unlawful only by statute. Further, they argue that most of the pollution that are sought to be criminalized are consequences of industrial activities that provide the society with significant benefits and that were hitherto perfectly lawful and considered to be acceptable.[63]

The above has led to calls to distinguish between routine cases of environmental harm that results from general activities and environmental crimes that have been wilfully committed with a view to personal or business advantage. The former, it is argued, should attract civil penalties and administrative sanctions while criminal sanctions should lie for the latter.[64] Indeed, the fact that most environmental offences impose strict liability is an acknowledgment that "*mens rea'* and '*actus reus'* does not always coincide. All that needs to be proved is the act or omission that forms part of the offence. To, however, mitigate the potential unfairness of absolute strict liability, statutory defences are at times introduced, or 'knowledge of violation' is introduced as a threshold in imposing criminal penalties.[65]

The concerns that have been raised in relation to environmental justice in criminal law are that prosecution is

63. OA Fagbohun , *ibid* at 145.
64. M Woods and R Macrory, *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (London: University College London, 2003).
65. See, e.g. Reg 48 (2) (c) in relation to National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations, 2009. Other examples of typical defences include acting in accordance with statutory consent, exercising due diligence in conduct of operations, having a reasonable excuse, or acting in response to an emergency situation.

costly and that many crimes go unpunished. Second is that those crimes that are prosecuted are not punished severely enough either because the levels of fines are low or that sentences are significantly reduced. The reason for the first concern is that the central aim of enforcement of environmental regulation is to prevent harm to the environment or human health, rather than to detect and then punish those who caused the harm. Consequently, in the enforcement pyramid, emphasis is more on all mechanisms other than prosecution in order to promote compliance. It is for this reason that prosecution end up being used on the very small minority of trenchant recalcitrants.[66] This is not to say that there is any consistency in the way regulatory officers exercise discretion in relation to prosecution. Indeed, for Nigeria, it can be said without fear of contradiction that there is no accurate picture of prosecution and sentencing for environmental crime.

With regard to the second concern, that fines are seemingly arbitrary and insignificant is true in fact. By way of example, section 6 of the National Oil Spill Detection and Response Agency (Establishment) Act, 2006 detailed the functions of the Agency. One of its core functions is its responsibility for surveillance and ensuring compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector.[67] There are also special functions stipulated

66. See generally, G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement*, (Oxford: Clarendon Press, 1982); K Hawkins *Environmental and Enforcement: Regulations and the Social Definition of Pollution*, (Oxford: Clarendon Press, 1984); S Bell and D McGillivray, *Environmental Law* (Oxford: University Press, 7th ed. 2008).

67. S. 6 (1) (a) of the Act. See also the position under the Environmental Impact Assessment Act (EIA Act). S.60 of EIA Act provides that failure to comply with the Act will upon conviction result in N100,000 fine for individuals and a fine of not less than N50,000 and not more than N1,000,000 for a firm or corporation. Aside of the paltry nature of fines for firm/corporation, there is no provision in situations where the offence is committed by Federal, State or Local Government in violation of a provision like s.12 (1) EIA Act. Situations like this make a mockery of enforcement provisions.

for the Agency under section 7 of the Act. Despite these enormous responsibilities, there is no general provision for offences under the Act. The only provision that has anything to do with commission of offences are sections 6 (2) and (3). They provide as follows:

6 (2) *An oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of Five Hundred Thousand Naira (N500,000.00) for each day of failure to report the occurrence.*

(3) *The failure to clean up the impacted site, to all practical extent including remediation, shall attract a further fine of one million Naira.*

In relation to section 6 (2), reason dictates that if there is a failure to report, it will be most difficult to come to terms with when exactly the incident occurred. As is always the case, the scenario will be one of disputes, arguments and counter-arguments. Local host communities will give one date as the date of occurrence while the oil company gives another date. Failure to report is without doubt a premeditated and deliberate act on the part of the oil company with a view to profit therefrom by escaping liability. Thus, one would have thought that this should be taken into account when passing a sentence. What will signal the seriousness of the crime in this particular instance is the sentencing option of imprisonment at the minimum and to which can then be added a monetary fine. The implication of this is that significant as the continuing daily fine of N500,000 post conviction would appear to be, it cannot be effective. In relation to section 6(3), the negative consequences of an oil spill and the immense problems of assessment and quantification of damages are so enormous that a fine of one

million naira is simply too insignificant for an offender who deliberately refused to live up to its responsibility of remediating an impacted site.

What is reflected in provisions like section 6(2) and (3) is that the true cost of crime to society and the environment have not been reflected in the law. Offenders are supposed to be punished appropriately. Not only should the law ensure that the polluter pays the price for the environmental harm caused, the offender should also not profit from the offence, even after being sentenced. Provisions like section 6 (2) and (3) leave the court with not much of a choice of sentencing options and it would be most absurd to turn around to blame the court for not imposing a sentence proportionate to the offence. The knock-on-effect of the above is that the concept of deterrence is not allowed a meaningful role in environmental crimes, while potential offenders find it cheaper on cost-benefit analysis to pollute and pay a fine than to comply with a regulatory regime that will minimise or avoid pollution incidents altogether.

At the minimum, there are four principles that an effective criminal sanction regime must capture, namely, proportionality in the application of law and in securing compliance; consistency of approach; transparency about how the regulatory agency operates; and the targeting of enforcement action at activities that give rise to the most serious environmental damage or in relation to which the hazards are least well controlled.[68] There is obviously the need to review the use of the criminal sanctions in Nigeria's environmental statutes. To do this effectively, there is an urgent need for a body like NESREA to coordinate cooperatively with other stakeholders the development of a general policy on enforcement and prosecution. Such a document will not only cover the principles that will guide regulatory agencies in making enforcement and prosecution decisions, it will also guide enforcement response

68. See S Bell and D McGillivray, *Environmental Law*, *ibid*, (n66) 279.

where an offence has been committed.[69] This will assist to secure a more consistent approach to enforcement across the board. Environment agencies should also in the context of a policy of 'name and shame' set out on annual basis key data on prosecutions and convictions particularly as regards business environmental performance.

Another area that has the potential to create serious concern for prosecutors and the court is the situation under which a company may be held to account for the acts of its employees. This raises the key question of corporate criminal liability. Studies suggest[70] that individuals are responsible for the majority of environmental crimes. The most significant acts of environmental harm arising as a result of violation of pollution control legislation are however caused by companies because of the scale of industrial operations. The structure of big companies means that it is a difficult task to identify the root cause of many pollution incidents. In the face of contentions that obscure the blame worthiness of offending companies, how are prosecutors and the courts to be guided?

The position would appear to be that where reference in the law is to a person responsible, it should be assumed that 'person' is to be given the broad meaning to include a body of

69. See Environment Agency (2004), *Enforcement and Prosecution Policy,* Enforcement Agency, Bristol, Environment Agency *Guidance for the Enforcement and Prosecution Policy*, December 2004; UK Environment Agency (periodically updated), *Guidelines for the Enforcement and Prosecution Policy,* available online at <www.environment-agency.gov.uk> accessed 14 January 2012. There is also a compliance classification scheme in relation to breaches of licence conditions as opposed to incidents: see <www.environment-agency.gov.uk/commondata/acrobat/ccsbr-iefingnote_745332.pdf> accessed 18 March, 2112; Magistrates' Associations, *Costing the Earth: Guidance for Sentencers,* (Environmental Law Foundation/Magistrates' Association: London 2002).

70. See UK the Environment Agency evidence to the House of Commons Audit Committee on Corporate Crime, 2004 HC 1135 – I, in which it was estimated that 38 – 40 percent of all prosecutions were brought against registered companies.

person incorporated or unincorporated,[71] unless a contrary intention appears. By way of example, section 31 of NESREA Act provides:

> *A person who obstructs an officer of the Agency in the performance of his duties under section 3 of this Act commits an offence and is liable on conviction to a fine not less than N200,000 for an individual or to imprisonment for a term not exceeding one year or to both such fine and imprisonment, and an additional fine of N20,000 for each day the offence subsists and in the case of a body corporate, it shall be liable for a fine of N2,000,000 on conviction and an additional fine of N200,000 for everyday the offence subsists.*

Another approach is that adopted in the National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations, 2009.[72] After creating different kinds of offences in regulations 46, 47, 48, 49 and 50 it proceeded in regulation 51 to establish a penalty provisions thus:

51 (1) Any person who violates any of the provisions of regulations 46 to 50 of these Regulations commits an offence and shall on conviction, be liable to a fine not exceeding N200,000.00 or to imprisonment for a term not exceeding two years or to both such fine and imprisonment and an additional fine of N50,000 for every day the offence subsists.

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71. See S. 18 (i) of the Interpretation Act, Cap. 123, LFN, 2004; *Altimate Inv. Ltd v. Castle & Cubicles Ltd* (2008) All FWLR (pt 417) 124 at 130.
72. Federal Republic of Nigeria Official Gazette, No. 68, Vol. 96, Government Notice No. 289.

(2) Where an offence under sub-regulation (1) of this regulation is committed by any facility, it shall on conviction, be liable to a fine not exceeding N1,000,000.00 and an additional fine of N50,000.00 for every day the offence subsists.

The macroscopic approach hitherto adopted is to think that corporate liability would only be established in cases in which the employees responsible were of sufficient seniority to be viewed as the 'controlling mind' of the company.[73] The reality however is that many pollution incidents are the responsibility of operational staff whose status cannot be categorized as the 'controlling mind'. It is thus clear that adopting a broad (rather than narrow) view of what will rest corporate liability will permit a more accurate overall contribution of the constructive role to be played by criminal law. Following therefrom, the courts have held that the actions of employees will create corporate criminal liability if it is clear that the relevant statutory purposes would be defeated if a company could not be prosecuted for the acts of its employees.

In large measure, and depending on the language of the statute, in circumstances where there is the need for proof of criminal intent or negligence it will be appropriate to seek for the individual who committed the offence. Where, on the other hand, it is a case of strict liability offences, there will be a deviation from the general rule that criminal liability is personal[74] in order to impose vicarious liability.

In the case of *National Rivers Authority v. Alfred McAlpine Homes East Ltd,*[75] the defendant AMHE caused water pollution during construction works. At the trial, AMHE was acquitted on the grounds that the prosecution had failed to demonstrate

73. *Tesco Supermarkets Ltd v. Nattrass* (1972) AC 153.
74. See *Huggins* (1730) 2 LD Raym 1574.
75. [1994] Env LR 198. See also, *Shanks and McEwan (Teeside) Ltd v. Environment Agency* [1997] Env LR 305.

that the employees that had caused the pollution were of sufficiently senior standing within the company to bind the company by their actions. On appeal, the court found AMHE to be liable. Moorland J. placed heavy reliance on the purposive approach to vicarious liability, namely, that the offence under section 85 of the Water Resources Act 1991 was designed to prevent water pollution. If therefore the legislation is to be made effective, there was a necessary implication that companies should be liable for the acts or omissions of all of their employees as opposed to simply the senior employees who were the 'controlling mind'. Moorland J emphasized this by referring to the idea that companies were, in fact, best placed to control activities of even very junior employees through such things as training and supervision.

As pointed out by Atkin J. in *Mousell Brothers Ltd v. London and North-Western Railway Co.*:[76]

> *... while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.*

76. [1917] 2KB 836.

It is submitted that it is this kind of purposive approach to corporate liability that should be given in the construction of a provision like section 31 of NESREA Act and similar statutory provisions. Looking at the way regulation 51(1) of the Chemical, Pharmaceutical Soap and Detergent Manufacturing Industries Regulations is structured, one would surmise that its construction will follow in the stead of section 31 of NESREA Act. A further reflection on the provision of regulation 51 (2) will, however, reveal that the said regulation presents a problem.

The confusion created by regulation 51 relates to the use of the word 'person'. In the definition segment of the regulation, the word 'Person' is defined as '…a natural or juristic personality (including 'facility'). The same definition segment defined 'Facility' to mean 'Chemicals, Pharmaceuticals, Soap and Detergent Industry'.[77] Yet, while regulation 51 (1) used the word 'Any person' to qualify situations where the offence is committed by an individual, it proceeded in regulation 51(2) to use the phrase 'any facility' to qualify where the offence is committed by a corporate body.

To start with, going by the definition of 'Facility' in the Regulations there is no way the Chemicals, Pharmaceuticals, Soap and Detergent Industry[78] as a body can be guilty of an offence under the Regulations. This clearly constitutes a serious bar to the operation and effective utilization of regulation 51(2) to bring corporate offenders to book under the Regulations. Further, the unusual tack taken by regulation 51(1) in using 'Any person' to qualify individual offenders while 51 (2) used 'any facility' to qualify corporate offenders has made a total

77. Reg. 54, *ibid*.
78. When the word 'industry' is used, the connotation is that it refers to the section of an economy concerned with a specific type of manufacturing or business, e.g. the steel industry, the oil and gas industry, the tourism industry – See the New Lexicon Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition, 495.

mess of the broad meaning traditionally associated with the word 'person'. Since regulation 51 (2) is supposedly aimed at corporate offenders, 51 (1) can no longer be extended to cover such offenders. The result is that the Regulations have not appropriately provided for corporate offenders.

Given the above reality, what one can constructively urge on the courts pending a review of regulation 51 (which sadly is the pattern of the penalty provision of almost all of the Regulations recently introduced by NESREA) is a flexible construction policy that will allow the word 'facility' for instance to mean a body corporate within the Chemical, Pharmaceuticals, Soap and Detergent Industry. This will be in line with the golden rule of interpretation and the fundamental position stated by Lord Hobhouse[79] that while it is unsatisfactory for a court to be compelled to construe a statute by implying words into it, it is much more unsatisfactory to deprive the statute altogether of meaning. The perplexing problem for the court will be how this will be balanced with another equally important rule of interpretation which requires that statutes must generally be constructed in their plain and unambiguous meaning free from all interpolations. It is not permissible to supply omissions therein even if such omissions are patently unintentional. There is, therefore, an urgent need for a revision of this provision by NESREA.

c) Civil Liability Regime

In contrast to administrative remedies and command and control regulatory regimes which seek to regulate in the public interest, private legal persons (individuals, corporate bodies and civil society groups) are beginning to show more interest in the use to which civil law mechanisms can be put in the regulation of pollution and general environmental governance. This interest has become heightened in the aftermath of the recognition of the

79. (1886), 11 App. Cas. 627, at 635.

importance of public participation by Principle 10 of the Rio Declaration.[80] The primary purpose of the civil justice system is to resolve disputes between two or more parties while the core of the reliefs that it offers e.g. compensation, injunction among others are aimed at providing remedy to a person or their property that has been, or may potentially be, harmed by the conduct of another.

As has, however, been noted,[81] aside of resolving the question of liability for specific incidents, the imposition of civil liability starting with the threat of civil action for personal injury or property damage can act as an incentive to motivate people to act in a particular way. It can also serve as a stimulus to integrate risk management principles into all levels of business decision-making: producers and manufacturers will act so as to reduce and manage their risks. Invariably, the imposition of civil liability not only aids fulfillment of the Precautionary Principle, it also assists the concept of shared responsibility which is the goal of Principle 10 of the Rio Declaration.

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80. As underscored by Principle 10, 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have access to information concerning the environment that is held by public authorities… and the opportunity to participate in decision making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided'. This basic principle has been further developed at the international level through the Aarhus Convention – See UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice, Aarhus, 1998.

81. S Bell and D McGillivray, *Environmental Law* (n66), 249. The various ways by which private individuals may utilize environmental law is to protect property and property related interests from the threat of environmental damage; obtain compensation for damage to property and related interests; obtain compensation for personal injury caused by pollution; and challenge the decisions of regulators via a judicial review action – See S Wolf, A White and N Stanley, *Principles of Environmental Law* (3rd edn. Cavendish Publishing Limited, London, 2002) 13.

Guided by the historical development of civil liability law in Nigeria,[82] the starting point for private litigants seeking remedies for harm caused by environmental pollution is the common law,[83] using such common law theories as nuisance, trespass, negligence and strict liability.[84] This is supplemented from time to time by statute law. The background to common law itself is that the law was created by judges in the courts, on a case by case, solution by solution basis and in an empirical and practical manner. Thus, the common law can be said to be reactive in nature.[85] More importantly, however, the application of the doctrine of judicial precedent or *stare decisis* through which judges are bound by previous judgments of a court of higher level gave rise to accretion of case law which became the common law. As noted by a learned author,[86] the implication of the above development for the common law is that it emerged as a complex and tangled web of law, which had many inconsistencies of approach and which provided many answers to some problems and none at all to others.

82. See generally OA Fagbohun, 'Public Environmental Litigation in Nigeria – An Agenda for Reform', in S Simpson and O Fagbohun (eds.) *Environmental Law and Policy*, (Law Centre, Faculty of Law, Lagos State University, Reprinted, 2000).
83. For a discussion of common law theories and their role in environmental restoration, see O Fagbohun, *The Law of Pollution and Environmental Restoration, a Comparative Review, ibid*, (n50) 234.
84. Claimants will use negligence and strict tort liability to redress damages for personal injury from environmental pollution, and rely actions in trespass and nuisance to redress invasion and environmental harm to property interests.
85. This is quite unlike the position in civil law systems which have largely favoured the use of abstract legal norms and principles in constructing a system of law.
86. C Kimber, 'Environmental licencing and permits in the UK', in K Deketelaere and M Faure (eds.), *Environmental Law in the United Kingdom and Belgium from a Comparative Perspective* (Intersentia Uitgevers N.V, 1999) 87.

With respect to issues relating to environmental damage,[87] the way the common law developed is such that its rules relating to liability are not directly concerned with environmental management and preservation of the ecosystem. Rather, they deal with injuries to persons and to property. Consequently, it is only where damage to the environment is incidental to personal and property damage that common law liability rules become relevant to environmental protection. Notwithstanding this limitation in the remedies provided for the environment by the law of tort, because there is no special civil liability regime for environmental damage cases, a plaintiff is still required to comply with the controls in use for regulation of the civil liability regime. Among others, he must bring his case within the statute of limitation; show that he has the standing to commence the action; and establish causation between the harm and the defendant's conduct. This is despite the fact that the natural resources degraded or the environmental media affected by pollution may be unowned (that is common to all),[88] or the injury to health or the environment may occur long after the release or discharge of pollution thereby making detection, causation and linkage difficult to prove.

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87. In relation to 'environmental damage' a distinction must be made between 'harm to the environment' and 'harm by the environment'. The former relates to harm done to the environment in the sense of threats to the quality of water, air, land, biodiversity, and which forms the basis of the civil liability claim. In the case of the latter, it relate to situations where the basis of action is that harm has been done to the plaintiff or his or her property by the polluted environment. An example of this is where a person has been made ill as a result of his or her exposure to a polluted environment.

88. Many environmental amenities are 'public property', in the sense that they are not owned by ascertained individuals. The common law can operate only where harm has been caused to an ascertained individual, rather than to the environment *per se*, so its effectiveness is limited to the resolution of what may be termed 'neighbourhood' environmental problems (e.g. the migration of landfill gas to neighbouring property) – J Thornton and S Beckwith, *Environmental Law*, (2nd edn. Thomson, Sweet & Maxwell, London, 2004) 329 – 330.

It is worth making a few comments about these controls of the civil liability regime, and what options are available in meeting the challenges posed by them. Before proceeding to do this, however, it is apposite to note that a number of scholars, including the writer, have stridently urged the courts to in the absence of appropriate applicable statutory provisions innovatively widen the ambit of the common law beyond their traditional and conventional sphere of operation in order to meet the exigencies of environmental policy objectives and governance. The courts have been very reluctant to do this for understandable reasons. The truth is, to depart from ordinarily applicable liability principles, the court requires careful and cogent justification. Otherwise, it may simply lead to distortion and confusion of the existing common law principles. As cautioned by Lord Goff:[89]

> *It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind: and public bodies, both national and international are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for the damage to the environment for which he is responsible – as can be seen from the WHO, EEC and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in Rylands v. Fletcher should*

89. *Cambridge Water Co. v. Eastern Counties Leather Plc* (1994) 1 All ER 53, HL. See also *Transco v. Stockport MBC* [2003] UKHL61.

> *be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.*

The expectation clearly is for statute to fill the gaps where common law is perceived to be insufficient and/or inadequate. In the case of Nigeria, how well has she been able to do this in order to amortise the significant complementary benefit of the civil liability regime? To some of these civil liability litigation controls we shall briefly turn.

(i) Pre-action Notice Procedure

Pre-action notice is the notice that an aggrieved party or intending plaintiff is expected to formally serve on the other party (the prospective defendant) before the commencement of his action.[90] The rationale is to encourage the exchange of early and full information about the prospective legal claim in a way that will enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.[91] Having regard to its use in Nigeria, pre-action has become a prevalent feature of the enabling law of almost every local government, public corporations, government agencies and institutions.

It is to be noted that the various government authorities and institutions play a key role in terms of environmental protection

90. S. 32 (1) NESREA Act.
91. See N Tobi, 'Environmental Litigation', in S Simpson and O Fagbohun (eds.) *Environmental Law and Policy*, (Law Centre, Faculty of Law, Lagos State University, 1998), p. 177 at 191.

particularly in the areas of responsibility for planning control system, investigating and abating nuisances, authorizing emissions, identifying contaminations, monitoring hazardous and toxic substances, promoting new legislation, issuing regulations and general enforcement of compliance. The main safeguards for the citizen against oppressive or faulty acts and omissions of government agencies are usually through judicial review of administrative action, vide which superior courts are able to exercise a residual controlling power on matters such as *vires* as these are relevant to the legality of official decisions. The good work of judicial review notwithstanding, it was also realized that access to court if absolutely unqualified will place too heavy a burden on public authorities if they have to defend every act against every disgruntled and dissatisfied member of the public. This will impede the administration of government. Consequently, the law gave statutory protection in the form of concept of pre-action notice.

In all of the statutes that have pre-action notice, the approach towards enforcing the seeming mandatory and fundamental nature of its rules has been the same, namely, that the failure to give it as prescribed by the relevant statute is not a mere irregularity which could be waived by the defendant. It would be construed as a failure to comply with a condition precedent and its effect would be to deprive the trial court of competence to look into the case.[92] In the face of current thinking, approaches and practices towards evolving an enduring strategic environmental management system, other jurisdictions have adopted a different approach to giving effect to pre-action notice.

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92. See *Abakaliki Local Government Council v. Abakaliki Rice Mills Owners Enterprises of Nigeria* (1990) 6 NWLR (pt. 155) 182; *The University of Ife v. Fawehinmi Construction Company Ltd.* (1991) 7 NWLR (pt. 201) 26; *Nigerian Ports Plc v. Ntiero,* (1998) 6 NWLR (pt. 555) 640; *Aro v. Lagos Island Local Government Council,* (2000) FWLR (pt. 13) 2132.

The nature of environmental risks is such that an injunction *quia timet* of *ex parte nature* is what may be required to avert the prospects of imminent danger that loomed large. In this case, a provision requiring notice of 1 month to 3 months, as the case may be, may result in harm of irremediable nature. Consequently, the approach in other jurisdictions have been to hold that the notice provision is merely procedural such that the court will be prepared to stay proceedings and allow notice to be served rather than dismissing or striking-out the suit[93]; or to approve that citizen suits can be brought without prior notice under federal question jurisdiction;[94] or for the legislature to always add a savings clause to pre-action notice provisions to the effect that such provisions shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.[95]

In order to infuse a change in the way the Nigerian judiciary approaches the issue of pre-action notice as relevant to environmental issues, I articulated my position in an article published in 2001 entitled 'Retheorising Pre-Action Notice as a Tool for Strategic Environmental Management in Nigeria'.[96] I further discussed my concerns with members of my post-graduate class which included my respected friend and brother, Mr. Mike Igbokwe, SAN, and also forwarded copies of the published article to all the learned justices of the Supreme Court at the time. I was pleasantly thrilled when Mr. Igbokwe excitedly called me in 2002 to note that the Supreme Court in the case of *Mobil Producing (Nig) Unlimited v. LASEPA, FEPA*

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93. *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 644 F. 2d 995 (3rd Gr. 1981).
94. *Natural Resources Defence Council Inc. v. Train*, 510 F. 2d 692 (Dr. C. Gr. 1974).
95. See for instance s. 505 (e) of the Clean Water Act of the United States.
96. Vol. IV Issue 1 (2001) LASU LJ, 24.

& Ors[97] has held *inter-alia*, that the service of a pre-action notice is at best a procedural requirement and not an issue of substantive law. Interesting as this development would appear to be, it has little promise in that non-compliance with pre-action notice still renders an action incompetent, except where it is not raised by a defendant in which case it would be taken as a mere irregularity. It is my respectful submission that it is time for the Supreme Court to lift the stakes in purposive construction, and at the minimum allow for stay of proceedings while the notice is being served. This will enable courts to be in position to grant orders of injunction in deserving situations.

(ii) Limitation Periods

The main purpose of limitation periods is to avoid a defendant having the indefinite threat of a claim. Consequently, on the premise that the ability of a defendant to prepare a defence is undermined where a claim is revived after a period of time, a statute of limitation sets the maximum time after an event that legal proceedings based on that event may be initiated. Thus, it is not unusual to see provisions like that of the Nigerian National Petroleum Corporation Act which provides that claims against the Corporation and its subsidiary companies must be instituted within a period of one year from when the cause of action arose.[98]

Given that a considerable period of time can pass from the time a pollutant is put in the environment and when it is discovered to have impacted its victims, it is often a difficult problem for potential litigants when they are faced with a statute of limitation in respect of which time starts to run from the date the act or omission occurred, and not the date of knowledge. In order to meet the challenge of limitation periods for environmental matters, what some jurisdictions have done is to

97. (2002) 18 NWLR (pt. 798) 1; (2003) FWLR (pt. 137) 1029.
98. S. 12 (1) NNPC Act, Cap. N123, LFN 2004.

provide that time runs from the date the cause of action accrued or, if later, the date of the claimant's knowledge. Some others provide that the starting date is the earliest date the claimant knew that the damage was sufficiently serious to justify proceedings, that it was attributable to the alleged negligence, and the defendant's identity.[99] I respectfully submit that it is along these lines that Nigeria must urgently begin to re-engineer its laws if it is to ensure the protection of her citizenry in the context of environmental concerns and sustainability.[100]

(iii) Standing

Another hurdle that environmental litigants seeking to use the civil liability regime must face is that of establishing standing. The concept of standing is viewed as a fundamental gate-keeping requirement for access to the court system. The traditional, strict test of standing (*locus standi* or standing to sue) as espoused by the cases is that a person should have a direct personal and proprietary relationship with the subject matter of litigation. In other words, he must have suffered special damage peculiar to himself from the interference with the public right.[101]

Aside of serving as 'gate-keeper' against the busybody and the crank,[102] the concept of standing, it is believed, also confines

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99. See ss. 11 (4) and 14A and 14B of the Limitation Act, 1980 (UK). See also O Fagbohun and G Uyi Ojo, 'Resource Governance and Access to Justice: Innovating Best Practices in Aid of Nigeria's Oil Pollution Victims', NIALS Journal of Environmental Law, Vol. 2 2012.
100. For an instance of the restrictive position that Nigerian Courts have been taking in relation to limitation of action, see *Gulf Oil Company (Nig) Ltd v. Oluba (2003)* FWLR (pt. 145) 712.
101. See *Boyce v. Paddington Borough Council* (1903) I Ch. 109; *Gouriet v. Union of Post Office Workers* (1977) AC 729 (QB). By these cases, unless a litigant is able to demonstrate personal injury and loss, the matter was one within the realm of public law, and it is only the Attorney-General who has *locus standi* to institute action. The only exceptions to this rule were representative suits or a relator action.
102. *Cahill v. Sutton* I.R 269 at 277.

the judiciary to its limited role in the system of separated powers in the way it helps ensure that cases filed in court involve the type of well-defined, adversarial contests which the courts are institutionally competent to resolve. While some jurisdictions have approached the application of the doctrine with its traditional rigidity, others have shown a preparedness to allow for a more flexible approach. Overall, three principal positions have been identified, namely: (1) the extensive approach which permits public interest actions to be brought in the form of *actio popularis*; (2) the restrictive approach which requires a potential litigant to demonstrate a breach of one of its own rights. This approach does not accept of law suits to protect collective interest or diffuse interests; and (3) the intermediate approach. Here the concept of 'interest' is broader than the requirement of a subjective right, but still ensures that a connection exists between the plaintiff and the cause of action.[103]

With respect to Nigerian courts, there is still no clearly established right of standing beyond that traditionally recognized under the common law. Following the decision of the Supreme Court in *Fawehinmi v. Akilu,*[104] it was the view of many that the common law concept of *locus standi* has been broadened from the inconsistent and conflicting interpretation of section 6(6) (b) of the 1979 Constitution in the earlier decided case of *Abraham Adesanya v. President of Federal Republic of Nigeria.*[105] By the time the case of Owo*dunni v. Registered*

103. N Sadeleer, G Roller and M Dross, 'Access to Justice in Environmental Matters and the Role of NGOs' ENV.A.3/ETU/2002/0030, (Groningen: Europa Law Publishing 2005) Germany is a case in point for the restrictive approach and to a lesser extent, Italy; France, Netherlands and Belgium exemplifies the intermediate approach; while Portugal and to some extent the United Kingdom are examples of countries that have adopted the extensive approach.
104. (1982) 18 NSCC (pt. 11) 1265 at 1301.
105. (1981) 5SC 112. The provision is in *pari material* with s. 6 (6) (b) of the Constitution of the Federal Republic of Nigeria. In *Adesanya's* case, while

Trustees of the Celestial Church of Christ[106] was decided, it became clear that the Supreme Court was more disposed to the restrictive approach underscored by Bello JSC in *Adesanya's* case.[107]

The wider implication of what has happened at the Supreme Court in relation to the concept of standing is that it has facilitated inconsistent, contradictory and confusing tendencies in the exercise of discretion by the lower courts. While some have continued to affirm the traditional individualistic application of *locus standi*, others have embraced the contrasting communitarian approach.[108] Premised on this, there have been strident calls for the Supreme Court, being the apex court, to give clarity on what should be the approach of the judiciary.

With particular reference to environmental litigation, the reason why it has been urged that it should be viewed differently from other forms of litigation is primarily because the environment does not have a voice of its own. It often needs committed representatives, independent from government functionaries who in certain situations could be compelled to act

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Fatai Williams, CJN and Obaseki, JSC would appear to support a liberal interpretation of standing, Bello JSC with Idigbe and Nnamani JJSC opted for a restrictive interpretation. Sowemimo, JSC on his part offered no comment on s.6(6) (b) on ground that its interpretation was not a direct issue for determination.

106. (2002) 6 SC (pt. 111) 60.
107. For a detailed appraisal of the position under Nigerian law, see O Fagbohun, 'Public Environmental Litigation in Nigeria – An Agenda for Reform', in S Simpson and O Fagbohun (eds.) *Environmental Law and Policy* (Law Centre, Faculty of Law, Lagos State University 1998) 115 – 58; GO Amokaye, *Environmental Law and Practice in Nigeria* (University of Lagos Press, 2004), 601 – 11; F Orbih, 'Public Interest Litigation,' paper presented at the Nigerian Institute of Advanced Legal Studies, Abuja, on 7 July, 2010 <www.nigerianlawguru.com/.../PUBLIC%20INTEREST%20LITIGATION.p ...> accessed 30 December, 2011.
108. See *NNPC v. Sele*, (2004) All FWLR (pt. 223) 1859 CA; Contra *Adediran & Anor v. Interland Transport Ltd* (1991) 9 NWLR (pt. 214) 155, and *Jonah Gbemre v. SPDC Ltd & Ors*, (2005) Suit No. FHC/B/CS/53/05.

in defence of a state entity engaged with impunity in activities detrimental to the environment. Among the advantages that have been canvassed in situations where rules of standing have been relaxed to allow for public interest litigation are: first, that the existing enforcement deficit prominent with environmental law could be tackled more successfully if more litigation rights exists; second, that it will contribute towards the democratic endeavours of the Aarhus Convention both with regard to general public awareness building as well as to participation rights. Third, that it would even the playing field and not leave the financially strong industries to be in position to challenge stringent regulations, while those harmed by pollution are not liable to challenge weak government regulations. Finally, that it induces positive environmentally friendly actions. The possibility that a polluter can be sued will itself have a positive effect by inducing public authorities and business enterprises to examine more carefully the compatibility of their decisions and activities with environmental law stipulations.

If we put in proper perspective the weak governance system that Nigeria has, it is clearly of importance for her to reform her rules of standing particularly in the way it affects environmental matters. This could be by way of judicial influence or legislation. For the judiciary, what is important is that judicial expansion of standing must be done with clear principles that will ensure the court system retains a consistent, efficient image and not one that bases a citizen's right to bring litigation on subjective discretion. The following list[109] presents one of such guides. Starting with the least harm required for law suits seeking compliance with informational or public participation rights on one end of the continuum and ending with the highest

109. P Goldman, 'Public Interest Environmental Litigation in China: Lessons Learned from the U.S Experience' (2007) *Vermont Journal of Environmental Law*, [Vol. 8] 251 at 270 – 271.

burden for lawsuits seeking compensation for harm from pollution:

i) If the plaintiff is seeking to exercise a public right to gain access to information or to participate in a public process, the burden is minimal since the right attaches to all interested members of the public;

ii) To seek an adequate environmental impact statement, the plaintiff would not need to prove that the underlying project will cause harm, but merely that the plaintiff would be affected by the project and that there is sufficient evidence of potential harm to warrant an analysis in an environmental impact statement;[110]

iii) To enforce a zoning standard, the plaintiff may need to be impacted by the project, but need not prove that the project will cause particular harm if the zoning standard is violated because the legislative body already made that judgment;

iv) To require adherence to a permit or regulatory standard, the plaintiff need not prove that violation of the standard will cause personal injury, since the permit or standard embodies a judgment that the enterprise must abide by the limit;[111]

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110. This has been interpreted to mean that broad standing rules apply to lawsuits seeking preparedness of an adequate environmental impact assessment before embarking on a project. To bring such a case, a plaintiff organization must show only that it or its members' may be affected by the environmental impacts of the underlying project – *Lujan v. Defenders of Wildlife* (Lujan II), 504 U.S. 555, 572 n7 (1992).

111. All that a lawsuit seeking to enforce a permit requires is that the permit violation affects his or her behaviour – *Friends of the Earth Inc v. Laildlaw Environmental Services* (JOC) Inc. 528 U.S 167 (2000). In such a case, it may be possible to obtain a remedy that requires the clean-up of illegally polluted sites.

v) To obtain compensation from harm from pollution, the plaintiff would need to be the person harmed by the pollution.

The kind of approach stated above is what will serve the view expressed by Tobi JCA (as he then was) in the case of *Busari v. Oseni,*[112] where His Lordship urged as follows:

> *In my view, the frontiers of the concept of locus standing should not be static and conservatively so at all times. The frontiers should expand to accommodate the dynamics and sophistication of the legal system and the litigation process respectively. In other words, the concept must move with time to take care of unique and challenging circumstances in the litigation process. If the concept of locus standi is static and conservative while the litigating society and the character and contents of litigation are moving in the spirit of a dynamic changing society, the concept will suffer untold hardship and reverses. That will be bad both for the litigating public and the concept itself.*

In relation to legislative intervention, this is what has been used critically to broaden access to courts and give a boost to public interest litigation. The approach is either to enact broad standing provisions in a framework law pursuant to which the courts can liberally interpret the rules of *locus standi*, or to enact prevention-oriented statutes that (1) establish minimum standards, (2) require polluting facilities to obtain permit that incorporate and adapt those standards to the particular

112. (1992) 4 NWLR (pt. 237) 557 at 589.

enterprise, and (3) authorize governmental and citizens suits to enforce both the requirement to obtain a permit and compliance with the particular permit.[113] Using these approaches, countries like the United States, Australia,[114] Portugal, France, the Netherlands, Belgium,[115] Greece, Brazil, Philippines,[116] and Bangladesh[117] have in relation to environmental matters been able to reduce or put an end to the burdensome requirement of standing. In Africa, countries like Tanzania, Uganda and Kenya[118] have also reduced the excessive burdens of the proof of standing on plaintiffs and the courts.

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113. See for instance the US Federal Water Pollution Control Act, 33 U.S.C §§ 1365(a) (1) – (2); see also Clean Air Act, 42 U.S.C §§ 7401 – 7671q (2000).
114. S. 123, Environmental Planning and Assessment Act, 1979 (NSW); also, Environment Protection and Biodiversity Conservation Act, 1999 (Eth) – s. 475 has broadened the scope for conservationists and conservation groups to seek judicial review, and obtain remedies, such as an injunction, to prevent breaches of the Act. In recent times, Australia has further adopted the approach of not assessing costs against unsuccessful environmental litigants, in order to reduce the negative deterrent that award of costs has on public interest litigants – *Oshlack v. Richmond River Council* (1997) 152 ALR 83.
115. *Ibid*, (n 103) p. 24.
116. Jon Owens, 'Comparative Law and Standing to Sue: A Petition for Redress for the Environment', *7 Envtl Law* 321, 357 – 360, 366 – 79 (2001).
117 The Supreme Court of Bangladesh interpreted the expression 'any person aggrieved' in Art, 102 of the Constitution as extending to the people in general and not confined to individual affected persons – see *Dr. Mohiuddin Faroque v. Bangladesh Represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Ors*, 48 DLR 1996 (SC Bangladesh, 1996). The case was also cited in SACEPT/UNEP/NORAD Publication series on Environmental Law and Policy, No. 3 Sri Lanka 4 – 6 July, 1997. It is to be noted that India and Pakistan have also developed greatly along these lines.
118. Patricia Kemeri – Mbote and Collins Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' Sustainable Development Law and Policy, Fall 2009, 31 – 38, 83, 84. In the case of Tanzania, see the case of *Rev Christopher Mtikila v. The Attorney – General*, Civil Case No. 5 of 1993, High Court of Tanzania, T.L.R 31. In the case of Uganda, see Art. 50 of the Ugandan Constitution which provides that 'any person or organization may bring an action against the violation of another person's or group's human rights'. The Courts have interpreted this to give every person *locus standi* – See *Environmental Action Network Ltd v. The Attorney – General and National Environmental Management Authority*, HC

At the very general level, environmental protection is seen in opposition to economic development, and often the latter tends to prevail. Potential plaintiffs also have to contend with the additional problem of funding public litigation, and meeting existing limitations on scope of review. Consequently, the fact of grant to access alone is not to be interpreted as tantamount to giving such litigants a more or less powerful position. The time is therefore ripe for Nigeria to enact laws that will at least provide for the intermediate approach.

vi) *Causation*

Another significant hurdle in pursuing a cause of action under civil liability regime is the difficulty of proving causation. Not only is the plaintiff expected to show the connection between pollution and the personal injury suffered, he is also required to show the link between the pollution and the activities of the defendant. In other words, the alleged wrongful behaviour must be the *condition sine qua non* of the harm. The harm would not have occurred without the wrongful behaviour.[119] For environmental matters, the problems that do occur in relation to proof of causation are several – there may be several simultaneous sources, some of which may be far away from the place where the harmful consequences appear; new pollutants may form in the air or water as a result of chemical reactions of several pollutants; contamination may not directly cause any specific death or morbidity, but may have aggravated existing health problems;[120] and, the plaintiff may not be able to have

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Misc. Appl. 39 of 2011 (Uganda) (unreported) available at <http://www.greenwatch.or.ug/pdf/judgments/TEAN%20versus20A.G%20&%20NEMA.pdf>

119. This does not exclude the rule of joint and several liability pursuant to which a plaintiff can claim full compensation from any of the defendants whose actions contributed to his loss.

120. EB Ristroph and I Fedyaev, 'Obstacles to Environmental Litigation in Russia and the Potential for Private Actions', Environs, [Vol. 29.2 Spring 2006], 235.

access to critical information such as investigations of federal and state agencies regarding the sources of pollution.[121]

Following the decision in *Fairchild v. Glenhaven Funeral Services Ltd,*[122] the approach now would appear to be that in traumatic injury cases, the 'but for' test applies; in cumulative injury cases, the claimant need only show that the defendant's breach of duty made a material contribution to the injury, i.e. caused part of the injury; and in 'one off' cases, the claimant needs only show that the defendant's breach of duty increased the risk that the claimant might suffer the relevant injury.[123] Despite the above development, it is recognized by environmental practitioners that environmentally based injury claims are still difficult to progress in the face of causal uncertainty. This has resulted in a succession of unsuccessful environmental claims.[124]

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121. Other issues relate to huge costs involved in bringing experts to analyze the impact of wrongful behaviours; utilization of litigation strategies such as 'Discovery' is usually expensive, time-consuming and at times frustrating. Intervening causes may also arise to create additional problems of proof – see O Fagbohun and G Uyi Ojo, 'Resource Governance and Access to Justice: Innovating Best Practices in Aid of Nigeria's Oil Pollution Victims', ibid.
122. [2002] UKHL 22.
123. J Batesm, W Birtles, and C Pugh, *Liability for Environmental Harm*, (LexisNexis: London 2004).
124. *AB v. South West Water Services Ltd* [1993] QB 507; *Reay v. British Nuclear Fuels Plc* [1994] Env. LR 320; *Shell v. Graham Otoko* (1990) 6 NWLR (pt. 159) 693 at 724 – 725; *Atunbi v. Shell BP* (Unreported) Suit No. UHC/48/78 of 25/11/74. The author on behalf of the Environmental Law Research Institute (ELRI, a nonprofit organization) is currently collaborating with the Centre for Understanding Sustainable Practice (CUSP) of Robert Gordon University, Schoolhill, Aberdeen, Scotland with respect to investigation of leakage of refined crude oil products resulting in contamination of water aquifers in Baruwa and Diamond Estate Communities of Lagos State, Nigeria. Dating back to 1994, the underground waters of these communities have been heavily polluted by refined crude oil products from underground oil pipeline passing through the communities. The Nigeria National Petroleum Corporation has sought to exculpate itself from liability premised on different arguments. One of the critical issues on which the investigation

Some commentators have argued that courts should not put too heavy a burden on the plaintiff as far as the requirements of proving a causing relationship is concerned and should also accept plausible presumptions as sufficient evidence[125]. The concern with these, however, is that it would mean an explicit development of the law in a way that is inappropriate for the judiciary. [126] Further, that it would render the notion of foresight meaningless. These were the reasons why legislative action became necessary with the evolution of statutory liability or strict liability legislation. Regrettably, the exceptions that are often made a feature of statutory or strict liability regimes are such that they end up seriously limiting the rights of a victim to compensation. An example in this area will suffice.

Under the Nigerian law, the polluter pays principle is very much touted as applicable in the oil and gas industry. However, a polluter is exempted from paying compensation for oil pollution arising as a result of oil spill caused by sabotage unless negligence can be proved on the part of the polluter, his servants or agents, and that such negligence is the cause of the damage suffered.[127] The philosophy behind this position is clearly to encourage community members to be more vigilant in the protection of oil pipeline installations and report culprits to

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is focused is to establish a nexus between the spillage and pipeline failure or corrosiveness.

125. See for instance H Bocken, 'The Compensation of Ecological Damage' in P Wetterstein (ed.) *Harm to the Environment: The Right to Compensation and the Assessment of Damages,* Oxford Clarendon Press, 1997, 144.

126. See the Court of Appeal decision in *Sutradhar v. National Environmental Research Council (2004) ECWA Civ 175.*

127. S. 11(5) (c) of the Oil Pipelines Act. See IS Ibaba and JC Olamuti, 'Sabotage Induced Oil Spillage and Human Rights Violation in Nigeria's Niger Delta', Journal of Sustainable Development in Africa (Vol. II, No. 4, 2009) Clarion University of Pennsylvania, Clarion, Pennsylvania. See also, K Robbins, 'Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act, Legal Studies Research Paper Series No. 12 – 12, The University of Akron School of Law, June 13 2012 <http://ssm.com/abstract=2083685> accessed 17 June, 2012.

the relevant authorities. Not many will, however, doubt the fact that sabotage is both dangerous and difficult (if not impossible) to monitor by private individuals not directly engaged for the purpose. Consequently, what the law has done contrary to the principle of fairness is to exclude damage caused by sabotage from compensatory payment in a way that infringed on the economic rights of innocent third party victims who are not culprit in the unholy act of sabotage.

For as long as statutory or strict liability remains limited through the use of exceptions, it would always result in environmental injustice. A person who creates a risk and benefits from it should be responsible for the negative consequences of damages that arise therefrom, and fault or wrongfulness do not need to be proven. Exceptions at best should be to protect against criminal liability. Nigeria must urgently revisit her regime of strict liability to ensure that it does not only take place in a systematic way, but also in a way that is pragmatic and well balanced in its protection of the innocent. The legislature should seek to express its target more clearly in laws and regulations in order to ensure that undue and overreaching limitations are not imposed by misguided exceptions. The utilisation of the ecological funds should also be revisited such that while arguments about liability is ongoing, it will not delay restoration and put vulnerable communities in a state of helplessness.

Judicial Response to a Green Culture

Mr. Director – General, judicial systems play a critical role in the enforcement of environmental policies and achievement of sustainable development. Indeed, the judiciary, more than any other institution is appropriately placed to not only adjudicate, but also to inform, guide and provide leadership. Where the judiciary is assertive, innovative and inspirational, it will consistently keep the executive and the legislature on their toes in the implementation of appropriate environmental strategies.

If past experience is anything to go by, we can learn from the role that the judiciary played in aid of the period of industrial revolution, the technology of which ironically is antithetical to green technologies that are being canvassed today. During that era, new factories were the subject of several pollution suits filed under the common law. Applying the principles of nuisance, in particular, courts expelled with regularity nuisance causing activities to the outskirts of the town.[128] This attitude, however, was not to last for long. Globally, economic development was at the time the name of the game, thus, the dynamics changed and the hitherto unfettered enjoyment of property became subject to the demands of economic value, productive use and economic development. The situation remained this way for several decades because there was no conclusive scientific evidence of what harm the industrial revolution technologies presented. By the late 1960s and early 1970s, evidence that they were harmful was beginning to come to the fore.

Today, international scientific cooperation and collaboration have placed beyond doubt[129] the need for cleaner technologies if our world is to achieve sustainable development and meet the challenges of poverty, inequality, climate change, unsustainable consumption of natural resources, resource scarcity and loss of biodiversity among others. The unfolding

128. See *Brady v. Weeks*, 3 Barb. 157, 160 (N. Y. App. Div. 1848). For a comprehensive discussion of the kind of litigation that characterized that era, see CM Rosen, 'Knowing' Industrial Pollution: Nuisance Law and the Power of Tradition in a Time of Rapid Economic Change', 1840 – 1864, 8 (4) Envtl, Hist. 565, 567 (2003); also, Y Esat, 'The Influence of Environmental Technology on the Common Law as Green Investment Grows', Journal of Technology and Policy, vol. 2009, No. 1, 203.

129. See IPCC First to Fourth Assessment Reports issued in 1990, 1995, 2001 and 2007; the Millennium Ecosystem Assessment, 2003. In June 2011, a Transition Team was again put together to guide the design phase and early implementation of a new Rio+20 initiative called 'Future Earth? Research for global sustainability?'

development accounts for the judicial activism that is now taking place in a number of jurisdictions in support of environmental visions. No longer is the judiciary taking the back seat in efforts at ensuring that development is pursued in such a way that it meets the needs of the present generation without compromising the needs of future generations.

To be fair to the judiciary in Nigeria, as I have earlier stated, there are constraints on the Court. Fundamentally, the Nigerian Constitution does not have the kind of bold and progressive provisions as that in the Indian Constitution which made the right to the environment a fundamental protected right for the benefit of the citizens. This handicap notwithstanding, the judiciary in Nigeria can follow the lead of those in Bangladesh, Thailand and the European Court of Human Rights to name a few, to innovatively and creatively construe provisions of law in ways that will meet the goals of sustainable development and maintenance of ecological balance.

In *Dr. Mohiuddin Faroque's* case,[130] the question on appeal before the Appellant Division of the Supreme Court of Bangladesh was whether the fundamental right to life included the protection and preservation of the environment. In its judgment, The Honourable Justice A.T.M. Afazal, Chief Justice of Bangladesh noted:

> *Although we do not have any provision like Article 48A of the Indian Constitution for protection of the environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which, life can hardly be enjoyed.*

130. *Ibid*, (n117).

Consistent with the above approach, the Thailand Administrative Court in September 2009 issued a temporary order of injunction that could effectively halt all 76 major investment projects relating primarily to energy and petroleum chemicals worth THB 400 billion (USD12.3 billion) at the country's Map Ta Phut industrial estate and surrounding areas. The court concluded that the Map Ta Phut area has long suffered from pollution problems that are getting worse. It also said that Article 67 of the 2007 Thai Constitution protecting the right of the people to live in a healthy environment must be strictly enforced by concerned government agencies. In particular, government agencies should pre-determine and reject projects that can harm the environment. In the court's view government agencies had failed to do this, and therefore the approval of the projects was a problem that may infringe on the law.[131]

Again, in the case of *Guerra & Ors v. Italy,*[132] which was referred to the Court by the European Commission of Human Rights, the object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the Italian Republic of its obligations under Article 10 of the Convention. The core of applicants' case was that in breach of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), the failure of the respondent in taking practical measures to reduce pollution levels and major accidents arising out of a particular factory's operation,[133] infringed their right to respect for their lives and

131. Reported in J Dosch, 'Balancing Trade Growth and Environmental Protection in ASEAN, Environmental Issues in Trade and Investment Deliberations in the Mekong subregion', Series on Trade and the Environment in ASEAN – Policy Report 2 (International Institute for Sustainable Development, 2010).
132. European Court of Human Rights, (116/1996/735/932) of 19 February, 1998.
133. In the course of the factory's production cycle, it released large quantities of inflammables gas and other toxic substances, including arsenic trioxide. In 1976, following the explosion of the scrubbing tower for the ammonia

physical integrity. Further, that failure of the relevant authorities to inform the public about the hazards and about the procedures to be followed in the event of a major accident infringed their right to freedom of information as guaranteed by Article 10. Finally, they maintained that they have also been victims of a violation of Article 8 of the Convention, which protects the right to respect for private and family life, home and correspondence.

The Court in its judgment noted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. On the basis that the respondent failed in providing certain essential information that would have enabled the applicants to assess the risks they and their families were running, the Court held that the respondent state did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

It is to be acknowledged that one or two lower courts in recent times have in Nigeria shown deference to the green culture and in this regard have given judgments geared towards protection of the environment.[134] It is respectfully submitted that such an approach may not go too far. What is required is for the Supreme Court as the apex court, to set the tone for other courts to follow. Furthermore, bearing in mind that environmental law is a fairly recent branch of law, continuous training of judges in this area as called for by Global Judges' Symposium on the Rule of Law and Sustainable Development is critical. I am aware that the National Judicial Council has organized programmes in this area in times past. This should be made more regular in order to keep judicial officers abreast of latest development in this field.

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synthesis gases, several tones of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped and 150 people had to be hospitalized on account of acute arsenic poisoning.

134. OA Fagbohun, ibid (n50) 345 – 346.

Public Participation in Environmental Decision-Making: Vital but Neglected

Mr. Director – General, there is an increasing emphasis on public participation in environmental law. This is based on the recognition that citizens are a valuable source of knowledge and values, and the democratic ideal of citizen representation in decision-making. In this respect, public participation seeks to maintain the democratic ethic by opening-up government decision to the public. Five core reasons can be posited behind increased public participation in environmental law and decision-making.

(i) It is regarded as a proper and fair conduct of democratic government in public decision-making activities;[135]

(ii) It is widely accepted as a way to ensure that projects meet citizens' needs and are suitable to the affected public;[136]

(iii) It gives more legitimacy and less hostility to project if affected parties can influence the decision-making process. In other words, because public opinions and values have been included in the decision-making process, citizens develop a sense of project ownership and are more supportive of implementation;[137]

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135. D Fox, *Public Participation in the Administrative Process* (Ottawa, Law Reform Commission of Canada, 1979); E Gelhorn, 'Public Participation in Administrative Proceedings', Yale Law Journal, (1971) 81, 359-387.
136. DW Pearce, L Edwards and G Beuret, *Decision-making for Energy Futures: A Case Study of the Windscale Inquiry* (London, Macmillan, in association with the SSRC, 1979); J Forester, *Planning in the Face of Power* (Berkeley, University of California Press, 1989); CS Tauxe, 'Marginalizing public participation in local planning: an ethnographic account', Journal of the American Planning Association, 61 (4), 471-481.
137. H Chapin & D Deneau, *Access and Policy-making Process* (Ottawa Canada Council on Social Development, 1978); L Susskind and J Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York, Basic Books, 1978).

(iv) Final decision is 'better' when local knowledge and values are included and when expert knowledge (scientific) is publicly examined;[138]

(v) It has the potential to keep both regulators and project proponents on their toes and compel them to do things right.

In the context of international recognition of the concept of public participation, over 150 states agreed to Principle 10 of the Rio Declaration to the effect that 'environmental issues are best handled with participation of all concerned citizens, at the relevant level'. Further progress was made internationally with the adoption of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.[139]

At the national level, public participation can have differing degrees of legal force. In some situations it can come as a mandatory substantive requirement, while in others it is facilitated through a procedural right to be consulted or heard at an inquiry. In some other situations, it can take place voluntarily in an attempt to use 'best practice' or to elicit values to settle

138. R Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa, Canada Minister of Supply and Services, 1988); T Webler, H Kastenholz & O Renn, 'Public Participation in Impact Assessment: A Social Learning Perspective', Environmental Impact Assessment Review, (1995) 15, 444-463.

139. UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was concluded at Aarhus, Denmark on 25 June 1998. Although regional in scope it sets out a comprehensive framework for procedural environmental rights. It is being globally used as a model for how public participation should be structured. There are three key parts to the Convention, namely: access to information, public participation in decision-making; and access to justice.

issues of environmental risk.[140] In the case of Nigeria, her history of public involvement in environmental decision making can be said to date back to 1988 when the FEPA Act albeit in a limited manner conferred the Director of the Agency with power to *inter alia* 'conduct public investigation on pollution'.[141] The most significant possibilities for individual citizens to be involved in environmental decision-making are those flowing from the requirement of Environmental Impact Assessment Act.[142] Over the years, more recent laws and regulations such as NESREA Act and the Regulations made pursuant to section 34 of that Act have sought to broaden public participation by encouraging the Agency's collaboration with public or private organizations in the development of environmental monitoring programmes, establishment of

140. S Bell and D McGillivray, *Environmental Law* (Seventh Ed. Oxford University Press Inc, New York, 2008) 311-312. Public participation can take the form of: pluralistic participation, within which representative bodies such as non-government organizations (NGOs) or industry associates speak on behalf of individual; stakeholder participation, within which proposals that have already been formulated are transmitted to interested parties to comment upon and refine; and deliberative participation, which consists of 'agreeing the ground rules', that is involving the public in determining what general policies and strategies should be adopted before moving to the stage of specific proposals.
141. S. 9(d) FEPA Act. See also s. 8 (g) of NESREA Act.
142. Environmental Impact Assessment Act, 1992, Cap. E12, LFN 2004. The purpose of EIA procedure is to ensure that planning decisions which may affect the environment are made on the basis of full information. It involves infusion of environmental consideration into decision-making and involvement of the public in the assessment of environmental impact. The practical effect of EIA came out clearly in the case of *Berkeley v. Secretary of State for the Environment* (2000) 3 WLR 420, where an individual member of the public with an interest in ecology succeeded in an application to quash the grant of planning permission for rebuilding a football stadium on the banks of the river Thames. The House of Lords agreed that the Secretary of State should have considered whether the application was such as to require an EIA in accordance with the Town and Country Planning (Assessment of Environmental Effects) Regulations 1998 which implemented Council Directive 85/337/EEC.

programme for setting standards[143] and granting access to what hitherto might have constituted confidential information.[144]

The above referred efforts, notwithstanding, it cannot be argued with any measure of seriousness that Nigeria is where it ought to be in her sequencing of the mechanisms for public participation or amortization of the benefits that ought to come with it. The reality of it is that environmental regulation in Nigeria is still substantially closed to public influence. In contrast with developments in other jurisdictions, some of which we have earlier examined, most of what Nigeria flaunts as notification and consultation processes are not only rudimentary but improper procedures: majority of citizens lack project-specific expertise that would guide them on the merits of the project and are too poor to seek expert advise; the close relationship between industry and regulators put proponents who are ever eager to implement their project at an advantage;[145] participation most times occurs too late in the decision-making process to influence the selection of alternatives or key project variables; notices and time frames to comment are inadequate;[146] participation most times are aimed at defending a decision already made or to placate the public by soliciting opinions that are subsequently not taken into cognizance;[147] public involvement most times is limited both in

143. S. 8 (n) (o) and (p) of NESREA Act.
144. See for example r.41 of the National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations, 2009, Government Notice No. 289 FRN Official Gazette No. 68 of 20th October, 2009, Vol. 96.
145. Stories abound of industry sectors providing requisite operational and monitoring equipments and facilities for regulators or sponsoring retreats, conferences and seminars of regulators traveling either as a group or on individual basis. When regulators compromise themselves in this manner, it becomes very difficult to carry out their functions.
146. See the views of the Court of Appeal, in *R. v North and East Devon Health Authority exp Coughlan* (2001) 1 QB 213 at 258.
147. An example is the Eko Atlantic City Development Project that is promoted as a model Public Private Partnership between Lagos State Government and

time (prior to project implementation and not through life-cycle of project) and in scale; nature conservation and environmental management decisions are almost entirely concentrated in the hands of regulators and other government officials without recourse to the general public; lack of transparency in decision-making; high degree of official discretion in setting environmental standards; and lack of access to relevant information.[148]

Mr. Director – General, an effective public participation programme will not happen by accident. It must be carefully planned and implemented. Many of the most challenging current environmental questions are uncertain and speculative with respect to harm at the time of their development, and it is only in rather extreme cases that there exist, recognizable and calculable harms to human interest. The consequence of this is that important repercussions may not be taken fully into account if left to the judgment of a few. Thus, while sufficiently skilled decision-makers can undertake an expert risk assessment which will quantify the risks, the contribution of a broad spread of participants will provide different perspectives on the risks which ought to be considered.[149] The fact that no person's

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South Energy Nigeria Ltd to protect Lagos from flooding and ocean surge, and to offer new habitable space for residents and business among others. The EIA was submitted 3 years after the commencement of dredging activities.

148. Considering the challenges that the Freedom of Information Act, 2011 faced before it was passed, it is too soon to come to a conclusion that there is an intention to build a true public deliberation process. For more than 12 years the FOI Bill was stalled for different reasons by the Executive and the Legislature. Indeed, unless the judiciary is determined to approach its interpretative duties in relation to this Act with due regard to the social purpose of the legislation, the passage of the Act would amount to no more than a pyrrhic victory. Effective right to information is what will enable citizens to question, challenge or otherwise influence decision-making more fully and also to enhance the transparency of environmental justice.

149. The law must not just stop at making provisions for interested parties. While those who are affected will be able to offer the decision-making process 'situated knowledge' premised on their greater understanding of the

whole belief system is likely to be represented by another in an entirely predictable way (premised on individuality of views, values and solutions) should not constitute a dissuading factor. Rather, it should be viewed as a potential for productive conflict between viewpoints.

The importance of public participation is such that some countries provide a system of monetary reward[150] for the public for the reporting of breaches of development permits or conditions that may help to overcome entrenched negative public attitudes towards the enforcement of environmental offences. Some others provide for intervenor funding model[151]to make available financial resources that will enhance the opportunity for public participation. Where those with responsibility for environmental decisions give premium to public participation, the public through its very skepticism and willingness to question expert and scientific claims, will ultimately provide important decision-making resources.

Contribution to the Climate Change Challenge

Climate change poses fundamental and varied challenges to all communities across the globe.[152] The situation is worse for Africa because the climate risk exposures are exacerbated by a range of endemic structural vulnerabilities such as widespread poverty, reduced yields of the main staples, entrenched

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problems, others will be able to provide opposite and complementing breadth of reflection – See A Shepherd and C Bowler, 'Beyond the Requirements: Improving Public Participation in EIA', Journal of Environmental Planning and Management, 40 (6) (1997) 125 – 739; also MI Jeffery, 'Environmental Governance: A Comparative Analysis of Public Participation And Access To Justice', Journal of South Pacific Law, Vol. 9, 2005, Issue 2.

150. See s. 60 of the Environment Management Act, 2005.
151. This is the position under the Canadian Legal System, *ibid*, MI Jeffery, (n149) 7.
152. IPCC, *Fourth Assessment Report, Working Group I, Summary for Policymakers* (Cambridge: Cambridge University Press, 2007); OECD, *Climate Change: Meeting the Challenge to 2050* (Paris:OECD, 2008).

inequalities in rights over land resources, lack of access to technology and information, endemic corruption, inter-tribal and other conflicts, and lack of effective governance.[153]

Mr. Director – General, I have been working at the Federal level with a coalition of organizations under the auspices of Nigeria Climate Action Network, and as a member of the Expert Group for the Development of Climate Change Policy and Legislation for the Federal Republic of Nigeria under the able leadership of the vibrant and irrepressible Professor Chidi Ibe, Pro-Chancellor and Chairman Governing Council, Imo State University, Owerri, Nigeria. Our objective is to put in place good development policy and a mechanism for effective mitigation and adaptation strategies for Nigeria. I have also been involved as a resource person in Regional Parliamentarian Workshops organized through the collaborative effort of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Directorate of Technical Cooperation in Nigeria (DTCA), African Union (AU), and the Economic Community of West African States (ECOWAS).[154] I have also been involved with a number of State Governments seeking to mainstream policy instrument and technology that can be utilized to eliminate or reduce the risk of climate change to human life and property.

At this juncture, I cannot resist the chance to mention some pertinent research I have been involved in with colleagues at the Environmental Regulatory Research Group of the University of Surrey. It is recognized that the sheer volume of law and policy emanating from the international level makes it uncertain which

153. O Fagbohun and F Nlerum, 'Implementing an Effective Regulatory Scheme for Climate Change in Nigeria: The Role of Law', NIALS Journal of Environmental Law, Vol. 1, 2001, 266-295, 271.

154. O Fagbohun, 'Legal Imperatives of Climate Change Action', Proceeding of UNESCO/DTCA/AU/ECOWAS Parliament Quadra – Partite Consultative Workshop on Climate Change Policy and Legislative Regional Parliamentarian Workshop Series III, October, 2010, 30.

type of regulatory or policy framework is likely to have a positive impact. Further, that climate change is not just an environmental problem requiring technical and regulatory solutions; it is a cultural arena in which a variety of stakeholders engage in contestation as well as collaboration over the form and substance of evolving regimes of governance.[155]

What we seek to understand with this research is how to better comprehend and theorise the role of cultural legitimacy in the choice and effectiveness of international legal and policy interventions aimed at tackling the impact of climate change.[156] If our hypothesis, that if peoples' values are incorporated not only in the way policy questions are framed but also in the way mitigation and adaptation strategies are developed, are supported by social science research, we may be able to develop some tools that will make more rational peoples conceptualization of the climate change challenge and the response of international and national law thereto.

Concluding Remarks

Mr. Director – General, I have guided us on a journey through Nigeria's quest for environmental governance and attempted to show how Nigeria bequeathed to herself polarized environmental goals and values, and a maladapted approach to innovating a rational, consistent and effective environmental policy. The destruction of Nigeria's environmental systems and features constitutes a creeping crisis that is certain to grow worse over time. As the nation grows, the gap between the people and the natural environment continue to widen. In seeking to explain the problem, discussions have turned on the struggle between humanity's limited spatial and temporal horizons and the laws of nature, and on how the expansive reach

155. See the Editorial to Special Edition Carbon Climate Law Review, 2011.
156. For the contribution of this author to the research, see O Fagbohun, 'Cultural Legitimacy of Mitigation and Adaptation to Climate Change: An Analytical Framework', Special Edition, Carbon Climate Law Review, 2011, 308-320.

of modern technology has turned the once seemingly infinite into the finite. But, these are only part of the problem.

Much more fundamental are the challenges of environmental protection as are rooted in the nature of the laws guiding environmental governance. The defining characteristic of Nigeria's lawmaking institutions is the horizontal and vertical fragmentation of authority[157] as deliberately designed to avoid the concentration of lawmaking and implementation, and ultimately reduce the potential risk of excesses, abuses of undue concentration of power and corruption. Regrettably, the way this has played out for environmental governance is that those concerned about the adverse effects of a particular act may have no jurisdiction over the cause, while those with jurisdiction over the cause may have no political accountability to those suffering the adverse effects. Aside of this generic problem, there are several other specific challenges (which are the direct result of the nature of Nigeria's environmental law) that are confronting third parties desirous of environmental justice. The result is that environmental remedies have brought nothing but lamentations and grieve to victims of environmental degradation; branches of government have continued to be pitted one against the other in unending conflicts; while unending friction has become the norm between federal and state government, between state governments, or between state and local governments.

The specific recommendations made in this lecture have clearly emphasized the critical role of law in environmental governance, and would if taken as a reform agenda make the system work better. The recommendations can be taken within the practical politics of the moment. We must not give up on the system despite its frequent failures. The truth is that environmental governance globally is inherently a complex,

157. On the one hand it is between each of the three branches of government, while on the other hand it is authority as allocated between federal, state and local government.

difficult and expensive process. It is only if we keep at it that we would be able to entrench not only institutional harmony and efficiency, but, also bring about tangible environmental improvement and positive movement towards the ultimate goal of sustainable development.

Acknowledgments

Mr. Director – General, the greatest gratitude goes to Allah, the Most Gracious, the Most Merciful. All praise is due to Allah, we praise Him, seek His help, and seek His Forgiveness. In my journeys through life, He has been my protector. I return all honour, adoration and glory to Him.

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Professor Tunde Samuel) and 'mama' Professor Jadesola Akande (of blessed memory) provided the starting point for my career in the academia. Professor Neil Gunnigham of the Australian National University laid the foundation for my knowledge in the field. To both Professors Imran Oluwole Smith and Mike Ikhariale who taught me the rudiments of administration, I say thank you.

I have had the benefit of insightful interaction with a number of distinguished personalities too numerous to mention at the outer and inner Bar, the Bench, the Academia and the corporate world. That I did not mention you all by name is due to the limitation of space. I thank you not only for your openness in sharing experiences, but, also for your consistent and continuing support which has seen me through a variety of challenges. To my former colleagues at the Lagos State University, and my colleagues at the Nigerian Institute of Advanced Legal Studies – I have learnt enormously from all of you and for this, I extend my deep appreciation. To my associates at RouQ & Company and the Environmental Law Research Institute, I express my special thanks to all of you for remaining dedicated, utterly dependable, skillful, accomplished and fun to work with. In this group are Iroro Onofe-Kohwo, Deinde Nelson-Cole, Nojeem Amodu, Wale Dosunmu, Ebere Akwuebu, Yemi Fabamishe, Qudus Mumuney, Lolade Ajibogun, Chinedu Ihenetu-Geoffrey, Tolulope Odeyemi, Philomena Omah and Bolanle Riliwan. A special thank you to the ever gracious and imperturbable Dr. Taiwo Ogunleye and Dr. Ayo Ayodele. I also acknowledge the valuable contributions of my students (under-graduate and post-graduate and my research assistants over the years for allowing me to deepen my knowledge of environmental law through them.

Permit me to salute the heads and members of staff of the following institutions and organizations that I have been opportuned to relate with and who have sustained my belief that we can collectively achieve an effective environmental

justice system: Lagos State Ministry of Environment; Lagos State Environmental Protection Agency; Lagos Waste Management Authority; British Council Lagos; United Nations Development Programme office in Nigeria; Ogun State Environmental Protection Agency; Basel Convention Coordinating Centre for the African Region; HEDA Resources Centre, Nigeria; Development Initiatives Network; Clean Energy Initiatives; Heinrich Boll Foundation; Environmental Rights Action/Friends of the Earth, Nigeria; Bioazul of Spain; TTZ of Germany; EMPA of Switzerland; SLU of Sweden; OEKO of Germany; GAIKER of Spain; TUB of Germany; ENDA of Senegal; MATAM of Senegal; IAGU of Senegal; ZOOM of Ghana; KNUST of Ghana; UAA of Cote d'Ivoire; CEDARE of Egypt; ICANDO of South Africa; and CEIA of Ghana.

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Estate Community – I thank you for your divine tolerance and patience. I must admit that I have been enormously fortunate to be blessed with these lovely children.

Finally, to my father, HRM Tajudeen Abayomi Alabi Fagbohun (Ogedengbe III, Oloja of Akesanland), you remain the inspiring father that you have been from the beginning. Mother, Abisola Dorcas (nee Oduyomi) certainly will be proud of today's event and of the way you have forged ahead since she departed this world on 21st March, 2003. This lecture is dedicated to Mum, your goodself, my wife and children.

Mr. Director – General, sir, I thank you and the esteemed audience most sincerely for your kind attention. This is my Inaugural Lecture.