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TOWARDS AN EFFECTIVE AFRICAN SYSTEM FOR ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

1 Introduction

It is clear from the aims and objectives of this African Regional Experts Meeting[1] that although a lot takes place at the national level that is still a need for the United Nations Environment Programme[2] (UNEP) to enhance and promote the Rio Declaration Principles especially Principle 10, and create an enabling environment for Governments to build capacity in this area by learning from each other.

The Justification for this lies in the fact that, Africa is a continent in environmental crisis. Despite Africa's enormous natural resource wealth, "economic and social development efforts, the balance between population, resources, environment and development has deteriorated. The harsh reality in many State is that the average quality of life has worsened, resources have been destroyed and environmental and economical deterioration has become widespread."[3]

It is against this background that this paper aims at realising the following objectives;- First, to determine the meaning of access to Justice and the general principles which all systems of Justice (civil, criminal and administrative) should meet in order to ensure effective access to Justice in environmental matters; Second, to identify the legal basis of access to Justice in environmental matters under Principle 10; Third, to examine the nature and scope of access to environmental Justice; Fourth, to analyse the role of the Judiciary in promoting the rule of law in regard to Principle 10; Fifth, to highlight the role of national legal systems in promoting the incorporation of the components of principle 10 in policy, law and their enforcement; Sixth, to identify the obstacles impeding effective access to Justice in environmental matter; and Finally, to conclude with some viable options.

MEANING OF 'ACCESS TO JUSTICE'

The term 'access to justice' means that people in need of help, finding effective solutions available from Justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense Justice fairly, speedily and without discrimination, fear of favour, and a greater role for alternative dispute resolution.[4]

In environmental matters, the term 'access to justice' refers to Judicial and administrative remedies and procedures available to a person (natural or Juristic) aggrieved or likely to be aggrieved by an environmental issue.[5] it refers also to a fair and equitable legal framework that protects environmental rights and ensures delivery of environmental justice.

Failure of States to provide access to Justice impedes effective legal protection of environmental rights and development, and constitutes a denial of environmental Justice.

1.2 GENERAL PRINCIPLES OF ACCESS TO JUSTICE

Without effective access to Justice there is no effective legal protection of human rights. That is why the legislatures or parliaments, governments and courts of every country have a positive duty to translate the ideal of effective access to Justice into practical reality. Effective access is not just an optional extra or a luxury of affluent and economically advanced societies. Everyone, everywhere, should enjoy the equal protection of the law if there is to be Justice for all.[6]

In his recent report on the English civil justice system, the master of the Rolls, Lord Woolf, identified a number of principles which the system should meet in order to ensure access to justice. The Justice system should, he wrote, "(a) be just in the result it delivers; (b) be fair in the way it treats litigants; (c) offer appropriate procedures at a reasonable cost; (d) deal with cases with cases reasonable speed; (b) understandable to those who use it; (f) be responsive to the needs of those who use it; (g) provide as much certainty as the nature of the particular case allows; and (h) be effective, adequately resourced and organised."[7]

Those principles of access to justice are of general application to all system of justice, civil and criminal.

In the context of environmental protection, access to justice requires the following principles to be observed and respected; (a) constitutional and other legal guarantees for access to justice by guaranteed; (b) broad and inclusive interpretation of locus standing; (c) impartial administrative, judicial, and alternative venues for resolution of conflicts and remedy; (d) offer affordable and timely legal services; (e) promote active education by government on citizen's environmental rights and duties; (f) promote the role of the judiciary in applying the rule of law to the Rio principle 10; and (g) promote the role of national legal systems in the incorporation of the Rio principle 10 in policy, law and their enforcement.

2. The legal basis of access to environmental Justice under Rio Principle 10

The principle of access to justice, access to information and public participation in decision – making relating to environmental matters has been emphasised and stressed in principle 10 of the 1992 Rio Declaration of the United Nations Conference on Environment and Development (UNCED)[8] More recently, this principle is reflected in the 1998 Convention on Access to information, public participation in decision-making and Access to justice in Environmental matters, adopted at Aarhus, Denmark, on 25

June 1998 which was negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE). This convention which is also referred to as the Aarhus convention entered into force in October 2001.

Principle 10 provides that, "At the national level, each individual shall have appropriate access to information concerning the Environment, that is held by Public Authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making 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."[9]

Principle 10 of the 1992 Rio Declaration is today one of the principles of the non-traditional source of international law, namely; 'Soft law'.[10] in terms of the general development of customary international environmental law, the international environmental law, the Rio Declaration is central. Agreed to all 176 states attending, it is a key soft law document, and an important text as regards the consolidation of a number of principles of customary international environmental law, including the access to Justice Principle 10 of the Rio Declaration.[11]

The 1992 Rio Declaration on Environment and Development and its Stockhold predecessor of 1972 are the two key documents in international environmental law They are the typical examples of a soft law as a non-binding and non-traditional source of international law. Such declarations perform a number of functions – they consolidate and restate what are already rules of customary international law, they contribute towards moving principles forward to the status of custom, and they reflect the agreed aspirations of the international community.[12]

The Rio Declaration is one of such instruments often within the context of so-called 'framework' or 'umbrella' treaties, in a way that does not fit, neatly into the categories of legal sources referred to in Article 38(1) of the International Court of Justice States.[13] These instruments are clearly not law in the sense used by that article but nonetheless they do not lack all authority. It is characteristic of all of them that they are carefully negotiated, and often carefully drafted statements, which are in many cases intended to have some normative significance despite their non-binding. Non-treaty form. There is at least an element of good faith commitment, an expectation that they will be adhered to if possible, and in many cases, a desire to influence the development of State practice and an element of law-making intention and progressive development. Thus they may provide good evidence of opinio Juris, or constitute authoritative guidance on the interpretation or application of a treaty or serve as agreed standards for the implementation of more general treaty provisions or rules of customary law.[14]

Soft law is by its very nature the articulation of a norm in written form, which can include both legal and non-legal instruments; the norms which have been agreed by states or in international organisations are thus recorded, and this is its essential characteristic; another is that a considerable degree of discretion in interpretation and on how and when to conform to the requirements is left to the participants. Its great advantage over 'hard law' is that, as occasion demands' it can either enable states to take an obligations that otherwise they would not, because these are expressed in vaguer terms or conversely, a 'soft law' form may enable them to formulate the obligations in a precise and restrictive form that would not be acceptable in a binding treaty. On environmental matters this might be either because scientific evidence is not conclusive or complete, but nonetheless a cautionary attitude is required or because the economic costs are uncertain or over-burdensome. Despite the above consideration, it does not follow that all soft law instruments are unenforceable; those which have been adopted within a treaty framework may well have to be taken into account in applying the treaty, while others may have acquired customary status.[15]

It is not surprising, therefore that international environmental law provides numerous examples of the soft law approach. Several international bodies have made special use of soft law, most notably the UN Environment Programme (UNEP), many of whose non-binding principles and codes have served as a starting point for the evolution of new regulatory treaties.

Moreover, even where as in the Stockholm and Rio Declarations, the instruments adopted are not formally binding on states, they have in many cases contributed to the development of consistent state practice, or provide evidence of existing law, or of the law-making intentions which is necessary for the evolution of new customary international law, or have led to the negotiation of binding treaty commitments.

Hence Rio Principle 10 on access to Justice is one of the principles of soft law as a source of international law and one of the number of consolidating principles of customary international environmental law.

3. Nature and Scope of Access to Justice in Environmental matters

This part of the paper aims at a critical examination of the nature and scope of access to environmental justice from the following perspectives.

3.1 Access to Justice as a procedural Right to Environmental Protection

Understandably, human rights and environmental protection share common objectives but not all environmental issues can be formulated in terms of human rights violations.[16]

Even then, strengthening the scope of certain procedural rights could aid the enforcement of environmental rights. These procedural rights include among others, the right of effective access to Judicial and administrative proceedings, including redress and

remedy.[17] Clearly, this would simply be an attempt to translate Principle 10 of the Rio Declaration into the domestic legislative framework by host governments.

The strongest argument for a human right to the environment focuses not on environmental quality, but on procedural rights, including access to Justice, among others in environmental matters. This approach rests on the view that governments which operate with openness, accountability and civic participation are more likely to promote environmental Justice, to balance the needs of the present and future generations in the protection of the environment to integrate environmental considerations in government decisions, and to implement and enforce existing environmental standards than re closed, totalitarian societies governed in a rigidly centralised fashion.[18]

Principle 10 of the Rio Declaration is fully reflected in Principle 23 of the World Charter for Nature,[19] in the 1992 convention on Environmental Aspect Assessment (EIA) in a Tran boundary context,[20] in the 1992 Biological Diversity Convention,[21] and in the 1993 Council of Europe Convention on Civil Liability for Damage resulting from activities Dangerous to the environment. [22]
Moreover, access to environmental information may be required in order to give effect to the procedural rights of access to Justice, rights to life or private life under existing human right treaties.[23] For instance, in Guerra v Italy[24] and LCB v UK[25] the European Court of Human Rights held that information concerning serious environmental health risks should have been made available by governments to those known to be at risk. Similarly, access to Justice article of the 1966 Covenant on Civil and Political Rights and the European Convention on Human Rights would apply to environmental claims where there is an interference with property rights or a risk to life and health.[26]

More specific provisions for access to Justice in environmental cases is found in the 1993 North American Agreement on Environmental Co-operation. Article 6 gives persons with a 'legally recognized interest' the right to bring proceedings to enforce environmental laws and to seek remedies for environmental harm; Article 7 provides for these proceedings to be fair, open, and equitable and to conform to standards of due process.

The most significant and comprehensive multilateral scheme for giving effect to Rio Principle 10 is the 1998 European regional Aarhus Convention on Access to Justice in environmental matters etc.[27]

Following Rio Principle 10, Article 9 of the convention also makes general provision for access to Justice to challenge breaches of national law relating to the environment. Adequate, fair and effective remedies must be provided. This article looks very much like an application of Article 6(1) of the European Convention on Human Rights and of the decisions in Lopez Ostra v Spain.[28] and Guerra v Italy,[29], where the European

Court of Human Rights for the first time held that a failure by the State to control industrial pollution was a violation of Article 8 where there was a sufficiently serious interference with the applicant's enjoyment of their home and private life. The interference did not have to threaten the health of the applicants. The court noted, however that reared must be had to the fair balance which must be struck between the competing interest of the individual and of the community as a whole, and it is clear from the case of Powell and Rayner v UK[30] that the needs of economic development may in appropriate cases outweigh the individual interests, provided these are not entirely disregarded. For that reason the applicants failed in their complaint about noise pollution form Heathrow Airport, under Article 8, and under Protocol 1, both because of the economic value of the airport and because the state had done all that was reasonable to offer protection from noise. In effect, it is the European Court which determines where the right balance lies in such cases, although Powell and Rayner suggests that a fairly wide margin of discretion is left to governments.[31] However, where a polluting activity is already violating the state's own law, as in Lopez Ostra and Guerra it is not easy for the respondent state to assert an overriding economic value or interest in its continued illegal operation.

One way of reading these decisions is to see them as a guarantee of procedural right to access to Justice for effective remedies in environmental matters, as called for in Principle 10 of the Rio Declaration.

The general policy of extending procedural rights as participatory rights is also fully reflected in the UN sub-commission's 1994 Draft Principles on Human Rights an the Environment. Procedural rights identified, include, among others, the right to effective access to Justice or to effective remedies and redress for environmental harm in administrative or judicial proceedings.

The real test of the significance of Rio Principle 10 lies in international instruments, however, than in national law. It is here that most of the important applications of the principle have taken place. In particular, public interest litigation has become an important feature of access to environmental justice, whether in the form of class actions or liberal rules of locus standing or allowing intervention by non-governmental organisations (NGOS),. Legislation in Ontario and Michigan allows citizens the right to use for harm to public resources.[32] Decisions of courts in common law countries such as England, the USA, and New Zealand have generally granted locus standi in administrative review proceedings to environmental groups an NGOs on a liberal basis, although such groups must usually demonstrate some interest in the issue beyond a mere concern for the environment.[33] Some civil law jurisdictions also allow an action popularis in environmental cases,[34] although standing before the European Court of Justice remains very restrictive.[35] Nor is this trend confined to developed states., India,[36]

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Pakistan[37], Bangladesh,[38] the Phillipines,[38] Malaysia[40] and several Latin American Jurisdictiosn[41] also have embraced public interest litigation on environmental issues have also embraced public interest litigation on environmental issues.

The main advantage of focusing on procedural rights like access to effective justice is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy. They can also be employed in the interests of future generations.[42] A further advantage of such litigation is that it can serve as a means of making public bodies accountable for their actions under international law it has enabled environmental groups in the USA to seek review of government decisions affecting the Conventions on Trade in Endangered species and Whaling[43] while in India international environmental law, including treaties and the Rio Declaration, have been relied on in public interest caeses.[44] The extent to which public international law and is beyond the scope of this paper.[45] It should not be overlooked that governments also have a role as public interest plaintiffs. Following the Bhopal disaster in India, the government assumed parens patriae power to negotiate a mass settlement of claims against Union Carbide.[46]

It had been suggested that the cases of Lopez Ostra, Guerra and Powell and Rayner referred to earlier, could have extra-territorial application if the state's failure to control environmental harm had also affected life, private life or property in neighbouring countries. [47]

To deny transboundary claimants the protection of human rights law would also be hard to reconcile with standards of equality of access to Justice and non-discriminatory treatment applied in European regional treaties such as the 1991 EIA Convention and the 1992 Arhus Convention.[48] Given that transboundary claimants may have to subject themselves to the Jurisdiction of the state causing the damage when seeking redress for environmental harm, it seems entirely consistent with the case law and the intention of the European Convention on Human Rights to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. Governments cannot afford to disregard transboundary risks or effects whether under general international law, or under international human rights law.

It has been argued that currently, the scope of access to Justice, environmental information and participation in decision – making as procedural rights is limited in Africa owing, perhaps to the apprehension that they may constitute to foreign investments. [49]

Be that, as it may, access to justice as a procedural right in environmental matters under Rio Principle 10, is an important way of giving voice and legal protection to those individuals or groups who want to seek for legal redress or speak for 'the' or 'their' environment. Procedural mechanisms also have the considerable virtue of being flexible in the light of substantive values changing over time, given their emphasis on process rather than outcomes.[50]

3.2 ACCESS TO CALL FOR JUDICIAL REMEDIES/REVIEW OF CONSTITUTIONALITY OF ADMINISTRATIVE DECISIONS AND LEGISLATIONS

Access to a court or administrative tribunal is a human right of an aggrieved or likely to be aggrieved person to have his cause heard fairly, reasonable, speedily, impartially, justly and for an effective remedy in both civil, criminal and administrative proceedings.

This right of access to a court for environmental justice is guaranteed by the Rio Principle 10 and emphasised by the combined effect of the following relevant international and regional human treaties and customary international awl;- Articles 8 and 10 of the Universal Declaration of Human Rights of December 10, 1948 Article 3 of the International Covenant on Civil and Political Rights, 1966, Article 7 of the African charter on human and peoples rights adopted in 1981 and entered into force on 21 October, 1986 and Articles 6 and 13 of the European Convention on Human Rights 1950.

Generally, the courts have the last and the most authoritative say in the determination and pronouncement of what Justice demands in every situation involving claims and counter-claims to legal rights and duties. But the Justice meted out by the courts is a product of a fair, impartial and consistent application of man-made laws to facts in dispute as adduced in evidence by the parties. Therefore, it usually depends upon the parties to a dispute as adduced in evidence by the parties. Therefore, it usually depends upon the parties to a dispute to prove their cases by furnishing it with all the facts in issue, which it weights and sifts, identifying and declaring those of them it has accepted to be true, material and relevant to the facts in issue as well as on the proper meaning and application of such law, selecting and indicating which of the arguments it has to be valid. Finally, it disposes of the issues in dispute by applying the law selected, and is interpreted by it to the facts it has accepted to be true, material and relevant.[51]

In the exercise of these functions, the courts have a wide range of choices to make in each case; they are therefore vested with a great deal of discretionary powers but as a human institution partaking of all the weaknesses and frailties of human nature, the courts can be biased, influenced, unreasonable or mistaken in the exercise of the discretion. As a result, guidelines are usually provided to control and regulate their

choice of law and facts, they are expected to follow well-established and time-honoured rules of evidence and procedure, to apply well-known and accepted principles of statutory construction and to accept the binding authority of judicial precedents. Furthermore, constitutionally, the courts are usually insulated from political authority of judicial precedents. Furthermore, constitutionally, the courts are usually insulated from political and administrative control and placed in a position in which they can effectively withstand all forms of economic and social pressures. Surely, if the courts in a community are independent and impartial in the discharge of their functions and if they act without fear or favour, seeking always to render to each party to a case his due, according to the law of the land or international law, the people and their administrative agencies cannot but keep within their legal limits. Indeed, an independent impartial and fearless judiciary is the greatest and surest security a community may have for constitutionalism, the rule of the law, stability, orderly progress, environmental protection and sustainable development.[52] As Justice Jackson of the United States Supreme Court rightly observed, 'severe substantive law can be endured if they are fairly and impartially applied'.[53]

Article 13 of the European convention on Human rights, which guarantees the right to "an effective remedy before a national authority" has been held not to require a judicial remedy.[54] But in general, the convention's emphasis is on the role of courts and tribunals. This was reflected in the judgement in Golder v. UK[55] which was the first decision made by the European Court of Human Rights based in Strasbourg, France in a case against the United Kingdom. The court held that Article 6(1) of the Human Rights Convention, which guarantees the individual's right to a fair and public hearing within a reasonable time by an independent an impartial tribunal, did not merely apply to an individual who was in fact involved in a case before the courts. It included the right of access to the courts, interference with this right of a prisoner occurred when he was refused permission to consult a solicitor to find out, whether he had a right of action in defamation against a prison officer.

In interpreting Article 6(1) as guaranteeing the right to take legal proceedings, the court had regard to the principle of the rule of law contained in the statute of the council of Europe and in the preamble to the convention.

The court considered that the rule of law is scarcely conceivable without the possibility of access to the courts. If the application of Article 6(1) to civil litigation arose only when someone was actually engaged in a dispute over which the courts had jurisdiction, government could be tempted to remove form that jurisdiction any disputes which it would suit them to have decided in a non-judicial forum.

In a number of decided cases ruled against the German, Dutch and Swedish Governments or public authorities, [56] the court also makes clear that Article 6(1) is not concerned only with what goes on in a court or tribunal, but is concerned with any decision-making process, of an essentially administrative character, determining an individual's civil rights and obligations.

Judicial Review in Environmental matters; main ground, principles and usefulness

On a very general, level, substantive environmental cases come before the courts in three main ways. First, where there is a dispute about a statutory definition in primary or secondary legislation, a court can be asked to interpret the statutory phrase. This can be in the context of criminal proceedings or by way of seeking the court's declaration (e.g. in relation to the definitions of 'causing' and 'waste'.[57] In these cases, the court's interpretation of the definition becomes the law. Secondly, there are common law disputes which have a long history in order to address modern environmental disputes (e.g. nuisances arising out of the pollution of ground water);[58] personal injury arising from emissions of asbestos dust;[59] and breach of statutory duty giving rise to stigma damages for radioactive contamination.[60] Finally, as most of the sources environmental law are statutory, cases arise where the powers granted to government and regulatory agencies are used unlawfully or statutory procedures ignored and the courts are asked to judicially review the exercise of the power.

These broad categories of cases are, of course, simplistic in the sense that environmental disputes arise in all sorts of ways which are impossible to categorise but nevertheless they illustrate that in certain areas environmental law is organic and develops to reflect the views and values of the Judiciary and arguably the general public. In summary, the courts in many jurisdictions appear to be willing to adopt wide purpose approach to interpreting statutory provisions which create environmental criminal offences but take a less interventionist approach to the Judicial review of environmental powers and duties or the private law.

(a) Main Ground of Judicial review

Environmental enforcement authorities are public bodies exercising public powers. Mostly, these powers are exercised under statute and consequential delegated legislation. However, in exercising these powers, it may be that such bodies do not follow statutory procedures, that they arrive at decisions, unfairly or that they attempt to make decisions which they have no power to make. The high court oversees the exercise of these powers by administrative bodies by means of judicial review. The main ground for judicial review is that an administrative body has made a decision which was outside the statutory powers given to it (ultra vires). This may happen in one of three ways

i. That the Agency has no power to make the environmental decision itself. Then decision would be subject to judicial review.

ii. That there was an improper exercise of discretion by such environmental enforcement bodies.[61] the improper exercise of discretion can be crudely subdivided into a number of different categories; taking into account irrelevant considerations; failing to take into account relevant issues; and acting so irrationally that the decision could only have been made in bad faith. Examples include taking into account the political party that an applicant supported when deciding an application for a waste disposal licence and failing to consider the special attention be paid to the provisions of the development plan when considering a planning application.

iii. Procedural unfairness; although in theory, the review of decisions made with procedural impropriety falls within the unreasonableness ground above, it is distinct enough to form its own head of reviews. These are that every person has a right to a fair hearing and that there should be no bias (or perception of bias) in a decision making process. The right to a fair hearing includes the right to meet any case put against an applicant and the right to present cogent and coherent evidence in support of a case. The prohibition against bias covers such situations as local authority planning committee members participating in decisions to grant planning applications on land which they own. In such circumstances it is impossible for the decision maker to reach a fair decision.

When a decision is made in any of the above circumstances, an aggrieved person has the right to apply to the High Court for judicial review. Such a right should not be confused with any statutory right to appeal, which may give rise to a reconsideration of the merits of a case, rather than consideration of questions of law, indeed theoretically, a court exercising its power of judicial review is not entitled to substitute its own decision for that of the administrative body. This general right to challenge administrative decisions is supplemented in certain cases by specifics statutory rights to challenge decisions.

(v) Main principles of judicial review

the main principles of judicial review, such as the need to have locus standing, the need to commence proceedings without delay and the need to have an arguable case, remain. This part of the paper will focus largely on locus standing.

However, in order to bring a claim for judicial review, the applicant must show in English law a 'sufficient interest' in the decision or power to which the application relates. There has been some suggestion that this interest has to be greater where the

application is for the remedies of prohibition or certiorari, but it is generally accepted that the only test is to show a sufficient interest. The phrase 'sufficient interest is of tremendous important in matters of environmental protection. It is clear that somebody with a private interest in land affected by an administrative decision would have sufficient interest or standing. It is more difficult that a person has the necessary locus standing by virtue of an interest in the environment as a whole, as it is not generally accepted that there are 'environmental rights' available to the public at large.

i. Locus standing

Lord Wilberforce said that the decision as to who had a 'sufficient interested had to be considered with the known merits of a case. It must be taken together with the legal and factual text.[62]

Local groups bringing challenges in connection with local environmental issues e.g., waste management licenses, statutory nuisances or local air pollution, need to demonstrate sufficient interest by objecting to proposal or giving evidence at a local inquiry. The position of general environmental interest groups e.g. friends of the earth or Greenpeace is more problematic as there is no necessary geographic connection with the matter being challenged. In R. V Inspector of Pollution, ex parte Greenepace Ltd.[63] (No.2) Greenpeace challenged the decision to allow the thermal oxide reprocessing plant at sellafied (THORP) to commence operations. Pointing to Greenepace's genuine interest in the issues raised and to its expertise and resources, Otton J decided that the group had sufficient interest, although he did note that it also had many members in the region who might be affected. In R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd (The Pergau Dam Case)[64] the court, if anything, went even further in allowing a pure public interest claim to proceed, since there were clearly no local residents involved. In particularly, it was emphasised that if the applicants were not granted standing then a clear illegality would not be subject to challenge.

Although general environmental interest groups have become increasingly accepted as having standing in judicial review actions, there is still a degree of uncertainty and there have been cases where the courts have required a special interest in the subject matter of the challenge.[65] In R. V. Somerset County Council, ex parte Dixon,[66] however, the decision in Pegau Dam was reaffirmed and the law on standing continued to be liberalised. In that case, the answer to the question of who had sufficient interest in the subject matter of the challenge was wide enough to include anyone who was not a busybody or a trouble maker. Public law challenges were concerned with the abuse of power, not the protection of private rights and therefore the classes of though who sought to draw attention to those abuses must include anyone who had a genuine interest in the subject matter of the challenge irrespective of any private law interest. There is

a degree of contradiction in the case of Garnett and Dixon. The two cases were strikingly similar in their facts with very different results. Whilst these differences emphasise the discretionary nature of Judicial review proceedings, they also illustrate that there is little precedent value in previous decisions.

ii. Delay

Generally, the issue of delay is considered within the context of the facts of the application and is essentially a question of discretion for the court. As evidenced by the Dixon and Garnett decisions.[67] Judicial attitudes to delay can differ. At one end of the spectrum there is a strict view that time is of the essence and any delay in commencing the application (even if it is justified e.g. trying to find specialist representation or raising funds to support a group action) could be fatal to the application. At the other end there is the view that the question of delay is to be viewed generally within the context of fairness and reasonableness.

(c) The usefulness of judicial review

How useful is judicial review as a mechanism for controlling the activities and decision making of environmental bodies/ there are the various procedural hurdles which must be overcome before an application for permission to bring a judicial review action will be granted, such as having locus standing, bringing any application 'promptly' an ensuring that there are no alternate remedies available. The main problem here is not with the hurdles themselves but that the determination of whether an applicant succeeds in 'jumping the hurdles' is largely discretionary and rests with the particular judge hearing the case.

In addition to these procedural hurdles, there is the difficult question of funding the cost of a judicial review action. As most environmental actions tend to be brought on a representative basis/either from local groups or interested parties, there is little direct financial interest in the outcome of an application (although there is a notable exception in the planning arena where commercial developed feature largely) the cost of going to litigation can be high particularly when considering that legal aid is seldom available in judicial review cases,[68] although there are notable exceptions including cases where children have been selected as applicants in particular cases.[69]

An extra pressure upon applicants is the fact that costs in judicial review proceedings normally follow the event, meaning that where an applicant loses (either at the full hearing or at the stage of seeking permission) they are normally obliged to pay the costs of the other side (again there are notable exceptions to this rule, in particular where there was no award of costs against the applicant as the application was considered ot be brought in the public interest'.[70]

3.2.2 Other avenues of challenge: administrative appeals

Although judicial review remains as one way of challenging a decision which has been made unlawfully, there are in some cases, alternative remedies for aggrieved parties by way of a statutory right to administrative appeal.

In a subject which is heavily dominated by policy, it is clear that the ultimate arbiter on questions of policy in the system of administrative appeals, can set precedents in terms of the manner in which central rules or guidance are to be interpreted both generally and on case by case basis. Although such administrative decisions are not binding upon any decision – makers (i.e. not in the way that Judicial pronouncements bind lower courts), they can effectively dictate the decision making processes of the regulatory agencies to whom such powers have been devolved.

The system of environmental appeals addresses questions of law. For example, whether a particular 'development' within the meaning of a Town and country planning law should be situated outside a town centre in contravention of central government guidance, or whether as a scientific and technical issue, a particular process option represents the 'best available techniques not entail excessive cost' or any combination of these. In this way, such appeals are concerned with the substantive (as opposed to procedural) rights and wrongs of environmental decision-making with all of the consequential impact that this has on public participation, provision of adequate and objective evidence and clarity and transparency of the decision itself.

In many ways, the 'battleground' of environmental decision making lies within the context of the administrative appeals system. Although the courts have supervisory powers under the judicial review process this si not concerned with the substantive decision but the manner in which the decision was made. One of the main problems with this approach is that there can be a tendency for administrative appeals to be viewed by the public as being more concerned with going through the correct procedures than with debating and adjudicating on the substantive issues at hand, as the appeal process is primarily concerned with apply central policy within an individual set of facts rather than debating whether that policy is in itself acceptable. For example, whether an incinerator is acceptable at a particular location, rather than whether we should be using waste minimisation techniques to ensure that there no need for further incinerators.

When considering the appropriate avenue of challenge, the courts have established two tests. First, would the statutory appeal process afford an adequate alternative remedy? If so, any application for permission to seek judicial review would be refused. The adequacy of the statutory right of appeal as an alternative remedy is dependent upon a number of variables, including comparative speed, expense and finality of the alternative procedure, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and the apparent strength of the applicant's challenge.[71]

In the third situation, where a collateral challenge is brought (i.e. as an incidental challenge to the main proceedings) the courts have dismissed such challenges as being an abuse of process where the decision which is being challenged was made many years before and the period for statutory challenge had passed.[72]

RIGHTS OF ACCESS TO LEGAL AID FOR ENVIRONMENTAL JUSTICE

Considering the high cost of litigation, especially environmental litigation (both domestic and transboundary), accessible an functional legal aid scheme in a given legal system becomes the essential bedrock of right of access to Justice. any society that respects and pursues the rule of law and democracy must provide all its citizens with both equal and effective access to Justice. Access to Justice makes human rights effective and further the rules of law.[73]

Similarly, access of citizens to legal aid is necessary for their access to the legal system and courts and for the protection and pursuit of their environmental rights and sustainable development. This is because sconstitutional goals and state policies for human rights and development cannot be meaningful and effective if there is no easy access for the people to seek their enforcement and protection when violated.[74]

Further, the availability of legal aid should promote the notion that fairness requires that every person, regardless of economic condition is entitled to the protection of the law. the potential loss of liberty or life should set in motion substantial rights to fairness which can best be protected by providing legal representation or advice.[75]

These premises are recognised in international and regional human rights norms as well as in the constitutions of most countries. The 1999 constitution of Nigeria provides that everyone is equal before the law and that everyone has the right to equal protection under the law. Apart from acknowledging individual rights, the constitution also provides for the establishment of the requisite institutions to support their realisation.[76] This implies that mechanisms must be put in place to ensure the great possible access to the law and its institutions, to legal services and to full information about the nature and content of the rights involved. For the poor, the concept of access to justice is of grave importance as it may mean the difference between an acquittal or imprisonment in criminal cases or the difference between successful pursuit or denial of a remedy in criminal matters.

In Europe, the Committee of Ministers of the Council of Europe has over the years adopted a number of legal instruments in order to assist member states in giving effect to Article 6 of the European convention on Human Rights. In June 1996, during a conference on the Efficiency and fairness of Civil, Criminal and Administrative Justice held in Budapest, the European ministers of justice reaffirmed need to ensure that

people have access to Justice system that is both fair and efficient and decided to review the legal instruments previously prepared by the council of ministers.

The main instrument related to the setting up of an efficient system of legal aid is resolution 78(8) of ministers of the council of Europe in March 1978, the resolution affirms the right of all persons to necessary legal aid in court proceedings. It further recommends that legal aid should provide for all the costs necessarily incurred by the assisted person in pursuing or defending his legal rights, in particular lawyer's fees, costs of experts, witnesses and translations.

Although the Committee of Ministers already in Resolution 78(8) laid down the principle that no one should be prevented by economic obstacles from pursuing or defending his rights before any court determining civil, commercial, administrative, social or environmental matters, it was only in 1993 that the committee acknowledged that more needed to be done if the enjoyment of civil and political rights such as those enthused in Articles 6 and 13 of the European convention on Human rights are to be achieved by the very poor. It therefore recognized that the enjoyment of these rights will not prove effective if it economic, social an cultural rights are not equally protected.

In its recommendation 93(1) on effective access to the law and justice for the very poor, the committee of ministers recommended that member states promote the setting up of advice centres in underprivileged areas and facilitate effective access to quasi-judicial methods of conflict resolution for the very poor by increasing the involvement of non-governmental organizations or voluntary organizations providing support to the very poor in quasi-judicial forms of conflict resolution such as mediation and conciliation.

Finally, states were advised to limit the circumstances in which legal aid may be refused by the competent authorities chiefly to those cases in which the grounds for refusal are inadmissibility, manifestly insufficient prospects of success, or cases in which the granting of legal aid is not necessary in the interests of justice.

Legal aid should aim at a full spectrum of legal relationships and transactions irrespective of whether such relationships or proceedings are criminal or civil. If the disabilities of the majority poor is understood to result from social and economic inequality, legal aid narrowly conceived is obviously inadequate. It must be defined broadly to include not only legal advice and legal representation by lawyers before courts in criminal and civil cases, but also empowerment programmes through communication legal education and paralegal training as well as legislative advocacy and lobby to remove laws that prevent access to justice. In this regard legal aid can play a substantial role in promoting empowerment by advancing environmental, social, economic and political rights through the law in such a way that the plight of the poor and vulnerable are meaningfully addressed.

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3.2.4 Remedies

The use of the common law as a mechanism for environmental protection would be usefulness unless there were effective remedies once a cause of claim have been established there are three main types of remedies that can be sought preventive and compensatory remedies, and abatement (self-help). An injunction allows for actions creating environmental problems to be stopped by order of the court. Monetary damages act as compensation for any damage suffered but can also pay for an clean up costs involved in rectifying the damage. Finally, there are limited circumstances where claimants can take action without resort to the courts to abate activities causing environmental harm.

As can be seen below, common law remedies have both positive and negative features when it comes to protecting the environment. On the positive side, the courts tend to treat remedies as following directly from the right that has been infringed. That is, they do not engage in further balancing exercise between the claimant's rights and the defendant's or (or wider social) interests. This is seen most clearly in relation to the preference for granting injunctions rather than awarding damages. Negatively, remedies are available to benefit claimant's rights not environmental interests. So, for example damages need not be spend on restoring the environment.[78]

(a) Injunctions

The granting of an injunction is a discretionary remedy that can either prohibit or restrict a defendant form carrying on an environmentally damaging activity. Normally, either the activity complained of has to be continuing at the date of claim, or there has to be a threat that the activity will continue. Even where the activity has ceased at the time of trial, an injunction can still be sought if it existed when the claim was brought. Although injunctions are discretionary, however the general principle in the two torts where continuing damage is likely – nuisance and trespass; is that claimants can expect to obtain an injunction unless the activity complained of is not of sufficient gravity or duration to justifying stopping the defendants actions.[79]

This principle was affirmed in Kennaway v Thompson,[80]a complaint about noise from power boat racing. The English Court of Appeal decided to award the claimant an injunction restricting the times the boats raced and the noise they made, notwithstanding the public interest in the sport. The importance of this decision is that it confirms that a party which causes a nuisance or trespass cannot simply 'buy off' the rights of those affected by paying an award of damages. In the cases of multi-party claims, of course, it is debatable, whether courts could every properly assess the right amount to damages payable if damages were ever to be preferred to injunctions on economic efficiency grounds.

There are situations where it is possible to obtain an injunction before the occurrence of the event causing injury or damage. Such anticipatory injunctions do not require proof of environmental damage at all. However, there must be sufficient proof of imminent damage and it must be demonstrated that if the activity were to continue the damage accruing would be significant enough to make it difficult to rectify. Such injunctions are seldom granted.

Injunctions are rarely specific in nature, the court mere sets the standard for the defendant to meet and this standard can be achieved in any way possible. For expel, it may be met either by closing down a particular plant which is causing environmental difficulties or by fitting new arrestment equipment. To give defendants time to make such damages, injunctions are often 'suspended' for a certain period before being enforceable.[81]

(b) **Damages**

Unlike an injunction, a claimant can demand that the court award damages. The aim of such damages it place the claimant as far as possible in the position they would have been in had the wrongful act not occurred. This could be calculated in two ways; on the cost of clean-up operations necessary to restore the proper to its previous state, or the difference between the value of the property as it was after the pollution had affected it, and before. The approach of the courts now, however, is to calculate damages according to the latter method. So where there has not been physical damage, damages will be based on the differences in possible rental value due the period of the nuisance. This means that damages will not depend on the number of people affected, in line with the idea that nuisance is a land tort.

However, if there is actual damage this will have to be compensated. An example of this is Marquis of Granby v Bakewell UDC,[82] the defendant operated a gas works which discharged poisonous effluent into a river over which the claimant had fishing rights, killing numerous fish. The claimant received compensation equalling the costs of restocking the river in addition to the loss of a large amount of the food supply for other stocks. The court also took into account the effects of the pollution on higher quality areas of the river and considered that the damages would be higher where environmental pollution was greater.

Damages for all future loss are only available in lieu of an injunction. This remedy is used only sparingly because of the ready availability of the more usual injunction procedure.

Lastly, exemplary or punitive damages can be awarded in specific instances. The basis of such an award is to deter the defendant and others from committing torts which may result in financial benefit to the person responsible. The scope for these damages is, however, limited to cases where there has been oppressive, arbitrary or unconstitutional action by government officials or public servants, or where the defendant's conduct was calculated to make a profit which could exceed the damages payable.[83] Thus a

claim for exemplary damages in public nuisance after the public water supply was polluted was rejected on the ground that public nuisance fell outside the above categories.[84]

(a) Abatement

The remedy of abatement tends to be more of historic interest than practical use. The remedy involves the removal of nuisance by the injured party without recourse to legal proceedings. The courts view this remedy unfavourably, and it now appears to be confined to simple cases where resort to legal proceedings would be inappropriate, or where urgent action is evidently needed. An example of the use of abatement is Lemmon v. Webb[85], where action was taken to trim back the branch of a tree that encroached on land from a neighbouring site. Any damages subsequent to an abatement action are restricted to damages in respect of harm prior to the abatement.

3.2.5 ACCESS TO REMEDIES IN TRANSBOUNDARY ENVIRONMENTAL CLAIMS

The problems of resorting to public international law to deal with transboudnary environmental disputes have been explored elsewhere and include the following; the lack of a forum with universal compulsory jurisdiction, the complexity and uncertainty of the law of state responsibility as regards environmental; damage, and the absence of clarity concerning the remedies available to states and their scope. These problems have not so far from being significantly mitigated by the International Law Commission either in its work on state responsibility or international liability. While public international law has done much in the past twenty years to regulate environmental harm, it cannot realistically be viewed as offering accessible remedies for transboundary environmental damage, save in those few exceptional cases where states have been willing to overcome their reluctance to litigate environmental claims.

It is against this background that we can now examine the somewhat greater progress in opening up national legal system to transboundary environmental litigation, but also through civil liability conventions covering ultra-hazardous activities, such as oil transportation or nuclear power. There are three good reasons for encouraging resort to private law remedies in transboundary environment dispute. First. It de-escalates dispute to their ordinary neighbourhood level,[86] where they can be resolved using national law and avoids turning them interstate controversies based on problematic concepts of state responsibility in international law. secondly, by allowing direct recourse against the enterprise causing the damage it facilitates implementation of a 'polluter pays' approach to the allocation of environmental costs.[87] Thirdly, it empowers individuals by enabling the private plaintiff to act without the intervention of a government and facilitates development of a human rights approach to environmental issues. This is consistent with the policy, in general terms, of promoting effective access to judicial

administrative proceedings, including redress and remedy ...' in accordance with Principle 10 of the Rio Declaration. Moreover, a policy of encouraging resort to transboundary civil litigation and remedies recognises the reality that many, if not most transboundary environmental problems are mainly caused by and affect private parties, rather than states as such. In this context transboundary litigation no only provides an effective mechanism for dealing with transboundary harm, but may also offer the possibility of securing redress from multinationals whose operations in developing countries are sometimes difficult to control through local law.

Encouraging the solution of transboundary problems through national law also have disadvantages, which must be recognised. There may be no remedy, or no effective remedy, if the applicable legal system is favourable to the activities of polluters. No common legal standards will necessarily govern the availability of remedies in different states unless there is parallel progress in harmonizing environmental standards and liability for damage. Even where adequate laws exists problems of jurisdiction, the availability of remedies and enforcement in transboundary cases may limit the usefulness of this form of litigation. Public and private international aw can have a role in securing access to justice by removing some or all of these disadvantages and by ensuring that adequate national remedies are available to plaintiffs in transboudnary cases. These objectives can be achieved in a variety of ways, but will usually involve addressing some or all of the following elements:-

i) Non-discriminatory treatment of transboundary plaintiffs and equal access to available national procedures and remedies

Here equality of access to transboundary remedies and procedures is based on the principles of non-discrimination, where domestic remedies are available already to deal with internal pollution or environmental problems, international or regional law can be used to ensure that benefit of these remedies and procedures is extended to transboundary claimants. As defined by the Organization for Economic Co-operation and Development (OECD)[88] equal access and non-discrimination should ensure that any person who has suffered transboundary environmental damage or who is exposed to a significant risk of such damage obtains at least equivalent treatment to that afforded to individuals in the country or origin. This includes the provision of an access to information concerning transboundary environmental risks; participation in hearings, preliminary enquiries and the opportunity to make objectives; and resort to administrative and judicial procedures in order to prevent pollution, secure its abatement or obtain compensation. These rights of equal access are to be accorded only to individuals affected by the risk of transfrontier injury but also to foreign NGOs and public authorities, in so far as comparable entities posses such rights in the country of foreign of the pollution.

It might reasonably be asserted that the arbitrary exclusion of transboundary litigants violates the standard of international legality[89] enshrined in the principles of equal protection of the law and non-discrimination found in Article 7 of the 1949 Universal Declaration on Human Rights and in Article 26 of the 1966 International Covenant on Civil and Political Rights. Discriminatory restrictions on transboundary access to Justice may also violate the right to a fair trial under Article 6(1) of the European Human Rights Convention, or under Article 14 of the 1966 UN Covenant on Civil and Political rights, which specifically states that All persons shall be equal before the courts and tribunals.

ii. Resolving problems of private international law, particular jurisdiction and choice of law in transboudnary cases. Here, a rule is found in various forms in some legal systems which denies Jurisdiction over actions involving foreign land. In some cases the rule applies only to actions concerning title or trespass to land, but in others it has been applied more extensively to include other torts resulting from extra-territorial effects of activities within the territory of the forum.[90]There is no obvious reasons in principle why a forum in which activates causing transboundary damage are situated should refuse jurisdiction merely because the effects are extra-territorial, but it is this rule which explains why the Trail Smelter case was referred not to the Canadian courts but to international arbitration.[91]

Given that a claim for transboundary damage may involve events, impacts and persons in several countries, and possibly on the high seas, the question which legal system should determine liability and other issue is a real and important one. A study has shown that as regards choice of law in transboundary environmental claims there is no discernible consensus.[92] The question of choice of law is thus determined by each national legal system.[93]

Iii. Harmonisation of national laws dealing with liability for environmental damage. Here, legal harmonisation, both at the substantive and procedural levels, has an important role in any scheme for transboundary access to justice. It can contribute greatly to simplifying the burden facing transboundary plaintiffs, while at the same time clarifying the responsibilities of transboundary defendants. Harmonisation can be a means of avoiding conflict of laws problems, and contribute to the creation of certain shared expectations on a regional basis. If the principle criteria for assessing progress towards environmental justice are the reduction of unpredictability, complexity and cost, balancing the interests of plaintiffs in the widest possible choice of law and jurisdiction against the interests of defendants in ordering third affairs in an environmentally responsible manner, then greater harmonization at least at regional level, remains a desirable goal.

The issues which need to be addressed in this context include the following;-

Liability; whether based on fault, strict liability, or absolute liability.

Proof; who bears the burden of proof and what standard of proof is required

Remedies; to what extent are compensation for environmental damage, restoration costs and injunctive relief available

Recognition and enforcement of judgements; can the defendant's assets be reached and his activities controlled outside the territory of the forum.

Compensation funds; these may be necessary to allow adequate recovery in case of serious loss.[94]

4 Role of the Judiciary in promoting the role of law in regard to the Rio Principle 10

The rule of law is scarcely conceivable without the possibility of access to the courts. Principle 10 of the Rio Declaration enhances the rule of law and the quality of the administration of Justice in a democratic setting.

The rule of law has had an important influence on constitutional law world-wide by insuring that fundamental human rights with procedural remedies for their enforcement by an independent judiciary are entrenched in national constitutions. This has helped considerably in most democracies not only to protect the civil rights and liberties of the individual but also to keep government, government officials and agencies within the law. This is the promise democracy holds for us under the doctrine of the rule of law.[95]

The rule of law is a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish environmental, social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised. Therefore the judge, in interpreting the law and the fundamental principles and assumptions that underlie it, can assist the executive arm of government in shaping community and environmental values, and formulating desirable social, economic and environmental policies and transforming them into law, and generally in articulating in broad principles the goals of the society.[96]

The role of the judiciary therefore in promoting the rule of law in regard to Principle 10 is to ensure environmental, economic, social and political advancement and sustainable development of the society through access to environmental justice.

An independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global

levels are crucial partners for promoting compliance with, and the implementation and enforcement of international and national environmental law.

Further, the role of the judiciary in regard to Principle 10 lies in the recognition of the fact that the rapid evolution of multilateral environmental agreements national constitutions and statute concerning the protection of the environment increasingly requires the court to interpret and apply new legal instruments in keeping with the principles of sustainable development.

It is worth emphasizing in the light of the responsibility under Principle 10, that the fragile state of the global environment requires the judiciary as the guardian of the rule of law, to boldly and fearless implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.

Furthermore, the judiciary has a key role to play in integrating human values set out in the United Nations Millennium Declaration; Freedom, Equity, solidarity, tolerance, respect for nature and shared responsibility into contemporary global civilization by translating these shared values in to action through strengthening respect for the rule of law both internationally and nationally.

Moreover, the judiciary, well informed of the rapidly expanding boundaries of the environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interests in a healthy and secure environment.

The above mentioned role of the judiciary is consistent with the Johannesburg Principles on the Role of Law and sustainable development adopted at the Global Judges symposium sponsored by UNEP.[97] For the realisation of these principles the judges proposed that the programme of work should include inter alia the following.

The improvement of the capacity of those involved in the process of promoting implementing, developing and enforcement environmental law, such as judges, prosecutors, legislators and others to carry out their functions on a well informed basis, equipped with the necessary skills information and maturely.

The improvement in the level of public participation in environmental decision making process access to justice for the settlement of environmental disputes and the defence and enforcement of environmental rights and public access to relevant information.

The strengthening of sub-regional, regional and global collaboration for the mutual benefit of all peoples of the world and exchange information among national judiciaries with a view to benefiting from each other's knowledge, experience and expertise.[98]

4. **Role of National Legal systems in promoting the incorporation of principle 10 in policy and law and their enforcement**

The phrase, 'legal system' refers to the totality of laws, conventions, practices, procedures and institutions that exist for the development, stability and maintenance of peace and order in any given nation. The legal system creates legally binding obligations and rights which are enforceable by constitutional bodies such as the courts, quasi-judicial bodies, the police and other institutions established for that purpose.[99] This distinguishing feature of the legal system sets it apart from the social system, which does not operate on the basis of legal obligations, but of morality, social norms and observances.

The principal features of a national legal system include

rule forbidding or enjoining certain types of behaviour under penalty.

Rules requiring people to compensate those whom they injure in certain ways

Rules requiring what must be done to make contracts or other arrangements which confer rights or create obligations

Rules committing members of the police force and society as a whole, jointly and severally to take effective and realistic measures to preserve peace, law and order in the various communities

Rules for the application for the application or enforcement of foreign laws, including international law, and foreign judgements by Nigerian courts

Legislatures to make new rules and amend or abolish old ones, for the progress of the nation and

Courts to determine what the rules of law are and when they have been broken to fix the punishment or compensation to be rapid and to provide any other relevant remedy, as well as the rules applicable to these courts.

In an era of heightened environmental threats, including armed conflict and attacks on innocent civilians, national legal systems, if properly organised and mobilised can serve as powerful and legitimate instruments for addressing the major environmental threats, and should be underpinned by a more determined, concerted and sustained effort to implement and enforce the international legal regimes for the protection of the environment and sustainable development.[100]

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Further, national legal systems can be of tremendous help in a area, where the people most affected by environmental degradation are the poor, provide a sound framework for strengthening the capacity of the poor and their representatives to defend environment rights, through effective access to justice as required by principle 10, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy their right to live in a social and physical environment that respects and promotes their dignity.

5.1 Incorporation of principle 10 (on access to justice in particular) in National Laws and policies – the African experience the principle of access to justice under the Rio principle 10 can be incorporated in National laws and policies through constitutional. Stature and institutional frameworks. This is because a lot takes place at the national level. Ever since the 1982 Stockholm conference efforts have been made to have environmental rights and the components of Principle 10 of the Rio declaration recognized in national constitutional and legislative frameworks. A number of countries have within their national constitutions and legislations provided for a justiciable or non-justiciable right to environment and or healthy environment and for access to courts and administrative appeals for effective remedies.According to a recent UNEP's report on models of national legislation, policy and guidelines in Africa, Asia, the Pacific Latin America and the Caribbean regions.[101], the principle of access to justice under the Rio Principle 10 has been incorporated in one form or the other in the following selected African countries.[102]

In Algeria, the national constitution does not expressly provide for environmental rights, however in Article 32 the fundamental human and citizen's rights and liberties are guaranteed as a common heritage for all. Article 34 further protects the right to life as being inviolable. Article 54 also grants to all citizens the right for the protection of their health. This protects the citizens from environmental hazards that endanger their health and well-being. Article 140 of the constitution provides that justice is founded on lawfulness and is accessible to all. Article 143 also ensures that there is a right of appeal in administrative authority decisions. Any miscarriage of justice by the State leads to compensation for the aggrieved person as per Article 49. Framework legislation also provides for criminal sanctions for transgressing the laws. An example at its chapter VI is law No. 83-03 of 5 February.

In Angola, the national constitution provides in Article 214 for a right to live in a healthy and unpolluted environment. The state is enjoined to take measures necessary to protect the environment and any acts, which are damaging to the environment are declared punishable by law. further it is for the state to create requisite political, economic and cultural conditions necessary to enable citizens effectively enjoy their rights and perform their personal duties. Article 4 confers on the citizen the right to contest and

take legal action and against any acts that violates their right as set out in the constitution an d other legislation. The interpretation and incorporation of the constitutional and legal norms related to the fundamental rights are to be in keeping with all the relevant international and regional human rights treaties to which Angola is a party. Further, international environmental rights are not excluded even if the constitution does not expressly provide for them

In Benin, the right to a health, pleasing and sustainable environment and the corresponding duty of all to protect it is provided for in Article 28 of the constitution. The state is responsible for the protection of the environment. Article 28 and 29 prohibit the handling, stockpiling, transportation important and discharging of harmful wastes in Benin. The protection of the environment and the conservation of natural resources fall within the purview of law pursuant to Article 98 of the constitution.

In Cameroon, Article 5 of the environmental management law provides that the laws and regulations shall guarantee the right of everyone to a sound environment. Article 92 provides that parties to an environmental dispute may settle the dispute by joint agreement through arbitration. Under article 93 traditional authorities also have competence to settle environmental disputes on the strength of local customs, but this does not infringe the right of the parties to refer the matter to competent courts. Article 91(1) grants administrative units in charge of environmental management full competence to effect a compromise, but they have to be notified by the defaulter. Strict liability offences are also provided for in Article 77(1) where by the rules of evidence are dispensed with and the burden of proof falls on the alleged defaulter. However, NGOS have a different way of accessing environmental justice. They have to be first of all registered and or authorized before they can engage in actions of public or semi-public environmental institutions. However, once there are registered, they may exercise the rights of plaintiff with regard to facts constituting breach of the Act or causing direct or indirect harm to the common good they are intended to defend.

In Nigeria, the 1999 National constitution does not expressly provide for a right to a clean environment, however the protection of the right to life under section 33 encompasses the right to an environment not detrimental to the right itself. Section 20 of the non-justiciable chapter of the constitution provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. Section 36 of the constitution protects the right to a fair hearing within a reasonable time by a court of competent jurisdiction or other tribunal established by law. the right to seek redress for violation or threatened violation of an individual's fundamental rights is provided for in section46 and gives the high courts original jurisdiction to entertain such applications. There is a right of appeal to the court of appeal and finally to the supreme court on points of law and constitutionality under sections 241(1) and 233 respectively.

Further, section 59 of the environmental aspect assessment (E.I.A) act of the 1992 also recognizes the principle of assess to justice as it makes provisions for judicial review, apparently without the usually impediment of the locus standing rule.

Alternative dispute resolution procedures are also available for parties in environmental disputes, there are mediation and panel of inquiry under section 32 of the EIA Act various criminal sanctions are also imposed by sectoral legislations for their violations.

Furthermore, the 1999 National Policy on the Environment provides under section 8 that action shall be taken among others, to periodically evaluate existing environmental legislations with a view to ensuring their adequacy and effective implementation; streamline all legislations and regulations relating to the environment in order to reorganise them into a holistic and integrated compact that recognises the cross-sectoral linkages of the environment. Under section 9, the policy provides that appropriate action shall be taken to incorporate into national legislation the international obligations which Nigeria has assumed under relevant international treaties and declarations or other non-bindings standards of international law for the purpose of implementation. That Nigeria will continue to participate in the progressive development of international laws and guidelines on environmental protection.

6. Obstacles impeding effective access to justice

The obstacles impeding effective access to justice take many forms. Governments devote only meagre public funds to legal aid and assistance for the poor and the not-so-rich. Member of the legal profession pursue private profit to the neglect of their ethical duty to act pro bono publico in public interest cases. Courts interpret procedural rules, for example, about legal standard and the award of costs, or evidential rules intended to safeguard the presumption of innocence, in ways which unduly handicap the vulnerable and disadvantaged. Legislature pass laws which are unnecessarily complex and obscure and which delegate excessively wide powers to public officials inbued with a culture of secrecy. Law reform including the simplification and modernisation of the statute book is given a low priority. Ministers and public authority amply clothed with immunities form suit using sweepingly broad statutory powers purporting to oust the court's jurisdiction. Public bodies are permitted by lax judicial scrutiny to avoid giving reasons for decision with an important impact on basic rights and freedom; or to withhold relevant documents disclosing the basis upon which those decisions have been reached. Into many countries claiming to share a common heritage of freedom and the rule of law, judges lack real independence and re more executive minded than the executive.

Impediments to equal access primarily involve procedural and jurisdictional obstacles. These can include requirements such a security for costs from foreign plaintiffs, or the denial of legal aid. A more significant obstacle to equal access for the transboundary litigant in Anglo- American law is the discretionary power of courts to dismiss cases on the ground that a foreign forum is a more appropriate venue for trial.[103]

In environmental impact assessment procedures or in administrative proceedings, to license or authorize potentially harmful activities, the main obstacles to equal access would be a refusal to take account of extra-territorial effects in determining the permissibility of polluting activities may lead to judicial review before national courts in some European countries, including France and Germany.[104] Moreover, such a failure would be a denial of transboundary. EIA and would on that ground probably be a violation of international law.

7. CONCLUSIONS AND VIABLE OPTIONS

It is evident form the above that access to justice is environment matters under Rio Principle 10 is a procedural rights to environmental protection and requires access to courts and administrative mechanisms for effective remedies and environment justice.

Further in many jurisdictions appear to be willing to adopt a wide purposive approach to interpreting statutory provisions which create environmental criminal offences but take a less interventional approach to the judicial review of environmental powers and duties or the private law.

Furthermore it is clear that unless greater harmonization of substantive environmental law can be achieved the need for greater coherence in the private international law aspects of transnational environment litigation becomes more apparent.

Moreover, despite the obstacles impeding effective access to justice earlier mentioned, there will certainly be a continuing increase in environmental litigation. The increased formality of many areas of environment policy in our national legal systems increase the possibility of a successful public law challenge, practicing, lawyers are increasingly aware of the possibilities thrown up by legal action, environmental interest troops have learned the usefulness of the legal process in making political points as well as in winning cases.

Finally, there are two viable options available to our national systems for effective access to environmental justice under Rio Principle 10. first a strong commitment to enforcement is required in any jurisdiction. It is desirable to have an activist bench such as the Indian Supreme court,[105] – but it requires enforcement of the rulings handed down. As we have seen access to justice is an important principle of the rule of law to the judiciary, demonstrated by some extraordinary activism in expanding the rules of standing by the Indian supreme court.[106] by making practical use of the power to grant orders under article 32 of the Indian constitution. Other innovations like the utilisation and adoption of common law public nuisance, and the re-emergence of almost forgotten remedies in the civil and criminal procedure codes have added to the court's ability to protect the environment. Second to improve the compliance standards for environmental protection, instigating through monitoring to ensure the disasters of the past do not re-occur, there is need for environmental regulatory bodies and local authorities to address environmental problems with the same attitude as the courts.

ENDNOTES AND REFERENCES

By Muhammed Tawfiq Ladan, LL.B, LL,M, Ph.D, *Lecturer, Faculty of Law, Ahmadu Bello University, Zaria.*

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17. Rio Principle 10 supra note 9
18. See Frank, 86 AJIL (1992) 46; Crawford, 64 BYIL (1993), 113
19. See also UNGA Res. 42/186 (1987)
20. Articles 2(6) and 3(8)
21. Article 14, but only where appropriate
22. See Article 14-16 Explanatory report in council of Europe CDCJ (92) 50
23. See Weber, 12 HRLJ (1991) 177
24. (1998) 26 EHRR 357
25. (1999) 27 EHRR 212
26. See ICCPR and ICESCR of 1966, Article 14, 1950, European Convention on Human Rights, Article 6(1)
27. UN Doc. ECE/CEP/43 Adopted at the 4th UNECE Ministerial Conference, Arhus, 25 June 1998
28. (1994) 20 EHRR 277
29. Supra note 24
30. (1990) ECHR Ser A/172
31. See Khatun v UK (1998) 26 EHRR CD 212, See also Thorton and Tromaus 11 JEL (199), 35
32. Ontario Environmental Bills of Rights, Act, S.O. 1993 C. 28; Michigan Environmental Protection Act 1970, Quebec, the Ukon and Northwest Territories also allow for citizen suits; See 4 YbIEL (1993, 310.
33. For the U.S.A. position are Sierra Club v Morton 405 US 727 (1972) Friends of the Earth v Laid Law, 120 S.Ct. 693(2000) 370 On New Zealand see Environmental Defence Society v South Pacific Aluminium (No. 3) (1981) INZLR 216. The position in England law is often misunderstood: locus standing in judicial review cases is available to anyone with a sufficient interest. Whether an interest

is sufficient will depend on the strength of the case and the seriousness of the illegality. An appropriate NGO will have standing if it has a good case. Compare R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement (1995) 1 ALL E..R 611 and R. V. Secretary of State for the Environment, ex parte Rose Theatre Ltd (19909) 1 Q.B 504. see Hilson and Cram, 16 Legal Studies (1996) 1. the 1998 Arhus Conventions also makes provision for public interest litigation using the test of 'sufficient interest' to determine standing See Article 9 (2)-(3).

34. In the Netherlands see 111 Neths. YBIL (1980) 318; Environmental Protection Act of 1993 and the collective actions Act of 1994.
35. See Stitching Green Peace Council v EC Commission (1998) ECR 1-1651; Gerard 10 JEL (1998) 331
36. E.g. Rural Litigation and Entitlement Kendra v State of Uttar Pradesh AIR (1985) SC 652: T.D. Raio v Municipal corporation of Hyderabad, AIR (1987) AP 171; M.C Mehta v Union of India (1987) 1 SCC 395; Subhash Kumar v State of Bihar AIR (1991) SC 420. these and other decisions are collected in UNEP, compendium of Summaries of Judicial Decisions in Environment Related cases (Colombo, 1997) See. Anderson in Boyle and Anderson, Human Rights Approaches to Environmental Protection (Oxford, 1996) chap. 10
37. Shela Zia v WAPDA< PLD (1994) SC 416 See Lau, in Boyle and Anderson (eds) Supra note 36, chap 14 who notes the Islamic law basis for expanded public interest litigation expressed by Pakistan's Supreme court and the four provincial High courts in the 1991 Quetta Declaration.
38. Faroque v Govt of Bangladesh (1997) 49 DLR (AD) 1
39. Minors Oposa v Secretary the Department of Environment and natural resources, 33 ILM (1994, 173
40. See KPJ Sekitar and Anor V Kajing T. and Ors. (1997) 3 MLJ 23 but compared Harding in Boyle. and Anderson supra note 36 chapter 11.
41. See Fabra in Boyle and Anderson, ibid chap. 12 but compare Fernandes, ibid chapt. 13
42. See Philippines Supreme Court decision in Monors Oposa v Secretary of the Department of environment and natural resources, 33 ILM (1994) 173 Kenda v the State of the U. Pradesh supra, note 36, Port Hope Environmental Group v Canada 20
43. Defenders of Wildlife Inc. v Endangered species authority 659 F. 2d 168 (1981) Japanese Whalling Association v American Cetacean society, 478 US 221 (1986) Gibson 14 ELQ (1987), 485
44. See T.D. Rao, supra note 36, Jaganath v Union of India (1998) 2 SCc 87
45. See various authors in RECIEL (1998)
46. See Bhopal Gas Leak Disaster (Processing of Claims at 1985 and Charan Lal Sahu v Union of India AIR 1990 SC 1480
47. See Merills and Robertson, Human Rights in Europe (4th edn., Manchester, 2001) 23-8
48. See Birnie and boyle, supra note 14, pp. 269-82
49. Worika, I.L Environmental Law and Policy of Petroleum Development in Africa (1st edn.) 2002, Anpez Ce3ntre for Environment and Development, Port Harcourt, Rivers State, Nigeria, chap. 6 on EIA etc. pp. 223-253
50. See Bell and Donald, Supra note 11. p. 57
51. Refer generally to Ladan, M.T (ed) Law, Human Rights and the Administration of Justice, Supra note 6.
52. Ibid, at pp. 261-287
53. Shaglinessy v USA 345 U.S. 20 (1953)
54. But See recent cases such as the Judgement of the European court of human Rights of 15 November 1996 in Chahal v UK Article is not examined further in this paper.
55. (1975) 1 EHRR 525
56. See Konig v Germany, Judgement of 28 June 1978 Series A. No. 27; (1979-80) 2 EHRR 170 See also Benthem v Netherlands Judgement of 23 October (1985) Series A, No. 97; (1986) 8 EHRR 1; Pudas v Sweden, Judgement of 27 October 1987, Series A, No. 125; (1988) 10 EHRR 380
57. See Empress Car Co. Ltd. V National Rivers Authority (1998) Env. L.R, 39 Mayor Party Recycling v Environment Agency (1999) Env. L.R 489
58. See Cambridge Water Co. v Eastern counties Leather (1994) Env. L.R 105
59. See Hancock and Margeresom v J.W. Roberts Ltd. (1996) Env. L.R. 304
60. See Blue Circle Industries v Ministry of defence (1997) Env. L.R. 22 and p. 286
61. See Lord Greene M.R in Associated PPH Ltd. V Wednesbury Corp. (1948) 1 KB 223
62. See Inland Revenue Commissioners v National Federation of Self Employed and SB ltd (1982) AC 617 Per Lord Wilberforce
63. (1994) 4 ALL ER 329
64. (1995) 1 WLR 386
65. See R v NS District Council, ex parte Garnett (1998) Env. L.R 91

66. (1998) Env. L.R 111
67. Ibid and Supra note 65
68. See R v Legal Aid Area No. 8 (Northern) ex parte Sendal (1993) Env. L.R 167p
69. See e.g. R. v Secretary of State for Trade and Industry ex parte Duddrige (1995) Env. L.R 151
70. See R V Secretary of State for the Environment, ex parte Greenpece Ltd. 9194 Env. L.R. 401
71. See R V Environment Agency, ex parte Petrus Oil Ltd (1999) Env. L.R> 732
72. See R V Ettrick Trout Company Ltd, (194) Env. L.R. 165
73. See Legal Resources Consortium, Lagos, Nigeria, April (2000), Discussion Paper on Transforming the provision of Legal Aid Services in Nigeria, p. 1
74. See Ladan M.T. Supra note 6 at p. 73
75. Refer to section 46(4)(b)(i) of 1999 Nigerian Constitution
76. Chapter 4 of 1999 Nigerian Constitution
77. The Council of Europe, F. 67075 Strasbourg, CEDEX, France (1996)
78. See N. Tobi, "Judicial enforcement of Environmental Laws in Nigeria," in Ladan M.T. Supra note 6 at 261-87
79. See Turner LJ in Godsmith v Timbridge WIC (1866) L.R (1 CH. App. 349)
80. (1981) QB 88
81. Pride of Derby and DAA Ltd. V British Celanese (1953) Ch. 149
82. (1923) 87 JP 105
83. Rookes v Barnard (1964) AC 1129
84. See AB v South WWS Ltd. (1993) QB 507
85. (1895) AC 1
86. Sand, Lessons Learned in Global Environmental Governance (New York) 1990, p. 31
87. A Policy of internalising the true economic costs of pollution is endorsed in principle 16 f the Rio declaration and in the policy of OECD and the EC.
88. OECD Council Recommendations C-74, 224, C-76, 55, C-77, 28; in OECD and the Environment (Paris) (1986).
89. The International Bill of Rights (New York, 1981), 263
90. See Hesperides Hotels Ltd., Mufitzade (1979) AC 508
91. Read, ICYIL (1963) 222, See Re Union Carbide Corp. Gas Plant disaster at Bhopal 634 F. Supp 842 (1986); 809 F. Ed 195 (1987) Aquida v Texaco Inc. 945 F. Supp. 625 (1996) The case was reinstated on appeal in 1998.
92. See Bernasconi, Hague YIL (1999) at 74-88
93. Ibid, at p. 35
94. It should be noted that transboundary litigation will only be fully effective in environmental cases if common minimum standards apply regardless of where the proceedings are brought.
95. See Ladan M.T Supra note 6, at pp. 1.30
96. ibid
97. Held in Johannesburg, South Africa on 18-2 August 2002
98. ibid at pp. 4-5
99. Yemi A.G. Legal System, Corruption and Governance in Nigeria (2000), New Century Law Publishers Ltd, Lagos, p. 41
100. See Johannesburg supra note 97, at p. 1
101. A publication of the Division of Policy Development and Law of UNEP 2002
102. Ibid, pp. 10-30 for the selected countries
103. see supra note 91, Union carbide case of India
104. See Rest. 24 EPL (1994, 173
105. Refer to Asia Pacific Journal of Environmental Law, Vol. 6 Issue 3 (2000) Kluwer International, Cambridge/London, pp. 291-305.
106. Ibid