EVALUATING ENVIRONMENTAL JUSTICE IN NIGERIA: PROCEDURAL JUSTICE IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS.

by

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ABSTRACT

It is now being widely acknowledged that environmental impact assessment is a vital instrument for the realisation of the goals of environmental justice. Achieving environmental justice through environmental impact assessments requires governments, regulators, non-governmental organisations, members of the public etc. to advance environmental sustainability and good governance, by resisting damaging development projects. This places a legal and moral obligation on these stakeholders, to safeguard the environment from exploitation and improve its components. Hence, the need for people to have access to environmental information, participate in decision-making processes, and have access to justice. In recognition of the role of procedural justice to promoting distributive fairness and enhancing legitimacy therefore, the key question this thesis seeks to address is, how effectively Nigeria's environmental impact assessment law and practice advances procedural environmental justice.

In determining whether there is regard for matters of procedure in Nigeria's EIA process, a framework for procedural environmental justice —based on the Aarhus Convention, the literature and case law— was developed, and used to evaluate the effectiveness of access to information, public participation in decision-making and access to justice in Nigeria's EIA law. Through a documentary analysis of the EIA reports and administrative records of 8 development projects conducted in Nigeria, the framework was also used to assess whether procedural justice rights are recognised in the EIA process. Further, this work explores broader issues of corruption, gender inequality, cultural and institutional biases etc. which have the capacity to affect the availability of procedural justice rights.

The central argument of this thesis is that procedural justice in the environmental impact assessment process cannot be fully realised through law and legal instruments alone, without political will in governance and a corresponding break from cultures of exclusion and misrecognition foisted in part, by the legacies of colonialism. Ultimately, in the light of the evidence in the literature, case law and the EIA reports reviewed, this thesis concludes that despite attempts to recognise procedural justice rights in Nigeria's EIA legislation, procedural justice as a prerequisite to environmental justice and sustainable environmental management, has not been fully realised in Nigeria's environmental impact assessment process.

DEDICATION

To the Glory of the Almighty God, who has **never** left me nor forsaken me.

To my husband Walter, and kids, Walter Jr & Joseph for your love and care.

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TABLE OF CONTENT

Abstract…… i

Dedication……... ii

Acknowledgement……..… iii

List of Abbreviations……..… xv

Table of Cases…….. xvi

Table of Legislation……. xix

Table of Statutory Instruments……. xx

Table of European Union Documents……. xxi

Table of Environmental Impact Assessment Reports…… xxii

Table of Figures ……xxiii

CHAPTER ONE: INTRODUCTION

1.1 Background of Study……..... 1

1.2 Statement of Problem …… 5

1.3 Significance of Study …….. 12

1.4 Objectives of Study ……. 14

1.4.1 To Enquire into the Meaning of Environmental Justice ……. 15

1.4.2 To Create a Better Understanding of the Processes that Engender Environmental Injustice……...15

1.4.3 To Develop an Evaluation Criteria for Procedural Justice……..... 16

1.4.4 To Assess the Extent to which Environmental Impact Assessment is a Tool for Achieving Environmental Justice in Nigeria ……..... 16

1.5 Research Questions……. 17

1.6 Methodology and Method …….. 17

1.6.1 Research Methodology……...… 19

1.6.2 Research Method ……...…… 20

1.6.3 Data Analysis ……. 24

1.6.4 Sampling …… 29

1.7 Ethical Issues ……. 31

1.8 Scope and Limitations of Study …… 32

1.9 Outline of Study …… 34

CHAPTER TWO: ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL IMPACT ASSESSMENT

2.1 Introduction……..... 37

2.2 The Idea of Environmental Justice…… 37

2.2.1 Distributive Justice…… 40

2.2.2 Procedural Justice…….. 42

2.2.3 Justice as Recognition……... 44

2.3 The Role of Environmental Justice in the Attainment of Environmental Sustainability …… 47

2.3.1 The Justice of Procedure: Why Important? 53

2.4 Why Environmental Impact Assessments are Useful Tools for Tackling Environmental Justice Issues…… 58

2.5 The Evolution and Process of Environmental Impact Assessment in Nigeria ……. 63

2.5.1 An Overview of the Environmental Impact Assessment Process… 66

2.5.1.1 The Legal Requirements: A Review of the Environmental Impact Assessment Act ……...…… 66

2.5.1.2 The Environmental Impact Assessment Process in Practice …….. 73

2.6 Conclusion……... 76

CHAPTER THREE: THEORETICAL FRAMEWORK: DEFINING PROCEDURAL JUSTICE

3.1 Introduction……..... 78

3.2 The Access Principles: An Important Tool for Evaluating Procedural (Environmental) Justice ……. 78

3.3 The Scope of the Access Rights……. 82

3.3.1 What Constitutes Access to Environmental Information? …… 82

3.3.1.1 Who is entitled to Receive Environmental Information?... 86

3.3.1.2 When is Environmental Information Accessible? ……. 88

3.3.1.3 When is Environmental Information Adequate? ……... 90

3.3.2 Public Participation within the Context of Environmental Impact Assessment: Meaning and Scope…… 92

3.3.2.1 Who can Participate in Decision-Making in the Environmental Impact Assessment Process..... 93

3.3.2.2 How Should the Public be Notified of Opportunities for Participation in the Environmental Impact Assessment Process? 95

3.3.2.3 What Forms of Participation should be used? …… 97

3.3.3 What Does Access to Justice in Environmental Matters Entail? … 101

3.3.3.1 Who is Entitled to Seek a Review?..... 103

3.3.3.2 What Review Procedures Should be Available? ……..... 105

3.3.3.3 What Requirements Must the Procedures Meet? …….....105

3.4 A Framework for Evaluating Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in the Environmental Impact Assessment Process in Nigeria…….….. 107

3.5 Conclusion…….……,, 109

CHAPTER FOUR: ACCESS TO ENVIRONMENTAL INFORMATION AND ENVIRONMENTAL IMPACT ASSESSMENTS IN NIGERIA

4.1 Introduction…….. 111

4.2 Access to Information as a Principle of Democracy…… 112

4.3 Freedom of Information in Nigeria…….. 114

4.3.1 Principles of Freedom of Information: Does Nigeria's Legislation Comply with International Standards?..... 115

4.4 Access to Environmental Information and Environmental Impact Assessment in Nigeria……. 124

4.4.1 Who May Receive Information on Environmental Impact Assessment in Nigeria?..... 124

4.4.2 Is Information on Environmental Impact Assessment Accessible in Nigeria?..... 125

4.4.3 Environmental Information in Nigeria: How Adequate?..... 129

4.5 Problems of Access to Environmental Information in Nigeria……... 131

4.6 Conclusion…….. 136

CHAPTER FIVE: PUBLIC PARTICIPATION IN DECISION-MAKING AND ENVIRONMENTAL IMPACT ASSESSMENTS IN NIGERIA

5.1 Introduction…….. 138

5.2 The Importance of Public Participation in Environmental Decision-Making…… 138

5.3 The Role of the Public in Environmental Decision-making……... 142

5.4 International Best Practice Policies on Public Participation in Environmental Decision-making……. 145

5.4.1 The Aarhus Convention……146

5.4.2 The International Association for Impact Assessment (IAIA) Principles……. 149

5.4.3 United States National Environmental Policy Act…….. 150

5.4.4 Equator Principles…… 152

5.4.5 World Bank Operational Policies…… 154

5.4.6 African Development Bank: Environmental and Social Assessment Procedures for Public Sector Operations……. 155

5.5 Public Participation in the Environmental Impact Assessment Process in Nigeria: Successes and Shortcomings……. 158

5.5.1 When Do the Public Participate in the Environmental Impact Assessment Decision-making Process?..... 159

5.5.2 How is the Public Notified of Opportunities for Participation in the Environmental Impact Assessment Process?..... 162

5.5.3 What Forms of Participation are Used in Nigeria…….. 163

5.6 Challenges of Public Participation in Environmental Decision-making in Nigeria……..….. 166

5.6.1 Institutional and Regulatory Problems……..…. 167

5.6.2 Poor Public Knowledge of Environmental Impact Assessments ……... 167

5.6.3 Inadequate Resources……..… 168

5.6.4 Mistrust……... 169

5.7 Conclusion……. 169

CHAPTER SIX: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS AND ENVIRONMENTAL IMPACT ASSESSMENT IN NIGERIA

6.1 Introduction…… 171

6.2 Why Access to Justice in Environmental Matters is Important……. 172

6.3 Access to Justice in the Environmental Impact Assessments Process in Nigeria……... 174

6.3.1 What Review Procedures are Available?..... 177

6.3.2 Who Can Seek a Revew?..... 180

6.3.3 What Requirements Must the Procedures Meet?.....189

6.3.3.1 Huge Costs Associated with Litigation……...191

6.3.3.2 Time: Delay in the Disposal of Cases…… 193

6.3.3.3 Availability of Adequate and Effective Remedies..194

6.4 Broader Concerns About the Availability of the Right of Access to Justice in Environmental Matters in Nigeria…….. 195

6.4.1 Absence of Substantive Environmental Rights…….. 196

6.4.2 Corruption and Lack of Political Will to Enforce Environmental Regulations……. 203

6.5 Achieving Access to Justice in Environmental Matters in Nigeria: The

Case for the Use of the Public Trust Doctrine…… 205

6.6 Conclusion…….. 208

CHAPTER SEVEN: PROCEDURAL JUSTICE IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN NIGERIA

7.1 Introduction……... 210

7.2 Procedural Justice in the Environmental Impact Assessment Process in Nigeria: An Analysis of the Environmental Impact Assessment Process Using Environmental Impact Assessment Reports and Administrative Records…….. 212

7.3 Discussion ……..... 220

7.3.1 Theme One: Information Concerning the Environmental Impact Assessment of Development Projects…….... 220

7.3.1.1 Appropriate Information……... 221

7.3.1.2 Meaningful Information……... 223

7.3.1.3 Broader Concerns About the Availability of Environmental Information……... 226

7.3.1.3.1 Is Information on Environmental Impact Assessments Widely Available?..... 226

7.3.1.3.2 Language Barriers and Communication Preferences…… 231

7.3.1.3.3 The Quality of Information in Environmental Impact Assessment Reports……..... 233

7.3.2 Theme Two: Public Participation in the Environmental Impact Assessment Process……... 237

7.3.2.1 Early Involvement……. 239

7.3.2.2 Meaningful Participation……... 240

7.3.2.2.1 Direct Involvement of Individuals and Groups……..... 242

7.3.2.2.2 The 'Affected and Interested' Members of the Public Entitled to Participate?..... 243

7.3.2.3 Public Participation in the Environmental Impact Assessment Process in Nigeria: The Wider Context……. 245

7.3.2.3.1 Designing the Public Participation Process... 246

7.3.2.3.2 The Cultural and Institutional Context Within Which Participation is Carried Out... 247

7.3.2.3.3 The Adequacy of Public Participation…….. 249

7.3.3 Theme Three: The Right to Redress in the Environmental Impact Assessment Process…….. 251

7.3.3.1 Is There Access to Justice in the Environmental Impact Assessment Process?..... 251

7.3.3.2 Approved EIA Projects: Is There Room for Challenging the Decision of the Regulator?..... 253

7.4 Conclusion……... 255

CHAPTER EIGHT: CONCLUSION

8.1 Summary of Key Argument……..... 257

8.2 Research Findings…… 260

8.2.1 Are Members of the Public Fully Informed About Proposed Projects, Environmental Planning and Decision-making Throughout the Environmental Impact Assessment Process?..... 261

8.2.2 Does the Environmental Impact Assessment Process Provide Members of the Public with Opportunities to Actively Participate in Decision-making and Environmental Governance?..... 269

8.2.3 Are Legal and Administrative Review Procedures for Challenging Regulatory decisions Available Under Nigeria's Environmental Impact Assessment Law?..... 278

8.3 Contribution to the Body of Knowledge…….. 280

BIBLIOGRAPHY

LIST OF ABBREVIATIONS

EIA	-	Environmental Impact Assessment
ESAP	-	Environmental and Social Assessment Procedure
ESIA	-	Environmental and Social Impact Assessment
FEPA	-	Federal Environmental Protection Agency
IAIA	-	International Association for Impact Assessment
NESREA	-	National Environmental Standards and Regulations Enforcement Agency
NGO	-	Non-Governmental Organization
UNECE	-	United Nations Economic Commission for Europe
UNESC	-	United Nations Economic and Social Council
UNGA	-	United Nations General Assembly
WAGP	-	West African Gas Pipeline

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TABLE OF FIGURES

Figure 1. Coding Schedule Table for Theme One (Information) ……... 26

Figure 2. Coding Schedule Table for Theme Two (Participation) ……..…... 26

Figure 3. Coding Schedule Table for Theme Three (Redress) ……... 26

Figure 4. Coding Manual for Theme One (Information) ……..... 27

Figure 5. Coding Manual for Theme Two (Participation) ……. 27-28

Figure 6. Coding Manual for Theme Three (Redress)…… 28

Figure 7. EIA Process Flowchart of the Federal Ministry of Environment, Nigeria ….…. 74

Figure 8. Coding Schedule Table and Coding Manual for Theme One (Information)….. 216

Figure 9. Coding Schedule Table and Coding Manual for Theme Two (Participation)… 217

Figure 10. Coding Schedule Table and Coding Manual for Theme Three (Redress) ..….. 218

Figure 11. Summary of Data Analysis and Ranking of Projects…… 219

Figure 12. Population Figures for the Eight KEFFES Communities in the EIA for OML 83/85 Integrated Full Field Development …….. 244

Figure 13. Total Number of Responses for the Eight KEFFES Communities in the EIA For OML 83/85 Integrated Full Field Development …….. 244

CHAPTER ONE

INTRODUCTION

This introductory chapter examines the problems affecting the effective realisation of procedural environmental justice in the EIA process, discusses the scope of the research and outlines the questions it seeks to address. It also focusses on the methodology of this research, describing and justifying the approach adopted as well as the design and methods chosen, in order to explain why they are most suitable for addressing the research questions and meeting the overall objective of the study. Finally, this chapter deals with the limitations of the study, the ethical considerations involved, and the outline of the thesis.

1.1 BACKGROUND OF STUDY

Since the 1972 United Nations Conference on the Human Environment was held, there have been various responses to environmental problems, ranging from the establishment of rules and principles to the creation of legislation and institutions.[1] While a striking body of environmental laws, policies, treaties, frameworks, protocols etc. have been developed at the national and international levels, there has been little or no progress in the transition to a more sustainable future.[2] There is no gainsaying the fact that environmental laws do not accord sufficient protection to the environment and as such, do not facilitate sustainable development.

[1] Christina Voigt, 'Rule of Law for Nature: Ideas and Developments' (2012) 42(3) Environmental Policy and Law 164.

[2] Nathalie Ruhs and Aled Jones, 'The Implementation of Earth Jurisprudence Through Substantive Constitutional Rights of Nature' (2016) 8 Sustainability 175.

With increasing concern about environmental quality, the conduct of an environmental impact assessment (EIA) has become a key requirement for development projects which have significant adverse effects on the environment.[3] In fact, it is argued that EIA is the policy instrument adopted by most developing countries, in response to the call to integrate environmental and sustainability issues in development planning, by the various international summits held since 1972.[4]

In Nigeria, Environmental Impact Assessment is primarily governed by the Environmental Impact Assessment Act, promulgated in 1992 by virtue of Decree No. 86 of 1992.[5] Prior to the promulgation of this law, assessments of the environmental, social and economic impacts of extensive development projects was ad hoc, uncoordinated and often lacking.[6] The effect of this was the deterioration of the environment and the rise of community movements, especially in oil producing regions of Nigeria. This was the case in the 1990s when the Movement for the Survival of the Ogoni People (MOSOP) which was set up to 'address the environmental, political, economic and social marginalization of the Ogoni people' drew global attention to the plight of the people of Ogoniland in Rivers State, Nigeria, who suffer radical environmental and economic changes because of the adverse effects of the exploration for and production of crude oil.[7] Several years after, and despite the enactment of the

[3] C. Aloni, L. Daminabo, B. Alexander, and M. Bakpo, 'The Importance of Stakeholder Involvement in Environmental Impact Assessment' (2015) 5(5) Resources and Environment 146.
[4] Twahiti Saidi, 'Environmental Impact Assessment as a Policy Tool for Integrating Environmental Concerns in Development' (Africa Institute of South Africa Policy Brief, 2010) 1 <http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-19.-Environmental-Impact-Assessment-as-a-Policy-Tool-for-Integrating-Environmental-Concerns-in-development.pdf> accessed 24 June 2017.
[5] Environmental Impact Assessment Act, 2004. In 2004, all Nigeria's primary and subsidiary legislation were consolidated to form the Laws of the Federation of Nigeria 2004. Hence, the Act is no longer referrend to as the Environmental Impact Assessment Act, 1992.
[6] Femi Olokesusi, 'Legal and Institutional Framework of Environmental Impact Assessment in Nigeria: An Initial Assessment' (1998) 18 Environmental Impact Assessment Review 159.
[7] Phia Steyn, 'Shell International, the Ogoni People and Environmental Injustice in the Niger Delta, Nigeria' in Sylvia Washington, Paul Rosier and Heather Goodall (eds), *Echoes from the Poisoned Well* (Lexington Books, 2006) 380.

Environmental Impact Assessment Act, it still remains to be seen, how effectively this established legal requirement handles the impacts from development projects.

Although it is widely acknowledged that EIA plays a vital role in environmental decision-making, there are still doubts as to its effectiveness, availability, impact, and the propriety of its methodologies.[8] More importantly, recent academic literature have also focussed on finding out whether environmental impact assessments are geared towards achieving environmental justice. Chalifour, for instance, sought to discover the role of EIA in achieving environmental justice through an examination of the Kearl Oil Sands Development in Canada.[9] Chalifour was most interested in finding out whether the EIA conducted, adequately considered the concerns of the Fort Chipewyan community that the oil sand development would put an unfair burden of environmental harm on it. The author concludes that while the Canadian Environmental Assessment Act requires an assessment of environmental harms to be undertaken, it is not concerned with how these harms are distributed among communities and their members.[10] Similarly, with reference to environmental assessment in the United Kingdom, Walker examined whether existing EIA practice ensures proper assessment of the distribution of environmental 'goods' and 'bads' for all groups concerned. He notes that although the impact assessment process in the United Kingdom is gradually developing and efforts have been made to incorporate environmental justice into certain areas of environmental assessments, current practice does not provide for standard or regular assessment of these issues.[11]

[8] Chris Nwoko, 'Evaluation of Environmental Impact Assessment System in Nigeria' (2013) 2(1) Greener Journal of Environmental Management and Public Safety 22, 23.
[9] Nathalie Chalifour, 'Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan' (2010) 21 Journal of Environmental Law and Practice 31.
[10] ibid, 61.
[11] Gordon Walker, 'Environmental Justice, Impact Assessment and the Politics of Knowledge: The Implications of Assessing the Social Distribution of Environmental Outcomes' (2010) 30(5) Environmental Impact Assessment Review 312, 313.

In addition to distributional justice issues, concerns about the recognition of procedural justice in the EIA process have also been raised. With a view to discovering how effectively procedural rights are delivered in the making of decisions for proposed developments in Belize and Jamaica, Andrade, Excell and Gonzalez examined the legislative framework for EIAs and the legal framework for citizens' enforcement of procedural rights in the EIA decision-making process, and concluded that there was a failure to protect procedural rights at law and in practice in these countries.[12] Similarly, acknowledging that participation of affected people (especially those of marginalized and vulnerable populations) in decision-making is crucial to the realisation of environmental justice, Simpson and Basta have considered the ability of, and availability of opportunities for, members of the public to sufficiently participate in environmental impact assessment processes.[13] Likewise, in relation to Nigeria, Nzeadibe and others have argued that the disregard for 'community perceptions and cultural diversity' in environmental and social impact assessments carried out by multinational companies in the Niger Delta region of Nigeria has tended to isolate the people from the decision-making process.[14]

Unfortunately, notwithstanding the above, the reality of the situation remains that while several studies have shown that people of colour and other poor and less influential people are disproportionately imperilled by hazardous pollution (especially in the United States), only few focus on studying the processes that engender environmental injustice.[15] Not much of the environmental justice literature deals with understanding causality. The implication of

[12] Danielle Andrade, Carole Excell and Candy Gonzalez, 'Citizen Enforcement of Procedural Rights in the Environmental Impact Assessment Process in Belize and Jamaica' (The Access Initiative 2011) 1 <https://accessinitiative.org/resources/citizen-enforcements-procedural-rights-environmental-impact-assessment-process-belize-and> accessed 15 June 2019.

[13] Nicholas Simpson and Claudia Basta 'Sufficiently Capable for Effective Participation in Environmental Impact Assessments?' (2018) 70 Environmental Impact Assessment Review 57.

[14] Thaddeus Nzeadibe and others, 'Integrating Community Perceptions and Cultural Diversity in Social Impact Assessment in Nigeria' (2015) 55 Environmental Impact Assessment Review 74.

[15] Leith Deacon and Jamie Baxter, 'No Opportunity to Say No: A Case Study of Procedural Environmental Injustice in Canada' (2013) 56(5) Journal of Environmental Planning and Management 607.

this is that while policy makers and scholars focus on the scope and extent of distributive injustice, the underlying causes of distributional injustices remain relatively unknown.[16] Therefore, since existing inequalities are sustained by the unfair distribution of environmental burden, an enquiry into procedural fairness is crucial because it advances substantive distributional fairness, ensures legitimacy and make conflict resolution accessible.[17] It is in view of this, that this research seeks to address environmental justice challenges in Nigeria through the consideration of procedural matters. This thesis thus contributes to existing literature by examining the extent to which procedural justice principles of access to environmental information, public participation and access to justice in environmental matters are considered in the EIA process in Nigeria.

1.2 STATEMENT OF PROBLEM

Nigeria is faced with severe environmental crisis affecting the health and well-being of its people and the sustainable development of its communities. The failure of the Nigerian Government to properly care for the environment has meant that communities where its natural resources are found, unfairly bear disproportionate environmental risks. Unsurprisingly, several cases— founded on claims of environmental injustice and seeking the enforcement of 'environmental rights'— have been brought before national and international

[16] ibid, 608.
[17] Jouni Paavola, 'Environmental Conflicts and Institutions as Conceptual Cornerstones of Environmental Governance Research' (2001) Centre for Social and Economic Research on the Global Environment Working Paper EDM 05-01, 7 <https://www.econstor.eu/bitstream/10419/80277/1/502235438.pdf> accessed 25 June 2018.

courts. For instance, in the case of *Jonah Gbemre (for himself and representing Iwherekan Community) v Shell Petroleum Development Company and 2 Others.*[18] the applicants' sought, *inter alia,* an order of court declaring that the continuous flaring of gas by the respondent in the Iwherekan community (host of the largest gas plant in West Africa) infringes the people's right to life and dignity of human person guaranteed under the Nigerian Constitution and the African Charter on Human and Peoples Rights.

The issue of environmental inequity also came before an international court in *Kiobel (individually and on behalf of her late husband, Kiobel et al.,) v Royal Dutch Petroleum Co. et al.*[19] where the petitioners who were residents of Ogoniland in Nigeria, sued the respondents as holding company of Shell Petroleum Development Company Nigeria Ltd (SPDC) in a United States court, on grounds that SPDC, aided and abetted the Nigerian Government to commit human rights abuses on the people of Ogoniland for protesting against its environmentally harmful practices.

Sadly, court-based efforts by individuals, communities, and public interest groups to challenge environmental injustice, have generally been unsuccessful in influencing government's implementation of environmental "right" laws. This is so because court rulings often meet stiff opposition from the Nigerian government— owing to its lack of respect for the rule of law and lack of political will to make changes to the hierarchy of its economic and environmental policy goals, most court decisions are unenforced.[20] Hence, the prevalence of environmental injustice issues in Nigeria today.

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[18] *Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation and Attorney General of the Federation* (FHC, 14 November 2005) <https://www.ecolex.org/es/details/court-decision/mr-jonah-gbemre-for-himself-and-representing-iwherekan-community-in-delta-state-nigeria-v-shell-petroleum-development-company-nigeria-ltd-nigerian-national-petroleum-corporation-and-attorney-general-of-the-federation-8ab5a7e4-9422-4dad-a136-bbc0c53e6db1/> accessed 28 November 2017.

[19] *Kiobel v. Royal Dutch Petroleum Co.* (2013) US 569.

[20] See pages 203 -204 for a detailed discussion of this issue.

There is no doubt that environmental injustice presents numerous dangers to the well-being of people and societies of present and future generations by opposing 'human right to equal protection, due process, consent and compensation'.[21] Indeed, the environmental justice literature contains accounts of conflicts resulting from exclusive decision-making processes, and of protests which emphasize lack of fairness in procedure and opportunities to be heard.[22] Much of the literature on environmental justice suggests that poor and under-represented people, living in contaminated areas are confronted with power inequalities and other difficulties that affect their capacity to fully participate in the making of decisions concerning their lives.[23] Without an understanding of the circumstances under which these present-day conditions of injustice arose, it will be impossible to tackle them. Hence this subsection discusses the problems which gave rise, to and sustain environmental injustice in Nigeria.

The drivers of environmental injustice in Nigeria are complex and multiple. In fact, much of the environmental challenges Nigeria is faced with today have been linked to recent issues such as its growing population and the trend in economic policies adopted worldwide.[24] However, in many ways, Nigeria's environmental crisis is largely rooted in colonialism and its attendant effects. The perils of colonialism have ensured that the people's right to fair treatment is marred by a culture of exclusion and a legacy of injustice. Indeed, as McCrath puts it, 'colonialism leaves an array of complex legacies, one of the most pernicious being an abiding sense of injustice.'[25] Since postcolonial governance in Nigeria has largely followed

[21] Kristen Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford University Press, 2002) 185.
[22] Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 48.
[23] Stella Capek, 'The "Environmental Justice" Frame: A Conceptual Discussion and an Application' (1993) 40(1) Social Problems 5, 7.
[24] Annie Kameri-Mbote and Philippe Cullet, 'Law, Colonialism, and Environmental Management in Africa' (1997) 6(1) Review of European Community and International Law 23.
[25] Ann McCrath, 'The Big Question: What Legacies of Colonialism Prevent Indigenous Peoples from Achieving Justice?' (2017) 34 (2) World Policy Journal 3, 5.

the trend set by the colonialists, it is important to determine how the legacies of colonialism impacts on environmental justice.

Through an analysis of community narratives and campaigns of indigenous people around the world, Goodall identified five themes which demonstrate the ways in which colonialism has occasioned environmental injustice— 'dispossession, displacement, entrapment (and control), invisibility (arising from settler environmental nationalism), and globalization (along the patterns set by colonialism).'[26] These five distinct but, overlapping processes have various implications for environmental justice which are discussed below.

In the first place, the colonialization of Africa meant that Europeans occupied the highest positions in the social structure of the countries under their rule. However, in countries like Nigeria, the limited number of the British made it necessary to rely on local people for the performance of certain middle and low level economic and political roles.[27] This form of governance which came to be known as indirect rule was based chiefly on two administrative principles— decentralization and continuity.[28] For a rapid progression of the objectives of colonialism to be attained, decentralization ensured that too much power was not left in the hands of the colonial government, while continuity saw to it that, a change of British officers did not affect the smooth running of the administration, hence, the use of local district officers and native rulers.[29] Because indirect rule was more likely in rural areas with low population and lesser resources throughout Africa, the significant administration and

[26] Heather Goodall, 'Indigenous Peoples, Colonialism and Memories of Environmental Injustice' in Sylvia Washington, Paul Rosier and Heather Goodall (eds), *Echoes from the Poisoned Well: Global Memories of Environmental Injustice* (Lexington Books, 2006) 75.
[27] Luis Angeles and Kyriakos Neanidis, 'The Persistent Effect of Colonialism on Corruption' (2015) 82 Economica 319, 320-321.
[28] Robert Collins, James Burns and Erik Ching (eds), *Historical Problems of Imperial Africa* (Markus Weiner Publishers, 1994) 101.
[29] ibid, 101-102.

meaningful development by the colonialists of local regions where it was used was lacking.[30] The effect of this was the creation of inequalities and government unresponsiveness to people in local regions, a state of affairs which was inherited by Nigerian elites at independence and practised by all successive governments since this time.

The British colonialization policies also left behind certain attitudes and beliefs that are inconsistent with the functioning of modern societies. The formulation of indirect rule as Britain's colonialization policy was greatly influenced by the academic work[31] of Lord Lugard, one its greatest colonial administrators.[32] According to Lugard, 'the object of the system adopted in Nigeria is to make each *emir* or paramount chief, assisted by his judicial council an effective *ruler* over his own people[33]… the authority of the emir over his own people is *absolute*.'[34] The key question is, are these principles consistent with modern ideas of governance which recognise the rights of individuals to participate in decision-making? Being autocratic, indirect rule made the consultation and participation of local people, and their access to information unnecessary, and left members of the public unable to demand accountability and transparency from their leaders. Since State authority was essentially coercive and autocratic in the colonial era, local people were treated as subjects with no or limited rights.[35] Without systems to ensure the accountability and transparency of the

[30] Nicholas van de Walle, 'The Institutional Origins of inequality in Sub-Saharan Africa' (2009) 12 Annual Review of Political Science, 307, 317.
[31] Collins, Burns, and Ching (n 28) 101. Lugard's book *The Dual Mandate in Tropical Africa* is credited for its clear presentation of the principles of indirect rule.
[32] ibid 101.
[33] John Lugard, 'Principles of Native Administration' in Robert Collins, James Burns and Erik Ching (eds), *Historical Problems of Imperial Africa* (Mark Wiener Publishers, 1994) 111.
[34] Emphasis added. ibid, 113.
[35] Centre for the Study of Violence and Reconciliation, 'Policy Brief: Transitional Justice and Colonialism' (2018) 1, 2 <https://www.csvr.org.za/pdf/Transitional%20Justice%20and%20Colonialism%20-%20Policy%20Brief.pdf> accessed 25 June 2019.

colonizers and the consultation of the colonized, widespread abuses were institutionalised with impunity.[36]

Worse still, colonialism was practised along gender lines. Where opportunities for participation of local people in decision-making were provided, there was no consideration for the inclusion of women.[37] In this way, the patriarchal social structures imposed by the colonialists tallied with some existing social arrangements of the local people,[38] creating a firm foundation for subsisting cultures of exclusion women are faced with today. Generally, exclusive decision-making processes and unfair procedures are key drivers of environmental injustice. Walker has demonstrated the problems associated with exclusive decision-making processes by reference to three notable waste siting cases which occurred in the United States of America (Warren County dumping), Scotland (Greengairs dumping) and Taiwan (Orchid Island dumping).[39] In these cases, protests arose not only over claims of distributive injustice, but also as a result of procedural problems involving lack of consultation, participation, access to information etc.[40]

In addition, colonialism remains an impediment to the quest for justice by rural people.[41] In many parts of pre-colonial Africa, the idea of collective ownership was central and property rights were determined by communal rules.[42] Being governed by cultural arrangement, collective ownership emphasized preservation for future generations, therefore, featured sustainability principles.[43] By means of colonialism, local communities were divested of control over land, without consideration for the crucial role of communal land ownership in

[36] ibid.
[37] ibid.
[38] ibid, 3.
[39] Walker, *Environmental Justice: Concepts, Evidence and Politics* (n 22) 78.
[40] Ibid, 82.
[41] Leena Minifie, 'What legacies of Colonialism Prevent Indigenous People from Achieving Justice' (2017) 34(2) World Policy Journal 3.
[42] Kameri-Mbote and Cullet (n 24) 25.
[43] ibid.

maintaining a unified resource management system.[44] This dwindled the peoples' environmental consciousness, including their sense of equity and stewardship towards future generations.[45] Following expropriation, the motives for colonialization ensured that the laws regulating natural resources were geared towards their extraction, hence, the emphasis on state control and private ownership.[46] Colonial policies thus emphasized the exploitation of forests and its products without regard for the needs of local people — a practice which having been continued by subsequent governments even after independence, has sustained inequalities among local communities.[47] As much of British jurisprudence and legal codes were retained even after independence, they have continued to influence the legal framework governing property rights in Nigeria today.

One major environmental justice issue created by dispossession of property rights is procedural inequity. Ako and Okonmah have illustrated this by reference to crude oil exploitation in Nigeria's petroleum industry in which laws have been enacted to secure the Federal Government's exclusive ownership of natural resources. Nigeria's Land Use Act has also made it unnecessary to seek the consent of family and community heads before exploration of crude oil commences, as was the case before the Act came into force.[48] As Ako and Okonmah have noted, this exclusion is not only responsible for the lack of participation of host communities in decision-making, it also affects the right of access to justice[49] to the extent that the resolution of property disputes is now a sole function of the courts, which owing to issues of cost, standing, delays etc. can hardly be accessed by local

[44] ibid, 23.
[45] ibid.
[46] ibid, 25.
[47] ibid, 27.
[48] Rhuks Ako and Patrick Okonmah, 'Minority Rights Issues in Nigeria: A Theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region' (2009) 16 International Journal on Minority and Group Rights 53, 58. Section 1 of the Land Use Act vests all land in the States (except land vested in the Federal Government and its agencies) in Governors of States. The Federal Government of Nigeria also has exclusive ownership of mines and minerals by virtue of Part 1 of the Second Schedule to the 1999 Constitution.
[49] ibid, 65.

people.[50] This is a striking contrast to the situation in the era before the Act, where the resolution of property disputes was a function of traditional rulers.[51]

Because social justice and peace can only be realised where impacted communities are recognised and can participate in making decisions that affect them,[52] it is important to determine how effectively environmental impact assessments at law and in practice, ensures that Nigerian people are informed, can participate and seek redress where decisions that affect them are being made, in the light of existing practices of exclusion foisted by colonialism.

1.3 SIGNIFICANCE OF STUDY

Environmental justice is a 'universal, equitable concept' that ought to be considered in environmental impact assessments, especially in relation to the interests of vulnerable communities and low-income populations.[53] Undoubtedly, where environmental impact assessment is geared towards achieving environmental justice, it can be used to elicit evidence of distributional inequalities, procedural injustice and misrecognition. Such evidence will stir up debate about the propriety or otherwise of any given situation as well as discussion of how to handle the effects, on affected communities.[54] Determining the impact of development projects on vulnerable communities will promote the development of

[50] Rhuks Ako, 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice' (2009) 53(2) Journal of African Law 289, 298.
[51] ibid, 297.
[52] Ako and Okonmah, (n 48) 64.
[53] Ronald Bass, 'Evaluating Environmental Justice under the National Environmental Policy Act' (1998) 18 Environmental Impact Assessment Review 83, 91.
[54] Walker, 'Environmental Justice, Impact Assessment and the Politics of Knowledge: The Implications of Assessing the Social Distribution of Environmental Outcomes' (n 11) 315

measures aimed at solving distributional and other environmental justice issues.[55] Hence, the need for environmental impact assessments to promote environmental justice.

There is no doubt that a plethora of literature exists on Environmental Justice and Environmental Impact Assessment in Nigeria. Nevertheless, this research remains relevant because existing literature mostly discuss both concepts distinctly, rarely focusing on the relationship between environmental impact assessment and environmental justice or more importantly, how effectively environmental impact assessments contribute to the attainment of environmental justice. Most of the literature on environmental impact assessment in Nigeria examine Nigeria's Environmental Impact Assessment Act with the aim of reviewing the law and practice of environmental impact assessment.[56] It is also usual to find literature that analyse the scope of the EIA process, criticize the EIA practice in Nigeria and suggest measures for improving the situation. [57] The focus rarely lies in achieving environmental justice. This research seeks to bridge this gap by undertaking a critical analysis of the Environmental Impact Assessment Act of 1992 to discover how well it guarantees environmental justice.

Also, contemporary issues touching on the theoretical and practical aspects of environmental justice have featured in the literature but with different theoretical frameworks and analytical perspectives. For instance, Ako's work which is based on Schlosberg's definition of environmental justice offers one of the most comprehensive and holistic analysis of environmental justice in Nigeria. However, unlike this research, Ako discusses all aspects of environmental justice but integrates very little of environmental impact assessments. In fact, Ako's discussion of environmental impact assessment is limited to public participation, as

[55] ibid.
[56] Olukesusi (n 6) 159.
[57] The work of Ijaiya for instance, illustrates this point. Hakeem Ijaiya, 'Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems' (2015) 13 The Nigerian Juridical Review 83.

one of the theories that make up the environmental justice frame. This thesis on the other hand, recognises that the objective of environmental justice will be best attained where the law governing the assessment of the environmental impacts of certain activities, comprise of measures aimed at a fair distribution of environmental benefits and burdens and a recognition of the various stakeholders, to be achieved through procedural justice rights.

This work offers an in-depth study of procedural justice as the underlying principle of the environmental justice frame and develops a framework for evaluating its effectiveness. In providing a comprehensive analysis of the principles and practice of procedural justice in environmental impact assessments in Nigeria, this research makes a significant contribution to the scarce literature on environmental justice in Nigeria.

This study is relevant to members of the public, the government and communities in general. It advances a process through which communities and its members can ensure that the decisions of regulators are sensitive to their interests and fears;[58] and for members of the public, it creates the awareness necessary for a better understanding of environmental justice issues and how they can be mitigated. The government can be made to be better responsive to the concerns of the people where environmental assessments reveal disproportionately high and harmful effects of its activities on the health and environment of vulnerable communities.

1.4 OBJECTIVES OF STUDY

The overall aim of this research is to evaluate the extent to which the legal framework on environmental impact assessment in Nigeria is reflective of the principles and values of

[58] Rajiv Bhatia and Aaron Wernham, 'Integrating Human Health into Environmental Impact Assessment: An Unrealised Opportunity for Environmental Health and Justice, (2009) 14(4) Ciencia and Saude Coletiva 1159, 1161.

procedural environmental justice. This study seeks to achieve this aim through the following objectives:

1.4.1 To Enquire into the Meaning of Environmental Justice:

This thesis advances a broad and holistic interpretation of environmental justice and seeks its recognition beyond theories of distribution, which have dominated the environmental justice discourse for several decades. Present-day conceptions of environmental justice widely acknowledge that the concept consists of three related principles expressed through distributive justice, procedural justice and justice as recognition. This work engages in a critical analysis of these environmental justice conceptions in other to promote the appreciation of the concept and the role of procedural justice as a key tool for securing substantive environmental justice.

1.4.2 To Create a Better Understanding of the Processes that Engender Environmental Injustice:

Increasing emphasis on the procedural fairness of environmental policy has meant that procedural justice enjoys foremost recognition as a key driver of environmental justice.[59] The fact that the focus now lies in understanding processes that produce inequitable results, breaks new grounds of great procedural importance. To this end, this research will examine the fundamental principles of procedural justice with a view to identifying key features that promote environmental justice.

[59] Heather Reynolds, 'Overview' in Heather Reynolds, Eduardo Brondizio and Jennifer Robinson (eds), *Teaching Environmental Literacy Across Campus and Across the Curriculum* (Indiana University Press, 2010) 25.

1.4.3 To Develop an Evaluation Criteria for Procedural Justice:

This work contributes to debates in existing literature about the role of information, effective participation in environmental impact assessments. Drawing on this wealth of information, this research formulates a model for evaluating access to information, public participation, and access to justice. This model identifies several indicators in the literature, legislative enactments and other policy documents which advance values that are regarded as necessary for ensuring adequate information, greater participation and access to review procedures for members of the public. The significance of the evaluation criteria is that it provides a framework with which to assess the degree to which Nigeria's Environmental Impact Assessment law and practice guarantees environmental justice.

1.4.4 To Assess the Extent to Which Environmental Impact Assessment is a Tool for Achieving Environmental Justice in Nigeria:

This research enquires into the legal framework on environmental impact assessment with a view to discovering the extent to which it guarantees environmental justice, using procedural environmental justice values as a yardstick. The goal is to identify grey areas in the current framework and advocate for the integration and consideration of environmental justice issues within the environmental impact assessment process.

1.5 RESEARCH QUESTIONS

This research seeks to answer the following questions:

- Are members of the public fully informed about proposed projects, environmental planning, and decision-making, throughout the environmental impact assessment process?
- Does the environmental impact assessment process provide members of the public with opportunities to actively participate in decision-making and environmental governance?
- Are legal and administrative review procedures available under Nigeria's Environmental Impact Assessment law, for persons affected and/or interested in the outcome of a development project to challenge decisions of regulators?

1.6 METHODOLOGY AND METHOD

This research is driven by the appalling state of the Nigerian environment (caused largely by harmful developmental activities) and the attendant environmental injustice meted on people in the local communities therein. As the growing body of evidence in the environmental justice literature has revealed, an effective way of addressing environmental injustice is understanding the fundamental issues that underlie inequities,[60] with a focus on procedural foundations upon which such injustices are formed rather spatial patterns of environmental injustice.[61] In this research therefore, I set out to discover how effectively matters of procedure are recognised and considered in the conduct of the environmental impact assessments of development projects in Nigeria. In so doing, my focus is on discovering how

[60] Susan Cutter, 'Race Class and Environmental Justice' (1995) 19(1) Progress in Human Geography 111, 117.
[61] Deacon and Baxter (n 15) 608.

well the environmental impact assessment process in Nigeria reflects a consideration of the three procedural justice principles of access to information, public participation in decision-making and access to justice in environmental matters.

However, in carrying out this research I was faced with methodological difficulties arising from security challenges in the relevant communities, lack of funding, lack of access to key EIA participants and time constraints. This meant that certain types of qualitative studies such as interviews, questionnaires, direct observation etc. had to be ruled out. Faced with these challenges, I resorted to a textual analysis of documents— the environmental impact assessment reports and administrative records of eight development projects conducted in various sectors and across 3 of Nigeria's 6 geo-political zones. The rationale for the use of reports and administrative records lies in their capacity to explain the process and outcome of environmental impact assessments. Therefore, not only can they aid an understanding of how effectively the access principles are recognised in the environmental impact assessment of development projects, they also serve as a means of elucidating regulatory decision-making in this regard.

This thesis therefore analyses environmental impact assessment documents across its three research questions with a view determining the availability or otherwise of information relating to development projects, the participation of the local people in the making of decisions relating to these projects, and the potential for access to justice within the projects reviewed. Therefore, this is a social legal study, which is qualitative in nature, based on

textual analysis of documents. This is triangulated by legislation,[62] case law, convention[63] and newspaper reports.

For a proper understanding of the approach adopted for this research, a discussion of the methodology, method, sampling, and data analysis technique of this research will be carried out.

1.6.1 Research Methodology

To deal with research questions which focus on evaluating the effectiveness of the procedural justice aspects of Nigeria's environmental impact assessment process against international best practice, a socio-legal research methodology was utilised. Socio-legal research recognises 'a wider context to law and legal institutions.'[64] It acknowledges that while traditional techniques of interpretation such as doctrinal research and other black-letter methods depict law and legal practice as concerned with statutory interpretation and case reading, the actuality of legal practice is often founded in procedural aspects of law which relate to how things are done, as opposed to through an understanding of substantive law.[65] The socio-legal research thus offers an opportunity for a methodical and regular reference to the circumstances that make up and define the problems that laws are set up to rectify, the

[62] This research also considers how well Nigeria's 1992 Environmental Impact Assessment Act takes account of the three access principles.

[63] Being the first international document to create minimum standards for environmental procedural rights and an international document of crucial importance, chapter three of this thesis used the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) on Access to Justice, Public Participation and Access to Justice as a theoretical basis of this research.

[64] Reza Banakar and Max Travers, 'Socio-Legal Research in the UK' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 279.

[65] Reza Banakar and Max Travers, 'Studying Legal Text' in Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 134.

objectives of these laws and their effectiveness in practice.[66] Therefore, because the socio-legal research methodology acknowledges that law is a crucial part of society, and functions within a wider social context,[67] it is best suited for analysing the procedural justice principles in the context of how they operate within the Nigerian society.

However, because of the nature of the socio-legal methodology and the way it is carried out, it has been criticised on grounds that its findings are 'malleable and unstable'.[68] The argument being put forward in this regard is that with the socio-legal research, there is the likelihood of reaching different conclusions on the same research question owing to variations in research designs, the use of different data collection methods or marginal differences in research questions.[69] In other words, the way a socio-legal research is carried out, in no small measure, determines the outcome of the research.

It is unlikely however, that the above criticism will affect the quality of the findings of this research since evidence is drawn from various sources including legislation, newspaper reports, case law, and documentary sources.

1.6.2 Research Method

It is argued that the way research questions are worded have implications on the type of methods to be adopted.[70] Research questions which are geared towards discovering, seeking to understand, exploring processes and describing experiences are said to be indicative of a qualitative method, as opposed to the terminology of research questions in a quantitative

[66] Ashish Singhal and Ikramuddin Malik, 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits' (2012) 2(7) Educational Research Journal 252, 255.
[67] ibid, 253-254.
[68] ibid, 255
[69] ibid.
[70] Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (3rd edn, Sage 2014) 23.

study which are often worded in terms of variables, factors affecting, and 'the determinants or correlates of'.[71] Since this research seeks to discover how effectively procedural justice is recognized in the environmental impact assessment process in Nigeria, a qualitative method is best suited.

Qualitative research provides important insights into the existence or otherwise of a particular social phenomenon, and where necessary, the nature of the phenomenon.[72] In contrast with quantitative research, the qualitative research approach focusses on processes and not consequences, holistic analysis and not independent variables and with meanings but not behavioural statistics.[73] Despite its advantages however, the qualitative approach is often criticised because its findings can hardly fulfil the requirements of validity and reliability as the quantitative approach which does not deal with subjective data.[74]

In the light of the use of documents (Environmental impact assessment reports and other administrative records) for evaluating the effectiveness of procedural justice in Nigeria's environmental impact assessment process, the document analysis method was selected as the appropriate research method for this work. Document analysis is an unobtrusive method of data collection method which rests on archive searches.[75] As a research method, it has been defined as 'a systematic procedure for reviewing or evaluating documents.'[76] In this method, data is

[71] ibid.
[72] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 18.
[73] Robert Burns, *Introduction to Research Methods* (4th edn, Sage Publications 2000) 12.
[74] ibid. Data used in qualitative research is often subjective, its selection may be influenced by the researcher's opinions and feelings. Its findings are therefore most applicable to the context of particular studies, unsuitable for generalisation.
[75] Volkan Gocoglu, Mahmut Korkmaz and Onur Gunduz, 'The Use of Document Analysis Technique in Turkish Scientific Studies: DAS Workshops and their Stand-by Potential for Turkey' (2017) 6(2) International Research Journal of Social Sciences 18, 19.
[76] Glenn Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) Qualitative Research Journal 27.

examined and explained in order to induce meaning, attain understanding and advance knowledge.[77]

The importance of documents to qualitative research has been captured in the following words;

> Documents, as the sedimentations of social practices, have the potential to inform and structure the decisions which people make on a daily and longer-term basis; they also constitute particular readings of social events. They tell us about the aspirations and intentions of the period to which they refer and describe places and social relationships at a time when we may not have been born or were simply not present.[78]

To meet certain targets or convey an impression, it is not uncommon for documents such as reports to embody selective information or deliberately suppress evidence that could show a full picture of a particular situation, hence documents are not to be taken at face value. [79] The main function of the documentary method, therefore, is analysing 'implicit knowledge', hitherto possessed by those observed.[80]

Distinguishing between literal or explicit meaning and implicit or conjunctive meaning is an essential element of the documentary method, leading to two successive stages of interpretation — the formulating and the reflecting.[81] In essence, the researcher formulates the explicit meaning of a document by analysing and interpreting the text (including its

[77] Ibid.
[78] Webley (n 72) 938.
[79] Nicholas Walliman, *Research Methods: The Basics* (Routledge, 2018) 95.
[80] Ralf Bohnsack, 'Documentary Method' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Analysis* (Sage Publications, 2014) 224.
[81] ibid, 225.

topical structure) before determining its documentary meaning through reflective interpretation. This involves a separation of what is depicted in the document from the framework[82] through which it is discussed— a move from concerns about what has been discussed, to determining how it has been discussed.[83] It is in the light of the above that the discussion on the availability of access to information, public participation in decision-making and access to justice in environmental matters in chapter 7, transcends the content of the EIA reports. Broader issues such as women's right to participation, the cultural and institutional context through which participation is carried out, the accessibility of environmental information etc are also explored.

It has been observed that to ensure corroboration and promote credibility of the research findings,[84] documentary data is often used alongside other qualitative methods by means of triangulation.[85] In this research however, documents are the main source of evidence, no other qualitative methods such as interviews, surveys or direct observations were used. As earlier noted, although direct observation and interviews were initially considered as possible research methods, owing to constraints of cost, time, insecurity and lack of access to participants, these methods had to be ruled out. To ensure credibility of the findings of this research, the use of documents have been triangulated by evidence obtained from legislation, case law and newspaper reports. In addition, since these documents relate to eight development projects, these multiple cases can be used to show several sources of evidence by means of replication.[86] This approach allows for a more extensive investigation

[82] ibid. This was described by Bohnsack as the framework of orientation.
[83] ibid.
[84] Robert Yin, *Case Study Research: Design and Methods* (5th edn, Sage 2014) 107.
[85] Bowen (n 76) 28.
[86] Zaidah Zainal, 'Case Study as a Research Method' (2007) 9 Jurnal Kemanusiaan Bil 1, 2.

of research questions.[87] Therefore, as opposed to a single case, evidence produced from multiple cases are both strong and reliable.[88] This makes it an effective means of analysing a group of eight (8) reports in order to reach a 'set of cross-case conclusions'.[89] This is because multiple cases offers an opportunity for critical analysis both within each of the cases under review and across all case studies as a whole.[90]

1.6.3 Data Analysis

The data collected for this research has been analysed using Content analysis. Since this research relies on data from EIA reports and administrative records, the Content Analysis method was chosen because of its effectiveness in analysing text data.[91] As Webley has observed, classical content analysis is a useful way of examining documents which have been developed for other uses.[92] Besides being an effective way of studying processes that indicate trends in society, content analysis is perhaps most advantageous because of its unobtrusiveness.[93]

Because it is a useful way of both examining the content of policy documents and interviews, and of analysing the nature and prevalence of specific kinds of legal issues within cases and press reports,[94] content analysis may be carried out inductively and deductively. Where content analysis is inductive, codes are derived from the qualitative data itself —items in the data are categorised, and the frequency of these items are added up to enable inferences to be

[87] Johanna Gustafsson, 'Single Case Studies vs. Multiple Case Studies: A Comparative Study' (Student thesis, Halmstad University 2017) 3 <http://www.diva-portal.org/smash/get/diva2:1064378/FULLTEXT01.pdf> accessed 1 February 2019.
[88] ibid, 11.
[89] Yin (n 84) 18.
[90] ibid.
[91] Hsiu-Fang Hsieh and Sarah Shannon, 'Three Approached to Qualitative Content Analysis' (2005) 15(9) 1277.
[92] Webley (n 72) 941
[93] Bruce Berg, *Qualitative Research Methods for the Social Sciences* (4th edn, Allyn and Bacon, 2001) 258.
[94] Webley (n 72) 941.

drawn from the qualitative data.[95] In deductive content analysis on the other hand, categories are developed from existing theory or research, and qualitative data is coded in terms of these categories.[96]

Deductive content analysis is most suitable for this research because its object is to substantiate a theoretical framework or theory,[97] and as such, it is most used in research that focuses on retesting existing facts and statistics in new contexts.[98] However, one limitation of deductive content analysis lies in the fact that, with the use of theory (and indeed, pre-defined categories) research may be approached with some bias; making it more likely for qualitative data to produce evidence that supports the theory and not otherwise.[99] Notwithstanding the above criticism, reliance on theory is advantageous. It signifies that analysis is directed by an existing body of knowledge,[100] thereby ensuring that evidence in qualitative data is corroborated.[101]

Using the deductive approach, the categorization of themes in this research is concept driven. It is based on my research questions and my analysis of the key elements of the access principles in the Aarhus Convention which is the theoretical framework of this thesis. Based on the above, data in the reports and administrative records analysed, were categorised into three main themes— Information, Participation and Redress. A coding schedule table and a coding manual as suggested by Walliman[102] were then developed for each of these themes. The coding schedule table was used to identify aspects of the reports and administrative

[95] ibid.
[96] Satu Elo and Helvi Kyngas, 'The Qualitative Content Analysis Process' (2008) 62(1) Journal of Advance Nursing 107, 111.
[97] Hsieh and Shannon (n 91) 1281.
[98] Elo and Kyngas (n 96) 111.
[99] Hsieh and Shannon (n 91) 1283.
[100] Mohammed Armat and others, 'Inductive and Deductive: Ambiguous La bels in Qualitative Content Analysis' (2018) 23(1) The Qualitative Report 219, 220.
[101] Elo and Kyngas (n 96) 114.
[102] Walliman (n 79) 98.

documents to be retrieved and recorded. To form the coding schedule table, the deductive content analysis approach was used to devise the units of analysis of each of the themes. In other words, the units of analysis were theoretically derived, based on the framework of procedural justice developed in chapter three of this thesis.

PROJECT TITLE	YEAR OF REPORT	LOCATION OF PROJECT	FORMAT OF REPORT AVAILABLE TO PUBLIC	NATURE OF ENVIRONMENTAL IMPACTS RECORDED	NOTIFICATION PROCEDURE	VENUE OF DISPLAY EXERCISE	TOPICS COVERED

Fig.1: Coding Schedule Table for Theme One (Information)

PROJECT TITLE	YEAR OF REPORT	LOCATION OF PROJECT	TIME OF PARTICIPATION	NOTIFICATION PROCEDURE	PUBLIC ENGAGEMENT PROCEDURE	PARTICIPANTS

Figure 2: Coding Schedule Table for Theme Two (Participation)

PROJECT TITLE	YEAR OF REPORT	LOCATION OF PROJECT	POTENTIAL FOR CHALLENGING DECISION OF REGULATOR	OBJECTION RECORDED IN REPORT AND RECORDS	OBJECTIONS RAISED OUTSIDE THE EIA PROCESS	REVIEW PROCEDURE USED	EFFECTIVENESS OF REVIEW PROCEDURE

Figure 3: Coding Schedule Table for Theme Three (Redress)

Following the formulation of the coding schedule tables, coding manuals were developed by breaking down the units of analysis to form numbered codes. These numbered codes were then used as a representation and measure of the unit of analysis.

FORMAT OF REPORT AVAILABLE TO THE PUBLIC

1. Print
2. Online
3. Digital
4. Braille
5. Large Print

NATURE OF ENVIRONMENTAL IMPACTS RECORDED

1. Local impacts
2. Transboundary/Global impacts

NOTIFICATION PROCEDURE

1. Town criers
2. Radio announcement
3. Newspaper publication
4. Television

VENUE OF DISPLAY EXERCISE

1. Local community
2. Local Government Council
3. Ministry of Environment of the State
4. Federal Ministry of Environment

TOPICS COVERED

1. Description of development
2. Description of effects of development
3. Description of mitigation measures
4. Alternatives
5. Baseline study
6. Description of evidence used to identify and assess significant impacts and main uncertainties concerned.
7. Non-technical summary
8. Reference list detailing sources used for description and assessment

Figure 4: Coding Manual for Theme One (Information)

TIME OF PARTICIPATION

1. During project planning
2. Before commencement of project.
3. After commencement of project
4. After completion of the project

NOTIFICATION PROCEDURE

1. Town criers
2. Radio announcement
3. Newspaper publication
4. Television

PUBLIC ENGAGEMENT PROCEDURE

1. Active participation of members of the public which influences decision-making
2. Direct participation of members of the public (through interviews, questionnaires and focus group discussion)
3. Consultation of key informants such as village chief and community stakeholders

PARTICIPANTS

1. Members of the community/ public
2. Key informants (Including village chief and council of elders)
3. Representatives (including women leaders and youth leaders)
4. Government bodies
5. Project affected persons

Figure 5: Coding Manual for Theme Two (Participation)

POTENTIAL FOR CHALLENGING DECISION OF REGULATOR

1. No/ inadequate access to information
2. No/ Inadequate opportunity to participate in decision-making
3. Acts and omissions inconsistent with national law relating to the environment

OBJECTION RECORDED IN REPORT/ADMINISTRATIVE RECORDS

1. Yes
2. No

OBJECTIONS RAISED OUTSIDE THE EIA PROCESS

1. Yes
2. No

REVIEW PROCEDURE USED

1. Administrative review
2. Judicial review
3. None

EFFECTIVENESS OF REVIEW PROCEDURE USED

1. Standing to sue
2. Equity and fairness in the review process
3. Timely disposal of the case
4. Low cost of review
5. Availability of adequate and effective remedies

Figure 6: Coding Manual for Theme Three (Redress)

In the final stage of the data analysis process, the environmental impact assessment reports and administrative records were reviewed for content and the coded fragments were retrieved and organised into the relevant units of analysis using numbered codes. No software was used in this process. A detailed analysis and discussion of the data reviewed is contained in chapter seven of this work.

1.6.4 Sampling

The purpose of this study is to evaluate procedural environmental justice in the environmental impact assessment process in Nigeria. To achieve this, a detailed examination and analysis of a small number of deliberately chosen Environmental Impact Assessment Reports and administrative documents will be carried out. This is necessary in order to discover how effectively the procedural justice principles of access to information, public participation and access to justice are recognized in the environmental impact assessment process in Nigeria. A careful examination and analysis of the data collected was conducted with a view to addressing the research questions above.

A stratified sampling method was used for this research. In the stratified sampling method, the overall population is identified and divided into strata and the samples are selected using a design that ensures similarity in the units within each stratum.[103] This ensures that the samples in each stratum are representative of the overall population.[104]

In this thesis, a range of EIA reports in the custody of the EIA Registry of the Federal Ministry of Environment Abuja - Nigeria were utilized. Reports of development projects submitted and approved between the years 2008-2018 were deliberately selected for this

[103] Steven Thompson, *Sampling* (3rd edn, Wiley 2012) 141.
[104] ibid.

study. It was necessary to focus on relatively recent reports to reflect the current practice and trend in the EIA process in Nigeria in relation to procedural environmental justice.

To the extent possible, data was obtained from reports of medium and large-scale developmental projects conducted in 3 of the 6 geo-political zones of Nigeria and across 6 sectors (Power, Agriculture, Mining, Oil and Gas, Transport and Telecommunication) in which records of EIA are mostly held by the EIA Registry. A total of 23 reports were initially identified as meeting the above criteria. However, owing to the unavailability of reports, (some reports and/or administrative records were either missing or classed as Confidential), the researcher had access to the reports and administrative records of 12 projects only.

In view of the need to minimise duplication[105] and ensure that an in-depth analysis of data is provided, the reports and administrative records of 8 projects only, were reviewed and analysed. The selection of 6 of the 8 reports was based on the 6 sectors in which EIAs are mostly undertaken in Nigeria. In cases where two or more reports were of EIAs carried out in the same sector, a random selection was made. The final 2 reports were chosen on the basis of the geo-political area in which they were carried out (north-central and south-west), as most of the reports which the researcher had access to, were of projects conducted in the south-south geo-political region. All eight reports were particularly relevant for providing evidence of consultation of local people concerning development projects and their 'access to information' in this regard.

[105] Most of the reports which the researcher had access to were of projects in the Mining and Oil and Gas sectors, conducted in the south-south geo-political region of Nigeria.

1.7 ETHICAL ISSUES

The key ethical issues in social research, according to Punch, are consent, harm, deception, privacy and confidentiality.[106] While it is usual for issues relating to consent to impinge on the credibility of researches of this nature, because no primary data was used for this research, there are no participants involved in the study and hence, no challenges with respect to informed consent were encountered.

Access to the secondary data used for this research was negotiated with the designated administrative officer after due permission had been first sought and obtained from the public officer in charge of the department. Since all documents in the administrative records of the regulator are classed confidential, the only documents which have been utilised from these records are those which have already been made available to the public.[107] In the same vein, although the official titles of the reports and the names of the project proponents have been used in this research, the rules of privacy and confidentiality[108] have not been broken, since like the administrative documents used, the public is allowed access to EIA reports. Finally, to minimise the risk of harm, all information obtained during this research has been used for the purpose of this study only and will be kept confidential.

[106] Punch (n 70) 43

[107] One example is newspaper publications of notice of environmental impact assessments.

[108] Confidentiality is 'the duty researchers and other controllers and processors of personal data have, to protect personal information from unauthorized access and use.' Horatiu Colosi, Carmen Costache and Ioana Colosi, 'Informational Privacy, Confidentiality and Data Security in Research Involving Human Subjects' (2019) 41(1) Applied Medical Informatics 16.

1.8 SCOPE AND LIMITATIONS OF STUDY

This research examines the extent to which environmental impact assessment is a tool for achieving environmental justice in Nigeria. To this end, an assessment of access to information, public participation in decision-making and access to justice in environmental matters (as aspects of procedural environmental justice) will be made vis-à-vis Nigeria's environmental impact assessment law and practice. It was important to limit this research to environmental impact assessment rather than a more general focus on environmental assessment (including strategic environmental assessment) because unlike environmental impact assessment, there is no formal or legal requirement for strategic environmental assessment in Nigeria,[109] and as such, there is no legislation to this effect.

Since Nigeria's economy largely relies on revenue accruing from the exportation of crude oil— which exploration is undertaken in communities inhabited by ethnic minorities— recurring incidents of environmental pollution has meant that much of the claims of environmental injustice have arisen from Nigeria's petroleum industry and oil producing communities. It is against this backdrop that environmental justice issues in the petroleum industry will feature prominently throughout this work, albeit, alongside experiences from other sectors such as mining, power, agriculture etc.

This research suffers some limitations, as several problems and challenges were encountered while it was being carried out. First, environmental impact assessment is an emerging field in Nigeria, and as such, the literature is highly limited in scope. The dearth of literature on environmental impact assessment in relation to environmental justice, made the evaluation of issues of procedural justice quite challenging. In the same vein, there is generally a lack of

[109] Chika Ogbonna and Eike Albrecht, 'Strategic Environmental Assessment as a Tool to Integrate Climate Change Adaptation: A Perspective for Nigeria' in Walter Leal Filho (ed) *Handbook of Climate Change Adaptation* (Springer, 2015) 1252.

case law on environmental impact assessment in Nigeria, as regulatory decisions are hardly ever challenged. This situation has meant that throughout this research, only three cases on environmental impact assessments in Nigeria were used.

More importantly, evaluating procedural justice in the environmental impact assessment process using documents (environmental impact assessment reports and administrative documents of projects), as this thesis does, is not without its problems—the veracity of information reported in documents can hardly be ascertained. Indeed, there is the danger that the official account of events, facts, findings, activities etc., as presented in the environmental impact assessment reports and administrative documents used for this study, may not fully represent the actual situation. Having emanated from the developers, the possibility that the information in environmental impact assessment reports have been embellished cannot be ruled out.

Closely related to the issue of bias is the poor quality of environmental impact assessment reports. In the first place, it is not uncommon to find reports which do not provide basic information such as the timeline of study, page numbers, key dates etc. Also, the environmental impacts identified in reports of environmental impact assessments conducted in Nigeria, are not usually broad enough to cover the wide range of environmental problems recognised in the Environmental Impact Assessment Act, neither do they often include wider transboundary issues and global challenges associated with development projects. In contrast to information on the benefits of development projects, very little is disclosed about the risks.

In addition, due to problems of cost, time and access, it has been impossible to conduct this research using other methods such as direct observation and interviews. In the light of the size (by area) of Nigeria, conducting interviews and observing EIA projects carried out in eight communities across the geo-political regions of the country had huge financial implications

which could not be met, due to the limited resources of the researcher. In any case, the difficulty involved in obtaining access to key participants of EIA projects which have been conducted many years back and the time required to do so meant that these other methods had to be ruled out.

One other limitation of this study is that availability and access have been the most significant determinants of the selection of reports and administrative documents which have been used for this research. Most of the reports which were initially selected for this study were either missing or not in the possession of the regulatory Agency and as such were unavailable to the researcher. In other cases, some administrative records containing documents of EIA projects held by the Agency were not within the reach of the researcher having been classed as inaccessible for research purpose for reasons of confidentiality and because of their incompleteness. The researcher could only work with administrative documents that were made freely available, but which may not be representative of the actual situation.

1.9 OUTLINE OF STUDY

The purpose of this research is to discover how effectively procedural (environmental) justice rights are recognised and incorporated in Nigeria's environmental impact assessment process. To achieve this goal, this research is structured in eight chapters. First, as an introduction into the issues which form the basis of this research, this chapter provides a brief discussion of the challenges of global environmental governance, elucidating the environmental justice issues Nigeria is faced with, and the factors which sustain existing environmental injustices. Further, it explains the objective and significance of the study, the questions the research seeks to address and the methodology for so doing, as well as the limitations of the study and the ethical issues involved.

Chapter two of this thesis engages in a critical analysis of the concept of environmental justice, expounding the role of procedural justice in the attainment of substantive environmental justice. This chapter therefore makes a case for the use of procedural rights to achieve environmental justice through the instrumentality of environmental impact assessments. In the light of this, it provides an overview of Nigeria's EIA law and practice, with some comparison to the law and practice in the United Kingdom, European Union and United States of America.

The third chapter involves a comprehensive analysis of the principles, scope and relevance of the procedural justice rights of access to information, public participation in decision-making and access to justice in environmental matters, with a view to identifying basic requirements for effective integration of procedural justice principles into environmental policy. Because the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[110] was the first to set out minimum requirements for the proper functioning of the three procedural justice rights which form the theoretical basis of this work, its principles feature prominently throughout this chapter, albeit with some reference to legislation, case law and academic literature. These requirements will be used in the development of an evaluation criteria for access to information and public participation and access to justice in environmental matters.

In chapters four, five and six of this research, the focus is on discovering the extent to which environmental impact assessments in Nigeria promotes procedural environmental justice. These chapters therefore examine Nigeria's environmental impact assessment law and evaluate the extent to which it promotes access to information, public participation and access to justice respectively, in impacted communities.

[110] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) (1999) 38 ILM 517.

The seventh chapter of this work then assesses the extent to which procedural justice is reflected in the environmental impact assessment process in Nigeria through an examination of the reports and administrative documents of eight projects in which environmental assessments have been undertaken in accordance with Nigeria's Environmental Impact Assessment Act. These projects will also provide a platform through which the procedural justice models developed in chapter three of the research can be tested.

Finally, based on the findings of preceding chapters, chapter eight of this research, concludes on how effectively procedural justice rights are recognised and applied in the environmental impact assessments process in Nigeria, at law and in practice.

CHAPTER TWO

ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL IMPACT ASSESSMENT

2.1 INTRODUCTION

This research builds on existing literature mirroring the relationship between Environmental Impact Assessment (EIA) and Environmental Justice by seeking to ensure that environmental justice concerns are incorporated into the environmental impact assessment process in Nigeria. In the light of this, this chapter introduces the two basic concepts that form the core of this research—environmental justice and environmental impact assessment. The relationship between these concepts and their implications on sustainable development are expounded. This chapter also provides an overview of the EIA law and practice in Nigeria, comparing these with the law and practice in the European Union (EU) and United Kingdom.

2.2 THE IDEA OF ENVIRONMENTAL JUSTICE

Claims of justice and injustice are prevalent in society today, and continue to dominate our political and moral discussions, hence liberal theorists have propounded different ideas of the concept of justice.[1] In relation to environmental discourse, the concept of justice found its way through environmental justice movements which originated in the United States in response to the unfair location of toxic installation in communities inhabited by blacks and other minority groups.[2] Today, the idea of environmental justice has gained remarkable grounds and is embraced in other countries and even by the international community as an

[1] Derek Bell 'Justice on one Planet' in Stephen Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 276.
[2] Karen Bell, *Achieving Environmental Justice: A Cross-National Analysis* (Policy Press, 2014) 15.

essential part of development planning.[3] This extensive use of environmental justice has given rise to a rather controversial term, with many activists championing its use in wider contexts and to various issues.[4] In line with this drive, delegates to the 1991 First National People of Colour Environmental Leadership Submit[5] endorsed 17 environmental justice principles with demands cutting across diverse issues, from freedom from ecological destruction[6] to a change in production and consumption patterns and lifestyles.[7] Environmental justice thus has many applications, interpretations and values, and is shaped by different traditional justice theories.[8] These various notions of environmental justice have made it difficult to proffer an all-embracing definition for the term; but discussions on the precise scope of environmental justice basically focus on those to whom the term pertains to, the appropriate environmental problems to which the term relates, the components of justice that should be taken into account, and whether there is a need to depart from its strict appreciation in terms of equity.[9] For instance, in discussing dimensions of social justice, Dobson put forward four (4) key questions which any theory of justice must address— what is the nature and extent of the community of justice? How impartial, universal, is the basic structure? What is distributed? What is the principle of distribution?[10]

Over the years, several definitions of justice by scholars and academics have related to the theories of John Rawls and as such revolve around distribution of goods in society and

[3] Phia Steyn, 'Shell International, the Ogoni People and Environmental Injustice in the Niger Delta, Nigeria' in Sylvia Washington, Paul Rosier and Heather Goodall (eds), *Echoes from the Poisoned Well* (Lexington Books, 2006) 380.
[4] Bell (n 2) 15.
[5] 'Principles of Environmental Justice' First National People of Colour Environmental Leadership Submit (6 April 1996) <http://www.ejnet.org/ej/principles.html> accessed 16 March 17.
[6] ibid, principle 1.
[7] ibid, principle 17.
[8] Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 218.
[9] Bell (n 2) 17.
[10] Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Dimensions of Social Justice* (Oxford University Press, 1998) 62-84.

principles that ensure a fair distribution of these goods.[11] Rawls notion of justice is founded on social contractarianism, albeit with a greater degree of abstraction.[12] Rawls likens the original position in his conception of justice to the State of Nature in the social contract theory. But unlike the State of Nature, the original position is a hypothetical situation in which 'no one knows his place in society, his class, position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities'.[13] For Rawls, the original contract is not one to establish a society or government; rather its purpose is to set-up principles of justice which will govern all other agreements.[14] These principles of justice are fair principles which rational persons, focussed on advancing their interests, will willingly accept in the original position as governing their association, defining their rights and responsibilities, and deciding the allocation of social benefits.[15]

Therefore, like Rawls', the central idea behind the bulk of the literature on environmental justice is the fair distribution of environmental benefits and burdens, and how people can adequately participate in making the decisions that govern the way this distribution is made.[16] Hence, Rasmussen has observed that 'Rawls' famous justice-as-fairness formula translates as a conception of social justice providing in the first instance, a standard whereby the distributive aspects of the basic structure of society are to be assessed.'[17] To Holifield too, environmental justice deals with 'questions of inequality, fairness and rights with respect to environmental conditions and decision-making processes.'[18] However, beyond this

[11] David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2009) 3.
[12] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 11.
[13] ibid, 12.
[14] ibid, 11.
[15] ibid.
[16] Bell (n 1) 276.
[17] Larry Rasmussen, 'Environmental Racism and Environmental Justice: Moral Theory in the Making?' (2004) 24(1) Journal of the Society of Christian Ethics 3, 17.
[18] Ryan Holifield, 'Environmental Justice as Recognition and Participation in Risk Assessment: Negotiating and Translating Health Risk at a Superfund Site in Indian Country' (2012) 102(3) Annals of the Association of American Geographers 591, 592.

distributive notion, other theorists seek a broader interpretation of the concept of environmental justice. Fraser, in seeking an integration of distribution and recognition, has put forward the argument that both distribution and recognition are crucial requirements of justice which cannot function independently.[19] It is against this backdrop that Schlosberg also points out that, a proper understanding of environmental justice requires an exhaustive definition, which incorporates the interests of environmental justice groups and the natural world's perception of justice; using the different tools and notions of justice that address critical issues of inequality, participation, recognition and even broader concerns such as capability of individuals and communities, and their functioning.[20]

Increasingly, it is now being accepted that the term Environmental Justice comprises of three related concepts— distributive justice, procedural justice and justice as recognition.[21] These three dimensions of environmental justice, though distinctive, are closely connected,[22] and often form the basis of calls for policy reform. This interconnectedness ensures that where political and cultural institutions engender inequity and misrecognition, then participation in political and cultural institutions is also affected.[23] This relationship makes a comprehensive analysis of all three dimensions of environmental justice necessary.

2.2.1 Distributive Justice

Distributive justice relates to the allocation of environmental benefits and burdens, and it is fostered by granting to the recipients, substantive rights to partake in the enjoyment of

[19] Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation' (1998) WZB Discussion Paper FS I 98-108, 1. <https://www.econstor.eu/bitstream/10419/44061/1/269802959.pdf> accessed 27 September 2017.
[20] Schlosberg (n 11) 8.
[21] Brian Preston 'The Effectiveness of the Law in Providing Access to Environmental Justice' in Paul Martin and others (eds), *The Search for Environmental Justice* (Edward Elgar Publishing Limited, 2017) 23.
[22] Holifield (n 18) 592.
[23] Schlosberg (n 11) 28.

environmental benefits, and to avert, alleviate, remediate or receive compensation for environmental burdens.[24] Humans of the present generation are the focus of distributive theories of justice— future generations of humans are not considered, neither are nonhuman entities of present and future generations.[25] Quite recently also, an international dimension to the distributive justice debate has emerged. Environmental movements seeking climate justice have included principles of intergenerational equity in arguing that it is unjust for poor countries and future generations to be most affected by dangerous climate change which is a consequence of the activities of rich countries and past generations.[26]

In distributive justice discourse, the focus has been on the patterns of distribution of environmental 'goods' among diverse social categories, with claims of injustice based on race, class, financial strength and even age.[27] The law structures the distribution of environmental benefits and burdens by assigning rights to use natural resources, regulating the use of land, controlling environmental pollution and allocating permits, through legislation such as natural resources laws, planning laws, pollution laws etc.[28] But very often, these laws are unfairly structured, not applied equitably or totally ignored.[29] In other cases, the law limits those entitled to benefit from equitable distribution of environmental benefits and burdens, thereby creating distributive injustice.

Studying environmental justice in distributive terms is beneficial, especially in providing comprehensible information with which to determine the closeness of risky facilities and dangerous environmental activity to diverse groups in society.[30] Walker has expressed the view that where evidence of distributional inequalities is made available through impact

[24] Preston (n 21) 23.
[25] ibid, 27.
[26] Bell (n 2) 18.
[27] ibid.
[28] Preston (n 21) 24.
[29] ibid.
[30] Bell (n 2) 19.

assessment for instance, it will stir up debate about the propriety or otherwise of the given situation as well as discussions of how to handle the effect on affected communities.[31] Also, determining the impact of development projects on vulnerable communities promotes the development of measures aimed at solving distributional and other environmental justice issues.[32] Besides triggering the negotiation of mitigation measures, evidence from distributional analysis in impact assessments may also serve as the basis for demanding compensation.[33] Indeed, tackling distributive injustice can be seen as a useful way of preventing violent crisis between impacted communities and governments.

However, discussing environmental justice based on distributive patterns alone offers only a dangerously restrictive view. As Bell observes, if our cry against environmental injustice dwells solely on unfair distribution patterns, then this would mean that the solution we seek is a mere equal distribution of environmental burden instead of a means of putting an end to it.[34] Therefore contrary to the traditional approach, it must be noted that although distributive theories of justice well apply to environmental justice, beyond the distributive conception of justice, there are other equally important ways in which justice could be perceived.[35]

2.2.2 Procedural Justice

With procedural justice, the concern is the manner in which decisions (including decision on the distribution of environmental benefits and burdens) are reached, who is concerned, and who has the capacity to affect the decision.[36] It is important for procedural justice that there is

[31] Gordon Walker, 'Environmental Justice, Impact Assessment and the Politics of Knowledge: The Implications of Assessing the Social Distribution of Environmental Outcomes' (2010) 30(5) Environmental Impact Assessment Review 312, 315.
[32] ibid.
[33] ibid, 316.
[34] Bell (n 2) 19.
[35] Schlosberg (n 11) 4.
[36] Preston (n 21) 23.

impartiality and transparency in decision-making processes,[37] and this is encouraged by the provision of a legal right of access to information, public participation and access to justice.[38] Right to know laws, the procedure for approval of development projects and environmental impact assessments as well as judicial and administrative review procedures are ways in which different jurisdictions seek to ensure procedural justice, although the extent to which law promotes procedural justice differ across jurisdictions depending on the measures implemented.[39]

Effective environmental justice activism depends largely on procedural justice. Where people are not informed, are restricted from communicating their thoughts and opinions, and cannot democratically affect the outcome of decisions, they are handicapped and naturally are unable to garner support for campaigns and activism that make other environmental justice demands.[40] Like distributive justice, the law interprets procedural justice as a right belonging to humans of present generation alone.[41] In the light of this, there have been calls to extend the right of participation that procedural justice seeks, to natural systems. However, for some scholars, this is unnecessary. White has rightly noted that, humans can through advocacy defend the interest of non-human components of the environment, ensuring that a representation is made on their behalf where human activities will ultimately affect them.[42]

It is noteworthy that although the importance of procedural justice cannot be overemphasized, procedural justice and distributive justice, without more, do nothing for the recognition of the concept of environmental justice beyond the fair distribution of environmental burdens, hence the need for justice as recognition.[43] Similarly, while enhanced

[37] Bell (n 2) 19.
[38] Preston (n 21) 23.
[39] ibid, 35-37.
[40] Bell (n 2) 20.
[41] Preston (n 21) 36.
[42] Rob White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press, 2014) 23.
[43] Bell (n 2) 21.

participatory processes can resolve distributive injustice and misrecognition issues, these forms of injustice must be tackled before they can contribute to boosting participation. This mirrors the relationship between these notions of justice and ensures that where political and cultural institutions promote inequity and misrecognition, then participation in political and cultural institutions is also affected.[44]

2.2.3 Justice as Recognition

There is a growing concern about the misrecognition of certain classes of people and vulnerable communities and their inability to participate in the making of decisions that affect them. The gist of justice as recognition is regard, respect and worth. Questions such as — is regard given to those who deserve it? who is held in high esteem? is the environment being respected? — often dominate discussions on justice as recognition. It follows therefore that misrecognition may result in the underestimation of the worth of persons, communities, and things, and may manifest in the form of insults, degradation, and devaluation.[45]

Increasingly, there is support for the view that misrecognition by way of 'insult, stigmatization and devaluation' greatly contributes to the harm, limitations, and distributional injustice that individuals and communities suffer.[46] Ako and Okonmah, with reference to Nigeria, have noted that misrecognition is responsible for the lack of participation of oil-producing communities in decision-making— a situation which has led to grassroot protests from community and environmental groups clamouring for policy reform to combat

[44] Schlosberg (n 11) 28.
[45] Rhuks Ako and Patrick Okonmah, 'Minority Rights Issues in Nigeria: A Theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region' (2009) 16 International Journal on Minority and Group Rights 53, 61.
[46] Schlosberg (n 11) 14.

inequalities and injustice.[47] They further observed that because misrecognition is the basis for distributional injustice,[48] the strive for redistribution in Nigeria has, at various times, involved a struggle for cultural recognition.[49]

Besides psychological injury, it has been noted that misrecognition destroys the social and institutional status of individuals and communities.[50] This is more so where cultural and institutional processes apply uneven methods of distribution to different social groups, based on age, sex, race, religion, tribe etc.[51] Fraser has observed that misrecognition is a 'status injury' which is not a function of an individual's mentality or thought processes but positioned in social relations.[52] It lies more in refusing to recognise certain people as entitled to fully take part in social interaction or engage in social life with others, as equals, because of institutionalised cultural patterns that regard them as undeserving of respect and regard.[53]

Indeed, because of the far-reaching effects of justice as recognition, we cannot speak of environmental justice unless members of the justice community are valued. Importantly, because misrecognition can lead to physical, moral and mental harm, it is necessary to recognize the cultural identity of peoples and communities. This point has been aptly captured by Preston in the following words:

> Access to Justice as recognition is promoted by the law giving substantive and procedural rights, but also by affording recognition of social groups and communities, and of the natural environment and components of it.[54]

[47] Ako and Okonmah (n 45) 65.
[48] ibid, 61.
[49] ibid.
[50] Preston (n 21) 38.
[51] Walker, *Environmental Justice: Concepts, Evidence and Politics* (n 8) 50.
[52] Fraser (n 19) 3.
[53] ibid.
[54] Preston (n 21) 24.

The foregoing analysis which has elucidated the meaning of justice in environmental discourse, emphasizes that environmental justice can only be attained where all three of its concepts —distributive justice, procedural justice and justice as recognition— are accomplished.[55] As Preston puts it, 'achieving environmental justice requires a holistic and comprehensive approach.'[56]

It is advantageous to understand the concept of justice beyond the scope of distribution and accept the importance of its unification with issues of procedure and recognition, as environmental justice activists posit.[57] The importance of integrating these notions of justice cannot be overemphasized. In relation to climate change for instance, if environmental justice for climate change (climate justice) means no more than distribution, then necessarily important elements of procedural justice concerning how mitigation and adaptation measures are formulated and implemented will be ignored, and so will the significance of material recognition for those mostly at risk of dangerous climate change.[58] Undoubtedly, 'within the environmental justice movement, one simply cannot talk of one aspect of justice without it leading to another.'[59]

However, while distribution and recognition are absolutely indispensable notions of justice, attention to the process of justice is recognised as a well suited mechanism for achieving both distributional justice and recognition.[60] Recognising that procedural justice is a vital means of securing substantive environmental justice,[61] and that tackling environmental injustice requires a focus on process rather than outcome,[62] this research seeks to discover the

[55] ibid, 40.
[56] ibid.
[57] Walker, *Environmental Justice: Concepts, Evidence and Politics* (n 8) 218.
[58] ibid.
[59] Schlosberg (n 11) 73.
[60] ibid, 26.
[61] ibid.
[62] Sheila Foster, 'Race(ial) Matters: The Quest for Environmental Justice' (1993) 20 Ecology Law Quarterly 721, 748.

procedural foundations upon which these environmental injustices are formed, and addresses environmental justice concerns through the instrumentality of matters of procedure. It is on this basis that this work evaluates environmental justice through the three key procedural justice principles which are expressed in the right of members of the public access to information, participation, and justice in environmental matters. To this end, the focus of this thesis is evaluating the extent to which Nigeria's EIA law guarantees that environmental information is available to the public, the public can participate in the making of decisions that affect them and have access to a court of law or other independent and impartial body established by law.

2.3 THE ROLE OF ENVIRONMENTAL JUSTICE IN THE ATTAINMENT OF ENVIRONMENTAL SUSTAINABILITY.

Notions of sustainability and sustainable development achieved widespread recognition among policymakers at the local, national and international level at a time when environmental justice issues began to take centre stage in public policy discourse.[63] Since its emergence in the 1980s, there has been a massive increase in academic literature on the concept of sustainable development, leading to debates about the exact meaning and purpose of the term. For instance, in the 1987 Brundtland Report,[64] (which was particularly instrumental to the international recognition of the concept of sustainable development and

[63] Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (New York University Press, 2005) 39.

[64] UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (4 August 1987) 42nd Session UN Doc A/42/427. Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* 406. Fisher, Lange and Scotford have described the Brundtland report as a leading document that set in motion an ongoing discussion at the international level about developing a framework on sustainable development which identifies long term goals and overall aims and the means of achieving them across nations of the world.

which provides its most extensively used definition),[65] sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[66]— a definition which has been criticised by Agyeman for its failure to mention justice or equity which are key considerations in the development of sustainable communities and futures.[67] Notwithstanding the above criticism, it is worthy of note that whatever the definition of sustainable development, a principal feature of the concept is the need to integrate economic, social and environmental objectives.[68] This integration has the goal of achieving environmental integrity and maintaining the health and wellbeing of vital aspects of nature that support life, including air, water and land.[69] When integration is discussed in terms of sustainable development, it means observing this purpose completely and with primacy.[70]

Arguably, since the emergence of the Brundtland Report, so little has been achieved to meet the goal of building a more sustainable future.[71] So far, efforts by the international community to ensure the observance of the principle of sustainable development have not produced an international legal framework that binds the actors and confronts the problems we face.[72] In fact, the 2012 United Nations Conference on Sustainable Development together with its outcome document, *The Future We Want*[73] did not advance innovative and

[65] Jacobus Du Pisani, 'Sustainable Development- Historical roots of the concept' (2006) 3(2) Environmental Sciences 83, 93. http://www.tandfonline.com/doi/pdf/10.1080/15693430600688831 accessed 23 February 2017.
[66] UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (n 64).
[67] Agyeman (n 63) 44.
[68] Christina Voigt, 'The Principle of Sustainable Development: Integration and Ecological Integrity' in Christina Voigt (ed) *A Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press, 2013) 146.
[69] ibid, 151.
[70] ibid, 152.
[71] Nathalie Ruhs and Aled Jones, 'The implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature' (2016) 8 Sustainability 174.
[72] ibid.
[73] UNGA, 'Resolution Adopted by the General Assembly' (27 July 2012) 66th Session UN Doc A/RES/66/288.

revolutionary agreements and has been widely criticized by many.[74] Montague also condemned the Rio+20 summit for its failure to introduce new energy into the earth summit process, describing it as dead, an epic failure.[75] Although it is acknowledged that the Rio+20 summit provided an opportunity for enlightenment on critical issues in the pursuit of sustainable development at the international level, its inability to occasion advances in commitments is its major setback.[76] For Bosselmann too, the Rio+20 outcome document more or less sets out optional measures which countries have a discretion to observe or disregard.[77] In the light of these challenges, it is necessary to consider the relationship between environmental justice and sustainable development, as this helps to explain how environmental justice can be used to promote sustainable development.

At the heart of the concept of sustainable development are principles of equity—intragenerational and intergenerational equity. For developed countries, intragenerational equity is a theory that largely concerns a State's or community's capacity to integrate economic development with environmental protection; but for their developing counterparts, it extends to the attainment of social justice and involves tackling all issues that engender poverty, hunger and disease.[78] The focus of intragenerational equity is achieving a higher degree of equity among competing groups within the present generation, bearing the notion of scarce resources in mind.[79] The concept of intergenerational equity on the other hand, is built on the notion that the environment of the earth is held jointly by human species as well

[74] Ruhs and Jones (n 71) 174.
[75] Brendan Montague, 'Analysis: Rio+20 – Epic Failure' The Bureau of Investigative Journalism' (22 June 2012) <https://www.thebureauinvestigates.com/2012/06/22/analysis-rio-20-epic-fail/> accessed 18 February 2017.
[76] Suan Ee Ong and Others, 'Examining Rio+20's Outcome' (*Council on Foreign Relations*, 5 July 2012) <http://www.cfr.org/world/examining-rio20s-outcome/p28669> accessed 19 February 2017.
[77] Klaus Bosselmann, 'Grounding the Rule of Law' in Christina Voigt (ed), *A Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press, 2013) 75, 76.
[78] Igor Vojnovic, 'Intergenerational and Intragenerational Equity Requirements for Sustainable Development' (1995) 22 Environmental Conservation 223, 225.
[79] ibid.

as other species and peoples of past, present and future generations.[80] In essence, these theories seek to ensure that people of the present generation are both trustees and beneficiaries, with a duty to secure the integrity of the environment and a right to utilize it.[81] This creates an obligation on present generation, to keep the environment from degradation and ensures that future generations can receive an equitable amount of the environment's resources.[82] The rationale is to prevent us, as present generation, from compromising the existence of future generations, in other to satisfy our insatiable wants. This highlights the relationship between sustainable development and environmental justice— both are principally concerned with the intragenerational and intergenerational allocation of benefits and burdens of development and seek the enhancement of the general welfare of individuals and societies (including their access to resources) as their key objective.[83] This relationship between sustainable development and the concept of justice has been aptly captured by Nijaki thus;

> Sustainable development is… a balancing act between the capabilities of this generation, with future generations in terms of everything from future sea level impacts, to future air pollution levels. Sustainability resultantly and implicitly then makes environmental consequences a justice issue for everyone and necessitates the removal of barriers towards functionings in a complex, inter-temporal manner.[84]

[80] Edith Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 The American University Journal of International Law and Policy 19, 20.
[81] ibid.
[82] Pulugurtha Sindhuri and Narmdeshwar Singh, 'Access to Justice in Environmental Matters' (2013) 6(10) Ontario International Development Agency International Journal of Sustainable Development 55, 56.
[83] Patricia Kameri-Mbote and Philippe Cullet, 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management' (1996) 1 International Environmental Law Research Centre Working Paper,1. <http://www.ielrc.org/content/w9601.pdf> accessed 10 March 2017.
[84] Laurie Nijaki, 'Justifying and Juxtaposing Environmental Justice and Sustainability: Towards an inter-generational and Intra-generational Analysis of Environmental Equity in Public Administration' (2015) Public Administration Quaterly 85, 93.

It is in the light of the relationship between sustainable development and environmental justice, that Salem has argued that no nation can achieve sustainable development without environmental justice.[85]

In view of the connection between environmental justice and sustainable development, environmental justice has been described as 'a policy tool in the sustainability tool-shed.'[86] This is so because, while environmental justice issues often relate to the impact of development projects on the wellbeing of people in a particular place, sustainable development, (being inherently composed of economic and social development components), concerns itself with the propriety of all forms of economic development, wherever they are found.[87] Hence, as Salkin, Dernbach and Brown observed, environmental justice and sustainable development are both concerned with addressing the adverse impact of environmental degradation on the health and wellbeing of people in society.[88] This relationship ensures that laws that promote sustainability also tackle injustices, since they demand that developmental activities take environmental, as well as economic and social considerations into account.[89] Non-recognition of the connections between environmental degradation and environmental justice debilitates community action and inevitably increases the chances of such activities being confined by government.[90]

It is also worthy of note that some of the main debates around the principle of sustainable development centre on questions of justice.[91] These controversies range from concerns that

[85] Hilmi Salem, 'No Sustainable Development in the Lack of Environmental Justice' (2019) 12(3) Environmental Justice 140.
[86] Agyeman (n 63) 50.
[87] Patricia Salkin, John Dernbach and Donald Brown, 'Sustainability as a Means of Improving Environmental Justice' (2012) 19(1) Journal of Sustainability and Environmental Law 1, 18.
[88] ibid, 11.
[89] Ibid, 28.
[90] Mick Hillman, 'Environmental Justice: A Crucial Link between Environmentalism and Community Action' (2000) 37(4) Community Development Journal 357.
[91] Ken Conca, Michael Alberty and Geoffrey Dabelko (eds), *Green Planet Blues: Environmental Politics from Stockholm to Rio* (Westview Press, 1995) 279.

the paradigms of sustainable development can make issues of fairness, distribution and power obscure, to arguments that environmental considerations may provide a rationale for the use of measures that engender social inequality, authoritarianism and the centralization of decision-making power in the hands of elites.[92] As a result, despite the commitment of sustainable development to integrating environmental and developmental concerns, questions have been raised concerning issues of justice and power within societies— who should bear the cost of environmental protection? Who should hold decision-making power? etc.[93] Perhaps, it is in the light of these issues that procedural (environmental) justice has been recognised at the international level as crucial to the promotion of sustainable development.

The international community, through the Rio Declaration on Environment and Development acknowledged that an important driver of sustainable development is good governance, the elements of which as set out in principle 10 of the same convention, are the rights of access to information, public participation and access to justice.[94] Principle 10 recognises the role of procedural justice in the progression towards environmental integrity and sustainable development[95] in these words:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous

[92] ibid.
[93] Ibid, 280.
[94] David Banisar, Sejal Parmar, Lalanath de Silva and Carole Excell, 'Moving from Principles to Rights: Access to Information, Public Participation, and Justice' (2012) 12(3) Sustainable Development Law and Policy 8.
[95] World Resources Institute and United Nations Environment Programme, *Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines* (United Nations Environment Programme, 2015) 11. <file:///C:/Users/osynd/AppData/Local/Temp/Temp3_Attachments_2017227.zip/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES%20-%20%20%20English.pdf> accessed 2 March 2017.

> materials and activities within their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[96]

Principle 10 thus emanates from the recognition that where governance excludes these important access principles, the result will be environmental degradation, social injustice and the flourishing of unsustainable practices.[97]

2.3.1 The Justice of Procedure: Why Important?

It is common knowledge that environmental risks are usually unequally distributed within and among societies, and that these risks affect people and communities in varied ways.[98] One way of tackling environmental injustice is understanding the fundamental issues that underlie these inequities.[99] Increasingly, with the development of environmental justice, the emphasis no longer lies in spatial patterns of environmental injustice, but has shifted to discovering the procedural foundations upon which such injustices are formed.[100] Several definitions of environmental justice now indicate the significance of procedural fairness as a

[96] UNGA 'Rio Declaration on Environment and Development' (12 August 1992) UN Doc A/CONF.151/26/ (Vol. I), principle 10.
[97] Banisar, Parmer, de Silva and Excell (n 94) 8.
[98] Susan Cutter, 'Race Class and Environmental Justice' (1995) 19(1) Progress in Human Geography 111.
[99] ibid, 117.
[100] Leith Deacon and Jamie Baxter, 'No Opportunity to Say No: A Case Study of Procedural Environmental Injustice in Canada' (2013) 56(5) Journal of Environmental Planning and Management 607, 608.

distinct notion of justice and call for the meaningful involvement[101] of all people and their access to the decision-making process.[102] It is in the light of this that Low and Gleeson posit that 'attention must be paid not only to the substance of justice, justice of outcomes and consequences, but also to the justice of procedure'.[103] The reason for this is not far-fetched—procedural justice remains crucial to changing cultures of exclusion and misrecognition, thereby ensuring legitimacy, better decision-making and the attainment of substantive justice goals. Indeed, Amao has identified popular participation (an aspect of procedural justice) as an underlying principle of Africa's norm setting, key to the emergence of a new legal order.[104]

The fact that procedural rights now dominate the environmental justice debate has been aptly captured by Aldinger who points out that present-day conception of environmental justice is founded on three pillars—access to information, public participation and access to justice; and that this was first formally established in the United States of America through Executive Order 12898 which required federal agencies to attain specific minimum standards.[105] Executive Order 12898 of the United States of America[106] requires federal agencies to develop environmental justice strategies that set down policies, programmes, planning and public participation procedures etc. connected with human health and the environment that need to be reviewed. This is necessary for (1) promoting the enforcement of all health and

[101] The United States Environmental Protection Agency, 'Environmental Justice' <https://www.epa.gov/environmentaljustice> accessed 13 October 2017. The United States Environmental Protection Agency defines environmental justice as '…the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'
[102] Walker, *Environmental Justice: Concepts, Evidence and Politics* (n 8) 48
[103] ibid, 47.
[104] Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge, 2019) 45.
[105] Peter Aldinger, 'Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana' (2013-2014) 26 Georgetown International Environmental Law Review 345, 360.
[106] Executive Order 12898 of February 11, 1994, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* 'Presidential Documents' Federal Register Vol. 59 No.32 <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf> accessed 5 August 2017.

safety laws in minority and low-income areas (2) enhancing public participation (3) improving research and data collection on the health and environment of minority and low-income populations and (4) recognising patterns of consumption of natural resources among minority and low-income populations.[107] Aldinger argues that these goals have influenced the way in which the concept of environmental justice is now being conceived nationally and internationally as including (1) better statutory and regulatory enforcement, as well as access to judicial review (access to justice); (2) enhanced public participation throughout the decision making process; (3) better access to information for affected communities to enable the actively contribute to the decision-making process; and lastly (4) attention to the effect of proposed actions on minority groups.[108]

In the same vein, Capek perceives environmental justice as a claims-making activity involving a demand by one party to another that a known condition be addressed.[109] Therefore, the framework of environmental justice is founded on a concept of rights, and embodies clearly defined claims in connection with the distinctiveness of environmental injury.[110] These claims, in Capek's view, include the right to: (1) precise information about the state of affairs; (2) a timely, respectful, and impartial hearing of claims; (3) democratic participation in decision-making; and (4) compensation for victims of environmental pollution.[111] In addition, other components of Capek's environmental justice frame call for support for victims of environmental injustice in other communities and the elimination of environmental racism.[112] However, it should be noted that unlike the first four components of the environmental justice frame, the elimination of environmental racism and solidarity with

[107] ibid, s 1, 1-103.
[108] Aldinger (n 105) 360.
[109] Stella Capek, 'The "Environmental Justice" Frame: A Conceptual Discussion and an Application' (1993) 40(1) Social Problems 5, 7.
[110] ibid, 8.
[111] ibid.
[112] ibid.

environmental justice struggles in other communities are not expressed in the form of rights.[113]

Like Capek, Walker has observed that various aspects of procedure can be the subject of justice and the basis of several dimensions of claims of injustice.[114] These have been identified to include access to environmental information which is an essential requirement for effectual participation and informed consent, involvement in the making of environmental policies and decisions, and access to justice for safeguarding environmental rights and questioning decision-making.[115] Unsurprisingly, a study by Deacon and Baxter of residents of a rural community located near two landfill sites in Canada has found that, certain 'subtle processes' related to public participation produce and perpetuate environmental injustice.[116] This was reflected in the unavailability of opportunities for residents to reject harmful developments.[117]

It is important to note that like procedural justice, rules of environmental assessment are also concerned with the manner and structure of decision-making— environmental assessment does not seem to have 'substantive or positive goals', it rather sets out procedural requirements and sets up 'programmes of administration' regulating decision-makers.[118] As Holder puts it, 'the conceptual underpinning of the regulatory nature of environmental assessment is that 'process substitutes for (substantive) standards by ensuring thoughtful and well-informed exercises of discretion.'[119] Therefore, although environmental assessments do not directly dictate the outcome of decision-making processes, it ensures that the decision-

[113] ibid.
[114] Walker, *Environmental Justice: Concepts, Evidence and Politics* (n 8) 48.
[115] ibid, 48-49.
[116] Deacon and Baxter (n 100) 607.
[117] ibid.
[118] Jane Holder, *Environmental Assessment: The Regulation of Decision-Making* (Oxford University Press, 2006) 238.
[119] ibid.

making body takes information gathered throughout the environmental assessment process into account.[120] For members of the European Union, this procedural control employed by environmental assessment is well reflected in Article 8 of Directive 2014/52/EU[121] which provides that 'the results of consultations and the information gathered pursuant to Articles 5 to 7 shall be duly taken into account in the development consent procedure.' Similarly, procedural control is exercised in the United Kingdom through Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations[122] which is to the effect that, 'the relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development.'[123]

This thesis recognises that the goal of environmental justice will not be actualized if it remains an abstract concept that does not improve conditions in impacted communities.[124] It therefore considers environmental justice under the broad umbrella of procedural justice. The goal is to ensure legitimacy of the EIA process, while also discovering matters of procedure that engender distributional injustice. In other words, the focus of this research is evaluating the extent to which the environmental impact assessment process in Nigeria ensures that members of the public have access to environmental information, are included in the decision-making process and have access to administrative and judicial procedures which violate national environmental law.

[120] ibid, 237.
[121] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment [2014] OJ L 124.
[122] The Town and Country Planning (Environmental Impact Assessment) Regulations, 2017.
[123] Holder (n 118) 238.
[124] Clifford Rechtschaffen, 'Strategies for Implementing the Environmental Justice Vision' (2007) 1 Golden Gate University Environmental Law Journal 321, 322.

2.4 WHY ENVIRONMENTAL IMPACT ASSESSMENTS ARE USEFUL TOOLS FOR TACKLING ENVIRONMENTAL JUSTICE ISSUES.

Environmental impact assessment has been defined as 'the systematic identification and evaluation of the potential impacts (effects) of proposed projects, plans, programmes, or legislative actions relative to the physical, chemical, biological, cultural and socioeconomic components of the total environment.'[125] It has also been described as a process whereby a proposed activity having the capacity to create serious environmental, social and economic harm is studied, in order to assess its impact, analyse other suitable ways of dealing with the situation, and advance measures aimed at averting and cushioning adverse effects.[126]

Notwithstanding the above definitions, it is noteworthy that while environmental impact assessment can ensure that actions which have significant adverse effects on the environment are abandoned, because environmental assessments generally take place within the wider context of political decision-making, economic, social and political factors may necessarily take precedence over environmental considerations.[127] Hence, it is argued that rather than prevent actions which have significant adverse effects the environment from being undertaken, EIA is meant to ensure that these actions are permitted with full knowledge of their environmentally harmful effects.[128] The primary aim of the EIA therefore, is to ensure that likely environmental impacts are predicted at a suitable phase of project design, and dealt with before any decision is taken on the project.[129] In the light of the role of environmental

[125] Anji Mareddy, *Environmental Impact Assessment: Theory and Practice* (Elsevier, 2017) 1.
[126] Allan Ingelson and Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10(1) Law, Environment and Development Journal 1, 3.
[127] Cary Jones and others, 'Environmental Assessment: Dominant or Dormant?' in Jane Holder and Donald McGillivray, *Taking Stock of Environmental Assessments: Law, Policy and Practice* (Routledge-Cavendish, 2007) 17.
[128] ibid.
[129] Fatona Olugbenga, Adetayo Olumide and Adesanwo Adeola, 'Environmental Impact Assessment (EIA) Law and Practice in Nigeria: How Far? How Well?' (2015) 1(1) American Journal of Environmental Policy and Management 11, 12.

impact assessments, Principle 17 of the Rio Declaration on Environment and Development has given recognition to it in these words;

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[130]

Interestingly, uneven exposure to risks and unfair patterns of risk reduction and compensation have become key features of present-day environmental management concerns; to such a great degree that ideas of equity and fairness are now established elements of decision-making for remedial actions,[131] hence the need for environmental impact assessments. While there are many ways of ensuring justice and fairness in environmental policy, the availability and utilization of policy appraisal tools such as impact assessments, remain vital.[132] This is so because they have the capacity of securing transparency and insightfulness in policy making, and ensure that material concerns of members of society are considered before decisions are reached.[133]

In addition, since the foremost argument of the environmental justice movement is that poor and minority communities suffer disproportionate environmental burden, the need for environmental impact assessment as a policy tool that identifies and remedies this harm cannot be overemphasized. This is implicit in the commonly used United States Environmental Protection Agency's definition of environmental justice as 'the fair and equitable treatment of all people, regardless of race, ethnicity, income, national origin or

[130] UNGA 'Rio Declaration on Environment and Development' (n 96) principle 17.
[131] Cutter (n 98) 111-112.
[132] Gordon Walker, 'Environmental Justice and the Distributional Deficit in Policy Appraisal in the UK' (2007) 2 Environmental Research Letter 1.
[133] ibid.

educational level in the development and implementation of environmental laws, regulations and policies.'[134] Chalifour has rightly interpreted this definition to mean that the government has a responsibility to incorporate social inequity into environmental law and policy-making.[135] Indeed, one key tool for integrating social justice into environmental law and policy is environmental impact assessments. As Saidi has pointed out, in taking bio-physical and socioeconomic factors into account, environmental impact assessment is more balanced, surpasses other environmental management tools such as risk assessment and cost-benefit analysis, and has become the most effective tool for incorporating environmental concerns into development planning.[136]

In the United States, the relationship between environmental justice and environmental impact assessments has been recognised by Executive Order 12898. The rising interest in environmental justice coupled with demands for policy reform necessitated the issuance of Executive Order 12898, designed to avoid environmental injustice in federal activities. Section 1 of the Executive Order encapsulates its primary objective thus:

> To the greatest extent practicable and permitted by law…each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on

[134] United States Environmental Protection Agency, (n 101).
[135] Nathalie Chalifour, 'Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan' (2010) 21 Journal of Environmental Law and Practice 31, 45.
[136] Twahiti Saidi, 'Environmental Impact Assessment as a Policy Tool for Integrating Environmental Concerns in Development' (2010) Briefing No. 19 Africa Institute of South Africa Policy Brief 1, 2.

> minority populations and low-income populations in the United States…[137]

In other words, federal agencies in the United States must tackle the adverse impact of their activities on the health and environment of minority and low-income populations and ensure that their policies, programmes, procedures etc. enhance public participation, distributional justice, recognition and capabilities.

Unfortunately, unlike the United States, there is no requirement in either Nigeria's Environmental Impact Assessment Act or other legislation, regulation, guidelines etc. to consider environmental justice as part of the environmental impact assessment process. Nevertheless, Bass has argued (and rightly so) that, since most environmental impact assessment laws give agencies ample leeway to incorporate socio-economic issues in environmental documents, ignoring environmental justice issues on grounds that they are not required to be considered is unjustifiable.[138] This argument has been taken further by Krieg and Faber who argue in favour of cumulative environmental impact assessments.[139] They posit that cumulative environmental impact assessment can play a key role in the fight for environmental justice by aiding our knowledge of 'disproportionate impacts, risk assessment, the politics of public health and community mobilization.'[140] Indeed, for the people of Ogoniland in Nigeria, despite several decades of oil exploration and corresponding agitation and environmental justice struggle in this region, the 2011 environmental assessment carried out by UNEP provided the first 'systematic and scientific evidence' of the nature, degree and

[137] Executive Order 12898 of February 11, 1994, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (n 106), s 1, 1-101.
[138] Ronald Bass, 'Evaluating Environmental Justice under the National Environmental Policy Act' (1998) 18 Environmental Impact Assessment Review 83, 91.
[139] Eric Krieg and Daniel Faber, 'Not So Black and White: Environmental Justice and Cumulative Impact Assessment' (2004) 24 Environmental Impact Assessment Review 667, 692.
[140] ibid.

impact of oil pollution.[141] The report of this environmental impact assessment highlighted that by polluting drinking water, the exploration and production activities in the region constitute a serious threat to human health and severely damaged the ecosystem.[142] This report provided baseline information on which remedial action in the ongoing clean-up of Ogoniland is based.

As the foregoing discourse reveals, environmental impact assessment being a vital instrument for mitigating the adverse impact of development projects on the environment,[143] is a valuable tool for achieving environmental justice. This relationship between environmental impact assessment and environmental justice has been aptly captured by Walker who noted that, impact assessment tools could adequately deal with issues of environmental injustice in decision-making in two ways.[144] The first is by permitting inclusive participation and as a result advancing procedural justice; while the second relates to the use of impact assessments to methodically analyse social patterns of benefits and burdens of projects, plans and programmes.[145] There is no doubt that EIA is a means through which a country can incorporate ideals of sustainability into development activities.[146] This underscores the need for legal scholarship in the field, in the light of continuing environmental inequities borne by vulnerable communities in Nigeria..

[141] United Nations Environment Programme, *Environmental Assessment of Ogoniland* (United Nations Environment Programme, 2011) 7 <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 29 November 2017.
[142] ibid.
[143] Chalifour (n 135) 31.
[144] Walker, 'Environmental Justice, Impact Assessment and the Politics of Knowledge: The Implications of Assessing the Social Distribution of Environmental Outcomes' (n 31) 313.
[145] ibid.
[146] Orhiogene Akpomuvie, 'Tragedy of Commons: Analysis of Oil Spillage, Gas Flaring and Sustainable Development of the Niger Delta' (2011) 4(2) Journal of Sustainable Development 200, 205

2.5 THE EVOLUTION AND PROCESS OF ENVIRONMENTAL IMPACT ASSESSMENTS IN NIGERIA.

Early efforts towards addressing environmental problems in Nigeria focussed primarily on the petroleum industry.[147] The initial belief that environmental monitoring and regulation was most required in the petroleum industry formed the basis for the legislative and regulatory attention in this sector.[148] Environmental awareness in Nigeria was strengthened however, by participation in international environmental conferences such as the United Nations Conference on Environment and Development which emphasized the role of EIA in the attainment of sustainable development.[149] Indeed, the establishment of the Urban Development and Environment Division as a Department of the Federal Ministry of Economic Development has in fact been attributed to Nigeria's participation in the 1972 United Nations Conference on the Human Environment.[150]

Closely following the build-up of awareness was the formulation of environmental policies, which was set in motion in the aftermath of the 1988 Koko waste dumping incident.[151] Environmental impact assessment thus became a compulsory requirement for certain development projects and activities following the discovery of shiploads of toxic waste from Italy at the small port community of Koko in Delta State, Nigeria. This led to the promulgation of the Harmful Toxic Waste (Special Criminal Provision) Decree and the (now repealed) Federal Environmental Protection Agency Act (FEPA Act).[152] The FEPA Act

[147] Olusegun Ogunba, 'EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings' (2004) 24 Environmental Impact Assessment Review 643, 647.
[148] ibid.
[149] R. O. Yusuf, S. E. Agarry and A. O. Durojaiye, 'Environmental Impact Assessment Challenge in Nigeria' (2007) 2(2) Journal of Environmental Science and Technology 75, 77.
[150] Ogunba (n 147) 648.
[151] ibid. In the Koko waste dumping incident, Italian businessmen imported thousands of tonnes of toxic waste into the local community of Koko, Nigeria, having paid a paltry sum to a member of the community for their storage.
[152] Yusuf, Agarry and Durojaiye (n 149) 77.

established a Federal Environmental Protection Agency (FEPA) vested with power to perform several functions, including the preparation of a "… procedure for environmental impact assessment for all development projects".[153] However, in a sequel to the repeal of the FEPA Act by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act),[154] all functions previously performed by FEPA are vested in the National Environmental Standards and Regulations Enforcement Agency (NESREA), being the Agency established by the NESREA Act.

NESREA has enforcement functions aimed at ensuring that environmental laws, policies, guidelines and standards are complied with. Among other functions, it is responsible for enforcing environmental control measures (by way of registration, licensing and permitting systems),[155] carrying out environmental audits,[156] creating awareness and providing environmental education.[157] However, some of the functions of NESREA overlap with those of the Environment Assessment Department of the Federal Ministry of Environment, which is also responsible for implementing the EIA Act, regulation of development projects, developing guidelines and standards and environmental audit.[158]

It is important to note that under Part II of the NESREA Act, the regulation of the Oil and Gas sector falls outside the functions and powers granted the Agency.[159] Hence, the principal regulator of EIA for the oil and gas sector remains the Department of Petroleum Resources (DPR) and the procedure for the conduct of an EIA for this sector is as set out in the

[153] Federal Environmental Protection Agency Act 2004, s 5(a).
[154] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007.
[155] Ibid, s 7(j).
[156] ibid, s 7(k).
[157] ibid, s 7(l).
[158] Federal Ministry of Environment, 'About Us' <https://ead.gov.ng/about-us/> accessed 27 July 2020.
[159] Ibid, ss 6 and 7.

Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN).[160]

In the wake of the environmental revolution immediately following the Koko waste dumping incident, there was an advancement in environmental regulation and awareness. As evident in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN),[161] regulations in the petroleum industry matured from reactive policies for addressing local problems to proactive control measures that provided an enabling environment for the development of EIA, just as legislation (the Environmental Impact Assessment Act and the Urban and Regional Planning Act) were promulgated, in recognition of the importance of EIA to all sectors of the economy.[162]

While the EIA Act together with several standards and guidelines, sets out the legal framework for the conduct of environmental impact assessment and environmental management in Nigeria, additional requirements for environmental impact assessments relating to urban development plans are contained in the Urban and Regional Planning Act of 1992.[163] In essence, this has created three somewhat distinct systems for environmental impact assessments in Nigeria— one for the petroleum sector, another for Urban and Regional Planning and finally the EIA Act which attempts to cover all sectors of the economy.[164] As Ogunba has rightly observed, in the light of the practice in jurisdictions with well-established EIA systems such as the United States of America and the United Kingdom, the multiplicity of systems governing the EIA process in Nigeria raises concerns as to how

[160] Damilola Olawuyi, *The Principles of Nigerian Environmental Law* (Afe Babalola University Press, 2015) 224.
[161] ibid.
[162] Ogunba (n 147) 649.
[163] World Bank, 'An Economic Analysis of Natural Resources Sustainability, the Mining Sector Component: Assessment of the Environmental Regulatory Framework of the Mining Sector (Draft Report)' <https://openknowledge.worldbank.org/bitstream/handle/10986/2886/561770ESW0whit10Box349489B01PUBLIC1.pdf?sequence=1> accessed 4 December 2018.
[164] Ogunba (n 147) 650.

well the Nigerian situation conforms to best practice.[165] In order to gain a holistic understanding of the EIA process in Nigeria and the place of procedural justice therein, an overview of the EIA process is necessary.

2.5.1 An Overview of the Environmental Impact Assessment Process

A cardinal objective of Nigeria's Environmental Impact Assessment Act is to ensure that activities which are likely to significantly affect the environment are considered, before any person or body takes on, or authorises the commencement of any activity or project.[166] Private persons and public bodies are prohibited from undertaking or authorising projects without a prior and early consideration of their effects on the environment.[167] To achieve its objectives, the EIA Act provides a detailed account of the minimum matters to be considered in respect of an environmental impact assessment, as well as conditions to be fulfilled before a decision on a proposed activity is reached. Noncompliance with these requirements, and indeed any other provision of the Act, is an offence which attracts a fine or imprisonment.[168] In recognition of their importance, this overview of the EIA process therefore involves an examination of the legal requirements and procedure for an EIA in Nigeria.

2.5.1.1 *The Legal Requirements: A Review of the Environmental Impact Assessment Act*

The Environmental Impact Assessment Act makes it mandatory for environmental impact assessments to be carried out for all projects which by their nature, extent or location are likely to significantly affect the environment.[169] In every case where an environmental impact

[165] ibid, 644.
[166] Environmental Impact Assessment Act 2004, s 1(a).
[167] ibid, s 2(1).
[168] ibid, s 62.
[169] ibid, s 2(2).

assessment is required, the minimum content of such assessment include: a description of the proposed activities; the environment concerned and the practical activities; an assessment of the likely or potential environmental impacts of the proposed activity and the alternatives; an identification, description and assessment of possible mitigation measures; an indication of the uncertainty or unreliability of the information required; an identification of potential effects of the proposed activity or its alternatives on the environment of any other State, Local Government Area of Nigeria or territory outside Nigeria; and a brief and non-technical summary of the study.[170]

Where before the commencement of a project, the regulatory agency (NESREA) determines that an environmental assessment of the project is necessary, the environmental impact assessment process may include 'a screening or mandatory study and the preparation of a screening report; a mandatory study or an assessment by a review panel and the preparation of a report; the design and implementation of a follow-up program.' [171] In other words, depending on the project, the environmental impact assessment process may involve a screening and the preparation of a screening report for projects which are not contained in both the mandatory study list and the exclusion list,[172] or a mandatory study and the submission of a mandatory study report for projects and activities described in the mandatory study list.

Projects and activities contained in the mandatory study list which are clearly defined in the schedule to the Act relate to agriculture, airports, drainage and irrigation, land reclamation, fisheries, forestry, housing, industry, infrastructure, ports, mining, petroleum, power generation and transmission, quarries and water supply.[173] For these activities, NESREA may

[170] ibid, s 4.
[171] ibid, s 16.
[172] ibid, s 19(1).
[173] ibid, Schedule to the EIA Act.

require that a mandatory study is conducted and a mandatory study report is submitted to it, or may refer the project to its Governing Council (the Council)[174] for onward referral to mediation or a review panel.[175]

Following the consideration of the mandatory study report and any comments filed by the public, the Council may refer a project to mediation or review if it determines that the project is likely to have immitigable and significant adverse effects on the environment or if the public concerns on the environmental effects of the project justifies same.[176] Projects which are unlikely to have immitigable and significant adverse effect on the environment, must be referred back to the Agency.[177] On receipt of the report of the mediator or review panel, or following the referral of a project back to the Agency, the Agency may, if it determines that the project is unlikely to have immitigable and significant adverse effects on the environment, permit the project to be carried out fully or partially, with due regard to any applicable mitigation measures,[178] or prohibit the undertaking of the project in every other case.[179]

Similarly, for projects not contained in the mandatory list, for which a screening has been undertaken and a screening report submitted, the Agency has power to permit the undertaking of a project which has been identified by the screening process as unlikely to have immitigable and significant adverse effects on the environment.[180] It is required however, to refer to the Council (for onward referral to mediation or a review panel), projects which it considers likely to cause significant adverse environmental effects that cannot be mitigated and projects for which the public concerns have been raised in respect of their environmental

[174] The Governing Council was established under section 3 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007. As defined by section 9(b) of the NESREA Act, one of its functions is to 'advise the Agency with regard to financial, operational and administrative matters.'
[175] ibid, s 23.
[176] ibid, s 26(a).
[177] ibid, s 26(b).
[178] ibid, s 40(1) (a).
[179] ibid, s 40(1) (b).
[180] ibid, s 22(1)(a)

effects.[181] It is important to note here that a remarkable feature of the Act is the requirement that before the Agency decides on a project or other activity which has been subject to an environmental assessment, it must accord government agencies, members of the public, experts etc., an opportunity to comment on the EIA of the project.[182]

While the EIA regime as set out in the EIA Act can hardly be faulted, its mechanism for ensuring compliance with the requirements leave much room for concern. Olawuyi for instance has expressed concern (and rightly so), that the prescribed monetary penalty of N100, 000 (one hundred thousand naira)[183] for individuals and in the case of a firm or corporation, an amount not less than N50, 000 (fifty thousand naira)[184] but not exceeding N1,000,000 (one million naira)[185] is grossly inadequate. This penalty cannot compel meaningful compliance with the provisions of the Act.[186]

In many ways, Nigeria's EIA law can be likened to that of the EU in its formative years. In European Union law, environmental impact assessments became a requirement for a wide range of public and private projects with the adoption of Directive 85/337.[187] As is the case with Nigeria's EIA Act, this Directive established two categories of projects — projects which must undergo an environmental impact assessment before development consent is given (Annex I) and projects for which an environmental impact assessment was required, where they were likely to have significant adverse effects on the environment (Annex II).[188]

[181] ibid, s 22 (1)(b), s 27.
[182] ibid, s 7.
[183] £214 (two hundred and fourteen pounds).
[184] £106 (one hundred and six pounds).
[185] £2,133 (two thousand, one hundred and thirty-three pounds)
[186] Olawuyi (n 160) 210.
[187] Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment [1985] OJ L 175.
[188] Ludwig Kramer, 'The Development of Environmental Assessments at the Level of the European Union' in Jane Holder and Donald McGillivray (eds), *Taking Stock of Environmental Assessment: Law, Policy and Practice* (Routledge-Cavendish, 2007) 132.

One key omission of Directive 85/337, as Kramer has observed was that operators were neither required to assess alternatives for projects nor the potential impacts of projects on the environment; and there was no obligation to identify possible mitigation measures.[189] The duty to carry out impact assessments therefore fell on the administration.[190] Unsurprisingly therefore, the wide discretion administrators enjoyed in respect of the interpretation of the Directive has been identified as another problem of Directive 85/337.[191] Other problems of the Directive were that it did not make provisions for how cases of poor quality environmental reports were to be addressed[192] and there was a lack of sanctions where development projects requiring an environmental impact assessment were undertaken without one.[193] Having undergone 3 amendments, Directive 85/337 together with its amendments were codified by Directive 2011/92/EU.[194] The provisions of Directive 2011/92/EU were amended by Directive 2014/52/EU. Hence, Environmental Impact assessment is governed by Directive 2014/52/EU.

Unlike the situation in Nigeria, the EU's EIA law and practice has developed tremendously, with various changes launched by Directive 2014/52/EU. In the first place, in replacing "human beings" with "population and human health" in its list of protected assets, there is the recognition that environmental impact assessments seek to identify health-related and other (particularly social) impacts of proposed projects.[195] Again, at the screening stage, where a case-by-case examination of projects listed in Annex II is to be carried out, the competent

[189] ibid, 133.
[190] ibid.
[191] ibid, 136.
[192] ibid, 134.
[193] ibid, 135.
[194] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment [2011] OJ L 26.
[195] Christoph Mayer, 'Directive 2014/52/EU: Big Step Forward of Merely Minimal Consensus? - An Attempt to Evaluate the New EU-Regulations on the Assessment of the Effects of Certain Public and Private Projects on the Environment' (2016) 1(1) Law Review 97, 101.

authority must have regard to the regulatory review process set out in Annex III[196] as well as information provided by the developer on the features of the project and its likely significant impacts.[197] The developer is required to consider the outcome of other relevant assessments of the effects of the project carried out pursuant to other EU legislation and provide a description of the characteristics of the project and measures expected to avoid significant adverse impacts on the environment.[198] This is a sharp contrast to the situation in Nigeria where 'any available information may be used in conducting the screening of a project.'[199] Because a detailed review of Directive 2014/52/EU falls outside the scope of this thesis, a brief discussion of some of the improvements made to provisions relating to access to information, public participation in decision-making and access to justice will be made. First, to guarantee access to information, on conclusion of the screening process, the EIA Directive requires the competent authority to make its determination available to the public.[200] The EIA Directive also requires member states to ensure that detailed arrangements—including electronic means of communication— are in place for informing and consulting the public.[201] This is not the case in Nigeria. As chapter 7 of this thesis will reveal, the unavailability of communication preferences is a major issue affecting access to information.

Regarding public participation, in line with Article 6(7), a minimum of 30 days is required for consulting the public and no maximum period is prescribed. No such provision exists under Nigeria's EIA Act. Finally, the inclusion of penalties is worthy of mention— rules on penalties are to be made within national law for infringement of EIA legislation.[202] This is a

[196] Directive 2014/52/EU (n 121) art 4(3).
[197] ibid, art 4(4).
[198] ibid.
[199] Environmental Impact Assessment Act, s 18 (2).
[200] Directive 2014/52/EU (n 121) art 4(5)
[201] ibid, art 6(5)
[202] ibid, art 10(a)

helpful way of ensuring that members of the public have access to adequate and effective remedies.

The provisions of Directive 2014/52/EU have been transposed into national law in the United Kingdom through the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. It is important to note that unlike Nigeria's EIA law where penalties are limited to fines and imprisonment, under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, in addition to the issuance of an enforcement notice, planning contravention notice, stop notice etc. under Regulation 34, the penalty for infringement includes an application to the court for an injunction.[203] This complies with Article 9(4) of the Aarhus Convention which requires that remedies include injunctive relief.

One remarkable feature of the EIA legislation of the United Kingdom and the European Union lies in their commitment to ensuring the production of high-quality environmental reports. They both require developers to ensure that environmental statements are prepared by competent experts and are accompanied by a statement of the qualification of such experts. This requirement is unknown to Nigeria's EIA law. Indeed, one of the limitations of this research, as noted in chapter one[204] is the poor quality of environmental impact assessment reports. There is need for these requirements to be incorporated into Nigeria's EIA legislation.

[203] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, reg 34(g).
[204] See page 33.

2.5.1.2 *The Environmental Impact Assessment Process in Practice*

While environmental impact assessments can be adapted to suit different developmental situations and indeed the specific needs of countries, some basic aspects of the EIA process which feature prominently in Nigeria's EIA practice include screening, scoping, impact analysis, mitigation and impact management, reporting and review of report, decision-making and implementation and follow-up.[205]

It is usual for the EIA process to begin with a screening as an initial evaluation process,[206] followed by scoping which sets out the impacts to be taken into account.[207] The likely environmental impacts are analysed and mitigation measures are developed, to reduce the adverse environmental impacts of the project on the environment.[208] An environmental impact assessment report is produced to record the result of the impact assessment process for consideration by the decision-making agency and members of the public. Following the review of the environmental impact assessment report by the Agency, a decision is reached approving (with or without conditions) or rejecting the undertaking of the project.[209] The final stage of the EIA process is implementation and follow-up which is a form of environmental audit to ascertain the progress and extent of compliance with any prescribed conditions, monitor the environmental effects of the project and mitigate environmental effects arising from the project.[210] A description of the EIA process in Nigeria according to the Federal Ministry of Environment (FMEnv) of Nigeria, Department of Environmental Impact Assessment EIA Process Flowchart is contained in figure 1.1 below.

[205] Olawuyi (n 160) 210-211.
[206] The screening process is used to determine projects that should be subject to an EIA.
[207] Olawuyi (n 160) 210.
[208] ibid.
[209] ibid, 210- 211.
[210] ibid, 211.

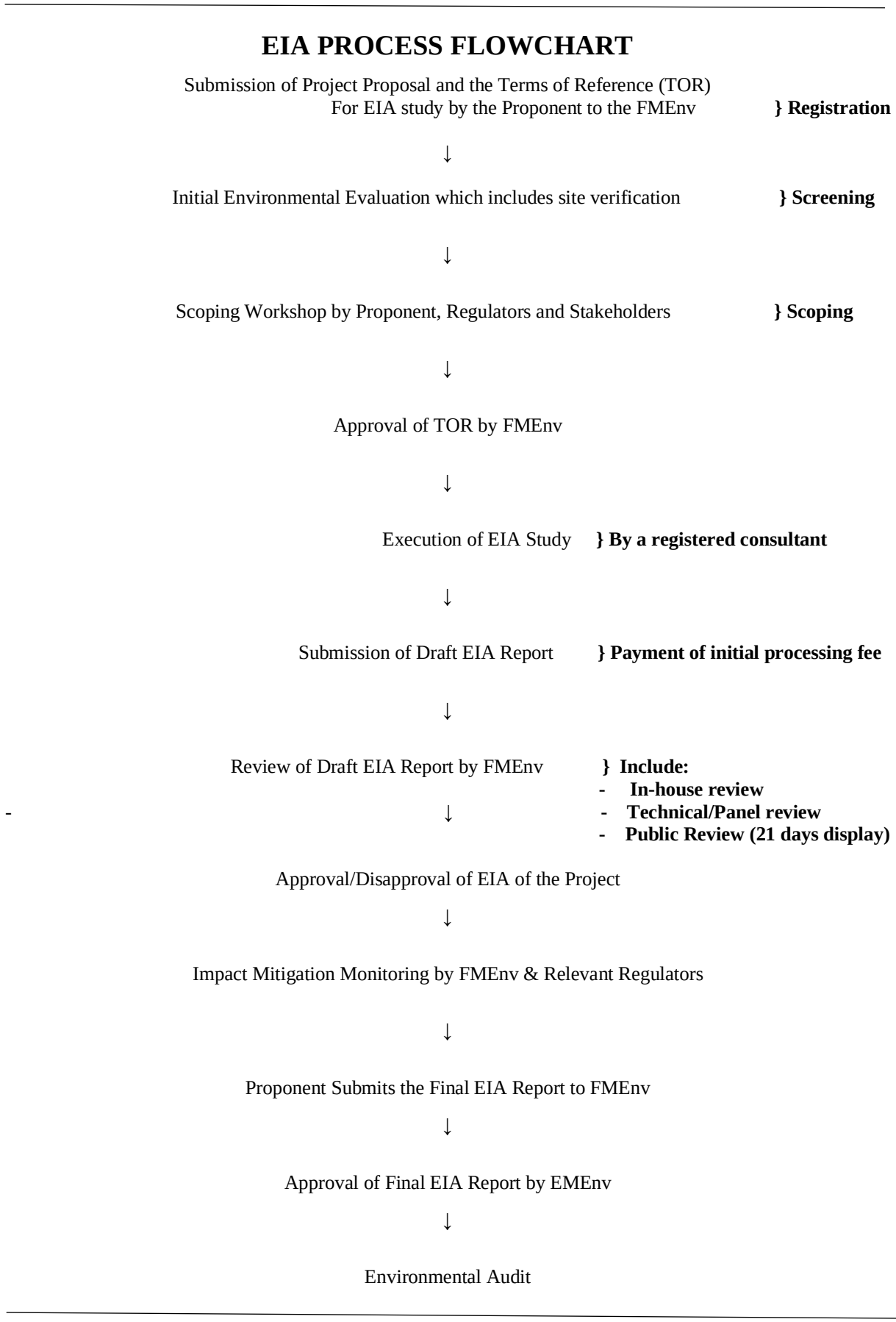

Figure 1: EIA Process Flowchart of the Federal Ministry of Environment, Nigeria

In the United Kingdom, the EIA process consists of 5 broad stages— screening, scoping, the preparation of an environmental statement, the making of a planning application and consultation, and the decision-making stage.[211]

As is the practice in Nigeria, the first stage of the UK's EIA process is Screening, in which the local planning authority (or the Secretary of State) determines whether a proposed project falls within the ambit of the Town and Country Planning (Environmental Impact Assessment) Regulation 2017, and by extension, requires an environmental impact assessment. Thereafter, there is the Scoping stage where the extent of the issues to be assessed and reported in the environmental statement are determined.[212]

A striking feature of the UK's environmental assessment process is that the applicant may seek the opinion of the local authority (scoping opinion) concerning the information to be included in the Environmental Statement.[213]Similarly, as provided for under Regulation 17(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the applicant may obtain environmental information from Consultation bodies (such as Natural England and the Environment Agency) and these bodies have a duty to make information in their possession available to the applicant. Following the preparation and submission of an Environmental Statement, the Environmental Statement and the application for development are to be made available to the public electronically and by public notice, and adequate opportunity must be given to the public other relevant 'consultation bodies' to comment on the proposed project and the environmental statement.[214]

[211] Ministry of Housing, Communities and Local Government, 'Guidance: Environmental Impact Assessment' (May, 2020) <https://www.gov.uk/guidance/environmental-impact-assessment> accessed 13 June 2020.
[212] ibid.
[213] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, reg 17(5).
[214] Ministry of Housing, Communities and Local Government (n 211).

The final stage of the UK's EIA process is the decision-making stage where the Environmental Statement and all information regarding the development, comments and representations made in respect thereof, are taken into account by the local authority or Secretary of State, before a decision is made to grant or withhold consent for the development.[215] The public is then informed of the decision and the reasons for same.

Based on the foregoing, it is evident that while the minimum requirements for environmental impact assessment have been largely complied with in Nigeria's EIA law and practice, there is room for improvement.

2.6 CONCLUSION

While environmental justice comprises of three cardinal concepts of distribution, procedure and recognition, the importance of matters of procedure cannot be overemphasized—effective environmental justice activism does in fact depend on procedural justice. Indeed, the crucial role of procedural justice in building a more sustainable society is recognized in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) whose objective is 'to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.'[216] Since environmental impact assessment is a key tool for promoting sustainability, justice and fairness in environmental policy, there is need to discover how well procedural justice principles are considered in the environmental impact assessment process.

[215] ibid.

[216] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) (1999) 38 ILM 517, art. 1.

The overview of the environmental impact assessment process above, indicates that the legislative and regulatory framework for the conduct of environmental impact assessments is set out to guide the undertaking of development projects relatively well. Beyond the fulfilment of these basic requirements however, it is also crucial that the environmental impact assessment delivers environmental justice, in terms of its recognition of the rights of those affected by development projects to access information relating to such projects, influence decisions to be taken by the regulator in respect of these projects, and have access to the courts to challenge acts and omissions which violate national environmental law. It is against this backdrop that chapter three of this thesis focusses on developing a framework for assessing the procedural justice rights of access to information, public participation in decision-making and access to justice in environmental matters, being the indices for assessing the effectiveness of procedural (environmental) justice in the EIA process. In the light of the centrality of the Aarhus Convention to the buildout of the three pillars of procedural justice, its principles have been heavily relied on in this thesis, forming the basis of the framework for procedural justice developed in chapter three.

CHAPTER THREE

THEORETICAL FRAMEWORK: DEFINING PROCEDURAL JUSTICE

3.1 INTRODUCTION

Because the procedural aspect of environmental justice is central to this work, the preceding chapter examined the concept of environmental justice and the place of matters of procedure therein, as well as the importance of using environmental impact assessment as a tool for achieving (procedural) environmental justice. Building on this framework, this chapter elucidates procedural environmental justice by engaging in an in-depth analysis of its renowned principles, with a view to developing a procedural justice frame, which defines the scope of the rights of access to information, public participation in decision-making and access to justice in environmental matters. To achieve this, the access rules guaranteed by the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) will be utilised, alongside legislation, case law and the literature.

3.2 THE ACCESS PRINCIPLES: AN IMPORTANT TOOL FOR EVALUATING PROCEDURAL (ENVIRONMENTAL) JUSTICE.

The access rules and the need to discover how effectively they are incorporated into the environmental impact assessment process in Nigeria remains crucial. This is so because ‘amongst the rules seeking to enhance the protection of the environment, those related to access to information, public participation in decision-making and access to justice in

environmental matters play a primary role.'[1] As earlier noted, the Aarhus Convention recognized the role of the access principles in building a more sustainable society when it declared that its objective is 'to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.'[2] This Convention, being the first international document to create minimum standards for environmental procedural rights,[3] and the 'most ambitious venture in environmental democracy,'[4] was signed by the European Union (EU) together with its Member States and nineteen other States on 25 June 1998,[5] making it a force to reckon with in discussions pertaining to procedural justice.

The Aarhus Convention, although originally made for Europe, has since its adoption 'been transformed into an international legal document of crucial importance, requiring the attention of the national environmental legislation of many countries in Europe and outside Europe.'[6] Against this backdrop, the Aarhus principles were accorded judicial recognition in the case of *Taskin v. Turkey*[7] where the European Court of Human Rights invoked the access rights contained in the Aarhus Convention, notwithstanding that Turkey is not a signatory to the Convention.[8] In this case, although the court noted that article 8 of the European

[1] Charles Poncelet, 'Access to Justice in Environmental Matters: Recent Developments' (2012) 14 International Community Law Review 179.
[2] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) (1999) 38 ILM 517, art. 1.
[3] Catherine Redgwell, 'Access to Environmental Justice' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007) 153-154.
[4] Jeremy Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 2(1) Journal of European Environmental and Planning Law 2.
[5] Poncelet (n 1) 179.
[6] Visar Morina *The Transposition of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Arhus Convention) with the Legislation of Kosovo* (The Regional Environmental Center for Central and Eastern Europe, 2005) 7 <http://kos.rec.org/english/pdf/ReportEng.pdf> accessed 14 December 2016.
[7] *Taskin and Others v Turkey* [2006] 42 EHRR 50.
[8] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) European Journal of International Law 613, 624.

Convention on Human Right does not contain precise procedural rights, it went on to read the access rights into the provision in its judgment.[9]

In the light of the importance of the access principles of the Aarhus Convention, there have been attempts by the Aarhus Convention Secretariat and the UNECE to promote these principles at the global level through four key initiatives— (1) developing a global convention on access to information, public participation in decision-making and access to justice in environmental matters, (2) promoting the Aarhus principles in international forums, (3) encouraging the accession of non-UNECE to the Convention and (4) the dissemination of information concerning the Convention internationally.[10] Unsurprisingly, the Aarhus Convention has informed other international instruments such as the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean which was adopted in March 2018 at Escazu, Costa Rica . Similarly, the international community has, through the United Nations Environment Programme (UNEP), created a framework for procedural justice with the development of the UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (UNEP Bali Guidelines)[11] which is modelled after the Aarhus Convention.

The Bali Guidelines aims to provide voluntary guidance to States, especially developing nations, on how best to advance the effective implementation of their obligation under

[9] *Taskin and Others v Turkey* (n 7) para. 118-119.
[10] Ludwig Kramer, 'Transnational Access to Environmental Information' (2012) 1(1) Transnational Environmental Law 95, 99.
[11] United Nations Environment Programme, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters Adopted by the Governing Council of the United Nations Environment Programme in Decision SS. XI/5, Part A' (26 February 2010) <http://wedocs.unep.org/bitstream/handle/20.500.11822/22925/Bali%20Guidelines%20for%20the%20Development%20of%20National%20Legislation%20on%20Access%20to%20information%2c%20Public%20Participation%20and%20Access%20to%20Justice%20in%20Environmental%20Matters.pdf?sequence=1&isAllowed=y> accessed 29 March 2017.

Principle 10 of the United Nations Convention on Environment and Development (Rio Declaration), within their national laws and procedures.[12] The goal of the Guidelines therefore, is to help these countries mend loophole and bridge any gaps in their legal norms as necessary, with a view to promoting wide access to information, public participation and justice in environmental matters.[13] In other words, it is aimed at assisting national governments implement principle 10 of the Rio Declaration through better laws and practices that promote access to information, public participation and access to justice.[14] Much of the 2010 UNEP Bali Guidelines owe its formative principles to the Aarhus Convention, having been inspired by it.[15]

The Bali Guidelines has since gained some recognition in Africa as an embodiment of the access principles. For instance, the Nairobi Statement which is the outcome document of the *1st Africa Colloquium on Environmental Rule of Law: Towards Strengthened Environmental Governance, Justice and Law* (although not a negotiated document) urges African countries to facilitate access to information, public participation and access to justice in environmental matters using the United Nations Environment Programme (UNEP) Bali Guidelines Implementation Guide and a strategy aimed at strengthening regional and sub-regional cooperation.[16] Arguably, the Aarhus Convention's access principles have gained widespread international approval. Therefore, notwithstanding that the Aarhus Convention does not

[12] ibid, 4.
[13] ibid.
[14] World Resources Institute and United Nations Environment Programme, *Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters'* (United Nations Environment Programme, 2015) 11. <https://wedocs.unep.org/bitstream/handle/20.500.11822/11201/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES-Interactive.pdf?sequence=1&isAllowed=y> accessed 2 March 2017.
[15] Uzuazo Etemire, 'Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights' (2016) 28 Journal of Environmental Law 393, 398.
[16] '1st African Colloquium on Environmental Rule of Law: Nairobi Statement' 2. <file:///C:/Users/osynd/AppData/Local/Temp/Temp2_Attachments_2017227.zip/nairobi-statement.pdf> accessed 1 March 2017.

directly apply to Nigeria, the Convention has restructured, elucidated and expanded on legislative and procedural steps that can aid the effective implementation of the vague and undetailed provisions on access to information, public participation in decision-making and access to justice in environmental matters in the numerous international environmental agreements to which Nigeria is a party.[17] It is in the light of the foregoing that this thesis largely relies on the Aarhus Convention in its evaluation of the scope of the access rights.

3.3 THE SCOPE OF THE ACCESS RIGHTS

Certain important question come to mind in discussing environmental justice within the context of principle 10 of the Rio Declaration —what do these principles entail? How can compliance with the access principles be effectively evaluated? How relevant are the access principles— are they mere procedural steps? A proper understanding of these issues requires an examination of the scope of these procedural rights.

3.3.1 What Constitutes Access to Environmental Information?

Access to information together with public participation and access to justice in environmental matters have been recognised as central to effective environmental governance by several national and international environmental law regimes.[18] However, it is important to note that meaningful public participation in environmental decision-making processes and effective access to justice in environmental matters depend greatly on the availability and

[17] Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge, 2016) 10-11.

[18] One of such regimes is the 1992 Rio Declaration on Environment and Development which in principle 10 recognises that the participation of all citizens is the key to tackling environmental issues and requires States to advance and encourage public awareness and participation while also providing effective access to justice.

sufficiency of relevant information.[19] Unsurprisingly, a survey by Hartley and Wood found that poor access to information is a major obstacle to effective participation.[20] This crucial role of the right of access to information has been recognised by the European Court of Human Rights in the cases of *Társaság a Szabadságjogokért v Hungary*[21] and *Kenedi v Hungary*[22] where the court held that an interference with the right of access to information is a violation of Article 10 of the European Convention on Human Rights which relates to freedom of expression.

Generally, the access to information obligation in the Aarhus Convention is two-fold—contracting parties must ensure that the public can request for, and obtain environmental information from public authorities (article 4), while also maintaining a system which enables public authorities to collect environmental information and disseminate same to the public, without a prior request having been made (article 5).[23] This makes environmental information central to any discussion on the right of access to information. Since the enjoyment of the right of access to information rests on the availability of information, it is important to gain an understanding of the meaning of environmental information, as this will prescribe the scope of information that a person is entitled to receive.

The Access to Information Programme has defined environmental information as 'information in written, visual, audio, electronic or other material form about:

[19] George Pring and Susan Noe, 'The Emerging International Law of Public Participation, Affecting Global Mining, Energy and Resource Development' in Donald Zillman, Alastair Lucas and George Pring (eds), *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) 29.
[20] Nicola Hartley and Christopher Wood, 'Public Participation in Environmental Impact Assessment—Implementing the Aarhus Convention' (2005) 25 Environmental Impact Assessment Review 319, 333.
[21] *Társaság a Szabadságjogokért v Hungary* App no. 373474/05 (ECtHR, 14 April 2009).
[22] *Kenedi v Hungary* App no 31475/05 (ECtHR, 26 May 2009).
[23] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014) 78.

- the state of elements of the environment (air, atmosphere, water, soil, landscape, mineral and biodiversity);
- the factors, reflecting on the state of the elements of the environment, such as substances, waste disposal, noise, vibrations, radiations etc.;
- activities and measures that have an impact on the elements of the environment (administrative measures, international contracts, policies, legislature, plans and programmes) and economical analyses in connection with them;
- the state of human health and safety;
- cultural sites, building structures and facilities;
- emissions, discharges and other harmful impacts on the environment.'[24]

A more extensive definition is contained in the Aarhus Convention wherein environmental information refers to 'any information in written, visual, aural, electronic or other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its component, including genetically modified organisms and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

[24] Access to Information Programme, *How to Get Access to Environmental Information?* (Sofia, 2003) 8.

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (a) above.'[25]

It is commendable that the definitions of environmental information above are sufficiently broad to cover all classes of information on the environment which members of the public may require. This is particularly so because, according to the definitions above, environmental information covers *any information* relating to the elements of the environment, the factors affecting these elements and other associated issues stated above. Therefore, even where the information does not directly relate to, or mention the environment, to the extent that it informs the public about matters affecting the environment, or helps their participation in environmental decision-making, it is still likely to constitute environmental information.[26]

In the United Kingdom, the court had the opportunity to give meaning to the phrase, *any information*, in the case of *Office of Communications v The Information Commissioner and T-Mobile*[27] and it favoured a wide interpretation of the words. In this case, a request was made by one Mr. Henton, the Information Manager for Health Protection Scotland, to the Office of Communications, concerning information on the ownership, precise location and technical attributes of mobile phone base stations in the United Kingdom, which it held.[28] The Office of Communications considered the request as one for environmental information and applying the

[25] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (n 2) art 2(3). This definition has been largely adopted by the European Union in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC [2003] OJ L41/26, art 2 and the United Kingdom in the Environmental Information Regulations 2004, s. 2(1).

[26] Information Commissioner's Office 'What is Environmental Information? (Regulation 2(1))' <https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf> 5 accessed 27 July 2019.

[27] *Office of Communications v The Information Commissioner and T- Mobile* [2008] EWHC 1445 (Admin).

[28] ibid.

provisions of the Environmental Information Regulations 2004 refused to grant the information requested.[29] Dissatisfied, Mr. Henton complained to the Information Commissioner under the Freedom of Information Act.[30] This case arose from the decision of the Information Commissioner which directed the Office of Communications to disclose the requested information. The Office of Communications contended (among others) that some of the information requested (such as the names of Mobile Network Operators operating each base station) did not constitute environmental information within the meaning of section 2(1) of the Environmental Information Regulations 2004.[31] The tribunal rejected this argument and held that the phrase "any information…on…radiation" incudes the names of owners of installations emitting electromagnetic waves because 'it is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'[32]

Despite this extensive definition however, an evaluation of the effectiveness of the right of access to information in Nigeria rests on the on the determination of the following questions—who is entitled to receive environmental information? When is environmental information accessible? When is environmental information adequate?

3.3.1.1 *Who is Entitled to Receive Environmental Information?*

The cardinal principle of access to information is that environmental information must be made available when requested, unless a refusal of same is justified under one or more of the recognised exceptions.[33] In order for the right of access to information to fulfil its role

[29] ibid.
[30] ibid.
[31] Information Commissioner's Office (n 26) 6.
[32] ibid
[33] European Environment Agency, 'Access to Environmental Information: Key Elements and Good Practice' <https://www.eea.europa.eu/publications/92-9167-020-0/page007.html> accessed 3 March 2018.

therefore, it is necessary that as a general rule, the legislation or legal instrument through which the right is guaranteed, grants access to any person upon request, without the need for them to proof that they are interested persons.[34] This is in line with the provision of Article 4(1) of the Aarhus Convention which requires contracting parties to ensure that where a request for environmental information has been made to a public authority, the public authority concerned must, in response to the request, make such information available to the public in the form requested, according to its national law, without the need for the person making the request to state an interest.[35] It is worthy of note that Article 4 recognises the right of members of the public to receive information *in the form requested.* It has been noted that this requirement means that when requested, public authorities must provide copies of original documentation (as opposed to merely providing members of the public with an opportunity to examine the documents in question) and/or an opportunity to examine documents alone, where requested.[36]

However, the Aarhus Convention does not guarantee an absolute right of access to environmental information. Where certain exceptions apply, a request for environmental information may be refused. Therefore, a public authority is entitled to refuse a request for environmental information where: (1) the information requested is not in the possession of the public authority from which it is requested, (2) an unreasonable request for environmental information has been made, (3) a request is made for a material which is the process of completion, or the request concerns the internal communications of a public authority which

[34] ibid.
[35] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (n 2) art 4(1).
[36] United Nations Economic Commission for Europe (n 23) 80.

that authority is entitled to refuse to grant at law or in practice, after due consideration of the public interest to be served by the disclosure.[37]

Furthermore, where a disclosure of information will adversely affect legally protected confidential proceedings of a public authority;[38] international relations and national security;[39] the course of justice;[40] commercial and industrial information protected by law for the security of genuine economic rights;[41] intellectual property rights;[42] the confidentiality of personal data of individuals where consent has not been obtained for such disclosure;[43] third party interests;[44] and the environment,[45] a request for environmental information may be refused. In such cases, the public interest to be served by disclosure must be taken into account, and a consideration of whether the information requested concerns emissions into the environment must have been made.

3.3.1.2 When is Environmental Information Accessible?

The definitions of environmental information above clearly provide that environmental information is information recorded in *any material form*— written, visual, aural, electronic etc. This means environmental information does not only relate to hard copies of text-based administrative documents alone, but includes drawings, sound recordings, CCTV recordings, other written information (such as letters, e-mails) etc. In fact, the Aarhus Convention requires parties to ensure that 'environmental information progressively becomes available in electronic

[37] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (n 2) art 4(3).
[38] ibid, art 4(4)(a)
[39] ibid, art 4(4)(b).
[40] ibid, art 4(4)(c).
[41] ibid, art 4(4)(d).
[42] ibid, art 4(4)(e).
[43] ibid, art 4(4)(f)
[44] ibid, art 4(4)(g)
[45] ibid, art 4(4)(h)

databases which are easily accessible to the public through public telecommunications networks.'[46]

Interestingly however, the accessibility of electronic information has been subject to question. Odparlik and Koppel for instance, have questioned the accessibility of information contained in government documents and the websites of government agencies, on grounds that the physical accessibility of information on these media does not necessarily amount to a substantive one.[47] This is especially so in cases where the public is ignorant of the existence of such information, unaware of how to obtain it, or lack the expert knowledge necessary to fully comprehend its significance.[48] Indeed, in an early study of the effectiveness of the United Kingdom's water registers, Burton identified the lack of public awareness about the existence of registers, together with the difficulty of gaining physical access to data stored in complex electronic forms, as part of the distinct but interconnected factors responsible for the poor use of the UK's water registers between 1985 – 1989.[49] It is arguable therefore that, there is a lack of access to information in developing countries like Nigeria where a significant percentage of the population are illiterate. Thus, effective access to environmental information is often contingent on both the availability of information, and the provision of education on how information may be found, construed and utilized.[50] Further, to be meaningful, access to information must encompass the right of citizens to know about laws

[46] ibid, art. 5(3).
[47] Lisa Odparlik and Johann Koppel, 'Access to Information and the Role of Environmental Assessment Registries for Public Participation' (2013) 31(4) Impact Assessment and Project Appraisal 324.
[48] ibid.
[49] T. Burton, 'Access to Environmental Information: The UK Experience of Water Registers' (1989) 1(2) Journal of Environmental Law 192, 194-195.
[50] Odparlik and Koppel (n 47) 324.

enacted, policies implemented, as well as how effectively these are executed according to the letters and spirits of the relevant legislation.[51]

It is important to note that with regards to access to information under the Aarhus Convention, time is of the essence. It is not enough therefore, that public authorities have a duty to provide information, such information must also be made available as soon as possible and in no more than one (1) month after a request is made, unless the volume and complexity of the information requested justifies an extension of up to two (2) months after a request is submitted.[52]

3.3.1.3 When is Environmental Information Adequate?

Like Odparlik and Koppel, Burton has pointed out that even where awareness and accessibility of environmental information are not in issue, incomprehensibility and insufficiency of data are responsible for the poor use of registers.[53] While the inadequacy of information held by registries is clearly a barrier to access to information, the lack of interest in, and follow up on the issues necessitating the request for information does in fact compound the problem.[54] Despite legislative steps towards providing unrestricted access to information, there are still several drawbacks to the realization of the right. One key reason for this is that officials equate the duty to provide information to the public to a mere procedural exercise, and the emphasis does not lie in the goal the right sets out to achieve. Therefore, although recognised as a crucial first step towards meaningful citizens'

[51] Marion Hourdequin, Peter Landres, Mark Hanson and David Craig, 'Ethical Implications of Democratic Theory for U.S Public Participation in Environmental Impact Assessment' (2012) 35 Environmental Impact Assessment Review 37, 39.
[52] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (n 2) art. 4(2).
[53] Burton (n 49) 194- 195.
[54] ibid, 204.

participation, the provision of information has been described as tokenism because mere information without more, only 'allow the have-nots to hear and not to have a voice.'[55] Because the right of access to information is only but a means to an end, not an end in itself, the provision of information serves no useful purpose unless it is followed up by opportunities for the public to respond to such information. In other to advance the deliberative stage of public participation, appropriate and meaningful information must be made available to participants to aid their understanding of the likely consequence of their own preferences, the various policy alternatives available to decision-makers and the potential effects of these options.[56]

Unfortunately, it is usual for environmental information to be disseminated through a one-way system of communication, in which information flows from relevant officials to the public through the media (news, posters, leaflets etc.) with no avenues created for negotiation nor the receipt of public responses.[57] This denies members of the public the opportunity to influence regulatory decisions, especially in relation to environmental impact assessments, hence, a barrier to access to information.

[55] Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Institute of Planners 216, 217.
[56] Hourdequin, Landres, Hanson and Craig (n 51) 39.
[57] Arnstein (n 55) 219.

3.3.2 Public Participation Within the Context of Environmental Impact Assessment: Meaning and Scope.

It is quite difficult to proffer an all-embracing definition of public participation; hence the difficulty in determining its exact scope and requirement.[58] The Public Participation Best Practice Principles of the International Association for Impact Assessment for instance, defines public participation as 'the involvement of individuals and groups that are positively or negatively affected by a proposed intervention (e.g, a project, a programme, a plan, a policy) subject to a decision-making process, or are interested in it'[59]— a definition which has been criticized by Glucker and others for its failure to elucidate the level and expected outcome of the involvement.[60]

A major difficulty arising from the definitional issue discussed above is determining what public participation entails. Although there is no agreement in the literature on the precise meaning of the term, definitions of public participation in the context of environmental assessments have been linked to the objectives it seeks to achieve.[61] To determine the precise scope of public participation in environmental impact assessment processes therefore, this subsection will explore the following questions— Who can participate in decision-making in the environmental impact assessment process? How should the public be notified of opportunities for participation in the environmental impact assessment process? What forms of participation should be used?

[58] Anne Glucker, Peter Driessen, Arend Kolhoff and Hens Runhaar, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) 43 Environmental Impact Assessment Review 104.
[59] Pierre André, Bert Enserink, Desmond Connor and Peter Croal 'Public Participation International Best Practice Principles' (2006) Special Publication Series No. 4 International Association for Impact Assessment 1. <http://www.iaia.org/uploads/pdf/SP4.pdf> accessed 18 October 2017.
[60] Glucker, Driessen, Kolhoff and Runhaar (n 58) 105.
[61] ibid.

3.3.2.1 *Who can Participate in Decision-making in the Environmental Impact Assessment Process?*

Like project planning, appraisal and development, there is a consensus that prompt and wide-ranging inclusion of 'the public' is essential to the success of environmental assessments.[62] One question that has been the subject of academic debate however, is what authors mean when they refer to 'the public' entitled to participate in decision-making. As Petts has noted, it is important to determine who the public are and what interests they have, in order that specific environmental impact assessment activities are properly structured, and the benefits of participation are clearly identified.[63]

It is apparent from the literature that the terms 'stakeholders', 'the public' and 'citizens' have been employed in relation to public participation in environmental assessment and are often used interchangeably. However, it has been observed that in relation to environmental impact assessments, there is need to distinguish between the different 'publics', and therefore, stakeholders, the affected public, the observing public and the general public have been defined in varied ways.[64] While the general public is defined broadly to include all those people who are not directly affected by the activity but have an interest in it, stakeholders are 'organized groups that are or will be affected by, or that have a strong interest in the outcome of a decision.'[65]

In the light of the distinction between stakeholders and the public, while some scholars have expressed support for stakeholder involvement in environmental impact assessments others

[62] Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement' (1998) International Institute for Environment and Development, Environmental Planning Issues No. II, 1, 2 <http://pubs.iied.org/pdfs/7789IIED.pdf> accessed 13 September 2017.
[63] Judith Petts, 'Public Participation and Environmental Impact Assessment' in Judith Petts (ed), *Handbook of Environmental Impact Assessment* (Vol. 1) (Blackwell Science, 1999) 150.
[64] Thomas Dietz and Paul Stern, *Public Participation in Environmental Assessment and Decision Making* (The National Academies Press, 2008) 15.
[65] ibid.

have attacked this for being too restrictive. On one hand, Hughes has argued that various stakeholders play a part in the environmental assessment process, ranging from citizen's groups, non-governmental organisations to business organization, academic institutions and even governmental agencies; and that through stakeholder participation, these persons may meaningfully engage in discussions on the design, implementation and management of a project, exchanging information and knowledge that may both contribute to the success of the project and advance their interests.[66] On the other hand, the stakeholder approach to public participation has come under severe criticism from scholars like Salomons and Hoberg who maintain that the goal of public participation is to give ordinary citizens a chance to contribute to policy formulation from an informed position.[67] The process ensures that the public is educated about the scope of a project, its weaknesses and any available alternatives, helping them make informed choices, in the interest of the community in general.[68] Against this backdrop, Salomons and Hoberg argue that public participation is not akin to stakeholder involvement because while stakeholder involvement limits opportunities for participation to those with a direct stake in the subject matter, public participation on the other hand is part of a larger scheme to make policy-making more democratic.[69]

One useful way of approaching this issue in the view of the Dietz and Stern is that 'the breadth of involvement must be matched to the issue.'[70] In other words, how much of 'the public' is required should depend on the context and the objective the process seeks to achieve; as the participation of stakeholders alone may be sufficient in some circumstances

[66] Hughes (n 62) 3.
[67] Geoffrey Salomons and George Hoberg, 'Setting Boundaries of Participation in Environmental Impact Assessment' (2014) 45 Environmental Impact Assessment Review 69, 70.
[68] Leke Oduwaye, 'Citizenship Participation in Environmental Planning and Management in Nigeria: Suggestions' (2006) 20(1) Journal of Human Ecology 43, 44.
[69] Salomons and Hoberg (n 67) 70.
[70] Dietz and Stern (n 64) 15.

but grossly inadequate in others.[71] In certain situations, the participation of all public actors will be most appropriate to avoid the process being hijacked by 'organized interests' which may not fully represent the interests of the rest of the public.[72] However, it is uneconomical to involve all public actors in every environmental issue; resources could also be wasted where the involvement fails to meet the expectation of the public.[73]

It should be noted that notwithstanding the foregoing debate, there seems to be a widespread agreement in theory and practice that 'the public' entitled to participate in environmental decision-making are natural and juristic persons having an interest in the outcome of a project, and who may be positively or negatively affected by it.[74] This broad-based public participation is advantageous because it ensures that environmental impact assessment processes influence planning and implementation of projects and as a result, produce greater developmental benefits.[75]

3.3.2.2 *How Should the Public be Notified of Opportunities for Participation in the Environmental Impact Assessment Process?*

While public participation remains useful both during the formulation of a project and after a decision is reached,[76] it is widely accepted that in order to minimize the likelihood of adverse environmental effects, and increase public trust in the environmental assessment process and its outcome,[77] opportunities for participation should be made available before project

[71] ibid.
[72] ibid.
[73] ibid 16.
[74] Glucker and others (n 58) 109.
[75] Hughes (n 62) 2.
[76] Hakeem Ijaiya, 'Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems' (2015) 13 The Nigerian Juridical Review 83, 86.
[77] Salomons and Hoberg (n 67) 71.

planning and decision-making.[78] But how should the public be made aware of such opportunities?

The Aarhus Convention requires contracting parties to ensure that members of the public are informed early in the decision-making process, individually or by public notice and in a manner that is adequate, timely and effective, of the proposed activity and the possible decision thereof, the public body responsible for making the decision, the procedure to be followed (including the commencement of the procedure, time and venue, access to information and opportunities for public participation), and the fact that an environmental impact assessment of the proposed activity is required.[79] Clearly, under the Aarhus Convention, the basic requirement that members of the public be made aware of opportunities for participation in the EIA process is qualified by the inclusion of the requirement that the notice is given in an 'adequate, timely and effective manner'. This means that in addition to informing the public early in the procedure, the notice must be adequate in terms of 'effectively targeting at least the public concerned with the decision.'[80]

This point is well illustrated in *Communication ACCC/C/2006/16 (Lithuania)*[81] in which a communication was submitted by the communicant representing the Kazokiskes Community in Lithuania, in respect of a landfill in the Kazokiskes village. The Communicant alleged that the Republic of Lithuania were in breach of its obligations under article 6(2) of the Aarhus Convention for its failure to provide both information at an early stage in the decision-making process and opportunities for the public to participate in the scoping process of the environmental impact assessment (where the designing of the EIA programme takes place

[78] Ijaiya (n 76) 86.
[79] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (n 2) art. 6(2).
[80] United Nations Economic Commission for Europe (n 23) 136.
[81] UNESC, 'Report by the Compliance Committee: Compliance by Lithuania with its Obligations under the Convention' (4 April 2008) ECE/MP.PP/2008/5/Add.6

under Lithuanian law).[82] In its findings, the Compliance Committee noted that the Republic of Lithuania had inaccurately notified the public concerned, by informing them about 'possibilities to participate in a decision-making process concerning development of waste management in the Vilnius region rather than a process concerning a major landfill to be established in their neighbourhood.'[83] As such notification cannot be deemed adequate, Lithuania had failed to comply with article 6(2) of the Aarhus Convention.

Similarly, for a notification to be considered effective within the meaning of article 6(2) of the Aarhus Convention, public authorities must make sure that the public is reached, ensure that the public understands the notification and take all reasonable steps to ease participation.[84] Following this, where a small advertisement is placed in a newspaper among hundreds of advertisements or the public is notified by a broadcast in a local television during the work hours of most people, such notice is unlikely to be considered effective.[85] Nevertheless, what constitutes effective notification will depend greatly on the peculiarities of each case.

3.3.2.3 *What Forms of Participation Should be Used?*

Several scholars have identified different levels of participation. To Andre and others for instance, the various levels of public participation range from 'passive participation or information reception, to participation through consultation (such as public hearings and open houses) to interactive participation (such as workshops, negotiation, mediation and even co-management)'.[86] While some scholars insist that public participation (properly so called)

[82] ibid, para 36.
[83] ibid, para 66.
[84] United Nations Economic Commission for Europe (n 23) 135.
[85] ibid.
[86] André, Enserink, Connor and Croal (n 59) 1.

requires active public involvement and influence in decision-making, others like O'Faircheallaigh prefer to describe it as all forms of interaction between the public, stakeholders and government taking place as part of the environmental impact assessment process.[87] It is not surprising therefore, that much of the literature on the subject perceive public participation as a generic term for all types of techniques used to ensure stakeholder involvement in the EIA process, irrespective of the scope and object of the activity.[88] Hence, the terms 'participation' and 'consultation' have at various times been used interchangeably. This practice has been criticised by Hughes who argues that although stakeholder involvement (comprising of participation and consultation) represents the whole range of interaction between stakeholders and the decision-making process, participation can be distinguished from consultation.[89] Participation in this sense is used to connote a process through which stakeholders, having considerable influence on the decision-making process can shape policy or decisions that concern them, and it differs from consultation by the extent to which stakeholders are permitted to shape, impact on, or control the decision-making process.[90] In line with the argument of Hughes, in this thesis, participation is not akin to consultation because unlike participation, 'consultation is an advisory process.'[91]

To distinguish between participation and non-participation, Arnstein advanced eight levels of public participation— (1) Manipulation (2) Therapy (3) Informing (4) Consultation (5) Placation (6) Partnership (7) Delegated power and (8) Citizens control. According to Arnstein, the first two levels of participation, (manipulation and therapy) amount to non-participation, while informing, consultation and placation are only but 'degrees of

[87] Ciaran O'Faircheallaigh, 'Public Participation and Environmental Impact Assessment: Purposes, Implication and Lessons for Public Policy Making' (2010) 30 Environmental Impact Assessment Review 19, 20.
[88] Glucker, Driessen, Kolhoff and Runhaar (n 58)105.
[89] Hughes (n 62) 3.
[90] Ibid.
[91] Desmond Connor, 'A New Ladder of Citizens Participation' (1988) 77(3) National Civic Review 249, 253.

tokenism.'[92] Regarding consultation for instance, when used by decision-makers/project proponents to connote participation may guarantee that the public hears and is heard, but yet lack the power to ensure that these concerns are taken into account.[93] True participation only occurs along the lines of partnership, delegated power and citizens' control.[94]

Similarly, Reed and others, distinguishing public engagement from consultation, argue that consultation and engagement have different implications on the outcome of the participation process. Having identified four types of public participation— (1) Top-down one-way communication and/or consultation, (2) Top-down deliberation and/or coproduction (3) Bottom-up one-way communication and/or consultation (4) Bottom-up deliberation and/or coproduction — Reed and others observed that the top-down one way communication and/or consultation is not generally regarded as participation.[95] This is so because, being instigated, organized and directed from the top (by an organization having all decision-making power) down to the public, in this mode of engagement, the public is either merely consulted (without having power to influence decisions) or has the decisions of the decision-maker communicated to it.[96]

Although it is commendable that public participation properly so-called allows people to be involved in the making of policies and programmes concerning the environment, an important question that arises is what principles underlie this mechanism? Relying on arguments of 'participation theorists' who oppose new participation mechanisms in which people are increasingly unable to influence social decisions that affect them, Fiorino posits that our understanding of public participation should conform to contemporary democratic

[92] Arnstein (n 55) 217.
[93] ibid.
[94] ibid.
[95] Mark Reed and others, 'A Theory of Participation: What Makes Stakeholder and Public Engagement in Environmental Management Work?' (2018) 26 (1) Restoration Ecology s7, s9 – s10.
[96] ibid, s9.

principles.[97] Like other participation theorists, Fiorino rejects over-reliance on technology, experts and national institutions, maintaining that people are best suited to determine their interests and can partake in governance.[98] Besides, the inability of members of the public to effectively question experts owing to their lack of technical and legal knowledge has been appropriately described as a barrier to effective participation.[99] Importantly, Fiorino puts forward four participation theories as guiding principles for assessing the extent to which institutional mechanisms (such as public hearings, citizens review panels etc.) conform to democratic processes.[100] The first is the direct participation of ordinary people in decision-making as opposed to through elected representatives, administrative bodies, experts or interest groups. Secondly, it is essential that the mechanism should allow for cooperation and collective decision making between citizens and government bodies. The third criterion recognises that creating opportunities for face to face communication is a crucial aspect of public participation processes and the fourth seeks to discover the extent to which ordinary people can participate on an equal footing with experts, defining issues, questioning processes and shaping decisions.[101] These principles have been adopted in this work and will make up the criteria for evaluation of public participation in Nigeria's EIA process.

Based on the foregoing, it is evident that the crucial role of public participation cannot be achieved where the process offers a passive role to members of the public. This is so because the public participation process is aimed at ensuring that interested persons are instrumental in the planning of activities that affect them, raising concerns and identifying priorities.[102] In line with Fiorino's participation theories, this research argues that public participation

[97] Daniel Fiorino, 'Citizen Participation and Environmental Risks: A Survey of Institutional Risks' (1990) 15(2) Science, Technology and Human Values 226, 228.
[98] ibid 229.
[99] Hartley and Wood (n 20) 332.
[100] Fiorino (n 97) 229.
[101] ibid, 230
[102] Salomons and Hoberg (n 67) 71.

properly so-called connotes the early and meaningful involvement of members of the public, through which they can influence policy and decisions that affect them.

3.3.3 What Does Access to Justice in Environmental Matters Entail?

The concept of Access to Justice is open to different interpretations. In a broad sense, it is used to denote an individual's capacity to institute an action in a court of law and have the matter adjudicated.[103] In a narrow sense, it indicates an individual's right, not only to have access to a court, but importantly, to have the case decided in a manner that conforms to substantive ideals of equity and justice.[104] An even more restricted understanding of the concept is in relation to legal aid.[105]

The conventional conception of access to justice which limits the concept to a right to seek redress from a court or other independent and impartial tribunal established by law is highly deficient; it is predicated on theories of the rule of law and separation of powers wherein the judicial and executive arms of government function independently and the role of the judiciary is strictly the application and interpretation of laws.[106] The idea of access to justice entails more than the procedural mechanism through which people seek redress for violation of legal rights; it in fact involves the nature and quality of justice dispensed,[107] hence the need for members of the public to have access to review procedures that are fair, equitable, timely, inexpensive etc.

[103] Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007) 1.
[104] ibid.
[105] ibid.
[106] ibid, 3.
[107] Nlerum Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 3 SUR International Journal on Human Rights 95, 97.

There is no doubt therefore that the right of access to justice is central to the democratic process. Okogbule has noted that 'without access to justice, it is impossible to enjoy and ensure the realisation of any other right whether civil, political or economic.'[108] The justification for the inclusion of a right of access to justice in the Aarhus Convention therefore, is to provide members of the public with review procedures and remedies for the enforcement of rights guaranteed under the Aarhus Convention and national law relating to the environment. Accordingly, article 9 of the Aarhus Convention makes provisions for review procedures in respect of:

- Wrongful refusals or poor handling of requests for environmental information by public authorities.[109]
- The decisions, acts and omissions of public authorities' concerning the public's participation in the making of decisions on specific activities.[110]
- The contravention of national law relating to the environment arising from the acts and omissions of private persons and public bodies.[111]

In every case, the review procedures must fulfil certain requirements set out in article 9(4) of the Convention which provides, in part, that:

> …the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive…

[108] ibid, 96.
[109] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (n 2) art 9(1).
[110] ibid, art 9(2).
[111] ibid, art 9(3).

Based on the foregoing provisions, it is evident that the enjoyment of the right of access to justice depends on the fulfilment of certain key requirements, which are inherent in the provisions of article 9(1) – (4) of the Aarhus Convention. For a proper understanding of the elements that make up the right of access to justice, this subsection poses three questions, which are discussed below.

3.3.3.1 *Who is Entitled to Seek a Review?*

Because of legal technicalities involving standing to sue, it is important to determine the persons who are entitled to seek a review under Article 9 of the Aarhus Convention. Regarding access to justice for refusal of a request for environmental information, the Convention provides that 'any person' whose request for environmental information has been refused, or not properly dealt with, can seek a review of such decision.[112] This is not surprising considering that the right of access to information is granted to the public.[113] In contrast, those entitled to a review of decisions, acts and omissions which relate to public participation are 'members of the public concerned, having sufficient interest or maintaining impairment of a right.'[114] Accordingly, while 'the public' used in relation to access to information includes natural or legal persons,[115] the public concerned on the other hand refers to 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making.'[116]

It should be noted that although the fulfilment of the requirements of sufficient interest and impairment of right is to be determined under national law, this is not to be regarded as an

[112] ibid, art 1
[113] ibid, art 4(1).
[114] ibid, art 9(2).
[115] ibid, art 2(4).
[116] ibid, art 2(5).

invitation to national governments to restrict the scope of standing to sue.[117] This is provided for under Article 9(3) of the Aarhus Convention which gives the right to access review procedures, to members of the public who meet the criteria, if any exist, under national law. The effect of these provisions is that, while national governments may set out the criteria which members of the public must meet in order to have standing to sue, such criteria must be in line with the goals the Convention seeks to achieve in respect of access to justice.[118] Therefore, in *Communication ACCC/C/2005/11 (Belgium)*[119] where the Aarhus Convention Compliance Committee had to consider whether in line with Article 9(3) of the Aarhus Convention, the criteria for standing in Belgium's national law promotes wide access to justice, the Committee found that "the phrase 'the criteria, if any, laid down in national law' indicates a self-restraint on the parties not to set too strict criteria."[120] It also noted that while parties are not required to set up a system of popular action through which anyone can challenge decisions, acts and omissions relating to the environment, the clause 'where they meet the criteria, if any, laid down in national law' is not to be used as an excuse for establishing or sustaining a criteria, so strict as to bar virtually all environmental organizations from challenging acts or omissions that are contrary to national environmental law.

[117] United Nations Economic Commission for Europe (n 23) 194 -195.
[118] ibid, 198.
[119] *Communication ACCC/C/2005/11 (Belgium)* Submitted by Bond Beter Leefmilieu Vlanderen VZW <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2005-11/communication/communication.doc> accessed 18 July 2020.
[120] UNECE, 'Findings and Recommendations with Regard to Compliance by Belgium with its Obligations under the Aarhus Convention in Relation to the Rights of Environmental Organizations to have Access to Justice (Communication ACCC/C//2005/11)' (28 July 2006) ECE/MP.PP/C.1/2006/4/Add.2, para 36.

3.3.3.2 *What Review Procedures Should be Available?*

Depending on the subject matter of the review, the Aarhus Convention sets out different procedures which allow contracting parties to meet their access to justice obligations. In this regard, articles 9(1) and 9(2) require the parties to provide review procedure before 'a court of law or another independent and impartial body established by law' for decisions, acts and omissions which relate to access to environmental information and public participation in environmental decision-making respectively. On the other hand, under article 9(3), the requirement is that administrative or judicial procedures are available for members of the public to challenge violations of national law relating to the environment.

It has been noted that the term 'judicial procedures' within the context of the Aarhus Convention refers to courts and other court-like bodies (such as tribunals); a key attribute of these bodies being their *independence* and *impartiality*[121] This therefore means that for judicial procedures to deliver effective access to justice in environmental matters, they must (among other things) be administered by courts or court-like bodies which are able to dispense justice, free from the interference and manipulation of the executive or other arms of government.

3.3.3.3 *What Requirements Must the Procedures Meet?*

A careful examination of the provisions of article 9(3) reveal that the access to justice obligations under the Aarhus Convention are not merely aimed at ensuring access to courts. More importantly, they seek to ensure that environmental matters are adjudged judiciously. Therefore, whatever the procedure (administrative or judicial) for reviewing decisions, acts

[121] Emphasis added. United Nations Economic Commission for Europe (n 23) 188.

and omissions adopted in national law, certain requirements contained in article 9(4) above must be met. Accordingly, the procedures must have the capacity to deliver justice, within reasonable time, using adequate and effective remedies, but without excessive cost. In addition, the need for remedies in environmental actions to be both adequate and effective cannot be overemphasized.

Adequate and effective remedies can avert environmentally harmful activities or unlawful administrative decisions, thereby preventing serious and irreversible harm to the environment.[122] In this regard, injunctive reliefs are particularly useful in protecting the environment from harm before a legal action is determined. However, it is important for access to justice, properly so-called, that remedies are not obtained at too great a cost, hence the requirement that the administrative and judicial procedures are not prohibitively expensive. Regrettably, in some legal systems, the practice is that a loser of an administrative or judicial action bears all or some part of the costs associated with the winner's litigation, such as legal fees, court fees etc.[123] Because potential litigants can neither limit nor foresee their exposure to the risks of bearing prohibitively expensive costs, the loser pays all principle hampers public interest environmental litigation, thereby constituting a barrier to access to justice.[124]

As the foregoing discussion has revealed, issues relating to cost, strict requirements of standing to sue, lack of adequate and effective remedies and delay in the administration of justice are inconsistent with the right of access to justice. To improve the quality of justice dispensed and the efficiency of the judiciary, judicial reform is necessary.

[122] Yaffa Epstein, *Approaches to Access: Ideas and Practices for Facilitating Access to Justice in Environmental Matters in the Areas of the Loser Pays, Legal Aid, and Criteria for Injunctions* (UNECE/Task Force on Access to Justice, 2011) 3.
[123] ibid.
[124] ibid.

3.4 A FRAMEWORK FOR EVALUATING ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN NIGERIA.

Drawing on the provisions of the Aarhus Convention and the literature above, a framework for evaluating access to information, public participation in decision-making and access to justice in environmental matters, will be developed. Through this framework, the extent to which the environmental impact assessment process recognises procedural justice rights, will be evaluated. It will serve as a benchmark against which the procedural legitimacy of the environmental impact assessment process in Nigeria, is assessed. Therefore, the model developed will produce a set of principles for determining the availability of environmental information relating to a proposed development, the scope of public participation allowed within the environmental impact assessment process, and the availability of review mechanisms to challenge decisions of the regulatory agency. To achieve this framework, the preceding subsections put forward a set of sub questions aimed at addressing the three important procedural justice issues which the following research questions seek to address:

- Are members of the public fully informed about proposed projects, environmental planning, and decision-making, throughout the environmental impact assessment process?
- Does the Environmental impact assessment process provide members of the public with opportunities to actively participate in decision-making and environmental governance?
- Are legal and administrative review procedures available under Nigeria's Environmental Impact Assessment law, for persons affected and/or interested in the outcome of a development project to challenge decisions of regulators?

This thesis posits that to constitute effective access to information, the public must be made aware of the existence of environmental information and educated on how it may be obtained, especially where such information is contained in electronic form. Environmental information must also be accessible in terms of the geographical location of the data, ease of obtaining physical access to the data and cost of obtaining the data. This is in furtherance of the requirement of the Aarhus Convention which provides that where a request for environmental information is made, unless a refusal of access is justified under one of the limited exceptions recognised by law, information must be made available upon request, to every person, within reasonable time and without the need for them to show an interest in the information. In addition to awareness and accessibility, meaningful access to information requires that environmental information be comprehensible and adequate. In this work therefore, effective access to information in Nigeria's environmental impact assessment process will be evaluated against these four criteria — (1) *awareness*, (2) *accessibility (including location, time, cost and ease of obtaining data)*, (3) *comprehensiveness of information available to the public and* (4) *sufficiency of the information.*

Regarding public participation, it is generally agreed that to promote the involvement of the public in policy formulation and decision-making, the provision of information to the public must be followed by opportunities for the public to respond to such information. It is also important that public participation in the environmental impact assessment process is not regarded as an event but a process, comprising of activities and actions throughout the duration of a project, which are aimed at both enlightening the public and obtaining their input.[125] In this work therefore, public participation involves the early and direct participation of members of the public (including opportunities for face-to-face communication) in the

[125] United States Environmental Protection Agency, 'Public participation Guide: Introduction to Public Participation' <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> accessed 27 September 2018.

making of decisions that affect them, resulting in a collective environmental decision-making process which recognises the equal participation of ordinary people and experts throughout the duration of a project or activity. This means, public participation will be adjudged effective only if: *(1) It is occurs early in the decision-making process (2) it is open to members of the public (3) it occurs through the adequate, timely and effective notification of the public, and (4) there is active public involvement in the decision-making process.*

Finally, the right of access to justice in environmental matters is guaranteed where administrative or judicial procedures are put in place to enable members of the public oppose acts and omissions of both private persons and public bodies which are inconsistent with environmental laws. In addition, these must be inexpensive procedures which deliver justice, within reasonable time, through the grant of adequate and effective remedies. In this work therefore, effective access to justice will be evaluated in terms of: *(1) scope of standing to sue (2) availability of review procedures and (3) effectiveness of review procedures (with respect to equity and fairness, time, cost, as well as the provision of adequate and effective remedies).*

3.5 CONCLUSION

Lee and Abbot have noted that 'the usefulness of access to information depends on the information being understood by the lay public; participation depends partly on being able to take part in dialogue; access to justice may depend on challenging technical information on its own terms.'[126] To reflect these principles, this chapter developed a framework for evaluating procedural justice by drawing on the provisions of the Aarhus Convention, legislation, case

[126] Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 The Modern Law Review, 80, 84.

law, and the literature. Having considered the scope of the access rights, it is necessary to determine how well the requirements set out above are met in Nigeria. In the light of this, the focus of chapter four of this thesis is discovering the extent to which the right of access to environmental information in Nigeria conforms to international best practice.

CHAPTER FOUR

ACCESS TO ENVIRONMENTAL INFORMATION AND ENVIRONMENTAL IMPACT ASSESSMENT IN NIGERIA.

4.1 INTRODUCTION

In chapter two of this thesis, it was established that procedural justice (as reflected in the rights of access to environmental information, public participation in decision-making and access to justice in environmental matters) is crucial to the progression towards environmental integrity and sustainable development.[1] This makes it necessary to determine how effectively these procedural justice rights are recognised and applied in the management of the environment and its resources in Nigeria.

As the first pillar of procedural justice, access to environmental information is a prerequisite for environmental awareness, environmental consciousness and sustainable management of resources.[2] Indeed, it has been observed that access to credible, up-to-date information makes for a better understanding of environmental problems and promotes the set-up of proper techniques and tools for their management.[3] To gain an understanding of the interpretation and application of this right in Nigeria, this chapter examines the relationship between the right of access to environmental information and the principle of democracy, and analyses the extent to which Nigeria's freedom of information legislation promotes access to information held by public institutions. It also focuses on determining how well Nigeria's environmental

[1] Text to n 96 in ch 2.
[2] Yemisi Babalola, Akinola Babalola and Faith Okhale, 'Awareness and Accessibility of Environmental Information in Nigeria: Evidence from Delta State' (2010) Library Philosophy and Practice 1, 5.
[3] Caroline Akporido and Josephine Onohwakpo, 'Access to Environmental Information by Women in Some Selected Oil Producing Communities in Nigeria' (2011) 2(1) Journal of Information and Knowledge Management 1.

impact assessment process recognises the public's right to access information relating to environmental assessments and discusses the problems of access to environmental information in Nigeria.

4.2 ACCESS TO INFORMATION AS A PRINCIPLE OF DEMOCRACY.

It is generally accepted that democracy as a concept, promotes majority rule and emphasizes the importance of the participation of the people in governance.[4] Since democratic decisions are largely based on the interests of the majority, the principle of democracy also embodies the political philosophy of liberalism and its ideas of equality and autonomy as a means of obviating the disregard of minority rights.[5] Given that they emphasize equal legal rights, treatment and political opportunity, as well as the people's liberty to determine and pursue their perception of good, the principles of equality and autonomy require that people are given an opportunity to partake in the making of decisions that affect them.[6] It is in line with this reasoning that Arnstein, has noted that participation of the governed is the mainstay of democracy.[7] It is without doubt therefore, that democratic ideals form the basis of participatory rights in environmental matters, of which access to environmental information is a vital aspect.[8] In democratic terms therefore, the focus of public participation is not merely voting rights; rather, public participation in the context of democracy encompasses the right to actively contribute to decision-making and the right to access justice within the ambit of

[4] Uzuazo Etemire, 'Public Access to environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3(1) Transnational Environmental Law 149.
[5] Marion Hourdequin, Peter Landres, Mark Hanson and David Craig, 'Ethical Implications of Democratic Theory for U.S Public Participation in Environmental Impact Assessment' (2012) 35 Environmental Impact Assessment Review, 37.
[6] ibid.
[7] Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Institute of Planners 216.
[8] Etemire (n 4) 150.

the law.[9] However, because the public cannot meaningfully contribute to the decision-making process where there is a paucity of information, information is referred to as the 'oxygen of democracy'.[10]

The right of access to information requires governments to act proactively and reactively towards the public, by providing information when requested, and collating, preparing, and communicating certain information about the environment to members of the public even where no request for such information has been made.[11] As a democratic State therefore, it behoves the Nigerian government to break barriers of non-disclosure and to set in motion, processes that facilitate access of members of the public to environmental information held by public institutions. This is necessary because, while democratic principles encourage participation of the public in decision-making processes, the nature and limit of participation is determined by law, and laid down in constitutional provisions, legislation, guidelines etc.

Having been linked to the democratic ideal, the right of access to information has been described as an aspect of freedom of expression —a fundamental human right, guaranteed by democratic States.[12] Nigeria's constitution does not expressly grant members of the public a right of access to environmental information. Unfortunately too, the right of freedom of expression which includes 'a right to receive and impart ideas and information without interference,'[13] has also not been formally recognised or judicially interpreted as guaranteeing access to information.[14] In the light of this, the right of access to information has been more suitably developed by legislation and forms an integral part of the Freedom of Information

[9] ibid, 149-150.
[10] Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (Article 19, 1999) 1.
[11] George Pring and Susan Noe, 'The Emerging International Law of Public Participation, Affecting Global Mining, Energy and Resource Development' in Donald Zillman, Alastair Lucas and George Pring (eds), *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) 29-30.
[12] ibid, 29.
[13] Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[14] Etemire (n 4) 157.

Act.[15] A proper assessment of the adequacy of the protection guaranteed by this Act is necessary.

4.3 FREEDOM OF INFORMATION IN NIGERIA

The enactment of Nigeria's Freedom of Information Act in 2011 marked the dawn of a new era of governmental transparency. This Act was enacted to, 'make public records and information more freely available, provide for public access to public records and information, [and] protect public records and information to the extent consistent with the public interest and the protection of personal privacy…'[16] While the Act does not distinguish between environmental information and all other types of information in the custody or possession of public institutions, its importance cannot be overemphasized.

The Freedom of Information Act recognises the right of every person (natural and juristic) to access or request information held by public officials, agencies or institutions, notwithstanding any provision in any Act, law or regulations to the contrary.[17] This means that the Freedom of Information Act takes precedence over the Official Secrets Act[18] and other laws that relate to access to information. However, the effect of this provision on statutes entrenched in the Nigerian Constitution, such as the Public Complaints Commission Act and the National Security Act— which grant the bodies they establish, power to withhold information from the public— may be disputable because the Constitution is supreme[19] and existing laws must conform to its provision.[20] Nevertheless, the Freedom of Information Act

[15] Freedom of Information Act 2011.
[16] ibid, long title.
[17] ibid, s 1(1)
[18] Official Secrets Act 2004.
[19] Constitution of the Federal Republic of Nigeria (n 13) s 1.
[20] ibid, s 315.

remains relevant to improving access to information. To discover how well this legal instrument meets international standards and improves the public's access to information relating to environmental impact assessments, an analysis of its provisions is undertaken below.

4.3.1 Principles of Freedom of Information: Does Nigeria's Legislation Comply with International Standards?

A set of nine key principles of freedom of information have been put forward as international standards against which to assess national law and determine how effectively it permits access to official information. These principles have been developed through extensive study, analysis and consultation conducted under the supervision of Article 19 organisation[21] as well as the work and experiences of collaborating organisations in various parts of the world.[22] The principles emphasize ideals of maximum disclosure, publication of information, open government, limited scope of exceptions, facilitation of access, affordable costs etc. which national and international regimes must conform to, to give effect to the right of access to information.[23] As these principles embody practical and effective freedom of information practices, they received the endorsement of the international community, and have been referred to in the reports of international organisations.[24] In this subsection therefore, a critical analysis of Nigeria's freedom of information legislation will be made, to determine

[21] Article 19 is a registered charity working to protect the public's right of expression and right to request and receive information held by governments, through the courts, international organisations and civil society. Article 19, 'Our Mission' <www.article19.org/about-us/> accessed 30 September 2019.
[22] Article 19 (n 10) 2
[23] ibid.
[24] ibid. These principles were endorsed by the Organisation of American States Special Rapporteur on Freedom of Expression and the United Nations Special Rapporteur on Freedom of Opinion and Expression in their reports of 1999 and 2000, respectively.

the extent to which it conforms with these principles, and by extension, to international best practice.

Principle 1 on maximum disclosure captures the basis of the right of freedom of information. It creates a presumption that except in limited specified circumstances, all information in the possession of public bodies are subject to disclosure.[25] Maximum disclosure recognises that access to information is a basic right, the enjoyment of which requires the criminalization of records destruction and a broad definition of 'information' and 'public bodies' in national legislation. The requirements of principle 1 appears to be met by Nigeria's Freedom of Information Act. The Act recognises the right of every person to access information,[26] and makes the destruction or alteration of records by public bodies a criminal offence.[27] The Act also defines public institutions to include 'private bodies providing public services, performing public functions and utilizing public funds.'[28] This takes care of situations where important public functions are undertaken by private bodies.

The meaning of private company in the context of the Freedom of Information Act has been the subject of debate and therefore, an issue for determination before the courts. In *Okoi Obono-Obla v China Civil Engineering Construction Corporation (CCECC) Nigeria Limited*[29] for instance, by judicial review, the court had to determine whether the defendant is a public institution as defined in the Freedom of Information Act, and from which the plaintiff can request and obtain information. The facts of the case are as follows.

[25] ibid, 2.
[26] Freedom of Information Act (n 15) s 1(1). The type of information that can be accessed is defined in broad terms in section 30(3) to include 'all records, documents and information stored in whatever form including written, electronic, visual image, sound, audio recording etc.'
[27] ibid, s 10.
[28] ibid, s 2(7).
[29] *Okoi Obono-Obla v China Civil Engineering Construction Corporation (CCECC) Nigeria Limited* (HC, 21 January 2014).

The plaintiff's request for information concerning the award of a road rehabilitation contract by the Federal Government of Nigeria to the defendant was not dealt with. After the expiration of the time within which the request for information was to be granted, the plaintiff applied to the court for a judicial review of the issue, pursuant to the provisions of section 20 of the Freedom of Information Act. The defendant challenged the jurisdiction of the court to entertain the matter on the grounds that, unlike administrative bodies and tribunals, being a private company, it is not subject to judicial review. Further, the defendant contended that as a private company 'which does not utilize public funds, provide public services or perform public function… and in which the government has no controlling interest,' it does not qualify as a public institution under the Freedom of information Act.

Rejecting the defendant's argument, the court held that since the subject matter of the contract is the rehabilitation of roads for the convenience and benefit of the public, carried out on behalf of the government, the defendant's argument that it is not a public institution is weak.[30] In addition, as payment for the contract cannot be made without the authorization of the legislative arm of government (the National Assembly), payments made to the defendant in respect of the contract amounts to a utilization of public funds as opposed to mere consideration for services rendered.[31] The court's willingness to interpret this provision widely is highly commendable.

The situation was no different in the case of *The EIE Project Limited/GTE v Coscharis Motors Limited and the Attorney General of the Federation*[32] where the court had to determine whether a request for information in respect of the purchase of two bullet proof BMW vehicles by a private company on behalf of the Federal Government of Nigeria was

[30] ibid.
[31] ibid.
[32] *The EIE Project Limited/GTE v Coscharis Motors Limited and the Attorney General of the Federation* (FHC, 28 April 2015).

wrongfully denied. The court upheld the plaintiff's rights of access to the information requested on the grounds that in purchasing the vehicles, the applicant enjoyed a waiver of import duty- a privilege exclusive to public institutions.[33] It therefore held the plaintiff's request was a request for information on the purchase of vehicles made by a public institution using public funds, for use in public functions.[34] The denial of access to the information was wrongful. Remarkably also, the privatization of a public service does not affect a person's right of access to information from a private institution.[35]

In accordance with principle 2 of the freedom of information principles which places an obligation to publish on public bodies, Nigeria's freedom of information legislation requires public institutions to publish information. It lists out the information that public bodies must publish,[36] and requires a widespread dissemination of such information to the public.[37] The Act also promotes access to information through public education and other mechanisms[38] set up to address official secrecy. In so doing, it satisfies the requirement of principle 3 of the principles of freedom of information.[39] It is also remarkable that in accordance with principles 8[40] and 9[41] of the freedom of information principles, the Freedom of Information

[33] ibid.
[34] ibid.
[35] For instance, in *Public and Private Development Centre Limited (PPDC) (for itself and on behalf of Nigeria Contract Monitoring Coalition) v Power Holding Company of Nigeria (PHCN) and Attorney General of the Federation* (FHC, 1 March 2013), the jurisdiction of the court to entertain the matter was not in issue because the 1st defendant carries out a public service (the distribution of electricity) notwithstanding its status as a private company.
[36] Freedom of Information Act (n 15) s 2(3). Some of these include 'a list of all classes of records under the control of the institution, a description of documents containing final opinions including concurring opinions
[37] ibid, s 2(4).
[38] For instance, section 13 of the Freedom of Information Act provides that 'every government or public institution must ensure the provision of appropriate training for its officials on the public's right to access information or records held by government or public institutions, as provided for in this Act and for the effective implementation of this Act.'
[39] Article 19 (n 10) 4-5. Principle 3 encourages the use of promotional activities such as trainings as a means of ensuring a cooperative civil service.
[40] The gist of principle 8 is that maximum disclosure is key, and therefore, laws that do not permit maximum disclosure must be amended or repealed.
[41] Principle 9 protects whistle-blowers from all forms of sanctions arising from their release of information on wrongdoing.

Act requires all other legislation on publicly-held information in Nigeria to be subject to its provisions[42] and provides protection for whistle-blowers.[43]

International best practice also requires that all requests for information from public bodies should be granted unless a refusal is justified under one or more of the *limited* exceptions recognised by law.[44] More importantly, a refusal is unfounded unless the public authority can demonstrate that the information satisfies the requirements of a strict three-part test: '(1) the information must relate to a legitimate aim listed in the law, (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information.'[45] Therefore, it is not enough that the information requested falls within an exemption, the public authority must weigh the interest to be served in non-disclosure against the public interest in having the information, in order to appropriately determine whether the exemption can be put into effect.[46] Where there is a disagreement with the public authority's assessment, an aggrieved applicant may seek redress by way of judicial review.[47]

To meet this requirement, Nigeria's legislation lists out exceptions by which public authorities may justify a refusal to grant information. These exceptions relate to national security,[48] law enforcement,[49] public or individual safety,[50] privacy,[51] commercial and other

[42] Freedom of Information Act (n 15) s 1.
[43] ibid, s 27.
[44] Principle 4 of the Principles on Freedom of Information Legislation. Article 19 (n 10) 6.
[45] ibid.
[46] Etemire (n 4) 168.
[47] Sections 1(3), 2(7) and 20 of the Freedom of Information Act give persons whose request for information have been refused a right to approach the court for a review of the public authority's decision.
[48] Freedom of Information Act (n 15) s 11(1). An applicant may be denied access to information which will be injurious to the international affairs or defence of the Federal Republic of Nigeria if disclosed. Similarly, section 12(1)(b) is to the effect that a public institution may refuse to disclose information which is injurious to the security of penal institutions.
[49] ibid, s 12(1).
[50] ibid, s 12(3). Information which a public institution has reasonable grounds to believe will aid the commission of an offence may be denied.
[51] ibid, s 14(1). There may be non-disclosure of personal information unless the person to whom it relates consents to the disclosure, or the information is publicly available.

confidentiality,[52] professional privileges[53] etc. and closely resemble the legitimate aims which may justify non-disclosure of information under section 4(4) of the Aarhus Convention. However, what is most important is that these exceptions are sufficiently narrow to ensure broad access to information, and precise enough to prevent public authorities from restricting access to information and negating the public interest test through the arbitrary exercise of discretion.[54].

A remarkable feature of Nigeria's Freedom of Information legislation is that in accordance with international best practice, the above exceptions are not absolute. Indeed, exemptions to disclosure are subject to a public interest override, which ensures that 'where the public interest in disclosing the information outweighs whatever injury the disclosure would cause,'[55] the exemption is inapplicable. The application of the public interest test is well illustrated in the case of *Boniface Okezie v Central Bank of Nigeria*[56] where the Federal High Court of Nigeria had to decide whether the plaintiff had been wrongfully denied information on:

(a) The amount of legal fees paid and to be paid by the defendant to 3 named firms of legal practitioners for the enforcement of its banking reform processes and;
(b) The total cash and properties recovered from a named ex- bank chief executive, and the whereabout of same.

The court considered the defendant's argument that the information requested relate to its contractual relationship with legal practitioners which is exempted from disclosure under the Freedom of Information Act. In reaching its decision, the court examined sections 15(1)(b) of

[52] ibid, s 15(1). The Act protects trade secrets and commercial and third- party contractual information.
[53] ibid, s 16. Information that is subject to privileges such as legal practitioner- client privileges, health worker - client privileges etc. falls within the exceptions to access to information.
[54] Etemire (n 4) 168-169.
[55] ibid, ss 11(2), 12(2), 14(3), 15(4) and 19(2) all provide the public interest limitation.
[56] *Boniface Okezie v Central Bank of Nigeria* (FHC, 22 February 2013).

the Freedom of Information Act which exempts from release, information which disclosure will 'interfere with contractual and other negotiations of a third party' and section 16(a) which protects legal practitioner-client privileges and upheld the plaintiff's case in part. [57]

With regards to the first issue, the court refused to grant the plaintiff access to the information requested, on the grounds that information on legal fees is exempted from disclosure under sections 15(1) (b) and 16(a). Further, it held that although the exemptions in sections 15(1)(b) and 16(a) are subject to the public interest override, there was no evidence of exceptional circumstances such as mismanagement of funds or misconduct on the part of the defendant to persuade the court to give way to the public interest, over and above the duty of confidentiality. On the other hand, in respect of the second issue, recognising that it is in the public interest that assets recovered and the whereabouts of same are disclosed, the court granted the relief sought.

Notwithstanding the foregoing, Nigeria's Freedom of Information Act deviates from best practice by including an exception that directly impedes the public right to access information. Section 15(2) authorizes public institutions to 'deny disclosure of a part of a record if that part contains the result or product of environmental testing carried out by or on behalf of a public institution.' This means, it is immaterial whether an interest is affected, as the public institution has power to approve or refuse to disclose such information.[58] Etemire has rightly criticized this provision on the grounds that since the scope of environmental testing is not defined by the Act, a wide discretion is given to public authorities which could be used arbitrarily.[59]

[57] ibid.
[58] Freedom of Information Act (n 15) s 15(2).
[59] Etemire (n 4) 170.

The Act has also been greatly criticized for the broad scope of the exemptions it recognises. Apuke has observed that the exemption clauses contained in the Act far exceed sections guaranteeing access to information, thereby leaving room for corrupt public officers to use them for improper purposes.[60] Worse still, not all exemptions in the Act are subject to the public interest override.[61] It is hoped that the inclusion of processes that facilitate access to information in the Act can help cure the defects created by these exemptions.

Remarkably therefore, in accordance with principle 5 of the principles on freedom of information legislation, the Freedom of Information Act makes it possible for an applicant to approach a court for review, where an application for access to information has been denied by a public institution.[62] However, it must be noted that Principle 5 favours a three-level process for deciding requests for information — complaints must first be made to the public authority concerned, before an appeal to an independent administrative body is made and finally an appeal may lie to a court or tribunal, where necessary. Nigeria's Freedom of Information Act could have more appropriately fulfilled the requirements of principle 5 by first requiring public authorities to have internal procedures for dealing with complaints which relates to their handling of information requests, before granting applicants a right of appeal to an independent administrative body whose decisions can then be challenged before a court of law. In the United Kingdom for instance, by virtue of section 50(1) of the Freedom of Information Act,[63] a complaint can be made to the Information Commissioner by any person who has made a request for information to a public authority which has not been properly dealt with, in accordance with the provisions of the Act. However, the Information

[60] Oberiri Apuke, 'An Appraisal of the Freedom of Information Act (FoIA) in Nigeria (2017) 13(1) Canadian Social Science 40.
[61] A good example is found in section 17 of the Freedom of Information Act which deals with information containing course and research materials made by faculty members.
[62] Freedom of Information Act (n 15) ss (1)3, 7 and 20. These provisions make it possible for an applicant to challenge a decision of a public institution before a law court.
[63] Freedom of Information Act 2000.

Commissioner is not entitled to decide on the matter unless such person has exhausted the complaint procedure provided by the public authority.[64] Where necessary, an appeal may be made to the Tribunal by the complainant or public authority, against the decision of the Information Commissioner.[65]

Nigeria's legislation further contradicts international best practice because contrary to principle 6, individuals may be discouraged from requesting information because of the costs they may have to bear. While it is true that under the freedom of information Act, fees are 'limited to standard charges for document duplication and transcription where necessary,'[66] as Etemire has observed, the fact that an applicant must bear the whole cost of duplication and transcription notwithstanding how excessive or unreasonable it may be, is in itself a barrier to access to information.[67] Therefore, where the information requested forms part of a large record, the cost of transcription or duplication of same may be manifestly unreasonable. This contradicts the provisions of the Aarhus Convention and the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters[68] which call for a 'reasonable amount'[69] and 'affordable access to information'[70] respectively. Clearly, despite the achievements of the Freedom of Information Act, it is not without its problems.

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[64] ibid, s 50(2)(a)
[65] ibid, s 57(1).
[66] Freedom of Information Act (n 15) s 8.
[67] Etemire (n 4) 166.
[68] The Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters was developed by the Governing Council of the United Nations Environment Programme in decision SS.XI/5 of 26 February 2010 to provide guidance for States on how best to implement principle 10 of the Rio Declaration.
[69] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (1998) 38 ILM 517, art 4(8).
[70] The Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, guideline 1 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjS3LeEmL3nAhULZcAKHYdtCkwQFjABegQIAxAB&url=https%3A%2F%2Fwedocs.unep.org%2Frest%2Fbitstreams%2F46803%2Fretrieve&usg=AOvVaw3lKiE_PVFlLjszLJ-Ool7v> accessed 27 March 2017.

4.4 ACCESS TO ENVIRONMENTAL INFORMATION AND ENVIRONMENTAL IMPACT ASSESSMENT IN NIGERIA.

The conduct of impact assessments and the disclosure of information about the effects of corporate activities on the general health and wellbeing of people, are vital aspects of the protection of human rights. It is not surprising therefore that lack of access to environmental information has been partly responsible for conflicts between communities, government and private companies in the Niger-Delta region of Nigeria, where vulnerable communities continue to suffer the adverse impact of petroleum exploration and production activities.

4.4.1 Who may Receive Information on Environmental Impact Assessment in Nigeria?

Various sections of Nigeria's Environmental Impact Assessment Act require the regulatory agency[71] to make information provided as part of the environmental impact assessment process, available to the public. Under sections 19(2) and 21(3) of Nigeria's Environmental Impact Assessment Act for instance, the Agency is required to provide the public with screening reports and records filed in the public registry respectively. In addition, to fulfil its access to information obligation, the Environmental Impact Assessment Act established a public registry to facilitate the public's access to records of environmental assessments of all projects.[72] The public registry holds all records and information which have been made, collected or submitted in relation to the environmental assessment of projects including reports of environmental impact assessments undertaken, comments filed by the public and records prepared by the regulatory agency.[73] There is no doubt therefore that, as with the

[71] The regulatory agency is the National Environmental Standards and Regulations Enforcement Agency (NESREA).
[72] Environmental Impact Assessment Act 2004, s 57 (1).
[73] ibid, s 57(3).

Aarhus Convention, those entitled to receive environmental information are members of the public.

However, the obligation to provide the public with access to information under the Aarhus Convention goes beyond the collection and dissemination of information as is the case under the Environmental Impact Assessment Act. It in fact includes a duty to provide information to the public where a request for same is made. It is commendable that Nigeria's Freedom of Information Act also recognises the right of every person to access or request for information which is held by public officials or bodies without the need to show an interest in the information.[74] This has gone a long way to improving the rights of members of the public to access information in Nigeria. Therefore, according to statistics in the official website for the Freedom of Information Act, the total number of requests for information received in Nigeria in the 2013- 2015 fiscal years are 1183, 314 and 217, with 48, 35 and 37 refusals recorded respectively.[75] While the contribution of the Freedom of Information Act to the realization of the right of access to information in Nigeria is not doubt, certain questions regarding the accessibility of environmental information (in terms of cost, location etc.) and the adequacy of information available to members of the public arise. These issues are discussed below.

4.4.2 Is Information on Environmental Impact Assessment Accessible in Nigeria?

It has been established that one way in which Nigeria's EIA Act complies with the access to information obligation of the Aarhus Convention is by requiring the regulatory agency to provide the public with information concerning environmental impact assessment. In

[74] Freedom of Information Act (n 15) s 1.
[75] FOIA Nigeria, 'Reports' http://www.foia.justice.gov.ng/index.php?option=com_content&view=article&id=14&Itemid=118&lang=en accessed 11 August 2019.

addition, the Freedom of Information Act makes it possible for members of the public to exercise their right to request for environmental information. However, a crucial question that arises in this respect relates to the accessibility of environmental information in terms of the location of the information, cost of obtaining information, time and ease of obtaining the information required.

One way in which governments ensure that environmental information is made available to the public is through environmental impact assessment registries. As noted above,[76] Nigeria's Environmental Impact Assessment Act utilises this mechanism as it establishes a public registry to ease public access to records that relate to environmental assessment.[77] Indeed, the Act requires that before the regulatory agency makes a decision in respect of a project, it must give the public a chance to scrutinize and comment on the screening report and any record filed in the public registry.[78] Given the vital role of public registries, it is important to discover how effectively this mechanism facilitates access to environmental information for members of the public in Nigeria as well as what constitutes good practice in this regard.

Hanna and Noble have noted that a perfect registry keeps all information concerning environmental assessments, irrespective of the stage of the application and the review process.[79] Thus, it should hold information from the initial stages of the project (such as notice of intent and terms of reference), as well as further information like the environmental assessment application, notice of hearings, EIA report, supporting documents and submissions filed by the public as soon as they are completed.[80] The decision and reasons for the decision of the relevant body, monitoring and follow-up requirements and the results of

[76] Text to n 72.
[77] Environmental Impact Act (n 72) s 57.
[78] ibid, s 22(3).
[79] Kevin Hanna and Bram Noble, 'The Canadian Environmental Assessment Registry: Promise and Reality' (2011) 25(4) UVP-Report 222.
[80] ibid.

the monitoring process should also be included.[81] Hanna and Noble's picture of an ideal registry is an organic and flexible institution, flourishing through the availability of accessible and comprehensible project information, complete and available to all.[82]

In principle, the public registry established under Nigeria's EIA Act possesses the basic features necessary for the proper functioning of public registries for environmental assessments. The requirement that public registries must provide information has been met under the EIA Act wherein the public registry is charged with the duty of holding 'all records and information produced, collected and submitted with respect to the environmental assessment of a project,'[83] including reports of the environmental assessment, comments filed by the public and records prepared by the regulatory agency in relation to the environmental assessment of a project.[84] This reflects good practice.

However, the effectiveness of this provision in practice is open to question, as the issue of accessibility remains an area of significant weakness. For instance, with reference to the West African Gas Pipeline (WAGP) project, Lawal, Bouzarovski and Clark observed that despite the conduct of an environmental impact assessment, it was only through protests and campaigns by local communities and non-governmental organisations that the environmental impact assessment report of the project was made available to the public.[85] It is in view of the shortcomings in this regard that Olugbenga, Olumide and Adeola have expressed the view

[81] ibid.
[82] ibid.
[83] Environmental Impact Assessment Act (n 72) s 57(3)
[84] ibid.
[85] Akeem Lawal, Stefan Bouzarovski and Julian Clark, 'Public Participation in EIA: The Case of the West African Gas Pipeline and Tank Farm Projects in Nigeria' (2013) 31(3) Impact Assessment and Project Appraisal 226, 229.

that 'public access to information through the public registry is yet to be honoured in compliance since the commencement of the EIA Act in 1992.'[86]

Even where information on environmental impact assessments are held at the public registry, their accessibility may still be in issue owing to the location of the information and the cost of obtaining same. As the public registry established under the EIA Act is located in the Federal Capital Territory, Abuja - Nigeria, it is arguable that information on environmental impact assessments contained therein is not easily accessible to members of the public residing in the thirty five other States that make up the country. Requests for information made pursuant to the Freedom of Information Act on the other hand, are not subject to this limitation.

In addition, the cost of obtaining information on the environment may pose problems to the effective realisation of the right of access to information. As earlier noted,[87] although the fees payable in respect of a request for information under the Freedom of Information Act is limited to charges for duplication and transcription of documents,[88] the cost of obtaining information may still constitute a barrier to access to information where fees are unreasonable. In line with article 4(8) of the Aarhus Convention therefore, fees associated with requests for information should be limited to a fair and reasonable amount to accommodate situations where information requested is to be obtained from a large number of records.

In relation to time, it is commendable that, regarding access to information under the Freedom of Information Act, time is of the essence. A public institution is generally required to decide on a request for information within 7 days,[89] unless certain exceptions requiring an

[86] Fatona Olugbenga, Adetayo Olumide and Adesanwo Adeola, 'Environmental Impact Assessment (EIA) Law and Practice in Nigeria: How Far? How Well?' (2015) 1(1) American Journal of Environmental Policy and Management 11, 13.
[87] Text to n 66.
[88] Freedom of Information Act (n 15) s 8.
[89] ibid, s 4

extension of no more than 7 days apply.[90] A failure to grant access to information requested within the time specified amounts to a denial of access,[91] which if wrongful, is an offence, and attracts a fine of N500,000 (five hundred thousand naira)[92] on conviction.[93]

4.4.3 Environmental Information in Nigeria: How Adequate?

The exchange of information and notification of organs and persons about the likely effects of proposed projects is well recognised in the EIA Act as a key objective of environmental impact assessments.[94] But beyond bold legislative proclamations, is there evidence of the development of procedures that facilitate the flow of information in practice? Are members of the public informed of the availability of information concerning the environmental assessment of projects? Do members of the public receive sufficient information about environmental impact assessments?

It is regrettable that the situation in Nigeria is such that most corporations neither publish information on environmental monitoring (since they are not required by law to do so), nor do they readily disclose information relating to the environmental and social impacts of their activities, where environmental assessments have been undertaken.[95] Hence, a report by Amnesty International has revealed (and rightly so) that local people in the Niger Delta region of Nigeria are not often provided with enough information on the benefits and risks of projects during the environmental impact assessment process.[96]

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[90] ibid, s 6
[91] ibid, s 7(4)
[92] £1,050 (one thousand and fifty pounds).
[93] Freedom of Information Act (n 15) s 7(5).
[94] Environmental Impact Assessment Act (n 72) s 1(3).
[95] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta Region* (Amnesty International Publications, 2009) 61.
[96] ibid, 57.

This issue was brought before the African Commission on Human and People's Rights in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[97] wherein the applicants alleged that the Nigerian Government had through the Nigerian National Petroleum Corporation (NNPC), been directly involved in the production of oil in the Ogoni Community, which caused serious environmental and health problems. Further, it was alleged that the respondents withheld information about the impacts of its activities from the Ogoni people and denied the host community, opportunities to take part in the making of decisions affecting them.[98] In reaching a decision on this issue, the court recognised the right to a satisfactory environment and the right to enjoy the best attainable state of physical and mental health guaranteed through Articles 24 and 16 of the African Charter on Human and Peoples' Rights[99] respectively, and held that compliance with these provisions require that the Nigerian Government provides access to environmental information, especially to communities imperilled by dangerous activities and hazardous materials.[100]

In the SERAC case above, the jurisdiction of the African Commission on Human and People's Rights was invoked by virtue of Article 30 of the African Charter on Human and People's Rights[101] adopted by the African Union in 1981 to 'promote human and peoples' rights and ensure their protection in Africa'. Being the 'normative framework of the African human rights system',[102] the African Charter is a mechanism through which civil, political, economic, social and cultural rights are guaranteed.[103] The case of *Social and Economic*

[97] *Social and Economic Rights Action Centre and Another v. Nigeria* [2001] AHRLR 60.
[98] ibid, para. 4
[99] This Charter has been ratified by Nigeria.
[100] Social and Economic Rights Action Centre and Another v Nigeria (n 97) para. 53.
[101] African Charter on Human and People's Rights (Banjul Charter), (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.
[102] Morne van der Linde and Lirette Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3 African Human Rights Law Journal 167, 170.
[103] Article 22(1) of the African Charter on Human and People's Rights for instance, provides that 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and

Rights Action Centre (SERAC) and Another v Nigeria remains paramount because it asserts the justiciability of socio-economic rights, which, under section 6(6)(c) of the Constitution of the Federal Republic of Nigeria cannot be subject to trial in a court of law.

Besides the lack of awareness about the availability of information, the scope of information that the public is entitled to receive has also been called to question. The key issue here is determining when exceptions to the right of access to information apply. The fact that exceptions under the Environmental Impact Assessment Act and the Freedom of Information Act are subject to the public interest override raises questions such as, what is the public interest? How do we accurately weigh the public interest against the injury to be caused by the disclosure of information?[104] This therefore means that in certain cases, the scope (and adequacy thereof) of information members of the public receive will differ, depending on the interpretation of public interest and of course, the weight attached to the public interest, both of which are subjective.

4.5 PROBLEMS OF ACCESS TO ENVIRONMENTAL INFORMATION IN NIGERIA

Several international agreements have established a link between regulatory measures and the availability of environmental information. In the Rio Declaration,[105] Agenda 21,[106] the Aarhus Convention[107] and various other Multilateral Environmental Agreements, this right

identity and in the equal enjoyment of the common heritage of mankind.' Under Article 22(2) States also have an individual and collective duty to ensure that the right to development is guaranteed.

[104] Ayo Ojebode, 'Nigeria's Freedom of Information Act: Provisions, Strengths, Challenges' (2011) 4(2) African Communication Research 267, 280.

[105] Rio Declaration on Environment and Development (1992) 31 ILM 874.

[106] Agenda 21: Programme of Action for Sustainable Development UN CAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf. 151/26 (1992).

[107] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (1999) 38 ILM 517.

has gained currency as one of the key drivers of environmental democracy. The past decades have in fact witnessed ardent calls for better public access to environmental information.

Nigeria is a signatory to several multilateral environmental agreements, many of which it has ratified. These international regimes, although greeted with enthusiasm before the international community, do not produce any meaningful outcome nationally as the legal mechanism necessary to give domestic effect to them are not often put in place.[108] Consequently, Nigeria's legislation is hardly ever reflective of international best practice; and until recently, environmental governance in Nigeria remained practically engulfed in the shadows of secrecy.[109]

Besides legislative incompetence, another major issue affecting access to environmental information is administrative secrecy. Administrative secrecy is inconsistent with democratic ideals which emphasize popular sovereignty and all forms of civic participation. This is because it produces varying levels of knowledge, and therefore, of power, restricting the capacity of citizens and their elected representatives to make fully informed decisions.[110] A contrary argument however, is that although absolute openness and full access to information are extremely useful concepts in theory, they are irreconcilable with efficient and pragmatic approaches to governance, in practice.[111] Kramer for instance, argues that 'complete transparency is unsustainable as it will paralyze initiatives, make a problem-oriented governmental policy difficult, if not impossible, and will reduce administrative creativity.'[112]

[108] The effect of section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is that treaties to which Nigeria is a party do not have the force law except by legislative enactment giving domestic effect to them.
[109] Etemire (n 4) 149.
[110] Ludwig Kramer, 'Transnational Access to Environmental Information' (2012) 1(1) Transnational Environmental Law 95.
[111] ibid, 95-96.
[112] ibid, 96.

Notwithstanding these arguments, freedom of information remains an essential right of every person, guaranteed by legislation in most legal systems.[113]

With reference to Nigeria, Etemire has attributed the problems affecting access to environmental information in Nigeria (and rightly so) to administrative secrecy instituted and sustained by the abundance of colonial laws such as the Evidence Act,[114] Public Complaints Commission Act,[115] Statistics Act,[116] Criminal Code Act[117] etc. which were in force in the country, post-independence, and continue to operate in the present democratic regime.[118] Under the Evidence Act for instance, the Minister or Governor has power to oppose the production of documents or call for the exclusion of oral evidence in any proceedings, where he is satisfied that it is in the public interest to do so.[119] Similarly, public officers cannot be compelled to disclose information made known to them in official confidence, if such disclosure will affect the public interest.[120] Clearly, a wide discretion is given to public officers and this could be used for improper purposes. The only exception to this is that by order of court, such information can be disclosed to a judge alone, who can receive it in evidence in private, where it is deemed necessary to do so.[121]

Also worthy of note is the provision of section 1 of the Official Secrets Act[122] which makes it an offence for any person (including public officers) to transmit classified matter without the authorization of the government; and for such classified matter to be obtained, reproduced or kept by any person without the necessary authorization. Worse still, under this Act, classified

[113] In the United Kingdom for instance, the Freedom of Information Act, 2000 gives people the right to access recorded information held by public bodies.
[114] Evidence Act 2011.
[115] Public Compliant Commission Act 2004.
[116] Statistics Act 2004.
[117] Criminal Code Act 2004.
[118] Etemire (n 4) 157.
[119] Evidence Act (n 114) s 243.
[120] ibid, s 191.
[121] ibid.
[122] Official Secrets Act (n 18).

matter is defined as information which according to the security classification in use is not to be disclosed to the public and which will adversely affect national security if so disclosed.[123] Again, Etemire has rightly criticised this definition and described it as 'wide and vague,' functioning only to restrict the disclosure of virtually all government information.[124] Indeed, this broad definition of classified matter has been capitalized on and inappropriately utilized to conceal information about corrupt practices from the public.[125]

In Nigeria, almost all government information is designated 'Top Secret' and as such not readily accessible, even where such information is part of a newspaper publication which has already been made available to the public.[126] This unhealthy culture of administrative secrecy has the capacity to directly contradict legislative intent. Unsurprisingly, while the long title of the Official Secrets Act clearly describes it as an Act aimed at securing public safety, it functions to impede the public's right to environmental information, through which they are made aware of the state of their health and safety and which ensures that they are able protect themselves from harm. One argument in favour of secrecy is that the general rule in favour of access to environmental information is subject to exceptions where disclosure of such information will be detrimental to certain legitimate interests.[127] Therefore, in accordance with this reasoning, while it is generally agreed that broad access to environmental information is desirable as it makes for a more informed and better society, restrictions may sometimes be necessary. In the United States for instance, in the aftermath of the terrorist attack of September 11, 2001, information on the environment, public health and physical

[123] ibid, s 9.
[124] Etemire (n 4) 157.
[125] Sam Olukoya, 'Rights-Nigeria: Freedom of Information Bill Proves Elusive' Inter Press Service, 21 June 2004 <http://www.ipsnews.net/2004/06/rights-nigeria-freedom-of-information-bill-proves-elusive/> accessed 1 March 2018.
[126] ibid.
[127] Richard Dahl, 'Does Secrecy Equal Security? Limiting Access to Environmental Information' (2004) 112(2) Environmental Health Perspectives A104, A107.

infrastructure which featured in the websites of government agencies were removed for fear that the vulnerable sectors identified in these resources could be easily targeted for future attacks.[128] Clearly, secrecy may be beneficial in the interest of sensitive issues such as national security. However, the key questions remain, what is the cost of non-disclosure? Is non-disclosure of environmental information without its problems?

What is most important is striking the right balance between protection from terrorism and the need to have a fully informed public that can safeguard themselves against the harmful activities of their neighbours.[129] A good way of achieving this is by identifying these exceptions clearly and definitely in the relevant legal instruments and applying them only after carefully weighing the harm to be caused by disclosure against the public interest in accessing such information.[130] Indeed, it has been recognized that with respect to the Aarhus Convention, the capacity of the Compliance Committee to weigh national law and administrative decisions against the tenets of the Convention is useful in striking the right balance between a genuine need for administrative secrecy and the public's right to information.[131] The Freedom of Information Act satisfies this requirement to the extent that it lists circumstances in which public institutions may deny an application for information[132] while also recognizing that 'an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.'[133] However, because of the wide scope of exceptions it recognises, the Act falls short.

Finally, the lack of access to information relating to environmental impact assessment is attributable to regulatory failure. One reason for this is incompetence on the part of the

[128] ibid, A104
[129] ibid, A107.
[130] European Environment Agency, 'Access to Environmental Information: Key Elements and Good Practices' <https://www.eea.europa.eu/publications/92-9167-020-0/page007.html> accessed 3 March 2018.
[131] Kramer (n 110) 104.
[132] Freedom of Information Act (n 15) s 12(1).
[133] ibid, s 12 (2). Similar provisions are contained in ss 14(3), 15(4) and 19(2).

regulator. For instance, while section 56 of the EIA Act requires the regulatory agency to keep a statistical summary of all environmental assessments it conducts or directs, all procedures adopted and all decisions made in connection with the effect of the project after the conclusion of the project, it has been observed that this is not the case in practice; hence, the regulatory agency 'legitimizes concealment of information as a tactical means to cover-up its failings, infraction of regulations and corruption in respect of the EIA process.'[134] Clearly, the reality of the Nigerian situation is that while section 56 of the EIA Act is consistent with the principle of freedom of information, access to environmental information concerning the conduct of environmental impact assessment is still more or less a herculean task.

4.6 CONCLUSION

Environmental health is put at risk where there are restrictions to the flow of information.[135] Sadly, like many other jurisdictions, the provision of access to timely and full information about projects in Nigeria has proven to be problematic— efforts towards according the necessary protection to the right of access to information are unsatisfactory. In theory, the Environmental Impact Assessment Act and the Freedom of Information Act provide an excellent framework for the dissemination of information concerning environmental decisions, but what counts is how the legal requirements set up by legislation, fare in practice. Indeed, if not properly implemented, legislation is useless.[136]

The foregoing discussion has revealed that although there are some areas of good practice, there are also fundamental flaws in the processes utilized by the legal and regulatory regime

[134] ibid 14.
[135] Ken Silver, 'Access to Environmental Information' (2004) 112 (8) Environmental Health Perspectives A458.
[136] David Banisar, 'Freedom of Information around the World 2006: A Global Survey of Access to Government Information Laws' (Privacy International, 2006) 26.

for access to information in Nigeria. Notwithstanding its shortcomings, there is no doubt that the enactment of the Freedom of Information Act is a step in the right direction. In the light of the importance of the right of access to information, there is need for a proper implementation of legislation as well as an amendment of flawed legislative provisions, to bring them in conformity with international best practice.

Transparency in governance can only be achieved where governments depart from internal cultures of secrecy, delay, poor record keeping, misuse of discretion etc. Thankfully, activities of civil societies and members of the public have proven to be effective in securing access to information. In Sweden for instance, modern environmental movements brought about positive changes in policy and public awareness just as it achieved remarkable results in the United States.[137] In the United States, as part of efforts to address environmental justice concerns, federal agencies are required to include a detailed statement of the impact of proposed actions on the environment as well as other adverse environmental effects which will necessarily arise from the proposed action.[138] Indeed, the relationship between regulatory actions and the provision of information can be traced to early responses to environmental movements.[139] It is necessary therefore, for members of the public in Nigeria, to actively test the efficacy of the legislation designed for their protection.[140]

Since access to information without, participation in decision-making and access to justice does nothing for the realization of procedural justice and sustainable development, the next chapter will examine public participation in the environmental impact assessment process in Nigeria.

[137] Paul-Cristinel Verestuic and Oana-Maria Tucaluic, 'Aspects Concerning Public Access to Environmental Information' (2015) 6 Quaestus Multidisciplinary Research Journal 267, 269.
[138] National Environmental Protection Act 42 U.S.C 4332, s 102(2)(c).
[139] Verestuic and Tucaliuc (n 137) 269.
[140] Banisar (n 136) 26.

CHAPTER FIVE

PUBLIC PARTICIPATION IN DECISION-MAKING AND ENVIRONMENTAL IMPACT ASSESSMENT IN NIGERIA.

5.1 INTRODUCTION

It is common knowledge that to promote transparency, inclusiveness, and accountability in environmental governance, three procedural justice rights have emerged as key principles of good environmental governance. Having considered the legislative implementation and practical application of the right of access to information in Nigeria in chapter four above, this chapter discusses the scope and relevance of public participation in environmental decision-making in the context of environmental impact assessments. It sets out to discover best practice for public participation as put forward in the literature, legal instruments, and guidance policy documents; and examines the effectiveness of public participation in the environmental impact assessment process in Nigeria by drawing on the successes, challenges and shortcomings recorded. Ultimately, this chapter focuses on determining the efficacy of public participation in the environmental impact assessment process.

5.2 THE IMPORTANCE OF PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING.

It is now generally agreed that public participation is a vital aspect of the environmental impact assessment process. Indeed, in order to promote equity, justice and collaboration, involving the affected and interested public in environmental decision-making processes, is

of utmost importance.[1] The role of public participation in environmental impact assessments has been recognised by the International Association for Impact Assessments (IAIA), which described it as key to good governance and the empowerment of local people and communities.[2] So integral is public participation that Wood has pointed out that 'EIA is not EIA without consultation and public participation.'[3] One reason for this is that through public participation, stakeholders (including the public, project proponents, decision-makers and the regulator) are educated and informed about a proposed project and its effects. The process ensures that interested persons are instrumental in the planning of activities that affect them, raising concerns and identifying priorities.[4] Its purpose therefore is to ensure that the concerns of stakeholders about potentially negative effects of a proposed project are identified at an early stage of project development, considered and recorded in the EIA report.[5] It is therefore vital that opportunities for participation are available before project planning and decision-making,[6] in order to minimize the likelihood of adverse environmental effects and increase public trust in the environmental assessment process and its outcome.[7] Nevertheless, public participation remains useful both during the formulation of a project and after a decision is reached.[8]

[1] Pierre André, Bert Enserink, Desmond Connor and Peter Croal 'Public Participation International Best Practice Principles' (2006) Special Publication Series No. 4 International Association for Impact Assessment 2 <http://www.iaia.org/uploads/pdf/SP4.pdf> accessed 18 October 2017.
[2] ibid.
[3] Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Pearson Education 2nd edn, 2003) 275.
[4] Geoffrey Salomons and George Hoberg, 'Setting Boundaries of Participation in Environmental Impact Assessment' (2014) 45 Environmental Impact Assessment Review 69, 71.
[5] Agaja Silas, 'Public Participation in Environmental Impact Assessment (EIA) Reports: The Nigerian Experience' IAIA13 Conference Proceedings, 33rd Annual Meeting of the International Association for Impact Assessment 13-16 May 2016 Calvary, Alberta. P.11.
[6] Hakeem Ijaiya, 'Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems' (2015) 13 The Nigerian Juridical Review 83, 86.
[7] Salomons and Hoberg (n 4) 71.
[8] Ijaiya (n 6) 86.

The significance of public participation in the advancement of access to information has also been well recognised. As with section 25 of Nigeria's Environmental Impact Assessment Act, Article 6 paragraph (2)(d)(iv) of the Aarhus Convention requires parties to the Convention to ensure that members of the public are informed early, adequately and effectively of 'the public authority from which relevant information can be obtained, and where the relevant information has been deposited for examination by the public.'[9] In this sense, public participation is a manifestation of democratic principles, wherein people can exercise their right to determine matters that affect their lives.[10] However, although public participation promotes legitimacy—which restores public confidence in the administration and management of the environment and its affairs,[11]— it is feared that increased opportunities for participation of members of the public may be inappropriately used by government as a tool for suppressing opposition while effecting little or no changes to policy.[12] Notwithstanding this drawback, public participation is desirable because of the enormous benefits it delivers to the environmental impact assessment process.

It is important to note that the status of environmental impact assessments and practices of public participation vary from country to country, and that effective public participation may be more difficult to achieve in developing countries.[13] Factors such as illiteracy, cultural practices, economic considerations, poverty, and the effect of colonial rule, have significantly shaped the way governments in developing countries govern people and the environment within their jurisdictions.[14] This has paved the way for authoritarian rule and the restriction of

[9] Convention on Access to Justice, Public Participation in Decision-making and Access to Justice in Environmental Matters (1988) 38 ILM 517, art 6(2)(d)(iv).
[10] Gabriella Kiss, 'Why Should the Public Participate in Environmental Decision-Making? Theoretical Arguments for Public Participation' (2014) 22(1) Periodica Polytecnica 13.
[11] Silas (n 5) 2.
[12] Salomons and Hoberg (n 4) 71.
[13] Lourdes Cooper and Jennifer Elliot, 'Public Participation and Social Acceptability in the Philippine EIA Process' (2000) 2(3) Journal of Environmental Assessment Policy and Management 339, 344.
[14] Raymond Bryant and Sinead Bailey, *Third World Political Ecology* (Routledge, 1997) 7-8.

'autonomous local activities.'[15] In the light of these restrictions, Salomons and Hoberg, reacting to changes in Canada's environmental assessment law which restrict public participation to only those directly affected or having relevant information or expertise, have pointed out that such limitations make it difficult for environmental assessment processes to ensure that decisions on development projects are made in the public interest.[16] Considering that those directly affected will most likely be those with the greatest material concerns, other members of the public having concerns about diffuse environmental impacts (such as impact to air, water, habitats etc.) will be ignored.[17] In the face of these challenges, it is questionable whether public participation fulfils its role in practice.

Despite the importance of public participation therefore, it has been observed that in developing countries like Nigeria, public participation amounts to a mere consultation activity rather than a process that empowers people to influence policy.[18] This is partly because like Nigeria, in many countries, except where projects are being sponsored by individuals and corporations, physical planning has little regard for the involvement of the public in the modelling of cities and the formulation of plans in general.[19] The effect of this is that public participation is very often undermined; treated as an activity in the environmental impact assessment process, rather than a substantive process that includes the public in environmental decision-making.[20] It is for this reason that Petts observed that 'EIA remains more a decision tool than a decision process'.[21]

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[15] Cooper and Elliot (n 13) 344.
[16] Salomons and Hoberg (n 4) 69.
[17] ibid, 70.
[18] Sulaimon Muse and Sagie Narsiah, 'Challenges to Public Participation in Political Processes in Nigeria' (2015) 44(2,3) Journal of Social Science 181.
[19] Leke Oduwaye, 'Citizenship Participation in Environmental Planning and Management in Nigeria: Suggestions' (2006) 20(1) Journal of Human Ecology 43.
[20] Anne Shepherd and Christi Bowler, 'Beyond the Requirements: Improving Public Participation in EIA' (1997) 40(6) Journal of Environmental Planning and Management 725.
[21] Judith Petts, 'Public Participation and Environmental Impact Assessment' in Judith Petts (ed), *Handbook of Environmental Impact Assessment* (Vol. 1) (Blackwell Science, 1999) 171.

5.3 THE ROLE OF THE PUBLIC IN ENVIRONMENTAL DECISION-MAKING

Reviews of environmental impact assessments have indicated that public participation is generally evoked as both an information dissemination mechanism and a process of gathering information from the public, rather than as an activity through which the public influences decision-making.[22] As far back as 1997, Ng and Sheate's survey of participants in the environmental impact assessment of three major airport development proposals carried out in the United Kingdom and Hong Kong revealed that, public participation was more or less conducted as an exercise for the provision of information to stakeholders.[23] More recently, a review of public participation in the environmental impact assessment process in Nigeria has also identified gaps in participation which have been partly attributed to the low level of public knowledge about projects and hearings.[24]

In relation to Nigeria, Lawal, Bouzarovski and Clark have noted that the reason behind the failure of EIA is the recourse to the top-down approach, which emphasizes that policy designers are key actors instead of the bottom-up model in which local people are central.[25] Local people are best placed to observe environmental changes occurring within their locality. Because certain issues may only be known by locals, their participation ensures that general decision-making is heedful of local circumstances.[26] The crucial role of local people is therefore not overturned by the functioning of public authorities, policy makers and other highly placed individuals or organizations.[27]

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[22] Lourdes Cooper and Jennifer Elliot (n 13) 341.
[23] Yuen Ng and W. Sheate, 'Environmental Impact Assessment of Airport Development Proposals in the United Kingdom and Hong Kong: Who Should Participate? (1997) 12(1) Project Appraisal 11, 23.
[24] Peter Aldinger, 'Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana' (2013-2014) 26 Georgetown International Environmental Law Review 245, 368.
[25] Akeem Lawal, Stefan Bouzarovski, and Julian Clark, 'Public Participation in EIA: The Case of West African Gas Pipeline and Tank Farm Projects in Nigeria' (2013) 31(3) Impact Assessment and Project Appraisal 226, 229.
[26] Salomons and Hoberg (n 4) 71.
[27] Oduwaye (n 19) 43.

Fiorino has described as a technocratic orientation, the idea of leaving risk decisions to administrative authorities, experts and elites, and has put forward three arguments to justify the need for the participation of the public in environmental decision-making— a substantive argument, a normative argument and an instrumental argument.[28] Fiorino's substantive argument advances the notion that people without specialized or professional knowledge of risks can make valid judgments about risks as much as experts in the field, or even more in certain cases.[29] Non experts perceive the social and political significance of issues, situations and problems (which experts may overlook while relying on scientific methods), and are better able to adapt to uncertainties and errors with the passage of time.[30] The normative argument on the other hand holds the view that technocratic orientation contradicts the ideals of democracy and amounts to a deprivation of the people's right to control policy and determine how to suit their interests,[31] while the instrumental argument is to the effect that 'lay participation' promotes legitimacy and leads to better outcomes.[32] Indeed, the Rio Declaration on Environment and Development acknowledges the role of the public in this way;

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. [33]

[28] Daniel Fiorino, 'Citizen Participation and Environmental Risks: A Survey of Institutional Risks' (1990) 15(2) Science, Technology and Human Values 226, 227.
[29] ibid.
[30] ibid.
[31] ibid.
[32] ibid 228
[33] Rio Declaration on Environment and Development (1992) 31 ILM 874, principle 22.

As a way of furthering projects that are favourable to their continued survival, communities should take part in the designing and execution of policies and proposals involving the physical development of their environment.[34]

It has been observed that conformity to environmental regulations and standards are better realised not only through regulatory enforcements but also through community pressure on both operators of facilities and regulators.[35] Only where broad-based inclusion of local people in the decision-making process is assured can those decisions be tuned to meet the precise needs of the people.[36] Summarily, a crucial goal of public participation is creating effective communication with the public at the onset of a project [37] and promoting the public good as opposed to short-term economic interests of project proponents and governments.

Notwithstanding the crucial role of the public in decision-making, broad-based public participation may also create difficulties. One reason why public participation may prove cumbersome is that, 'the public,' although consisting of individuals and groups (be they business, professional, community etc.) with a stake in an issue, is erroneously perceived as a 'homogeneous entity' — a view which overlooks the complexity of perceptions that exists among these various elements of the public.[38] Given the disparity in experience and interests existing between sectors of the public, the public cannot always be united on issues that affect them.[39] Clearly, where there is no consensus on the public interest, public participation is useless in advancing the public good.

[34] Oduwaye (n 19) 44.
[35] Fatona Olugbenga, Adetayo Olumide and Adesanwo Adeola 'Environmental Impact Assessment (EIA) Law and Practice in Nigeria: How Far? How Well? (2015) 1(1) American Journal of Environmental Policy and Management 11, 13-14.
[36] Oduwaye (n 19) 44.
[37] ibid.
[38] Petts (n 21) 150.
[39] ibid.

Also, while democratic principles make it desirable that people who are likely to be affected by a proposed development be empowered to give their approval of such projects before they can commence, this may create serious problems for policy making and implementation, as consensus will hardly ever be reached in relation to certain policies dealing with the siting of undesirable installations.[40] In such situations, project proponents may find it easier to exclude the public altogether, since public participation will be tantamount to 'public resistance', functioning only to cripple policy and hinder the construction of required facilities such as nuclear power stations and waste disposal sites.[41] However, it must be noted that denying the public access to the decision-making process is not necessarily convenient since it creates suspicion and mistrust, and will most likely result in time-consuming legal action.[42]

5.4 INTERNATIONAL BEST PRACTICE POLICIES ON PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING.

With economic forces driving major changes to the environment, and the increasing awareness about the role of the public in environmental decision-making, governments and international organisations around the world have come up with policies and strategies aimed at securing the active involvement of the public in environmental decision-making. An analysis of some these policy documents is necessary, to draw on qualities which an effective participation system should exhibit.

[40] Anne Glucker, Peter Driessen, Arend Kolhoff and Hens Runhaar, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) Environmental Impact Assessment Review 104, 106.
[41] Ciaran O'Faircleallaigh, 'Public Participation and Environmental Impact Assessment: Purposes, Implication and Lessons for Public Policy Making' (2010) 30 Environmental Impact Assessment Review 19, 22.
[42] Sherperd and Bowler (n 20) 726.

5.4.1 The Aarhus Convention

Articles 6 – 8 of the Aarhus Convention are concerned with public participation in decision-making and set out various requirements aimed at facilitating the process. The role and significance of public participation in decision-making has been stressed by the Aarhus Convention which requires contracting parties to 'provide for early public participation, when all options are open and effective public participation can take place'.[43] The requirements of 'early' and 'effective' have proved the most difficult to interpret given that the precise meaning of the terms have not been provided for in the Convention.[44] Thankfully, the meaning of these requirements can be deduced from the findings and recommendations of the Aarhus Convention's Compliance Committee.

In Communication ACCC/C/2005/12[45] for instance, the Compliance Committee had to determine whether Albania had complied with the provision of the Aarhus Convention requiring it to provide early opportunities for the participation of the public. This communication was brought by a non-governmental organisation which alleged that the Government of Albania had failed to effectively notify and consult the public, at an early stage of planning and decision-making, in respect of the development of an industrial park comprising of oil and gas pipelines, a refinery, thermal power plants etc.[46] Disputing the claim, the Government of Albania argued that the decision of the Council of Territorial Adjustments of the Republic of Albania referred to by the complainant, only relates to the location of the industrial park;[47] and that the public had been given opportunities to

[43] Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (n 9) art 6(4).
[44] Nicola Hartley and Christopher Wood, 'Public Participation I Environmental Impact Assessment-Implementing the Aarhus Convention' (2005) 25 Environmental Impact Assessment Review 319, 320.
[45] United Nations Economic Commission for Europe, 'Report of the Compliance Committee on its Sixteenth Meeting: Findings and Recommendations with Regards to Compliance by Albania' (31 July 2007) ECE/MP.PP/C.1/2007/4/Add.1
[46] ibid, para 3-4.
[47] ibid, para 72.

participate in the decision-making process in respect of a specific aspect of the project (the thermal power plants).[48] Therefore, as a final decision on an environmental permit and other complex decisions on the development of the industrial park as a whole had not been made, it was not in breach.[49]

The Compliance Committee rejected this argument and found that, because there was no evidence that the public concerned were notified or given opportunities to participate in the process leading up to the decision of the Council of Territorial Adjustments, even if opportunities for public participation were subsequently provided in respect of other specific activities concerning the industrial park, Albania will still be in breach of the requirement of the Aarhus Convention that members of the public be given opportunities to participate at an early stage, when all options are open.[50]

It is worthy of mention also that the requirements of the Aarhus Convention's public participation pillar have been expressed in European Union law through Directive 2003/35/EC[51] which variously amends the Environmental Impact Assessment and Integrated Pollution Prevention and Control (IPPC) regimes, bringing them in line with the stipulation of the Convention. The Directive demands that the public is given 'early and effective' opportunities to participate in decision-making.[52] Particularly, Article 3 paragraph 6 of this Directive, highlights the importance of timing for public participation. It states that 'reasonable time-frames for the different phases shall be provided, allowing sufficient time

[48] ibid, para 6(b) (c) (e).
[49] ibid, para 6(a).
[50] Ibid, para 74.
[51] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
[52] ibid, art 3 para 4.

for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making.'

After evaluating the Aarhus principles and the literature on public participation, Hartley and Wood produced a framework consisting of six goals to aid an understanding of the requirements of Article 6 of the Convention and ensure that it is effectively implemented.[53] The six goals advance the notion that the Aarhus principles stress the need to '(1) Time participation programmes, to achieve 'early' participation; (2) provide the public with access to all documentation relevant to the decision-making process; (3) enter into discussions with the public concerned; (4) allow the public to submit their opinions at public inquiries; (5) consider the outcome of public participation in the decision-making process; and (6) achieve 'effective' participation.'[54]

Hartley and Wood have also devised a public participation evaluation framework comprising of ten practice evaluation criteria derived from the Aarhus principles and the public participation literature.[55] The ten criteria identified as crucial to the attainment of 'early' and 'effective' participation that the Aarhus Convention demands are communication, fairness, timing, accessibility, information provision, influence on decision-making, competence, interaction, compromise and trust.[56] In many ways, Hartley and Wood's criteria mirror the framework for evaluating public participation in decision making developed in this thesis and discussed in chapter three above.[57]

[53] Hartley and Wood (n 44) 325.
[54] ibid, 325-327.
[55] ibid, 327.
[56] ibid, 328
[57] See pages 108-109.

5.4.2 The International Association for Impact Assessment (IAIA) Principles

The IAIA has also advanced three broad principles of best practice for public participation in impact assessment which present-day public participation practices should conform to—basic principles, operating principles and developing guidelines.[58] The basic principles to be observed are timely, meaningful, educative and inclusive involvement of people affected by a proposed development, a recognition of and respect for the individuality of these people and communities, which promotes cooperation and the improvement of the proposal.[59] Best practice in this regard requires that a balanced approach is adopted when these basic public participation principles are applied to impact assessments.[60]

Regarding the application of basic principles to the EIA procedure, the Operating Principles demand that a credible and transparent process is initiated at an early and appropriate stage of the project and maintained thereafter. The process should also be well structured, assistive, and adapted to the peculiarities of the communities.[61] The final tier of the best practice principles seeks the development of guidelines to produce a better outcome for public participation. This basically involves advancing access to information, greater public participation, and access to justice, with a view to establishing directions for the enhancement of public participation in EIAs.[62]

[58] André, Enserink, Connor and Croal (n 1) 2.
[59] ibid.
[60] ibid.
[61] ibid, 2-3.
[62] ibid, 3.

5.4.3 The United States National Environmental Policy Act

The development of environmental impact assessments and the institution of public participation in the environmental impact assessment process has been largely instigated by the United States National Environmental Policy Act (NEPA).[63] NEPA is the basic national document for environmental protection. It declares a national policy which seeks to promote harmonious existence of man and nature and coordinates federal actions, plans, programmes, functions etc. as a way of realising the policy.[64] Specifically, section 102 of the Act contains stipulations designed to ensure that federal agencies act in accordance with the letters and spirit of the Act. Environmental impact statements must be prepared by federal agencies for 'major Federal actions significantly affecting the quality of the human environment.'[65]

The Council on Environmental Quality (CEQ) established by NEPA has come up with regulations which are binding on federal agencies and relevant for implementing aspects of NEPA. Section 1506.6 requires agencies to 'make diligent efforts to involve the public in preparing and implementing their NEPA procedures.'[66] Agencies are also to give public notices of hearings, public meetings, and the availability of documents, to ensure that members of the public affected or interested are informed.[67] Such meetings and public hearings are to be held or financed by the agencies in appropriate cases.[68] The Act also requires agencies to request information from the public.[69]

It is important to note that notwithstanding the above requirements, public participation under the NEPA and CEQ regime is not without problems. While the CEQ demands that federal

[63] Glucker and others (n 40) 104.
[64] National Environmental Policy Act, 42 USC 4321, s 101 (a) and (b).
[65] ibid, s 102 (2)(c).
[66] Council on Environmental Quality CFR Title 40 CFR Chapter V, para 1506.6 (a).
[67] ibid, para 1506.6 (b).
[68] ibid, para 1560.6 (c).
[69] ibid, para 1560.6 (d).

agencies involve the public in the preparation and formulation of their NEPA procedures,[70] public participation is only required by NEPA after the completion of the environmental assessment, through the requirements of notice and comments.[71] Therefore, after a decision to prepare an environmental impact statement has been made, the agency must publish a notice of same in the federal register.[72] Furthermore, after the preparation of a draft environmental impact statement, but before a final environmental impact statement is made, the agency must request comments from affected and interested members of the public.[73] This means that definite opportunities for public participation are only available if an environmental assessment reveals that an activity may significantly affect the environment, and the agency has gone further to scope and prepare an environmental impact statement.[74] This is in line with 102 (2) (c) of NEPA, wherein federal agencies are to prepare an environmental impact statement for federal actions with a potentially significant impact on the environment and make available to the public, the completed environmental impact statement. There is no mention of the public or public participation at an earlier stage.

Outka has rightly observed that owing to the limited opportunity for public participation at the environmental assessment stage, the opportunities for participation provided by the requirements for notice and comment come late in the decision-making process.[75] The danger with this practice is that, because of the time and resources spent during the environmental assessment, it is highly unlikely that agencies will readily consider and adopt the comments of the public which oppose its findings and choices. Therefore, while the regime for public

[70] ibid, para 1506.6 (a)
[71] Uma Outka, 'NEPA and Environmental Justice: Integration, Implementation and Judicial Review' (2006) 33 Boston College Environmental Affairs Law Review 601, 608.
[72] Council on Environmental Quality (n 66) para 1501.7
[73] ibid, para 1503.1(a)(4).
[74] Outka (n 71) 608
[75] ibid, 609.

participation under NEPA is guided by best practice principles, it does not ensure that the public is meaningfully involved in the decision-making process in practice.

5.4.4 Equator Principles

The Equator Principles are a set of ten principles adopted by financial institutions to ensure that industrial and infrastructure projects, financed and advised on, are developed in a socially responsible way, using practices that demonstrate sound environmental management.[76] Hence, it is 'a framework for determining, assessing and managing environmental and social risks in projects.'[77] With a global application to all industry sectors, the Equator Principles are relevant to financial institutions supporting new projects under four financial products— project finance advisory services, project finance, project-related corporate loans and bridge loans— where certain specified criteria are met.[78] At present, these principles have been adopted by ninety-seven financial institutions in thirty-seven countries (including Nigeria).[79]

For all projects which may have significant (Category A) or limited (Category B) adverse environmental and social effects, principle 5 of the Equator Principles which deals with stakeholder engagement requires clients to demonstrate that the affected communities and other stakeholders (where necessary) are properly engaged in the decision-making process in a continuous and culturally appropriate manner.[80] Disclosure of the environmental risks

[76] 'The Equator Principles' (June 2013) 2 <https://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf> accessed 5 September 2019.
[77] ibid.
[78] ibid, 3.
[79] 'EP Association Members and Reporting'<https://equator-principles.com/members-reporting/> accessed 5 September 2019.
[80] The Equator Principles (n 76) 7.

associated with a project must be made at an early stage of the impact assessment process (before project construction) and on a continuing basis.[81]

A striking feature of stakeholder engagement under the Equator Principles is that for Category A projects, stakeholder engagement must comprise of a consultation and participation process.[82] The consultation process must be structured to consider the impacts of the project, the phase of development of the project, the preferred language of affected communities, the decision-making processes in the communities concerned, and the demands of vulnerable groups.[83] It is also important that the process is not tainted by external influence, intrusion, coercion and intimidation.[84]

It is also important to note that the Equator Principles recognises the interests of indigenous peoples. Since indigenous people may form part of the vulnerable groups of an affected community, projects affecting this class of people must be guided by a process of informed consultation and participation, and conform to the rights and protection accorded to indigenous people in national law and relevant international law instruments.[85] The 'free, prior and informed consent' of indigenous people must also be obtained where a project is likely to have adverse effects on them.[86]

To ease stakeholder engagement generally, the Equator Principles demand that relevant documents relating to impact assessments must be made available to members of affected communities (and where necessary, other stakeholders) in their local language and in a way

[81] ibid.
[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid, 8

that is culturally appropriate.[87] The outcome of the engagement process and any actions agreed therein, must also be taken into account and recorded.[88]

5.4.5 World Bank Operational Policies

Public participation has evolved from being a key driver in the development of environmental impact assessment in the United States to be a fundamental requirement for multilateral project financing, with far-reaching effects for countries, corporations and other lending establishments.[89] For developing countries, the funding of a development project by an international organisation may be conditional on the involvement of the public in the formulation and execution of such project. Since 1993 this has been the position of the World Bank, which requires early consultation with affected groups in project planning and during the preparation of the draft EIA.[90]

The World Bank Operational Policies 4.01 on Environmental Assessments requires that projects put forward for financing by the Bank undergo environmental impact assessments to ensure that such projects are environmentally friendly and sustainable.[91] Where the environmental assessment reveals that a project is in breach of a country's environmental, social or other legal obligations, such a project will not be funded by the Bank.[92] It is the responsibility of the borrower to undertake environmental assessments, and such assessments must be carried out for 'projects that are highly risky or contentious or that involve serious

[87] ibid, 7
[88] ibid.
[89] Cooper and Elliot (n 13) 340.
[90] ibid.
[91] World Bank Operational Manual OP 4.01 (January 1999), para 1.
[92] ibid, para 3.

and multidimensional environmental concerns' (Category A projects).[93] The assessments must conform to the Bank's environmental assessment requirements.[94]

Paragraph 15 of the Operational Policies sets out the Bank's public participation requirement. It prescribes early consultation of local non-governmental organisations and groups affected by the project. Such consultation must, where necessary, continue throughout the implementation of the project, to tackle issues that affect these groups in relation to the project.

5.4.6 African Development Bank: Environmental and Social Assessment Procedures for Public Sector Operations

The Environmental and Social Assessment Procedure (ESAP) aims to enhance decision-making and project outcome as a means of establishing a sustainable environmental and social management of projects, plans and programmes financed by the African Development Bank.[95] It therefore provides a formal process for the environmental and social assessments of all projects, plans and programmes which the bank finances, whether directly or through intermediaries.[96] This enhances the value and benefits to be derived from such projects, plans and programmes while also preventing, minimizing, mitigating and compensating for their harmful impacts.[97]

[93] ibid, para 4
[94] ibid, para 5.
[95] African Development Bank, 'Environmental and Social Assessment Procedures for African Development Bank's Public Sector Operations' (2001) <https://www.afdb.org/en/documents/document/environmental-and-social-assessment-procedures-for-afdb-public-sector-operations-june-2001-11386> 2 accessed 6 September 2019.
[96] ibid, 1.
[97] ibid, 2.

Under the ESAP, different rules for public consultation apply, depending on the scope and classification of the project. For projects which are likely to have significant adverse impacts and for which a full environmental and social assessment must be carried out (Category 1 projects), as part of the environmental and social assessment process, there must be meaningful consultation between the borrower and relevant stakeholders (such as affected and vulnerable groups, beneficiaries of the project, civil society organisations, local authorities etc.) concerning the environmental and social risks associated with the project.[98] Such consultation should take place at an early stage of project preparation[99] and be conducted in accordance with the legal requirements of the borrower's country, which must meet the bank's minimum requirements.[100] As with Category 1 projects, for Category 2 projects,[101] where special issues such as small-scale resettlement require the borrower to consult with stakeholders, the borrower shall consult stakeholders likely to be affected by the development at an *early* stage of the project cycle, and report on the findings made from such consultation.[102] In line with section 5.2, consultation is meaningless unless the borrower provides timely access to relevant information, in the form and language comprehensible to those consulted.

Further, for Category 1 projects, stakeholders must also be consulted during the preparation of the Environmental and Social Impact Assessment (ESIA) report. The purpose of this is to discuss the objectives and activities of the proposed project, assess its likely environmental and social effects, and request recommendations from stakeholders for the improvement of

[98] ibid, procedure 5.1
[99] ibid, procedure 5.2
[100] ibid, procedure 5.1
[101] The Environmental and Social Assessment Procedures for African Development Bank's Public Sector Operations defines these as projects which are 'likely to have detrimental and site-specific environmental and social impacts that can be minimised by the application of mitigation measures included in an environmental and social management plan.' ibid, ix.
[102] African Development Bank (n 95) procedure 5.9.

the project.[103] Following this, a non-technical summary of the draft ESIA report must be provided by the borrower for additional consultation.[104] In accordance with the provisions of section 5.5, after public consultations on the draft ESIA report has been carried out, the borrower has a duty to include details of the consultation process and the findings of same in the ESIA report. In appropriate cases, the borrower considers the concerns of stakeholders and decides on measures for integrating these into the design and implementation of the project.[105]

It is important to note that public consultation for Category 1 projects under the African Development Bank's environmental and social procedure does not end after the production of the ESIA report — it continues throughout the implementation of the project (construction and operation phases), serving as a means of addressing issues raised by stakeholders in relation to the environmental and social assessment of the project.[106] In quarterly reports to the Bank, borrowers are required to report on ongoing consultation with stakeholders.

The foregoing assessment of the various strategies put forward by Governments and international bodies reveal the prevalence of certain indispensable elements of public participation. Based on this finding, best practice for participation in environmental assessments involve achieving the following goals— early and continuous participation of members of the public in decision-making, timely access to information in the form and language comprehensible to those consulted and meaningful involvement of the public in decision-making. These reflect the principles of public participation developed in chapter three above and validates their use as the criteria for evaluating public participation. In the

[103] ibid, procedure 5.4.
[104] ibid.
[105] ibid, procedure 5.5.
[106] Ibid, procedure 5.6.

light of this, an evaluation of public participation in Nigeria against these criteria will be made.

5.5 PUBLIC PARTICIPATION IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN NIGERIA: SUCCESSES AND SHORTCOMINGS.

With economic growth and industrialization, there has been a marked increase in the number of environmental impact assessments carried out in Nigeria. Nwoko has attributed the successful conduct of these environmental impact assessment processes to public participation and legal regulation.[107] A significant requirement of Nigeria's Environmental Impact Assessment Act is contained in section 7, which is to the effect that stakeholders such as government agencies, experts in relevant fields, members of the public and interested groups are to be given a chance to comment on the environmental impact assessment of a project or activity before a decision is made by the competent authority.[108] It is remarkable that the requirement for public participation is not restricted to the State or local community where the project is to be carried out. Where the EIA reveals that another State or local community will be affected by the proposed activity, the Act requires the State or local government of the area in which the project is to be undertaken to notify the other and carry out timely public consultation.[109]

In addition to the legal requirements for public participation under the Environmental Impact Assessment Act, a holistic assessment of the successes and shortcomings of public participation in environmental decision-making requires an evaluation of public participation

[107] Chris Nwoko, 'Evaluation of Environmental Impact Assessment Systems in Nigeria' (2013) 2 (1) Greener Journal of Environmental Management and Public Safety 22, 30.
[108] Environmental Impact Assessment Act 2004, s 7.
[109] ibid, s 11.

in practice. As noted in the framework for evaluating public participation in environmental decision-making developed in chapter three of this thesis, public participation is effective only if (1) It is occurs early in the decision-making process (2) it is open to members of the public (3) it occurs through the adequate, timely and effective notification of the public, and (4) there is active public involvement in the decision-making process. These requirements will be assessed below.

5.5.1 When Does the Public Participate in the Environmental Impact Assessment Decision-making Process?

Several opportunities exist for public participation in Nigeria's Environmental Impact Assessment Act. This may be during the assessment process (initial consultation for EIA study), after the submission of the draft EIA report and during the review of the final EIA. The Environmental Impact Assessment Act also suggests that there is an opportunity for public participation during the screening stage.

With regards to public participation during the assessment process, section 17(1)(c) of the Act guarantees that in every screening, the comments of members of the public concerning the environmental effects of a project shall form part of the factors to be considered. The Act also provides that after the completion of the screening report, the regulatory agency[110] is to provide members of the public with an opportunity to examine and comment on the report and any record filed in the public registry before it takes any action regarding the project.[111] The implication of the foregoing is that the public plays an important role in determining the projects that require a full environmental impact assessment and those for which further

[110] In Nigeria, the regulatory agency is the National Environmental Standards and Regulations Enforcement Agency (NESREA)
[111] Environmental Impact Assessment Act (n 108) s 22(3).

assessment will not be necessary. However, it is noteworthy that the actualisation of public participation under section 17(1) (c) is largely dependent on the receipt of comments from the public, which is in turn determined by the degree of public interest in the project and whether the public is invited to comment.

The public can also participate in the EIA process where, in accordance with the Act, the regulatory agency has received the mandatory study report of the project and published a notice of the address and deadline for filing comments on the conclusions and recommendations of the report.[112] Members of the public can then file comments on the conclusions and recommendations of the report within the time stated in the notice.[113] This requirement has been criticized as retroactive because it requires the public to comment on a draft EIA which they had not contributed to, and probably had no knowledge of.[114] Again, the number of comments (if any) received will depend on whether the public are invited to comment, which is often determined by the extent of public interest in the project.[115]

Regarding public participation during the review of the final EIA, after the completion of the screening report, if the Agency believes that the proposed project will significantly affect the environment or where the concerns of the public regarding the environmental impacts of the project so necessitates, the project may either be referred to a review panel or mediation.[116] Where a project is referred to a review panel, the panel is required to ensure that, all information to be used for the assessment is made available to the public and the hearing is conducted in a manner that enables the public to participate.[117] Importantly, the comments of

[112] ibid, s 25(1)(c).
[113] ibid, s 25(2).
[114] Allan Ingelson and Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining in Nigeria: A Critical Analysis' (2014) 10(1) Law, Environment and Development Journal 35, 51.
[115] ibid.
[116] Environmental Impact Assessment Act (n 108) s 22(1)(b).
[117] ibid, s 37.

the public are to be captured in the report of the panel.[118] This report will then be made available to the public, once it has been submitted to the Agency.[119]

Finally, the referral of an EIA to a review panel pursuant to section 27 of the Act may necessitate the holding of a public meeting or public hearing. This may be the case where the Agency believes the project may cause irreparable damage or the public concerns regarding the environmental effects of the project make it imperative to do so.[120] Again, the public hearing must be held in a manner that makes it possible for the public to participate in the assessment.[121] However, it is important to note that the obligation of the regulatory agency to conduct a public hearing is not a binding one as such. This is so because whether a public hearing will be held is determined by the degree of public interest in the project, hence, it is discretionary.[122]

The synopsis of the legal framework on public participation in EIA above reveals that efforts have been made to promote broad-based public participation through legislation. The EIA Act ensures that the public has a fair chance at participating throughout the various stages of the application. However, although opportunities exist for the early and continuous participation of the public in the EIA process in principle, as further discussions in this chapter will reveal, there are other practical challenges to the actualization of the goal of public participation.

[118] ibid.
[119] ibid, s 39.
[120] ibid, s 27
[121] ibid, s 37(b).
[122] Ingelson and Nwapi (n 114) 51.

5.5.2 How is the Public Notified of Opportunities for Participation in the Environmental Impact Assessment Process?

In the framework for evaluating public participation in environmental decision-making developed in chapter three, it was noted that to be effective, public participation must occur through the adequate, timely and effective notification of the public.[123] In spite of this, in Nigeria, lack of awareness about the existence of opportunities to take part in the making of environmental impact assessment decisions, still poses a challenge to the realization of the goal of public participation. One major problem of public participation in Nigeria is that the public are not sufficiently knowledgeable about the impact of a project, and in contrast to their counterparts in developed countries, where they have no interest in the outcome of a project, they are often unconcerned.[124] Quite often, opportunities for public participation are made available very late in the EIA process when most decisions on variables such as size, location and type of project have already been taken.[125] A good example of this is the Nigerian Liquefied Natural Gas Project (NLNG) which was undertaken at Bonny, Rivers State, Nigeria wherein the mandatory EIA required for the project was not carried out until after the project had commenced.[126] Any involvement of the public at a stage where the project plan has already been devised may only amount to public relations, which functions either to justify already made decisions or avert conflict, but not for giving due consideration to the public input.[127] Therefore, although public participation in Environmental Impact Assessment in Nigeria seeks to ascertain the effect of development projects on the general wellbeing of individuals and societies, this goal has not been fully translated into practice.[128]

[123] Text to n 79 in ch 3.
[124] Nwoko (n 107) 28.
[125] Shepherd and Bowler (n 20) 727.
[126] Ingelson and Nwapi, (n 114) 51.
[127] Shepherd and Bowler (n 20) 727.
[128] Lawal, Bouzarovski, and Clark (n 25) 226.

5.5.3 What Forms of Participation are used in Nigeria?

Notwithstanding the opportunities for public participation under Nigeria's EIA Act discussed above, the legal framework for public participation in environmental impact assessments in Nigeria has been criticised for being rather limited, since developers are only required to provide information concerning the project and the environmental impact assessment report to the public but not required to consult or discuss with them, when preparing the report.[129] In respect of projects described in the mandatory study list for instance, the Environmental Impact Assessment Act provides that after the completion of the mandatory study report, the Agency is to publish a notice containing '(a) the date the report will be made available to the public, (b) the place at which copies of the report may be obtained, and (c) the deadline and address for filling comments on the conclusions and recommendations of the report.'[130] Clearly, this contradicts the Aarhus Convention which requires that public participation procedures allow ample time for informing the public and for the public to prepare and *participate effectively* during the decision-making process.[131] As Hartley and Wood's evaluation framework above reveals, the requirement of effective participation emphasizes (among others) the need to enter into discussions with the public.[132] This requirement is not reflected in Nigeria's EIA Act. Unsurprisingly, an examination of fifty-three randomly selected development reports concluded between 2001 and 2012 in Nigeria revealed low participation levels for fifty-four per cent of the projects studied.[133]

[129] This is the case under section 7 of the Environmental Impact Assessment Act.
[130] Environmental Impact Assessment Act (n 108) s 25.
[131] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (n 9) art 6(3).
[132] Hartley and Wood (n 44) 326-327.
[133] Silas (n 5) 1.

Further, through an examination of two projects— West African Gas Pipeline (WAGP)[134] and Tank Farm projects[135]— carried out by both multinational and indigenous operators respectively, Lawal, Bouzarovski and Clark argue that Nigeria's environmental impact assessment law is only attentive to public participation on paper.[136] The Environmental Impact Assessment conducted for both projects claims to have adequately fulfilled all requirements of the law, and recorded public participation as one of its most important successes.[137] However, a careful assessment of the EIA report revealed that the proceedings of public participation and the comments of experts were not included in the report, as required by law.[138] When interviewed, members of the public also complained of being excluded throughout the EIA process.[139]

In the case of the WAGP, the failure to sufficiently carry out public participation is quite surprising, bearing in mind that the proponent of the project is a multinational company which is subject to the World Bank supplementary requirements for multinational companies, in addition to its obligations under national law.[140] It is saddening that even where multinational companies take steps to meet their obligations under national and international legal instruments, they do not apply the same standards in every situation, and to every country. While legal rules and regulations pertaining to projects undertaken in Nigeria are easily ignored, this is not the case in other national contexts.[141] Regrettably, it has been

[134] The WAGP is an offshore and onshore project originating from Nigeria, travelling across Ghana and beyond.
[135] The Tank Farm Project is an onshore project for the construction of a facility for the storage of petroleum products.
[136] Lawal, Bouzarovski and Clark (n 25) 227.
[137] ibid.
[138] ibid, 228.
[139] ibid, 229.
[140] ibid, 228.
[141] ibid, 229.

observed that the reason for this is 'because the situation in Nigeria appears to be business as usual.'[142]

The problem is no different where indigenous project operators are concerned. It is usual for public participation to be ignored, notwithstanding that a proposed project has a direct and immediate impact on the environment, life and property.[143] Even where the public is given an opportunity to participate, there is no guarantee that their concerns and input will be considered.[144] Shittu and Musbaudeen, while examining the scope of public participation in the Makoko and Iwaya communities of Lagos State, Nigeria, observed the frustration of Heads of Traditional Councils who expressed disappointment about the practicability of town-hall meetings, as several decisions reached at these meetings are disregarded by the relevant authorities in the formulation and execution of proposals and projects.[145]

Further, multinational and indigenous operators often employ a range of techniques aimed at preventing the public from participating in EIAs. Lawal, Bouzarovski and Clark have identified these techniques to be quasi-participation (which makes it possible for one State or local Governments to represent others, where a project is likely to affect more than one State or local community), the non-disclosure of information contained in EIA reports, and the fact that project proponents fraudulently seek out members of the public to promote their projects.[146] The reason for the use of these forms of participation is not far-fetched— the cost of properly carrying out environmental assessments, the length of time involved in so doing, and the possibility that approval of the proposed project may be denied where genuine concerns are raised, all contribute to making project proponents avoid the involvement of the

[142] ibid.
[143] ibid.
[144] ibid.
[145] Ayodele Shittu and Abiodun Musbaudeen, 'Public Participation in Local Government Planning and Development: Evidence from Lagos State' (2015) 3(2) Covenant University Journal of Politics and International Affairs 20, 36.
[146] Lawal, Bouzarovski and Clark (n 25) 230.

public. In certain cases, the limited time within which the public can file complaints concerning a project may also work in favour of project proponents.[147] These are contrary to the provisions of Nigeria's environmental impact assessment law.

5.6 CHALLENGES.OF PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING IN NIGERIA

While public participation is widely recognized as a key aspect of EIA, the effectiveness of the process is generally determined by the mechanism used and the mode of implementation. Generally, effective public participation in Nigeria is being confronted by institutional problems stemming from economic and social factors which continue to affect the development of an integrated system.[148] Therefore, in the light of the necessity for development projects to be carried out quickly and at minimal costs, certain factors may restrict the scope of public participation in EIA.[149]

Academics have pointed out various constraints to effective public participation. Hughes for instance has identified these as including time and money, literacy, education, culture, gender, remoteness of area, equivocal EIA legislation and guidelines, project size, existing structure and practice of decision-making, mistrust etc.[150] For Hartley and Wood, barriers to effective participation include poor provision of information, regulatory constraints, mistrust, problems in the execution of participation techniques, the not in my back yard (NIMBY) syndrome, poor knowledge of planning issues and lack of access to legal advice.[151] It is

[147] ibid.
[148] Lawal, Bouzarovski and Clark (n 25) 231.
[149] Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement' (1998) International Institute for Environment and Development, Environmental Planning Issues No. II, 4 <http://pubs.iied.org/pdfs/7789IIED.pdf> accessed 13 September 2017.
[150] ibid, 5-7.
[151] Hartley and Wood (n 44) 333.

important to discuss some of these key constraints to effective participation in order to discover how they can be effectively tackled. These constraints are examined below.

5.6.1 Institutional and Regulatory Problems

Although the legal framework for the regulation of environmental impact assessment in Nigeria is quite comprehensive, fifty-seven percent of respondents in a 2011 study which evaluated the effectiveness of the EIA system in Nigeria identified the non-implementation of mandatory requirements together with non-utilization of the power to impose fines as responsible for problems in the EIA process.[152] Because of the weakness in the enforcement mechanism, project proponents often carry out environmental assessments at a later stage of decision-making, sometimes after the commencement of the project.[153] In such situations, public participation becomes a mere formality and does nothing to influence decision-making. This weak coordination of activities between regulatory agencies and the project proponent creates problems for public participation.

5.6.2 Poor Public Knowledge of Environmental Impact Assessments

In Nigeria, the public is relatively unconcerned about environmental issues. In most cases, this is caused by lack of information about the adverse effect of environmental degradation and the role of environmental impact assessments in this regard. Also, the environmental impact assessment legislation, reports and discussions are written in English and sometimes contain technical information which cannot be interpreted by inhabitants of local communities who are mostly uneducated. This issue can be somewhat resolved through

[152] Nwoko (n 107) 27.
[153] ibid.

public hearings wherein project proponents and environmental impact assessment consultants can clarify complex issues through face-to-face discussions.[154] Even where the affected public is literate, the poor coordination of the EIA process may result in non-compliance with legal requirements and affect the public's right of access to information. Empirical studies have in fact shown that it is common for environmental reports not to be adequately and appropriately displayed by the regulatory agency.[155]

Besides poor knowledge of the project, the NIMBY syndrome greatly influences the attitude of the public to participation. Generally, people residing closest to the development exhibit the most concern, taking steps to utilize as much information at their disposal. For others who are not directly affected, there is no motivation to engage in the participation process.

5.6.3 **Inadequate Resources**

Financial costs are incurred in carrying out an environmental impact assessment. Because of the huge costs involved, while developers often have enough resources to effectively pursue an environmental impact assessment, they may prefer to avoid it altogether. In addition, the economic situation in most developing countries like Nigeria is such that agencies are highly understaffed and lack both the facilities to undertake proper baselines studies and the capacity to properly monitor and enforce regulations.[156] For members of the public on the other hand, inadequate resources means that access to legal advice and guidance is restricted. This has far-reaching effects on public participation especially when members of the public cannot readily have access to information.[157]

[154] ibid, 28.
[155] Lawal, Bouzarovski and Clark (n 25) 230.
[156] Ingelson and Nwapi (n 114) 19.
[157] Hartley and Wood (n 44) 334.

5.6.4 **Mistrust**

Sometimes project proponents may neglect to provide adequate and appropriate information of a proposed activity to the public. This may strain the relationship between the public and the developer and create suspicion. Although it is believed that increasing the legitimacy of the decision-making process can help build trust between developers and the public, this can hardly be achieved in the face of suspicion and doubts.[158] It is difficult for the public to actively participate where there is a perceived breach of trust.

5.7 CONCLUSION

It is without doubt that environmental impact assessment in Nigeria has attained new heights and recorded significant successes over the past years, with much more environmental assessments being carried out than was the case in the period after the promulgation of the Environmental Impact Assessment Act. Notwithstanding this achievement, the environmental impact assessment process is fraught with several challenges that continue to affect its effectiveness. Increasingly, environmental impact assessments are now being undertaken without a thorough evaluation of environmental impacts and often, late in the development process. For environmental assessments to achieve their goal and lead to more sustainable outcomes, the various stakeholders, especially government, regulatory agencies and the public must adopt new ways of viewing impact assessments, away from practices of tokenism and business as usual.

In its quest for industrialization, successive governments in Nigeria have paid little or no attention to environmental interests, and have through their activities, encouraged

[158] ibid.

unsustainable practices. There is need for a mechanism for holding governments, regulators, corporations etc. accountable for their actions. It is important therefore, that members of the public have access to administrative and judicial review procedures to challenge acts and omissions of private persons and public bodies which contravene environmental laws. In the light of this, chapter six of this thesis will examine the right of access to justice in environmental matters in the environmental impact assessment process

CHAPTER SIX

ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS AND ENVIRONMENTAL IMPACT ASSESSMENTS IN NIGERIA.

6.1 INTRODUCTION

This chapter examines best practice on access to justice in environmental matters vis-à-vis the law and practice in Nigeria, with a view to identifying barriers to access to justice in environmental matters and proffering solutions for their improvement. It also assesses the extent to which the Environmental Impact Assessment Act promotes access to justice. In line with this approach, an examination of access to environmental justice principles contained in the Aarhus Convention is necessary.

There is no doubt that ensuring access to justice in environmental cases remains crucial. It provides the appropriate machinery through which members of the public can enforce rights, international environmental laws can be effectively implemented and enforced and national laws, properly followed. It is only through the recognition of the right of access to justice also, that the publics' right to access environmental information, and participate in environmental decision-making can be enforced. This complements efforts at national and international levels towards environmental protection.

In Nigeria, there is a lack of political will towards ensuring proper access to justice in environmental matters. This is induced by the quest for industrialization and economic benefits, corruption, the need to attract foreign investments and the desire for continuous natural resource control and management. The failure of the Nigerian government to effectively enforce environmental regulation means that members of the public can only seek justice in a court or tribunal, or through an administrative body established by law. Sadly, the judiciary is often under pressure to support the industry providing the country with its sole

source of revenue.[1] In no small measure, these issues, together with the procedural barriers discussed in this chapter, affect the individual's right of access to justice as they undermine the whole legal, regulatory and judicial mechanisms for the protection of the environment.

6.2 WHY ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IS IMPORTANT.

The focus of Article 9 of the Aarhus Convention is the access to justice obligations of contracting parties. Article 9 requires that adequate review procedures are made available, for the protection of rights granted by other pillars of the Convention and national environmental law. Therefore, while Articles 9(1) and 9(2) of the Convention require contracting parties to provide access to review procedures for information requests and public participation in decision-making respectively, Article 9(3) requires parties to the Convention to ensure that members of the public have access to administrative or judicial procedures to oppose acts and omissions by both private persons and public authorities which offend their national environmental laws.

There is no gainsaying the fact that the right of access to justice is crucial to the enjoyment of other civil and political rights. It ensures that members of the public can challenge illegalities and seek the enforcement of fundamental rights. This is well illustrated by the case of *Baytide (Nig) Limited v Mr. Kayode Aderinokun and Ors*[2] where, through the instrumentality of the court, the applicant successfully secured an injunction for trespass to land, just as the respondent sought (albeit wrongfully) to prevent an illegality. The facts of this case are that

[1] Rhuks Ako, 'Mainstreaming Environmental Justice in Developing Countries: Thinking Beyond Constitutional Environmental Rights' in Chile Eboe-Osuji and Engobo Emeseh (eds), *Nigerian Yearbook of International Law* 2017 (Springer, 2018) 286.
[2] *Baytide (Nig) Limited v Mr. Kayode Aderinokun and Ors* [2014] 4 NWLR 164.

the appellant who had been allocated a piece of land by the local authority for the construction of a petrol station, and obtained all necessary approvals, was faced with widespread objection to his development project from the residents of the area, hence, the appellant's application to the High Court for a declaration of trespass against the respondents, injunction and damages. The case for the respondents was that an environmental impact assessment had not been carried out and that the views and concerns of the respondents, as residents of the area had not been sought.

In its decision, the High Court granted an injunction against the respondent but found that the appellant's failure to obtain comments from the respondents in respect of the environmental impact assessment of the petrol station nullified the approval thereof. Dissatisfied with judgment of the High Court, the appellant brought this appeal before the Court of Appeal. At the Court of Appeal, the decision of the High Court was overturned on grounds that environmental impact assessments are not required for petrol stations under the Environmental Impact Assessment Act, since they do not fall under the range of activities that are likely to significantly affect the environment. Therefore, there was no need to comply with the provisions of section 7 of the Environmental Impact Assessment Act which requires comments from members of the public.

The idea of access to justice entails more than the procedural mechanism through which people seek redress for violation of legal rights; it in fact involves the nature and quality of justice dispensed.[3] It is unsurprising therefore that review procedures, according to Article 9(4), must 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.' A careful examination of the above provisions reveal that they are not merely aimed at ensuring access

[3] Nlerum Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 3 SUR International Journal on Human Rights 95, 97.

to courts; more importantly, they seek to ensure that environmental matters are adjudged judiciously.

Sadly, despite the existence of internationally recognised principles, in Nigeria, there are various barriers to access to justice ranging from issues of standing to cost, and yet to other broader concerns like poverty and corruption, all of which have continued to impede on the rights of members of the public to access justice. It is in view of this that Ekhator points out that the limited resources of litigants, delay in the judicial process, strict requirement of standing, proof, overdependence on the law of tort, as well as the attitude of the government, are all factors that deny people their right of access to the courts.[4] Similarly, Okogbule has observed that effective access to justice in Nigeria is hindered by a number of substantive and procedural obstacles including delay in the administration of justice, cost of litigation, constitutional provisions, standing, and illiteracy.[5] These problems are worsened by the limited role of civil society organisations and the lack of political will of the government. In the light of these issues, a discussion of access to justice in the environmental impact assessment process in Nigeria is necessary.

6.3 ACCESS TO JUSTICE IN ENVIRONMENTAL IMPACT ASSESSMENTS IN NIGERIA.

The importance of involving the public in the Environmental Impact Assessment decision-making process cannot be overemphasized. In many ways, the Environmental Impact Assessment Act provides opportunities for public input in the decision-making process. For

[4] Eghosa Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Role of NGOs in Nigeria' (2014) 22(1) African Journal of International and Comparative Law 63.
[5] Okogbule (n 3) 98-105.

instance, section 21 gives the Agency (NESREA) power to permit a project to be carried out if it is unlikely to cause adverse effects on the environment, or such effects can be mitigated.[6] But before exercising such power, it must provide the public with an opportunity to examine and comment on the screening report and any other record filed and take same into consideration.[7] However, for public input in the environmental impact assessment process to be meaningful and facilitate procedural (environmental) justice, such input must be assured through statutory provisions which grant members of the public access to administrative or judicial procedures to challenge acts, omissions and decisions of the public authority.

One way in which public input in the environmental impact assessment process is assured is through the inclusion of statutory appeal provisions in legislation.[8] Indeed, many scholars agree that 'statutory avenues of appeal' are an essential constituent of an effective environmental impact assessment process,[9] as it is a means through which decision-makers can measure the efficacy of the EIA system and its management.[10] The appeal process also promotes public participation and serve as a mechanism through which the public can challenge decisions of public authorities.[11] Therefore for public input in the environmental impact assessment process to be effective, the system must allow for 'administrative or judicial review procedures in which the adequacy of the environmental review process can be tested.'[12] But how is this reflected in Nigeria's environmental impact assessment legislation?

The effect of sections 21(1)(b) and 25(a) of the Environmental Impact Assessment Act is that where a project is likely to have significant adverse effects on the environment which may

[6] Environmental Impact Assessment Act 2004, s 21(1).
[7] ibid, s 21(3).
[8] Sali Bache, 'Are Appeals an Indicator of EIA Effectiveness? Ten Years of Theory and Practice in WA' (1998) 5(3) Australian Journal of Environmental Management 159.
[9] ibid, 160.
[10] ibid, 167.
[11] ibid.
[12] Allan Ingelson and Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10(1) Law, Environment and Development Journal 3, 18.

not be mitigatable, or where the public concern so demands, such project shall be referred to a mediator or a review panel, which shall make its report to the Agency after taking appropriate steps.[13] Interestingly, although the report of the mediator or review panel is made available to the public,[14] the final decision still rests with the Agency, which may refuse or permit the project to be carried out.[15] There is no provision in the Environmental Impact Assessment Act for internal review of a decision by the Agency which approves or rejects an environmental impact assessment report and the execution of a project.

As Ingelson and Nwapi have observed, the effect of this is that members of the public are denied justice, even where they are genuinely concerned that their comments were not considered, the process was marred by illegalities, or that given compelling evidence, the decision is unreasonable and injudicious.[16] Clearly, there is no access to justice under Nigeria's Environmental Impact Assessment Act, because although there are opportunities for public input in the decision-making process, these are not provided for through appeal provision which affords the public concerned a right to seek redress.

Thankfully, members of the public may have access to review procedures to challenge acts and omissions of private persons and public authorities which contravene national environmental law. However, for administrative or judicial review procedures to conform to the principles of access to justice contained in the Aarhus Convention, they must meet certain requirements prescribed in article 9(1) - (4) of the Convention. These requirements have been discussed in chapter three of this thesis[17] and they relate to the scope of standing to sue, the availability of review procedures and the effectiveness of review procedures (with respect to equity and fairness, time, cost as well as the provision of adequate and effective remedies). It

[13] Environmental Impact Assessment Act (n 6) ss 33 and 36.
[14] ibid, s 38.
[15] ibid, s 39.
[16] Ingelson and Nwapi (n 12) 18.
[17] See pages 105-106 above.

is against these criteria therefore, that access to justice in Nigeria's environmental impact assessment process will be evaluated in the subsections below.

6.3.1 What Review Procedures are Available?

To challenge the decision of the regulator, aggrieved members of the public may have access to administrative or judicial review procedures by complaining to an ombudsman or through the instrumentality of judicial review.

The Nigeria ombudsman is the Public Complaints Commission. It was set up to look into complaints by members of the public relating to administrative actions of public authorities and companies or their officials.[18] Accordingly, its commissioners[19] have power to investigate administrative action by departments or ministries of the federal, state, and local government in Nigeria; statutory corporations or public institutions established by the Government, and all companies incorporated under the relevant laws, whether owned by the Government or private persons.[20] The Commission also has power to investigate administrative actions by officers and servants of the bodies mentioned above.[21]

To ensure that administrative action do not engender injustice against citizens and residents of Nigeria, the Public Complaints Commissions Act provides that Commissioners must take special care when investigating administrative acts which are or appear to be:

> (i) contrary to any law or regulation; (ii) mistaken in law or arbitrary in the ascertainment of fact; (iii) unreasonable, unfair,

[18] Public Complaints Commission Act 2004, long title.
[19] The Commission consists of Commissioners from the different States of the Federation.
[20] Public Complaints Commission Act (n 18) s 5(2).
[21] ibid, s 5(2) (e).

> oppressive or inconsistent with the general functions of administrative organs; (iv) improper in motivation or based on irrelevant considerations; (v) unclear or inadequately explained; or (vi) otherwise objectionable.[22]

In addition to administrative review procedures, members of the public may approach the courts for a judicial review of an administrative action. The Federal High Court (Civil Procedure) Rules 2009 provides that 'an application for an order of mandamus, prohibition and certiorari, or an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review.'[23] In the light of this, under section 20 of the Freedom of Information Act, 'any applicant who has been denied access to information, or a apart thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application.' Similarly, the right of members of the public to a judicial review of the decision of the regulatory agency is also recognised under the Environmental Impact Assessment Act.[24]

The jurisdiction of the courts to entertain applications for judicial review of administrative action stems from section 6 of the Constitution of the Federal Republic of Nigeria which vests the judicial powers of the Federation in the courts.[25] These powers extend to 'all inherent powers and sanctions of a court of law'[26] of which judicial review forms a part. The general principles governing applications for judicial review were restated by the Supreme

[22] ibid, s 5(3).
[23] Order 34 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009. Similar provisions are contained in Order 44 Rule 1(1) of the High Court of Lagos State Civil Procedure Rules 2019 and in the Rules of the various High Courts in the States.
[24] Environmental Impact Act (n 6) s 59.
[25] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 6(1).
[26] ibid, s 6(6)(a).

Court of Nigeria in *MTN Nigeria Communication Limited v Mr Etuk Harison*[27] in the following way;

> In the Court's exercise of its jurisdiction in respect of an application for judicial review, the following must be borne in mind: (a) a judicial review is not an appeal; (b) the court must not substitute its judgment for that of the body whose decision is being reviewed; (c) the correct focus is not upon the decision but the manner in which it is reached; (d) what matters is the legality and not the correctness of the decision; and (e) the reviewing court is not concerned with the merits of a target activity.[28]

It is important to note that while the concept of judicial review only addresses the legality of decision-making processes as opposed to the merits of the decision itself,[29] the EIA Act provides that, an application for judicial review of any matter contained therein shall be refused if 'the sole ground for relief established in the application is a defect in form or a technical irregularity.'[30] This provision functions to limit further, the scope of access to justice as it relates to environmental impact assessments. As the Act neither defines 'defect in form' and 'technical irregularity' nor identify some of the issues that might fall into these categories, it is arguable that an application for judicial review on grounds that the environmental impact assessment process involved consultation with stakeholders (such as the village head) as opposed to the engagement of members of the public may be within the ambit of this provision. This is contrary to the principle of access to justice.

[27] *MTN Nigeria Communication Limited v Mr. Etuk Harison* [2017] 18 NWLR 394.
[28] ibid, p 425-426.
[29] Chukwunweike Ogbuabor, 'Expanding the Frontiers of Judicial Review in Nigeria: The Gathering Storm' (2011-2012) 10 Nigerian Juridical Review 1, 2.
[30] Environmental Impact Assessment Act (n 6) s 59.

6.3.2 **Who Can Seek a Review?**

The Nigerian Constitution is the basis for the rule on standing to sue.[31] Under section 6(6)(b), the judicial powers of the courts, to which all matters, actions, and proceedings 'between persons or between government or authority and any person relate… (shall be) for the determination of any question as to the civil rights and obligations *of that person*.'[32] Accordingly, the only person who can successfully apply to a court of law for redress is the person whose rights have been, or are in danger of being violated.[33] The position of the law on standing to sue is well reflected in the Rules of Court which require that an applicant for judicial review has 'sufficient interest in the matter relating to the application.[34]

While actions instituted by claimants for damage to property interests resulting from environmental pollution and degradation are not generally affected by the procedural issue of standing, where the injured person refuses or is unable to sue, and regulatory agencies fail to act, then the environment may suffer irreparable damage, despite the availability and willingness to act, of non-governmental organisations. This is because of procedural requirements which representative actions must meet. Although non-governmental organizations, acting as defenders of the environment, play a key role in spearheading campaigns to reduce incidents of environmental degradation, the requirement that to have standing to sue, they must show direct interest, over and above a shared interest which is in common with other citizens, often acts as a barrier to access to justice in many jurisdictions.[35]

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[31] Eva Brems and Charles Adekoya, 'Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria' (2010) 54(2) Journal of African Law 258, 266.

[32] (Emphasis added). Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[33] Brems and Adekoya (n 31) 266.

[34] Order 34, Rule 3(4) of the Federal High Court (Civil Procedure) Rules, 2019. Similar provisions are contained in the High Court (Civil Procedure) Rules of the various States. See Order 44 Rule 3(4) High Court of Lagos State (Civil Procedure) Rules 2019.

[35] Rufus Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel' (2013) 2(1) Afe Babalola University: Journal of Sustainable Development Law and Policy 149, 161.

This difficulty in meeting the requirement of standing which non-governmental organisations face is not uncommon. Within member states of the European Union (EU), a major concern for NGOs has been showing that acts complained of are of direct and individual concern. In the EU, the access to justice rules contained in the Aarhus Convention have been implemented through Title IV of Aarhus Regulation,[36] which provides that where a non-governmental organization meets certain specified criteria, it can make a request for an internal review of the administrative act or omission of a Community institution or body to the institution or body concerned.[37] The non-governmental organisation that made the request for internal review also has a right to institute proceedings in the Court of Justice 'in accordance with the relevant provisions of the treaty'.[38] In other words, the access to justice provisions in the Regulation provide for an internal review after which judicial review procedures may be sought. Therefore, Article 12 of the Aarhus Regulation is to the effect that where a non-governmental organisation had made a request for internal review, it could institute proceedings in the Court of Justice 'in accordance with the relevant provisions of the Treaty.'[39] What then, is the relevant provision of the treaty?

Article 263(4) of the Treaty on the Functioning of the European Union[40] provides that,

> Any natural or legal person may under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is

[36] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13.
[37] ibid, art 10.
[38] ibid, art 12.
[39] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, 2013) 394.
[40] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

of direct concern to them and does not entail implementing measures.

Therefore, where individuals or legal persons intend to exercise their right under the Aarhus Convention to bring an action challenging acts of and omissions of EU institutions and bodies that breach EU law, they can do so by virtue of the provisions of Article 263 TFEU as non-privileged actors but, they have to meet the conditions provided for in Article 263(4) TFEU— that is, show direct and individual concern.[41] This makes it difficult for members of the public to have access to judicial review procedures.[42] Specifically, the requirement of 'individual concern' makes it almost impossible for non-governmental organisations to establish standing in the Court of Justice of the European Union.[43] The difficulty with this condition is that, as Poncelet has argued, the idea of protecting the environment in itself is usually one that indicates a public concern as opposed to something specific to a particular individual.[44] Since no one can claim ownership of the environment, requiring NGOs to show 'individual concern' in environmental cases creates a contradiction that is difficult to balance.

A good illustration of this point can be found in the case of *Stichting Greenpeace Council (Greenpeace International) and others v. Commission of the European Communities.*[45] In this case, the Court of Justice of the European Union (CJEU) upheld the decision of the Court of First Instance that, the Appellants action for annulment of a decision taken by the Commission, which granted Spain financial assistance for building of power stations was inadmissible because the Appellant lacked *locus standi*. In so doing, the CJEU held that as

[41] Vera Rodenhoff, 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 Review of European Community and International Environmental Law 343, 354.
[42] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?' (2012) 24 Journal of Environmental Law 287, 297.
[43] ibid, 298.
[44] ibid, 297.
[45] Case C-321/95P *Stichting Greenpeace Council (Greenpeace International) and others v Commission of the European Communities* (1998) ECR 1-1651.

regards natural persons, where the applicant's particular situation was not taken into account when the act complained of was adopted, and the act complained of affects him in the same way as other people, then it is not of 'individual concern' to him.[46] Further, it was held that this same test applies to organisations where their *locus standi* is tied to the 'individual concern' of persons they represent.[47] As this was not the case, the appeal was dismissed.

Because of the problems in the Aarhus Regulation's implementation of the Aarhus Convention, Communication ACCC/C/2008/32[48] was submitted against the European Union before the Aarhus Convention Compliance Committee. Here, Client Earth argued that the jurisprudence of the European courts made it difficult for members of the public to have access to justice in matters of the environment because of the limited manner in which they have interpreted the requirement of 'individual concern' contained in Article 230 of the Treaty, thereby breaching of Articles 9(2) to (5) of the Aarhus Convention.[49] It therefore called on the Committee to recognize that if Regulation 1367/2006 is not altered, there will be a breach of the Aarhus Convention.

The committee found that although it was not satisfied that the EU was in breach of its obligations, it will be useful for EU courts to change its jurisprudence to avoid contravening the Convention.[50] It therefore recommended that the EU institutions concerned, should act in their different capacities to ensure that the deficiency in the jurisprudence of the EU courts regarding access to justice is dealt with.[51]

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[46] ibid, para 28.
[47] ibid, para 29.
[48] Communication ACCC/C/2008/32 submitted by Client Earth against the European Community <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf> accessed 9 July 2018.
[49] ibid, 3.
[50] Findings and Recommendation of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part 1) Concerning Compliance by the European Union, para 97. <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf> accessed 9 July 2018.
[51] ibid, para 98.

In contrast to the Aarhus Regulation, the rules of standing under the EU EIA Directive have been formulated to promote access to justice for members of the public concerned. Under Article 11(1) of Directive 2011/ 92/EU,[52] Member States of the EU are to ensure that members of the public concerned can 'challenge the substantive or procedural legality of decisions, acts, and omissions, subject to the public participation provision' of the Directive, through a review procedure before a court of law or another independent and impartial body established by law, where they have sufficient interest[53] or maintain the impairment of a right.[54] Although what accounts for sufficient interest and impairment of a right, is to be determined by Member States, Article 11(3) requires that this is done with the goal of providing wide access to justice.

The scope of Member States autonomy under Article 11 has been determined by the Court of Justice of the European Union in *Case C-535/18 IL and Others v Land Nordrhein-Westfalen.*[55] Here, in a request for a preliminary ruling from a German Court, the CJEU was called to determine whether national law which allows a claimant who is not an environmental association, to apply for the annulment of a decision on grounds of a procedural defect, only where the procedural defect deprived the claimant of the right to participate in the decision-making process, was consistent with Article 11(1)(b) of Directive 2011/92/EU (EIA Directive).

In its ruling, the CJEU recognised that Article 11(1)(b) gives Member States a wide discretion to determine the individuals who have standing to challenge decisions which are

[52] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment [2012] OJ L 26/1.
[53] ibid, art 11(1) (a).
[54] ibid, art 11(1) (b).
[55] *Case C-535/18 Il and Others v Land Nordrhein-Westfalen* (CFI, 28 May 2020).

within the scope of the EIA Directive.[56] It therefore held where Member States require the impairment of an individual's right to establish standing to sue, standing may be refused where the procedural defect complained of did not affect the outcome of the decision, as the individual's right cannot be said to be impaired in these circumstances.[57]

Similarly, in the United kingdom, the rules of standing are increasingly being liberalized by the courts.[58] In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*[59] for instance, in a judicial review action, the court allowed a public interest claim brought by a Movement to proceed, because there were no local residents affected. In the reasoning of the court, it was necessary for the applicants to be granted standing to ensure that an illegality does not go unchallenged.[60] However, despite the willingness of the courts to recognise environmental interest groups as having standing to sue in judicial review actions, the courts still require applicants to have a special interest in the matter being challenged.[61]

More recently too, in *Walton v The Scottish Ministers*[62] the Supreme Court of the United Kingdom had to consider the question of standing to sue. In this case, Mr. Walton challenged the legality of schemes and orders made pursuant to the Roads (Scotland) Act 1984 by the Scottish Ministers, permitting the construction of a road network in Aberdeen, Scotland. Although Mr. Walton's argument that the failure to carry out public consultation on one

[56] Anne Friel, 'Court of Justice Ensures Standing for Individuals to challenge Breaches of the Water Framework Directive' (*Client Earth,* 19 June, 2020) <https://www.clientearth.org/court-of-justice-ensures-standing-for-individuals-to-challenge-breaches-of-the-water-framework-directive/?utm_source=facebook&utm_medium=social&utm_campaign=tweepsmap-test1> accessed 3 July, 2020.
[57] ibid.
[58] Stuart Bell and others, *Environmental Law* (9th edn, Oxford University Press 2017) 334.
[59] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386.
[60] ibid.
[61] ibid.
[62] *Walton v Scottish Ministers* [2012] UKSC 44.

element of the road network, was incompatible with the requirements of the Strategic Environmental Assessment Directive[63] was rejected, his standing to bring the claim was nonetheless considered. It was held that the requirement under the Roads (Scotland) Act 1984 that an application must be brought by a person aggrieved is not to be interpreted restrictively. While the words 'persons aggrieved' do not include busy bodies, 'persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their compliant is that the decision was not properly made.'[64] The court also recognised that in certain situations (such as where a development was not adequately described in the application and advertisement), a person who did participate in the process may be regarded as aggrieved.[65]

In Nigeria, the Fundamental Rights Enforcement Procedure (FREP) Rules, [66] made pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria has liberalized the requirement of standing in the human rights field and made it possible for non-governmental organizations to avoid the standing obstacle. One of the overriding objectives of the Rules is to promote and encourage public interest litigation.[67] Specifically, Preamble 3(e) provides in part that 'human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant.' It is remarkable that under these Rules, human rights include rights recognised in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, of which environmental rights form a part.[68]

[63] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment [2001] OJ L197/30.
[64] *Walton v Scottish Ministers* (n 62) [86].
[65] ibid, [87].
[66] Fundamental Rights Enforcement Procedure (FREP) Rules 2009.
[67] ibid, preamble 3(e).
[68] ibid, Order 1(2).

Prior to the FREP Rules 2009, Order 1 Rule 2 of the FREP Rules 1979 provided that 'any person who alleges that any of the fundamental rights provided in the Constitution, and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court… for redress.' For so long, this provision was interpreted in a plethora of cases[69] to mean that, to the exclusion of all others, only a person whose rights have, are or are likely to be breached may approach a court of law for redress.[70] This made it difficult for NGOs to sue in a representative capacity.

The rules of standing are also relevant in complaint procedures before an ombudsman and in actions for judicial review of administrative action. Hence, section 6(1)(g) of the Public Complaints Commission Act restricts a Commissioner from investigating matters brought by complainants who have no *personal interest* therein. Likewise, as earlier noted, under Order 34 Rule 3(4) of the Federal High Court (Civil Procedure) Rules,[71] to bring an action for judicial review, an applicant must show that he has *sufficient interest* in the matter which the application is concerned with.

It is important to note that the provisions of the Freedom of Information Act have some implications on the rules of standing, as it relates to the sufficient interest test. The combined effect of section 1(1) and (2) Freedom of Information Act is that any person has a right to request information which is in the custody of a public official or institution without the need to show a specific interest in the information applied for. In addition, section 1(3) recognises the right of 'any person entitled to the right to information… to institute proceedings in the Court to compel any public institution to comply with the provisions of the Act.'[72] These

[69] One of such cases is *Shugaba Darman v. Minister of Internal Affairs* [1981] 2 NCLR 459.
[70] Abiola Sanni, 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The Need for Far-reaching Reform' (2011) African Human Rights Law Journal 511, 520.
[71] Federal High Court (Civil Procedure) Rules 2019.
[72] Freedom of Information Act 2011, s 1(3).

provisions have been interpreted (and rightly so) to negate the application of the sufficient interest test in respect of judicial review actions brought under the Freedom of Information Act.[73] In this way, the Freedom of Information act facilitates the right of members of the public to access justice where their rights of access to information have been infringed.

In addition to standing to sue, the question of who can be sued (particularly with regards to matters of jurisdiction) often deny individuals' access to justice, resulting in their loss of confidence in national and international judicial processes.[74] The right of members of the public to access justice is also challenged by rules of regional or international courts which do not directly entertain cases from individuals or have jurisdiction over certain legal persons. In the case of *The Registered Trustees of the Socio-Economic & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Ors,*[75] for instance, although the court recognised its jurisdiction to hear the matter, as well as the applicant's standing to sue, it nevertheless held only the Nigerian Government and its agency, the Nigerian National Petroleum Corporation (NNPC), liable for the human rights violations in the Niger Delta and declined jurisdiction over the multinational companies.

As Ekhator notes, the court was unable to exercise jurisdiction over the multinational companies because unlike States and individuals, companies cannot be held accountable under international law.[76] This was also the position of the court in *Kiobel v Royal Dutch Petroleum*[77] where it was held that the plaintiffs could not bring claims against the defendants under the Alien Tort Statute because the idea of corporate liability for international crime is unknown to customary international law.

[73] Ogbuabor (n 29) 18.
[74] Mmadu (n 35) 149.
[75] *The Registered Trustees of the Socio-Economic and Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Ors.* (FHC, 3 March 2015)
[76] Ekhator (n 4) 73.
[77] *Kiobel v Royal Dutch Petroleum* [2013] US 569.

Based on the foregoing, it is clear that while the rules of standing are necessary because they ensure that the floodgates are not open to thousands of claims by busybodies, strictly applied, they constitute a barrier to access to justice.

6.3.3 What Requirements Must the Procedures Meet?

As earlier noted, the access to justice provisions of the Aarhus Convention require review procedures to 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'[78] Therefore, while it is remarkable that administrative and judicial review procedures exists for the challenge of regulatory action in Nigeria, the key question is, do these review procedures meet the access to justice requirements of the Convention?

To comply with best practice principles as set out by the International Ombudsman Institute, Nigeria's ombudsman system must be a redress mechanism which provides 'free, independent and objective consideration of complaints'[79] These requirements mirror some of the elements of access to justice under article 9(4), particularly, those relating to cost, equity and fairness, and the availability of adequate and effective remedies respectively.

In the light of the huge costs associated with judicial proceedings, the contribution of the ombudsman to the administration of justice in Nigeria is worthy of note. By providing the public with a free mechanism for redress of acts and omissions by public bodies which are contrary to law, the ombudsman contributes immensely to the attainment of the goal of access to justice. However, the independence of Nigeria's ombudsman has been seriously

[78] Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (1998) 38 ILM 517, art 9(4).
[79] International Ombudsman Institute, 'Developing and Reforming Ombudsman Institutions: An IOI Guide for those Undertaking these Tasks' (2017) 1 IOI Best Practice Papers 2.

questioned in the literature. In the first place, the fact that the salaries, allowances and gratuity of the Commissioners are determined by the President[80] leaves much room for control, and the capacity for bias. Unsurprisingly therefore, although section 5(6) of the Public Complaint Commission Act provides that Commissioners are not under control of any other person or authority when exercising powers granted them by the Act, a 2014 study by Osakede and Ojimakinwa of cases lodged at the Lagos State Public Complaints Commission between 2008-2013 revealed that in practice, the activities of the Commission are not free from government control.[81] Osakede and Ojimakinwa found no correlation between the number of complaint cases lodged by the public and those concluded by the Commission, and concluded that the recurrence of unresolved cases meant that the ombudsman process was marred by government interference.[82] In the same vein, through an analysis of public responses to questionnaires and interviews, Osegbue and Madubueze's study identified undue interference of government as one of the factors affecting the effectiveness of the ombudsman.[83] In the light of the evidence put forward in the literature, it is difficult for the Nigerian Ombudsman to be regarded as an adequate review procedure within the meaning of Article 9(4) of the Aarhus Convention, since an interference with the activities of the ombudsman raises doubts about the place of equity and fairness in the review process.

Besides the lack of independence, there are still problems with the ombudsman's capacity to provide adequate and effective remedies. Although a remarkable feature of the Nigerian ombudsman system is that, in addition to the duty to investigate complaints lodged by the public, Commissioners are granted wide powers to initiate an investigation into

[80] Public Complaints Commission Act (n 18) ss 2(4) and (5).
[81] K. Osakede and S. Ijimakinwa, 'The Role of Ombudsman as a Means of Citizen redress in Nigeria' (2014) 3(6) Review of Public Administration and Management 120, 125.
[82] ibid, 124-125.
[83] Chike Osegbue and Madumelu Madubueze, 'The Ombudsman and Administration of Justice in Nigeria: A Study of Anambra State 2010-2015' (2017) 22(4) IOSR Journal for Humanities and Social Science 40, 56.

administrative actions where they deem it necessary,[84] the adequacy and effectiveness of its remedies remains in doubt. The Ombudsman lacks power to enforce its decisions.[85] Under section 7(3) and (4) of the Public Complaints Commission Act for instance, where investigations reveal the commission of a crime or a misconduct by any person, the Commissioner concerned may only make recommendations of its findings to the appropriate authority. Being a recommendation, there is no guarantee that the findings of the Commissioner will be acted upon, hence the question of its effectiveness as a remedy under the access to justice rules of the Aarhus Convention.

The effective realization of access to justice in environmental matters through judicial review has also been called into question, as several factors hinder access to the courts. Drawing from the provisions of Article 9(4) of the Aarhus Convention, these constraints to access to justice essentially relate to cost of litigation, length of litigation, the unavailability of effective remedies etc. These issues are discussed below.

6.3.3.1 *Huge Costs Associated with Litigation*

Huge costs often associated with litigation deters victims of environmental pollution from seeking redress in court. A survey of 154 legal practitioners and court cases related to the Nigerian crude oil industry reveal that the main constraints to access to justice are financial problems and ignorance.[86] As many as 75.3 per cent of the respondents identified inability to fund the excessive cost of litigation as a key constraint to access to courts for potential litigants.[87] This is unsurprising bearing in mind that litigation often involves considerable

[84] Public Complaints Commission Act (n 18) s 5(2).
[85] Osakede and Ijimakinwa (n 81) 126.
[86] Jedrzej Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10(3) Social and Legal Studies 397.
[87] ibid, 405.

costs for legal fees, court fees, expert witnesses etc. which litigants must bear.[88] The combined effect of Order 53 rule 1 and Appendix 2 of the Nigeria's Federal High Court Rules[89] for instance is that, the fees payable for the recovery of an amount exceeding N1,000,000 (One Million Naira)[90] is N1,500 (One Thousand Five Hundred Naira)[91] per N100,000 (One Hundred Thousand Naira)[92] or part thereof, up to a maximum of N50,000 (Fifty Thousand Naira).[93] This means a claim for the recovery of N10,000,000 (Ten Million Naira)[94] will most likely attract a fee of N50, 000 (Fifty Thousand Naira)[95] — an amount which must be paid before the suit is filed.[96] It is rather interesting that the only exemption to the court rules on fees applies to parties who are or represent Government Ministries and Departments, Federal, State and Local Governments and their agencies.[97] Thankfully, the problem of cost is now being overcome through the use of representative actions, in which cases are instituted by groups and communities and the cost of action is borne by all members as opposed to an individual.[98]

Closely related to the issue of fees are costs of proceedings and costs related to court proceedings, which the court may order. In Nigeria, it is widespread practice in civil suits, for litigants to seek, among other claims, recovery of legal fees and cost of instituting and maintaining a suit.[99] This practice is in line with the English law rule that costs follows the event, in which costs are awarded to the party who wins the case or matter. The basis for this

[88] ibid, 406.
[89] Federal High Court (Civil Procedure) Rules (n 71).
[90] £2211 (two thousand two hundred and eleven pounds).
[91] £3.32 (three pounds, thirty-two pence).
[92] £221 (two hundred and twenty-one pounds).
[93] £110.55 (one hundred and ten pounds, fifty-five pence).
[94] £22,112 (twenty-two thousand, one hundred and twelve pounds).
[95] £110.55 (one hundred and ten pounds, fifty-five pence).
[96] Okogbule (n 3) 101.
[97] Federal High Court (Civil Procedure) Rules (n 71) order 55(2).
[98] Frynas (n 86) 406.
[99] Folabi Kuti, 'Nigeria: Passing the Burden of Legal Fees to the Other Side – A Recoverable Cost?' (*Mondaq,* 8 August 2016) <http://www.mondaq.com/Nigeria/x/517154/Civil+Law/Passng+The+Burden+Of+Legal+Fees+To+The+Other+Side+A+Recoverable+Cost> accessed 14 June 2018.

is both to indemnify the successful party for the cost incurred in undertaking the case and to reduce frivolous litigations.[100] Therefore, in Nigeria, while the Rules of Court stipulate that costs are awarded at the discretion of the court, the general approach suggests that cost follows the result. This uncertainty surrounding the liability for costs, discourages potential litigants from seeking justice in court and constitutes a barrier to access to justice.

One way in which English law has addressed this problem is through Protective Cost Orders (PCOs) in England and Northern Ireland and Protective Expenses Orders (PEOs) in Scotland. These judge-made orders, which were developed by the courts in exercise of its discretion in the award of expenses, seek to ensure that liability of public interest litigants in expenses are limited or excluded altogether.[101] Because PCOs and PEOs offer some certainty concerning costs and meet the requirements of Article 9(4) of the Aarhus Convention, they have been a means of addressing the issue of prohibitive costs in environmental matters.[102] In the light of its benefits, this practice should be adopted by Nigerian Courts to tackle the cost barrier.

6.3.3.2 *Time: Delay in the Disposal of Cases*

Justice delayed is justice denied. The Constitution of the Federal Republic of Nigeria recognises the importance of timely disposal of cases in Section 36(1) where it provides that 'in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time, by a court or other tribunal established by law.'

Notwithstanding this, delay in the disposal of cases is not unknown to the Nigerian judicial

[100] ibid.

[101] Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19(1) Edinburgh Law Review 36, 36-37.

[102] Environmental Law Centre Scotland and Friends of the Earth Scotland, 'Prohibitive Expenses in Environmental Cases: Friends of the Earth Scotland and Environmental Law Centre Scotland Briefing' (June 2013) 1, <https://foe.scot/wp-content/uploads/2017/07/FoES%20&%20ELCS%20Briefing%20on%20Prohibitive%20Expense%20June%202013.pdf> accessed 27 June 2018.

process. Cases are usually before the court for several years before they are concluded. Often, this is due to factors such as undue adjournment of cases, administrative issues and judges' inability to deliver judgments within reasonable time.[103] As a fallout of this ugly situation, the role of the courts has been undermined as the public has lost confidence in the judicial process. Against this backdrop, there have been ardent calls for the establishment of environmental courts and tribunals. Clearly, one rationale behind these agitations is that general courts are already inundated with vast numbers of other civil and criminal cases.[104] In addition to avoiding lengthy delays and a consequent denial of justice, environmental courts and tribunals can help further the development of environmental rule of law and secure access to justice.[105] This thesis therefore recommends the establishment of an environmental court in Nigeria as a means of tackling undue delay in the disposal of environmental cases.

6.3.3.3 *Availability of Adequate and Effective Remedies*

It is common knowledge that certain human activities have significant adverse effects on the environment, which are often irreversible. It is therefore important that remedies for non-compliance with environmental laws are adequate, as they serve as a means of ensuring the effective implementation of obligations, providing redress and restitution, as well as promoting the rule of law and sustainable development in general.[106] In the light of the need to protect the environment from irreparable harm, article 9(4) of the Aarhus Convention requires contracting parties to ensure that members of the public concerned have access to review procedures that 'provide adequate and effective remedies, including injunctive relief

[103] Okogbule (n 3) 99.
[104] George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (United Nations Environment Programme, 2016) ix.
[105] ibid, x.
[106] Jona Razzaque, 'Access to Remedies in Environmental Matters and the North-South Divide' in Shawkat Alam and others, *International Environmental Law and the Global South* (Cambridge University Press, 2016) 588.

as appropriate.' As Epstein has noted, this requirement can only be achieved where review procedures 'provide a means to actually prevent environmental harm.'[107] Regrettably, in practice, while decisions in most environmental cases have been in favour of environmental protection, many court victories contribute little or nothing towards preventing environmental harm, owing to an inability to put an end to degrading activities during the pendency of suits[108] and indeed after cases have been decided. This was the situation in the *Jonah Gbemre*[109] case, where the defendants continued to flare gas in the Iwerhekan Community despite the High Court's earlier judgment of 14th November 2005. Evidently, it is not enough that remedies are made available to victims, to fulfil the purpose of the Aarhus Convention, such remedies must also be successful in reaching the desired outcome, hence the requirement that remedies are adequate and effective. The situation in Nigeria is such that while the remedies available to litigants are adequate, because of regulatory shortcomings affecting their enforcement, they are ineffective in preventing environmental harm.

6. 4 BROADER CONCERNS ABOUT THE AVAILABILITY OF THE RIGHT OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN NIGERIA

Procedural rights are important aspects of discussions relating to the rule of law, the elements of which include not only access to courts, but also, the setting up of a right to a remedy recognised by law for violation of human rights.[110] Therefore, access to justice which situates in the gaps of 'procedural human right, environmental law and good governance'[111] is

[107] Yaffa Epstein, 'Access to Justice: Remedies— Article 9.4 of the Aarhus Convention and the Requirement for Adequate and Effective Remedies, Including Injunctive Relief' (9 March 2011) 7 <http://dx.doi/10.2139/ssrn.2311559> accessed 9 July 2018.
[108] ibid.
[109] *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (FHC, 14 November 2005).
[110] Catherine Redgwell, 'Access to Environmental Justice' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007) 158.
[111] ibid, 153.

generally contingent on the meeting of two factors—'legal rights recognised in a given society, and the procedural gateway created by law for the enforcement of such right.'[112]

A careful examination of the literature on access to justice in environmental matters in Nigeria reveals that the focus is essentially limited to tackling procedural issues like standing, cost of litigation, remedies available to a successful litigant etc. While this is in accordance with the letters of the Aarhus Convention, it is necessary for us to continue to bear in mind the peculiar circumstances of developing countries. As Ako puts it, in developing countries, certain issues 'influence the dynamics of environmental justice'[113] and forces come into play even before a litigant access the courtroom, which in fact act as barriers to access to justice, inconsistent with the spirit of the Aarhus Convention. As such, a discussion of barriers to access to justice which focuses on procedural problems outlined in the Aarhus Convention alone, will be limited in scope, in the light of the circumstances of developing countries like Nigeria. It is against this background that this research examines barriers to access to justice in Nigeria from a substantive, procedural and socioeconomic viewpoint.

6.4.1 Absence of Substantive Environmental Rights

As earlier noted, procedural rights together with the recognition of a right to a remedy for violation of environmental rights, form the basic elements of the rule of law. It is in the light of this that Okon has also observed that to ensure access to justice, environmental provisions in Constitutions should create rights.[114] It is important for environmental protection to be

[112] Emeka Amechi, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation (2010) 6 Law, Environment and Development Journal 320, 323.
[113] Ako (n 1) 270.
[114] Emmanuel Okon, 'The Environmental Perspective in the 1999 Constitution' (2003) 5(4) Environmental Law Review 256.

recognized in constitutional terms. Environmental constitutionalism creates a platform for safeguarding environmental rights and interests, provides the mechanism through which Government and even non-state actors can be obligated to fulfil their duties to protect and promote the environment, and limits impingements on these rights by private individuals.[115] In view of its benefits, constitutional environmentalism is now being recognised in many parts of the world.

Article 33 of the Bolivian Constitution grants to everyone, the right to a 'healthy, protected and balanced environment'.[116] This right may be used by persons of present and future generations, whether acting for individual interests or collectively, as well as other living things in other that their growth and advancement is assured in a usual and permanent manner. Also worthy of note is the provision of article 14 of the Constitution of Ecuador, which guarantees the right to a healthy environment for all people.[117] It further declares as matters of public interest, the conservation of nature, protection of ecosystems and biodiversity as well as the prevention of environmental harm. Similarly, the Constitution of the Republic of South Africa gives everyone a right to an environment that 'is not harmful to their heath or wellbeing and (a right) to have the environment protected for the benefit of present and future generations, through *reasonable legislative and other measures*…'[118]

On the other hand, Nigeria's 1999 Constitution although, the first of its kind to expressly provide for the protection of the environment, does not accord the environment the same protection as it does for civil and political rights.[119] Chapter II of the Constitution of the Federal Republic of Nigeria deals with the environment as one of the fundamental objectives

[115] Louis Kotze, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) Transnational Environmental Law 199, 210-211.
[116] Bolivia (Plurinational State of)'s Constitution 2009.
[117] Constitution of Ecuador, 2008.
[118] Constitution of the Republic of South Africa, 1996.
[119] Ekhator (n 4) 66.

and directive principles of State policy —objectives which the Nigerian State should strive to achieve. Specifically, section 20 which provides for the environmental objective of the government states that 'the State shall protect and improve the environment and safeguard the water, air land, forest and wildlife of Nigeria.' Unfortunately, the enforcement of this provision is hindered by the effect of section 6(6)(c) of the same Constitution which states that the judicial powers 'shall not… extend to any issue or question as to whether any act or omission by any authority or person, or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.' This provision has acted as a barrier to access to justice in Nigeria, as courts cannot entertain cases dealing with the enforcement of section 20 of the Constitution.

It should however be noted that while laws entrenched in a constitution are advantageous over those without constitutional backing, constitutionalism is not a magic bullet for all governance problems and should therefore not be over emphasized.[120] In fact, environmental constitutionalism, especially as it relates to environmental rights have been criticized as 'vague, absolute, redundant, ineffective and merely an exercise of window dressing that generates false hope.'[121] Besides, protecting the environment through constitutional environmental rights might sometimes be problematic. The need to meet with international commitments or best practice may create problems for constitutional rights of nature at the national level. As Ruhs and Jones have noted, this may arise where in a bid to depart from fossil fuel consumption there is increased dependence on dams (hydraulic power) which

[120] Kotze (n 115) 207.
[121] ibid, 210.

construction has damaging effects on the local ecosystem.[122] The question of how competing constitutional rights rank, thus lingers.

Similarly, Reid and Nsoh, while recognising that constitutional environmental provisions serve the purpose of ensuring that rights are not used to give sole legal protection to human preferences, have expressed concern about whether the ambitious provisions contained in the Constitution of Ecuador can be effectively enforced.[123] The authors have noted that owing to economic and social factors and the potential for these environmental rights to interfere with other constitutionally guaranteed rights, guaranteeing the absolute protection of the environment may be problematic.[124] This is more so since these rights may only be enforced through the instrumentality of the State. In circumstances where the State has conflicting requirements to meet, enforcement of environmental rights may be impossible. This therefore raises the issue as to how this constitutional environmental right, if guaranteed in Nigeria can be effectively enforced.

While a constitutional right to a healthy environment ensures that members of the public have a cause of action where none may have existed, the absence of constitutional environmental rights does not invariably equate to the absence of a cause of action.[125] Quite recently therefore, Nigerian courts have begun to adopt the jurisprudence of other legal systems like India and in so doing have interpreted other substantive rights recognized by the Constitution (such as the right to life) broadly.[126] In the unreported case of *Chief Stephen Oji (Village Head) and others (For themselves and on behalf of the people of Old Ekuri and New Ekuri*

[122] Nathalie Ruhs and Aled Jones, The implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature' (2016) 8 Sustainability 174, 184.
[123] Colin Reid and Walters Nsoh, 'Whose Ecosystem is it anyway? Private and Public Rights under New Approaches to Biodiversity Conservation' (2014) 5(2) Journal of Human Rights and the Environment, 112.
[124] ibid.
[125] Ako (n 1) 282.
[126] In *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria and Others* (n 109) it was held that continuous gas flaring was a violation of the applicants' right to life.

Villages) v The Government of Cross River State and the Attorney General, Cross River State,[127] the applicants brought an action for the enforcement of fundamental human rights contending that the entry into, cutting of trees and clearing of forest by the respondent constituted an 'infringement of the applicant's right to life, dignity of human, economic and socio-cultural development, and property ownership.'[128] They further contended that the commencement of a Super Highway Project without an environmental impact assessment is unlawful and therefore, sought a declaration restraining the respondents and anyone acting on their behalf from entering and clearing the Ekuri community rain forest. An order directing the respondent not to enter or destroy the rain forest was also sought. Unfortunately, this case has since been discontinued for want of jurisdiction.

Following the discontinuation of the *Chief Stephen Oji's case* above, the Ekuri community supported by local NGOs and several international organizations such as World Wildlife Fund (WWF), Birdlife International and the World Conservation Society[129] instituted an action in the High Court in the case of *Joseph Oyama and others (for themselves and on behalf of the Ekuri Village of Akamkpa Local Government Area of Cross River State) v The Governor of Cross River State and others.*[130] In this case, the community sought a declaration that the proposed construction of the superhighway through Ekuri community will have adverse and irreparable effects on the entire rain forest in the community in contradiction of section 20 of the Constitution of the Federal Republic of Nigeria 1999,[131] This action together with the negative publicity brought about by widespread NGO activism, led to a conditional

[127] *Chief Stephen Oji and Others (For Themselves and on Behalf of the People of Old Ekuri and New Ekuri Villages) v Government of Cross River State and Attorney General of Cross River State* (FHC, 25 May 2016)
[128] ibid.
[129] Judex Okoro, 'Cross River Super Highway of Controversy' <https://www.sunnewsonline.com/cross-river-super-highway-of-controversy/> accessed 9 April 2019.
[130] *Joseph Oyama and Others (for themselves and on behalf of the Ekuri Village of Akamkpa Local Government Area of Cross River State) v The Governor of Cross River State and Others* (HC, 12 December 2016).
[131] Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that 'the State shall protect and improve the environment and safeguard the water, air, land, forests and wildlife of Nigeria.'

approval of the proponent's EIA by the Federal Ministry of Environment of Nigeria in 2017. The 23 conditions which were to be met by the proponent before a final approval is granted include the re-routing of the super highway away from the Ekuri community forests.[132] Because of the failure of the proponent to meet the conditions, the project is yet to commence, as the final approval of the EIA has not been secured.

However, the strategy of interpreting constitutional rights broadly is not without its problems— the success of actions instituted through this mechanism is largely dependent on proof that the plaintiff has suffered injury to his health or wellbeing, among other issues.[133] The difficulty associated with this mechanism was brought to the fore in *Okpala and others v Shell Petroleum Development Company and others,*[134] where the applicants representing themselves and three communities (Rumuekpe Eremah, Akala-Olu and Idama) in Rivers State, Nigeria sought a declaration under the Fundamental Rights (Enforcement Procedure) Rules 1979 that their fundamental rights to life and dignity guaranteed under section 33 and 34 of Nigeria's Constitution and Articles 16 and 24 of the African Charter respectively, included a right to a clean and healthy environment. Further, the applicants argued that continuous gas flaring and oil exploration activities in their communities constituted a violation of these rights.

The court rejected the argument of the applicants and held that the right to life and dignity of human person provided for in section 33 and 34 of the Constitution of the Federal Republic of Nigeria are rights conferred on persons. These rights cannot be claimed by a community as a whole, but by each person in the community whose rights have been infringed. The court also held that the fundamental rights which persons can seek redress for, under section 46 of the Constitution do not include rights guaranteed by the African Charter. Therefore, these rights

[132] Okoro (n 129).
[133] Amechi (n 112) 324.
[134] *Okpala and others v Shell Petroleum Development Company and others* (FHC, 29 September 2006).

could not be enforced through the Fundamental Rights (Enforcement Procedure) Rules 1979. The court was not persuaded by the decision in *Jonah Gbemre v Shell Petroleum Development Company*[135] which had been delivered earlier.[136]

Another strategy in use for environmental matters is leaning towards the African Charter on Human and Peoples' Right which expressly provides for environmental rights in its Article 24. This provision is brought to life not only because the Charter is domesticated in Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act but also because of the Fundamental Rights (Enforcement Procedure) Rules 2009 which specifically recognises its applicability and grants standing to non-governmental organisations.[137] The domestication of the African Charter has without doubt, improved access to justice in environmental cases, as it forms part of Nigerian law and courts have an obligation to enforce it.[138] Remarkably, there is now less reliance on tort law rules which require litigants to establish causation before a remedy can be obtained.

However, Article 24 of the African Charter also suffers some limitation —its applicability is made subject to the provisions of the Constitution and any other law that modifies or repeals it. Therefore, although the African Charter is superior to municipal law, it ranks below the Constitution, which prevails against any other law inconsistent with its provisions.[139] The effect of this, as noted by Amechi is that in certain circumstances, it might be possible for other fundamental rights guaranteed by the Constitution to override the right to a healthy

[135] *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria and Others* (n 109). This case is discussed in page 203-204 below.
[136] Uchenna Orji, 'The Right to a Clean Environment: Some Reflections' (2012) 42 (4-5) Environmental Policy and Law, 285, 289.
[137] Amechi (n 112) 329.
[138] *General Sani Abacha and Others v Gani Fawehinmi* [2001] AHRLR 172.
[139] Ekhator (n 4) 70.

environment.[140] Clearly, to some extent, effective access to justice in Nigeria is still hindered by lack of substantive rights.

6.4.2 Corruption and Lack of Political Will to Enforce Environmental Regulation

The reality of the Nigerian situation is such that certain key (but often ignored) issues affect access to justice and the recognition and enforcement of environmental rights.[141] In relation to Nigeria's oil industry, it has been observed that in order to prevent an obstruction of State revenue, the legal framework regulating the sector is set up to create environmental injustices, just as continuing State interference with the judicial process (and disregard for the rule of law) has hampered the recognition and development of the right to a healthy environment.[142] The case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited and Others*[143] provides a classical example of these issues. Here, the defendants continued flaring gas in the Iwerhekan Community in spite of the High Court's earlier judgment of 14th November, 2005, hence contempt of court proceedings were filed against them in December, 2005.[144] In 2006, the court granted a conditional stay of execution of its 2005 order on conditions that;

1. Shell Petroleum Development Company (SPDC) and the Nigerian National Petroleum Corporation (NNPC) end gas flaring in the Iwerhekan Community within a year under the supervision of the court.

[140] Amechi (n 112) 327.
[141] Ako (n 1) 286.
[142] ibid, 285.
[143] *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (n 109).
[144] Friends of the Earth, 'Archived Press Release: Press and Media' <https://friendsoftheearth.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007> accessed 24 April 2018.

2. A detailed plan for the phase out of gas flaring by 30th April 2007 is prepared and submitted by the Managing Director of SPDC, Group Managing Director of NNPC, the Minister of Petroleum and the Company Secretary of NNPC.
3. The above-named individuals appear before the court on the 31st of May 2006 to present the plan for the phase-out of gas flaring.[145]

The defendants appealed the stay of executions in the Court of Appeal, which did not amend the conditions of the stay of execution but rather ordered the Federal High Court not to sit on the 31st of May (the day set for key officials to appear before the Federal High Court).[146] Worse still, the government meddled with the judicial process by securing the transfer of the presiding judge, Justice Nwokorie to a different judicial division in the northern Nigeria State of Katsina.[147] Following this, on the 30th of April 2007, the detailed plan was not submitted, the case file was unavailable and none of the key officials of the defendants or government turned up in court.[148]

It is quite clear that the Nigerian Government is more concerned about economic gains and will stop at nothing to protect the interest of multinational companies, however unjust they may be. Unsurprisingly, in the case of *The Registered Trustees of the Socio-Economic & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Others,*[149] where a non-governmental organisation, SERAP instituted an action in the ECOWAS Community Court of Justice against the Nigerian government and some multinationals operating in the country in which it established a link between poverty and oil exploration in the Niger delta region of the country, the Nigerian government vehemently denied this

[145] ibid.
[146] ibid.
[147] Ogunnaike Taiwo, 'The Sovereign State Responsibility and the Human Rights Imperative of Zero-Gas Emission in the Niger-Delta: Rejigging the Imposed Legal Order for a Quick Climatic Redress' (2017) 32(4) American University International Law Review 971, 974.
[148] Friends of the Earth, 'Archived Press Release: Press and Media' (n 144).
[149] *The Registered Trustees of the Socio-Economic and Accountability Programme v President of the Federal Republic of Nigeria and Others* (n 75).

averment in spite of overwhelming evidence in a 2011 UNEP report, to the contrary.[150] In a nut shell, the reality of the Nigerian situation remains that economic considerations rank above environmental concerns and the individual's right of access to justice.

6.5 ACHIEVING ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN NIGERIA: THE CASE FOR THE USE OF THE PUBLIC TRUST DOCTRINE.

Environmental rights, even where guaranteed, will pose some challenges in relation to enforcement, especially in a country like Nigeria where the legal framework regulating the Oil and Gas industry is structured to impede environmental justice and ensure a constant flow of State revenue.[151] This is so because, a lot will depend on the action of the public institutions and government regarding enforcement for the non-human elements of the environment. To address this challenge, I advance the position of Sax that the Public Trust doctrine is sufficiently broad to serve as a universal tool that can help build a comprehensive legal approach to the problem of natural resource management.[152] As Sax notes, to be effective, the doctrine must 'contain some concept of a legal right in the general public, it must be enforceable against the government, and it must be capable of interpretation consistent with contemporary concerns for environmental quality.' This ideal public trust doctrine which Sax proposed more than four decades ago is now being utilised in countries like India and the United States. This doctrine ensures that specific natural resources are safeguarded for the benefit of the public, and it is the duty of the government to preserve and maintain these resources for the public.[153]

[150] Ekhator (n 4) 69.
[151] Ako, (n 1) 285.
[152] Joseph Sax, 'The Public Trust doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Michigan Law Review 471, 474.
[153] Rebecca Harms, 'Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes' (2015) 39 (1) University of California, Davis 97.

Although rooted in Roman law and principally invoked to protect land and navigable waters, the original scope of the doctrine has been expanded to include almost every public use of natural resources.[154] Quite recently too, the statutory public trust doctrine has evolved, — California's constitutional amendments for instance, saw the public trust doctrine being introduced into its Constitution in Article X section 4. Thus, the modern public trust doctrine embodies both Common Law principles and that of statutes.

In India, the courts have had cause to use the Public Trust doctrine in a few cases including the case of *M. I Builders Pvt. Ltd v. Radhey Shyam Sahu.*[155] Here, the respondents (as petitioners in the High Court), brought this action contending among others, that the decision of Lucknow Nigar Mahapalika (the Corporation) which gave permission to M. I. Builders (the Appellants) to carry out a development of a park of great historical significance and maintain same, was arbitrary, illegal, and unconstitutional. The High Court held in favour of the petitioners, hence this appeal. At the Supreme Court, it was contended that the Corporation as trustee of the park, could under the doctrine of public trust which is applicable to India, only manage the park and had no right to dispose of it, alienate it, or change its nature to something different from a park, because it held the park in trust for the citizens of Lucknow. Ruling in favour of the Respondents, the Supreme Court held that if the true nature of the park is destroyed by the development, it will amount to a violation of the Public Trust doctrine.

The most striking aspect of this case is that the court held that, the scope of Article 21 of the Constitution of India on the right to life and personal liberty has been extended to include the right to a healthy environment and the right to livelihood; and that the third aspect of the right to life is the application of the public trust doctrine to protect and preserve the public land.[156] Therefore, the application of the public trust doctrine in India is both a function of national

[154] ibid.
[155] *M. I. Builders Pvt. Ltd v Radhey Shyam Sahu* [1999] 6 SCC 464.
[156] ibid.

law and international law.[157] This remarkable reasoning of the court ought to be adopted into Nigeria's jurisprudence, thereby making section 33 of the Constitution on the right to life, the basis for the application of the public trust doctrine.

Although not expressly stated, the public trust doctrine seems to have formed the basis of the court's decision in the case of *Urgenda Foundation v The State of Netherlands (Ministry of Infrastructure and the Environment)*.[158] On the 24th of June 2015, The Hague District Court delivered judgment in favour of Urgenda Foundation when it held that the State of Netherlands must, in the light of its duty of care to safeguard and enhance the living environment, take further action to prevent the impending danger posed by climate change.[159] The uniqueness of this action lies in its use of the tort law approach against a national government (as opposed to multinational companies), notwithstanding that the court has often held the regulation of greenhouse gas emissions to be a political rather than legal matter.[160] Remarkably, in its landmark decision of 20th December 2019, the Supreme Court of the Netherlands upheld the decision of the lower courts and ordered the Dutch Government to reduce its greenhouse gas emissions significantly (at least 25% of the 1990 levels) by the end of 2020.[161]

Similarly, in *Juliana v United States,*[162] a lawsuit was filed against the government of the United States of America by a group of young people represented by a non-governmental organisation (Our Children's Trust). The plaintiffs allege that by knowingly permitting and

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[157] Jona Razzaque, 'Application of the Public Trust Doctrine in Indian Environmental Cases' (2001) Journal of Environmental Law 221.

[158] *Urgenda Foundation v The State of Netherlands (Ministry of Infrastructure and the Environment)* [2015] HA ZA 13- 1396.

[159] Elaw, 'Urgenda Foundation v. The State of the Netherlands' <https://elaw.org/nl.urgenda.15> accessed 7 February 2017.

[160] Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands' (2015) 79 Cigi Papers 2 <https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf> accessed 7 February 2017.

[161] Decision of the Supreme Court of the Netherlands of 20th December 2019 in *Urgenda Foundation v The State of Netherlands (Ministry of Infrastructure and the Environment)* <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 16 June 2020.

[162] *Juliana v United States* [2016] 46 ELR 20072.

subsidizing the extraction, use and exportation of fossil fuels (despite their effects on global warming and climate change), the defendant has violated the fundamental rights to life, liberty and property of the plaintiffs and failed in their duty to protect public trust resources.[163]

It is important to note that although the defendant challenged the jurisdiction of the court to entertain the matter on the grounds that 'the case presents *non-justiciable political questions*, the plaintiffs lack standing to sue, and federal public trust claims cannot be asserted against the federal government,'[164] the federal district court denied the government's motion for a dismissal of the case in its Opinion and Order.[165]

Actions brought against national governments often rely heavily on environmental and administrative law, and have sometimes been unsuccessful because they involve evaluating government's action in view of present environmental laws.[166] A broad interpretation and an extensive use of the public trust doctrine, if adopted into Nigeria's Jurisprudence will go a long way to ensuring that government bodies perform their role and act within their limits.

6.6 CONCLUSION

There is need to embrace a new system of Access to Justice founded on the rule of law and good governance. Indeed, there is a lot to learn from the jurisprudence of other countries where steps have been taken to secure wide access to justice. The constitution of Ecuador for instance, offers quite a unique approach in terms of securing constitutional remedies. Its 2008 amendment provides for *accion de proteccion*— a type of action that functions to secure 'the

[163] Opinion and Order of the United States District Court for the District of Oregon in *Juliana v United States* (n 139) <https://elaw.org/system/files/us.juliana.Aiken_.mtd_.pdf?_ga=2.56921193.2122461083.1568983773-2022481502.1568983773> 2 accessed 20 September 2019.
[164] ibid, 6.
[165] ibid.
[166] Cox (n 160) 3.

direct and efficient safeguard of the rights enshrined in the constitution' by eliminating procedural barriers like standing and pleading formalities.[167] Further, in Ecuador as in many other Latin American countries, the burden of proof in 'right of nature cases' is on the defendant, being the party asserting that no damage will be done to the environment.[168]

In the light of their far-reaching effects therefore, procedural barriers to access to justice in Nigeria must be tackled, alongside wider issues of corruption and political interference with the judicial process.

As preceding chapters have revealed various issues affecting the realization of the public's right of access to information, public participation in decision-making and access to justice in environmental matters in Nigeria, it is necessary to determine the effects of these on the environmental impact assessment process. To this end, the next chapter will evaluate the effectiveness of these procedural justice rights through an examination of the environmental impact assessment reports and administrative records of eight development projects.

[167] Erin Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature' (2012) 21(1) Review of European Community and International Environmental Law 63.
[168] ibid, 64.

CHAPTER SEVEN

PROCEDURAL ENVIRONMENTAL JUSTICE IN THE ENVRONMENTAL IMPACT ASSESSMENT PROCESS IN NIGERIA

7.1 INTRODUCTION

There is growing recognition for the crucial role of procedural justice rights. In this chapter, this awareness is being tested in relation to environmental impact assessments. To meet legislative requirements and address environmental and community concerns, environmental impact assessment must function as a process for the dissemination of environmental information and the involvement of the public in environmental decision-making, while also providing mechanisms to challenge acts and omissions which contravene legal rules in this regard. Determining how well these are being realized in the environmental impact assessment process in Nigeria, requires a careful examination and critical analysis of the reports of environmental impact assessments carried out in respect of certain projects, and other administrative documents relating to the projects under review. This chapter therefore evaluates the recognition of the procedural justice principles of access to information, public participation in decision-making and access to justice in environmental matters through a critical analysis of the reports[1] and administrative records[2] produced in respect of the environmental impact assessment of eight selected projects.

[1] Developers are required to produce environmental impact assessment reports for every project for which an EIA has been carried out. These reports contain information such as details of the proposed project, the potentially affected environment, the likely impact of the activity on the environment, alternatives, mitigation measures, a non-technical summary etc.

[2] These are documents (such as evidence of publication of notice of meeting in newspaper) submitted by the project proponent/developer concerning the environmental impacts assessments undertaken on development projects. These documents are filed and kept by the Federal Ministry of Environment and forms part of the records held by the Ministry/regulator in respect of such projects.

The rationale for the use of reports is that they are particularly relevant for providing information on consultation with local people. The administrative records relating to development projects on the other hand, are useful for determining the quality of access to information. Regrettably, because of the scope of the right to access to justice, it can hardly be evaluated by reference to environmental impact assessment reports and administrative documents. As noted in Chapter six above[3] under Nigeria's Environmental Impact Assessment Act there are no internal mechanisms for challenging the final decision of the Agency to grant or refuse the undertaking of a development project. Aggrieved persons can only seek redress by way of judicial review.

Despite their availability, mechanisms of judicial review have remained unutilised in relation environmental impact assessments in Nigeria. One reason for this is that EIA is relatively new to Nigeria's law, and as such its application, scope and relevance have not been fully appreciated. Besides, other barriers to accessing judicial review such as cost, time, standing etc. constantly come into play. Hence, it is not surprising that none of the projects under review were subject to judicial review.

Because of the practical impossibility of evaluating access to justice in the environmental impact assessment process through reports and other administrative records relating to environmental impact assessment, in this chapter, the focus therefore is on discovering whether there is room for challenging the decision of the regulator in respect of the approved projects under review. Therefore, to evaluate access to justice in the projects under review, this chapter will focus on discovering whether an adequate platform exists for court-based interventions, notwithstanding that the jurisdiction of the court has not been invoked in this respect.

[3] Text to n 15 in ch 6.

7.2 PROCEDURAL JUSTICE IN THE EIA PROCESS IN NIGERIA: AN ANALYSIS OF THE EIA PROCESS USING ENVIRONMENTAL IMPACT ASSESSMENT REPORTS AND ADMINISTRATIVE RECORDS.

The reports and administrative records of eight development projects were analysed, with a view determining how effectively the principles of procedural environmental justice have been recognised. To provide an insight into the nature and significance of the EIA reports selected for review, a brief description of these projects is necessary.

- **Project 1: EIA of the Construction of the Proposed Akpakun-Murtala Mohammed Airport Route No. F269 Lagos State, by the Federal Ministry of Works, Nigeria.**

This project concerns the construction of the Akpakun-Murtala Mohammed Airport route in Lagos State, Nigeria by the Federal Ministry of Works. The project was carried out for the purpose of improving the airport environment as well as the transportation network. The project road traverses through two local communities — Ajao and Maffoluku Oshodi.

- **Project 2: EIA of Itobe- 2 Coal Power Limited for the 300 megawatts (mw) Coal-Fired Power Plant as Part of the Four Special Purpose Vehicles in the 1200mw Coal-Fired Power Plant at Ofu Local Government Area, Kogi State, Nigeria.**

This project relates to the construction of a coal power plant for the provision of affordable and reliable power, which will promote the growth of industries. This power station is situated approximately 3 kilometres away from a local community and adjacent to the Niger River in Kogi State, Nigeria.

- **Project 3: EIA of Oil Mining Lease 83/85 Integrated Full Field Development Offshore Project, Bayelsa State, Nigeria.**

This is an EIA of an integrated full field development project involving the drilling of eighteen (18) wells, among others. Being an offshore development, it is located several kilometres away from the coastline of Bayelsa State, Nigeria, and has no host community. However, eight (8) littoral communities have been identified as likely to be affected by the development. These are Koluama 1, Koluama 2, Ezetu 1, Ezetu 2, Foropa, Fish Town, Ekeni and Sangana which are together known as the KEFFES communities.

- **Project 4: EIA for the Proposed Construction of two Base Transceiver Stations (BTS) Projects in Cross River State, Nigeria.**

This EIA was conducted for American Tower Corporation in respect of the construction of two base transceiver stations in Cross River State in locations where network coverage is either unavailable or insufficient. The project involves the construction of telecommunication tower infrastructure.

- **Project 5: EIA for the Proposed Indorama Eleme Fertilizer and Chemicals Limited (IEFCL) Train 2 Fertilizer Project, in Rivers State, Nigeria.**

This project is concerned with the construction of Ammonia and Urea Plants for the purpose of increasing the production of fertilizer within the existing manufacturing site of the project proponent at Eleme, Port Harcourt, Rivers State, Nigeria to bridge gaps in the demand and supply of fertilizer.

- **Project 6: EIA of the Proposed Extension 2 Oil Palm Development Project in Edo State, Nigeria.**

This is an EIA for the extension of an oil palm development project at Okomu-Udo, Ovia Southwest Local Government Area, Edo State, Nigeria. The purpose of this extension is to ensure that the project proponent meets the growing demands of its customers and increases its annual income.

- **Project 7: EIA for the Proposed Granite Quarry in Ondo State, Nigeria.**

This EIA is for a proposed granite stone quarry in Ofoso, Idanre Local Government Area in Ondo State- Nigeria for processing rock materials into aggregate granites. The granite stone quarry is a large-scale developmental project expected to produce 200 tonnes of stone dust and 500 tonnes of granite each day. The Elebiseghe community is the only community likely to be affected by the development.

- **Project 8: EIA of the Proposed 220 Megawatts (mw) Independent Power Plant (IPP) at Ewekoro, Ogun State Nigeria.**

With the rising demand for electricity in Nigeria and frequent power shortages affecting homes, industries, and commercial establishments, in 2017, the project proponent —Wapsila Nigeria Limited, proposed to install a 220mw Independent Power Plant which will be sold to the National grid, as a way of meeting the over 25,000mw electricity generation target. As this project involves activities such as site preparation, development engineering work, operational and maintenance work etc. an EIA was conducted to determine the likely effects of the installation on the environment.

The three themes which form the basis of the analysis in this chapter are Information, Participation and Redress. These themes having been drawn from my analysis and understanding of the key components of procedural justice as defined by the Aarhus Convention, legislation, case law and the literature. To analyse the data in the EIA reports and administrative documents, the content analysis method was used. This involved the use of coding schedule tables and coding manuals[4] to determine the units of analysis of the themes. Following the formulation of coding schedule tables and coding manuals for the three themes of these research, the environmental impact assessment reports and administrative records were reviewed for content and the coded fragments were retrieved and organised into the relevant units of analysis using numbered codes derived from the coding manual, as shown below.

[4] Text to n 102 in ch 1. See also p 26.

Coding Manual and Coding Schedule Table for Access to Information

FORMAT OF REPORT AVAILABLE TO THE PUBLIC

1. Print
2. Online
3. Digital
4. Braille
5. Large Print

NATURE OF ENVIRONMENTAL IMPACTS RECORDED

1. Local impacts
2. Transboundary/Global impacts

NOTIFICATION PROCEDURE

1. Town criers
2. Radio announcement
3. Newspaper publication
4. Television

VENUE OF DISPLAY EXERCISE

1. Local community
2. Local Government Council
3. Ministry of Environment of the State
4. Federal Ministry of Environment

TOPICS COVERED

1. Description of development
2. Description of effects of development
3. Description of mitigation measures
4. Alternatives
5. Baseline study
6. Description of evidence used to identify and assess significant impacts and main uncertainties concerned.
7. Non-technical summary
8. Reference list detailing sources used for description and assessment

PROJECT TITLE	YEAR OF REPORT	FORMAT OF REPORT AVAILABLE TO PUBLIC	NATURE OF ENVIRONMENTAL IMPACTS RECORDED	NOTIFICATION PROCEDURE	VENUE OF DISPLAY EXERCISE	TOPICS COVERED
Project 1	2015	1	1	2, 3	3, 4	1-7
Project 2	2014	1	1	3	2, 3, 4	1-7
Project 3	2017	1	1	2, 3	2, 3, 4	1-7
Project 4	2018	1	1	2, 3	2, 3, 4	1-8
Project 5	2017	1	1	2, 3	2, 3, 4	1-7
Project 6	2016	1, 2	1	2, 3	2, 3, 4	1-7
Project 7	2017	1	1	2, 3	2, 3, 4.	1-7
Project 8	2014	1	1	2, 3	2, 3, 4.	1-7

Figure 8.

Coding Manual and Coding Schedule Table for Public Participation in Decision-making.

TIME OF PARTICIPATION

1. During project planning
2. Before commencement of project.
3. After commencement of project
4. After completion of the project

NOTIFICATION PROCEDURE

1. Town criers
2. Radio announcement
3. Newspaper publication
4. Television

PUBLIC ENGAGEMENT PROCEDURE

1. Active Participation of members of the public with an influence on decision-making.
2. Direct participation of members of the public (through interviews, questionnaires and focus group discussions)
3. Consultation of stakeholders/ key informants such as village chiefs.

PARTICIPANTS

1. Members of the community/ public
2. Key informants (Including village chief and council of elders)
3. Representatives (including women leaders and youth leaders)
4. Government bodies
5. Project affected persons

PROJECT TITLE	YEAR OF REPORT	TIME OF PARTICIPATION	NOTIFICATION PROCEDURE	PUBLIC ENGAGEMENT PROCEDURE	PARTICIPANTS
Project 1	2015	2	2, 3	3	4, 5
Project 2	2014	2	3	3	2
Project 3	2017	2	2, 3	2, 3	1, 2, 3
Project 4	2018	2	2, 3	2, 3	1, 2
Project 5	2017	2	2, 3	2, 3	1, 2
Project 6	2016	2	2, 3	No information	No information
Project 7	2017	2	2, 3	2, 3	1, 2
Project 8	2014	2	2, 3	2	1

Figure 9.

Coding Manual and Coding Schedule Table for Access to Justice in Environmental Matters

POTENTIAL FOR CHALLENGING DECISION OF REGULATOR

1. No or inadequate access to information
2. No or inadequate opportunity to participate in decision-making
3. Acts and omissions inconsistent with national law relating to the environment

OBJECTION RECORDED IN REPORT/ADMINISTRATIVE RECORDS

1. Yes
2. No

OBJECTIONS RAISED OUTSIDE THE EIA PROCESS

1. Yes
2. No

REVIEW PROCEDURE USED

1. Administrative review
2. Judicial review
3. None

EFFECTIVENESS OF REVIEW PROCEDURE USED

1. Standing to sue
2. Equity and fairness in the review process
3. Timely disposal of the case
4. Low cost of review
5. Availability of adequate and effective remedies

PROJECT TITLE	YEAR OF REPORT	POTENTIAL FOR CHALLENGING DECISION OF REGULATOR	OBJECTIONS RECORDED IN REPORT AND RECORDS	OBJECTIONS RAISED OUTSIDE THE EIA PROCESS	REVIEW PROCEDURE USED	EFFECTIVENESS OF REVIEW PROCEDURE
Project 1	2015	1, 2	2	2	N/a	N/a
Project 2	2014	1, 2	2	2	N/a	N/a
Project 3	2017	1, 2	2	2	N/a	N/a
Project 4	2018	1, 2	2	2	N/a	N/a
Project 5	2017	1, 2	2	2	N/a	N/a
Project 6	2016	1, 2	2	1	3	N/a
Project 7	2017	1, 2	2	2	N/a	N/a
Project 8	2014	1, 2	2	2	N/a	N/a

Figure 10.

Summary of Data Analysis and Ranking of Projects

PROJECT TITLE	COMPLIANCE WITH EIA FLOWCHART	VALUE OF PROJECT	STATUS OF PROJECT	INFORMATION PROVISION	PARTICIPATION EXERCISE UNDERTAKEN	DISPUTE RESOLUTION MECHANISM USED?	RESEARCHER'S REMARKS ON QUALITY OF EIA REPORT
Project 1	Yes	Ease of transport-tation	Commence ment	Yes	Yes	No	Satisfactory
Project 2	Yes	Provision of Alterna-tive source of energy	Commence ment	Yes	Yes	No	Unsatisfactory
Project 3	Yes	Increased Oil export earnings	Commence ment	Yes	Yes	No	Satisfactory
Project 4	Yes	Improved communi cation	Commence ment	Yes	Yes	No	Satisfactory
Project 5	Yes	Increased Agricultu-ral producti-vity	Commence ment	Yes	Yes	No	Satisfactory
Project 6	Yes	Food security	Commence ment	Yes	Yes	No	Unsatisfactory
Project 7	Yes	Provision of materials for construc-tion works.	Commence ment	Yes	Yes	No	Satisfactory
Project 8	Yes	Electricity genera-tion	Commence ment	Yes	Yes	No	Unsatisfactory

Figure 11.

7.3 DISCUSSION

This subsection discusses the data recorded above. As the focus of this thesis is determining the adequacy of procedural rights, and identifying illegalities arising from the implementation of same, the analysis of the effectiveness of access to information, public participation, and access to justice in Nigeria's EIA process, will involve discussions of broader issues and wider challenges affecting the public's enjoyment of these procedural justice rights.

7.3.1 Theme One: Information Concerning the Environmental Impact Assessment of Development Projects

On the face of it, an examination of the administrative records of all projects under review indicate that members of the public are well notified of the availability of information relating to the project. This is evidenced by newspaper publications which provide information on the date and venue for the public display of draft environmental impact assessment reports.[5] Notwithstanding the apparent recognition of the right of access to information in the EIA process, the key question remains, how effectively is this right applied?

Discussions of the access principles in preceding chapters produced a set of requirements necessary for the attainment of procedural environmental justice. This will be used as the yardstick for evaluating the effectiveness of the application of the access rules in the EIA process in Nigeria. To determine the meaning and scope of the right of access to information as it relates to EIA process, Chapter three of this thesis explored three sub-questions relating to who is entitled to receive environmental information, the accessibility of environmental information, and the adequacy of same.

[5] Such publications are often accompanied by opportunities for members of the public to comment on the report/project.

The model developed recognised that the right of access to information, properly so-called requires that appropriate and meaningful information is made available to members of the public, within reasonable time, at an early stage of planning and whenever requested, except where a recognised exception to access to information applies. Based on this framework, the basic requirements of access to information (the availability of appropriate and meaningful information) have been deduced and discussed below.

7.3.1.1 *Appropriate Information*

Information is appropriate if it provides enough awareness about benefits and risks of projects during the environmental impact assessment process. An examination of the EIA reports under review revealed that the requirement that to constitute access to information, members of the public must receive appropriate information has largely been met. [6] This is because this requirement is fulfilled where the public not only have full knowledge of the development project but are also educated about their role in the EIA process. In the Extension Two Oil Palm Development Project (project 6) for instance, it is recognized that in addition to obtaining the comments and views of members of the host community, consultation was carried out in order to inform and educate stakeholders about the project, its justification, scope, and the potential and associated impacts. Similarly, in project 8, information dissemination and stakeholder consultation were used to intimate members of the public about the proposed project and solicit their views, expectations and concerns on environmental and social health issues to be integrated into the impact assessment and mitigation.

[6] Report of the Environmental and Social Impact Assessment of the Proposed Extension Two (2) Oil Palm Development Project at Ovia-North East and Uhunmwode Local Government Areas, Edo State – Nigeria (2016) xvi.

Interestingly however, in all reports reviewed, despite the supposed education of members of host community on the risks of development projects, no environmental concerns or objections were raised by the public. The comments and views of members of the public in respect of the projects were strictly geared towards securing community infrastructure rather than environmental considerations. In the Itobe-2 coal power plant project (project 2), the responses of community representatives at the disclosure meeting were particularly targeted at the local content arrangement, social infrastructure, and capacity building. Similarly, driven by lack of understanding of the purpose of EIAs, a host community purported to endorse a development projects despite its adverse effects. This was reported in the following words:

> The summary of the communities' assessment of the likely environmental impacts of the proposed project was that the project would largely have insignificant adverse impacts.
>
> Project 6: EIA of proposed Oil Palm Development p. xvi

One reason for the above may be lack of information about the project and the role of environmental impact assessments and the rights of members of the public concerned. On the other hand, this raises questions as to the quality and sufficiency of the information disseminated.

7.3.1.2 *Meaningful Information*

To be meaningful, the information must be physically and substantively available, in terms of being fully comprehensible to those it is meant for, as to give them an opportunity to respond to the information received. There is no access to information where information is insignificant and unsuccessful in achieving its purpose. This is particularly so where the physical availability of information does not translate to a substantive access to information. An examination of all reports under review reveal some difficulty in fulfilling this element.

As part of the environmental impact assessment process, after the submission of the draft EIA report to the Agency, the next stage is the review of the draft EIA report by the Federal Ministry of Environment. This usually involves an in-house review, a technical/panel review and the public display of the draft report.[7] At this stage, the regulatory agency directs the project proponent to make known to the public, the date(s) and venue(s) of the display of the draft EIA report through radio announcement and advertisement in a national daily. This arrangement amounts to a total abuse of the right of access to information for most people in local communities who are often indigent and as such unable to purchase a radio or newspaper.

This problem is well illustrated in Itobe-2 coal power project (project 2) where the findings of the socio-economic survey revealed that there is a high level of poverty in the study area. The analysis of the questionnaire administered also showed that more than three quarters of the dwelling houses do not possess modern and social conveniences.[8] With a high rate of unemployment, more than three quarter of the population regard themselves as unable to meet their personal and family needs. Despite the high rate of poverty in this community, and

[7] See figure 7, p 74.

[8] Environmental and Social Impact Assessment of Itobe -2 Coal Power Limited for the 300MW Coal-Fired Power Plant as Part of the Four SPVs in the 1200MW CFPP at Ofu LGA, Kogi State-Nigeria (2014) 103.

the consequent lack of purchasing power, the regulatory agency approved the advertisement of the public notice for information and comments on the draft EIA report and the public display exercise to be made in a national daily (the Daily Trust). This is rather interesting considering that town criers are well known to be the most effective means of communication in rural settings. Indeed, the crucial role of town criers in information dissemination has been recognised in several studies. A 2019 study by Apata for instance, notes that in view of the high rate of illiteracy within traditional African societies, an 'effective, cheap, simple and reliable' mode of communicating information is through town criers.[9] Similarly, the responses of 210 respondents in Akporido and Onohwakpo's study on women's access to environmental information found town criers most effective in disseminating information.[10] In addition, the display centres approved for the display exercise were the local government headquarters, the Federal Ministry of Environment, Lokoja (the State capital), the Federal Ministry of Environment Abuja (the Federal capital) and the Environment Library Abuja. No provisions were made for inspection of the draft EIA report within the local community concerned. This issue is by no means peculiar to the Itobe-2 project. Indeed, in all eight projects under review, the communication of public notices for information and comments on draft EIA report have been made through national dailies (and radio announcements in certain cases), just as the approved display centers have been limited to the premises of Federal, State and Local government departments and parastatals. This seems to be standard practice in Nigeria. Unsurprisingly, concerns have been raised by members of local communities in respect of lack of access to reports.

[9] Temidayo Apata, 'Information Dissemination and Communication Strategy Using Town Crier in a Traditional Context in Southwestern States, Nigeria' (2019) Applied Tropical Agriculture 78.
[10] Caroline Akporido and Josephine Onohwakpo, 'Access to Environmental Information by Women in Some Selected Oil Producing States in Nigeria (2011) 2(1) Journal of Information and Knowledge Management 1.

In the Oil Mining Lease (OML) 83/85 Integrated Full Field Development Project for instance, this problem was pointed out to the proponent of the project thus;

> The environment is very critical, and I am aware that you will conduct an Environmental Impact Assessment. However, the reports of previous EIAs is not made available to the communities.
>
> Project 3: EIA of OML 83/85 Integrated Full Field Development p.236.

In the light of the foregoing, it is evident that the realisation of the right of access to information in the EIA process is being hindered by several cost implications which place an undue burden on poor people in rural communities. Hence, the practice of publishing public notices relating to environmental impact assessments in national dailies only, together with the display of draft EIA reports in specific locations such as Federal and State Ministries of Environment, the EIA Registry and the Environment Library (both in the Federal Capital Territory of Nigeria) without other arrangements to suit the circumstances of local people who are most affected by the development project, is in itself a barrier to access to information.

For the requirement of the Environmental Impact Assessment Act[11] to be fulfilled, it is important for members of the public (including relevant actors and stakeholders) to have access to EIA reports to enable them make comments on the environmental assessment of proposed developmental activities.

[11] Section 7 provides that 'before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity.

7.3.1.3 *Broader Concerns About the Availability of Environmental Information.*

The focus of discussions on access to information both in legislative provisions and the literature in general is transparency. The transparency theme has been quite successful in identifying minimum legal requirements for effective access to information. Notwithstanding this, it is important to note that the realization of good governance through access to information rests not only on transparency but also on the capacity of members of the public to request for, and use information both of which may be severely limited in 'low capacity settings'.[12] As Haider, Mcloughlin and Scott have observed, there are certain structural problems in developing countries which impact on the ability of relevant bodies to produce information and the public's capacity to demand for, and use their right of access to such information.[13] Therefore, while it is remarkable that the basic legal requirements of access to information above have largely been met, the importance of addressing certain broader issues relating to the right of access to information, such as the availability of information, the mode of dissemination of information, and the quality of information dispensed cannot be overemphasized. In many respects, these issues affect the appropriateness and meaningfulness of the information received, which as discussed above, are minimum requirements for effective participation.

7.3.1.3.1 Is Information on Environmental Impact Assessments Widely Available?

The right of access to information requires that members of the public are given adequate and meaningful information about development projects. One way in which this requirement is fulfilled is through the environmental impact assessment process. Indeed, an objective of

[12] Huma Haider, Claire Mcloughlin and Zoe Scott, *Topic Guide on Communication and Governance* (2nd edn, Governance and Social Development Resource Centre, 2011) 56.
[13] ibid.

environmental assessments under the Environmental Impact Assessment Act is 'to encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or trans-state or on the environment of bordering towns and villages.'[14] Individuals, authorities, incorporated and unincorporated bodies, and even the Government thus have a legal obligation to carry out an environmental impact assessment when undertaking or authorising an activity which is likely to have significant adverse environmental effects on the environment to be carried out.[15]

In certain circumstances however, notwithstanding that the activities concerned are likely to significantly affect the environment adversely, environmental impact assessments are not required to be undertaken. One of these situations arises where the regulatory agency believes that the project is in the list of projects which in the opinion of the President or Council is likely to have minimal environmental effects.[16] Clearly, this section grants extensive powers in respect of the conduct of environmental impact assessments to the President, which can be exercised where his subjective views so demand. The implication of this on the public's right of access to information is that this provision may provide a legal backing for undemocratic political systems and non-inclusive governments, which can be relied on to deny the public of their right to information. Corrupt governments unwilling to provide information about harmful development projects, can lawfully retain the culture of secrecy on grounds that the effects of the activity on the environment are minimal.

It is important also to note that, the conduct of an environmental impact assessment does not in itself guarantee access to information— corruption and poor administration of the EIA process have created new challenges for the realization of the public's right to access

[14] Environmental Impact Assessment Act 2004, s 1(c).
[15] ibid, s 1(a).
[16] ibid, s 15(1).

information in EIAs. It has been observed that the regulatory agency's procedure for disclosing records of environmental assessments is far from transparent.[17] The reason for this is that the Agency employs concealment of information as a means of suppressing its failings and shortcomings, one of which is its failure to keep a statistical summary of all EIAs conducted as required under section 58 of the EIA Act.[18] This is unsurprising considering that one of the limitations of this study is lack of access to documents. As earlier mentioned,[19] selection of projects for this thesis was, to some extent, determined by the availability of documents, as administrative documents of some projects of interest were deemed inaccessible for research purpose 'for confidentiality reasons and because of their incompleteness.'

Because corruption and secrecy are inseparable bedfellows, corruption engenders secrecy, just as secrecy gives rise to corruption. Williams and Dupuy, in their analysis of why corruption occurs in the environmental impact assessment process adopted the dominant principal-agent theory, and on this basis concluded that corruption thrives where too much decision-making power is in the hands of a few people, there is lack of access to information concerning decisions made, and no mechanisms for holding decision makers accountable for their acts and omissions.[20]

Based on the foregoing, central to the problem of corruption in EIAs are weak institutions. The absence of institutional mechanisms for ensuring transparency, accountability and participation means the various actors in the EIA process cannot be constrained from wrongdoing.[21] Unsurprisingly, the system in Nigeria which gives ample leverage to operators

[17] Fatona Olugbenga, Adetayo Olumide and Adesanwo Adeola, 'Environmental Impact Assessment (EIA) Law and Practice in Nigeria: How Far? How Well?' (2015) 1(1) American Journal of Environmental Policy and Management 11, 15.
[18] ibid, 14.
[19] This was discussed as part of the limitations of this study in chapter 1. See p 34.
[20] Aled Williams and Kendra Dupuy, 'Deciding Over Nature: Corruption and Environmental Impact Assessments' (2017) 65 Environmental Impact Assessment Review 118, 119-120.
[21] ibid, 120.

of multinational oil and gas projects to regulate their activities, creates further problems for the realization of the right of access to information.[22] This is because, these operators now regard any form of cooperation with local communities as an undue burden.[23] The effects of this on the procedural justice rights of the Nigerian people are enormous— they have no information about projects that affect their daily lives and are not involved in the making of decisions in respect of such projects. Without enforcement from the regulatory agency, many local communities remain excluded from the EIA process.[24]

The foregoing discussion has revealed that the attainment of the right of access to information in EIAs in Nigeria is being hindered by legislative and institutional ills. In view of the nature of these issues, and their far-reaching implications, it is doubtful that true access to information is realised in every case.

Finally, a discussion of the accessibility of environmental information within the context of EIAs in Nigeria is incomplete unless there is a consideration of women's right in this regard. Rural women are a major part of Africa's poor, unemployed and socially disadvantaged.[25] Historically, women have had no or unequal access to certain rights, opportunities and privileges.[26] While enormous progress has been recorded on a global scale, in Nigeria, there are still concerns as to women's economic empowerment, access to education and political participation, despite the existence of legislation to the contrary.[27] Access to information is therefore necessary for the advancement of women and their involvement in the development process.[28]

[22] Olugbenga, Olumide and Adeola, (n 17) 13.
[23] ibid.
[24] ibid.
[25] Akporido and Onohwakpo, (n 10) 2.
[26] Abdullahi Kangiwa, 'Gender Discrimination and Feminism in Nigeria' (2015) 7(3) International Journal of Economics, Commerce and Management 752.
[27] ibid, 753.
[28] Haider, Mcloughlin and Scott (n 12) 61.

Regrettably, a 2011 study of women's access to information in three oil producing communities in Nigeria found that rural women had limited access to environmental information.[29] This is still the case today, as barriers to the full integration of the Nigerian woman in political participation and decision-making are engendered by age-old customary laws and cultural practices which advance various forms of discrimination against women. In the light of this, it is doubtful that women have effective access to information in EIAs. This is more so considering that there was no direct involvement of women in some of the EIA projects reviewed.

In host communities, it is usual for the consultation exercise to involve a limited number of people of high social standing. Characteristically, this people are the village chief, council of elders, women leader and representative of the youths. This was the case in the Itobe-2 Coal Power Plant (project 2) for instance, in which the consultation carried out to inform stakeholders of the nature, size and timing of the project involved the royal father (village head), village council members, social groups and representatives of women and youths.[30] The situation was no different in the EIAs of Extension 2 Oil Palm Development (project 6) and the Base Transceiver Stations Development (project 4).

The problem with this approach is that in most traditional settings in Nigeria, administrative offices are the preserve of male members of the community. This has been well illustrated by Onyemaechi who found female administrative title holding uncommon in the political system of the Igbos of south-eastern Nigeria.[31] Bassey and others, also noted that in accordance with the custom of the Efiks of southern Nigeria, men are the leaders of the community.[32] This means that in the stakeholder system of participation, the rights of rural Nigerian women to

[29] Akporido and Onohwakpo, (n 10) 6.
[30] Environmental and Social Impact Assessment of Itobe -2 Coal Power Plant (n 8) p.116.
[31] Uzoma Onyemaechi, 'Igbo Political System' <http://umunna.org/politicalsystems.htm> accessed 2 May 2019.
[32] Antigha Bassey and others, 'Gender and Occupation in Traditional African Setting: A Study of Ikot Effanga Mkpa Community Nigeria' (2012) 2(3) American International Journal of Contemporary Research 238, 242.

access to information in respect of EIAs are tied to the successful engagement of the women leader with the consultation process.

Because participation ensures that the public is educated about the scope of a project, its weaknesses and any available alternatives etc.,[33] the stakeholder approach to participation functions to limit women's access to information in EIAs. As earlier noted,[34] the goal of participation is to give ordinary citizens a chance to contribute to policy formulation from an informed position.[35] Rural women can hardly have access to information in respect of EIAs where there are excluded from processes in which information is disseminated. Hence, better access to information for rural women can be achieved where women have face-to-face contact with liaison officers / project proponents, and information centres are provided for their education.[36] This will complement the present system in which information is communicated through the mass media alone.

7.3.1.3.2 *Language Barriers and Communication Preferences*

Differences exist in the way individuals understand and use language and this can lead to problems in communication. Unsurprisingly, Blume and Board's study on language barriers led to the conclusion that 'lack of common knowledge of language can generate substantial efficiency losses.'[37] Although it has been argued that language is not a catalyst for exclusion since people can learn any language of their choosing, the fact that people do not always have full access to learning the languages through which interactions are made in their society,

[33] Leke Oduwaye, 'Citizenship Participation in Environmental Planning and Management in Nigeria: Suggestions' (2006) 20(1) Journal of Human Ecology 43, 44.
[34] Text to n 37 on ch 5.
[35] Geoffrey Salomons and George Hoberg, 'Setting Boundaries of Participation in Environmental Impact Assessment' (2014) 45 Environmental Impact Assessment Review 69, 70.
[36] Akporido and Onohwakpo (n 10) 6-7.
[37] Andreas Blume and Oliver Board, 'Language Barriers' (2013) 81(2) Econometrica 781, 802.

makes language a convenient means of exclusion.[38] Therefore, the right of access to information is meaningless unless information on EIAs are provided in appropriate languages to those concerned, so that they are effectively informed of the EIA and able to participate in it.

In Nigeria's environmental impact assessment process, the environmental information in the final EIA report, is often written in English. This is in fact the case in all reports reviewed. The practice of providing information on environmental assessments in English fails to take the peculiarities and demographics of the country into account. Nigeria is a multilingual nation, made up of different ethnic groups, with over four hundred indigenous languages.[39] The indigenous language of any given set of people is its first language. The official language of the nation is English, which is often learnt through formal education. However, with an adult literacy rate of 56.9%,[40] illiteracy remains a major challenge in Nigeria and as such there is a low rate of proficiency in English. Therefore, the effect of providing information on environmental assessment in English alone is that illiterate members of society can only enjoy a physical availability of information, without a substantive access to information. Hence, language is a basis for the abuse of the right of access to information. Information dissemination in the EIA process will be more effective where environmental information is communicated in indigenous languages at the consultation stage, the final EIA report is written in simple English and interpreters are used.

Interestingly, even where literacy is not in issue, there could still be a lack of access to information where, although readable, information is incomprehensible. This is particularly

[38] Ayo Bamgbose, 'Language as a Factor in Participation and Exclusion' in Ozo-mekrui Ndimele (ed), *Four Decades in the Study of Languages & Linguistics in Nigeria: A Festschrift for Kay Williamson* (M & J Grand Orbit Communications, 2019) 76.
[39] R. Agheyisi, 'Minor Languages in the Nigerian Context: Prospects and Problems' (1984) WORD 35(3) 235.
[40] United Nations Educational, Scientific and Cultural Organization, 'National Literacy Action Plan for 2012-2015 Nigeria' (2012) 1. <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/Nigeria.pdf> accessed 23 April 2019.

the case where information is written in technical language, requiring an interpretation from experts, to be meaningful to lay people. This was a common issue in some of the EIA reports which are the subject of this research. In the EIA of the proposed 220MW Independent Power Plant (project 8), the potential impacts of the development on air quality was described in the following words:

> Ambient air quality may be impaired by Stack NOx and SOx emissions. SOx emission may be low if the Natural gas/distillate liquid fuels used for firing are sweetened, but NOx emissions from the Gas Turbine may be a concern… NOx also takes part in a number of chemical reactions with hydrocarbon present in urban air to produce toxic pollutants…
>
> EIA of the Proposed 220mw Independent Power Plant, p 6

Undoubtedly, this representation of the impacts of the development on air quality being incomprehensible to the lay man, requires expert interpretation which is often unavailable. In the circumstance, access to information through the EIA report is ineffective.

Besides language barrier, there is also the problem of communication preferences. There are no arrangements for the provision of information in special formats such as large prints and braille, for those who can only access printed documents in this way. In the light of the foregoing discussion, it is evident that these barriers to access information must be eliminated if the realization of the right is to be achieved.

7.3.1.3.3 *The Quality of Information in Environmental Impact Assessment Reports*

One approach to ascertaining the quality of EIAs is by reviewing the quality of EIA reports. Sandham has described this review process as providing a quality control function which

contributes to the effectiveness of EIA in any given system.[41] While a good quality report does not necessarily translate to an effective EIA, since the EIA report is a vital element of the EIA process, a good quality report increases the likelihood that better decisions will be taken by the decision-maker who reads it.[42]

Several methods of assessing the quality of EIA reports have been put forward in the literature. For instance, Laivina, Pubule and Rosa have advanced a criteria of evaluation which is made up of four groups, namely— '(1) General assessment of Environmental impact statement, (2) Existing situation, description of planned activity (3) impact analysis, Mitigation and Impact management (4) Alternatives, public participation, monitoring.'[43] Similarly, Lee and Colley's Environmental Statement Review Package[44] identified four review areas which are: '(1) a description of the development, the local environment and base-line conditions, (2) identification and evaluation of key impacts, (3) alternatives and mitigation of impacts and (4) communication of results.'[45]

To identify deficiencies in environmental statements, the four review areas outlined in Lee and Colley's environmental statement review package above, were used to review 12 environmental statements in the UK. The review package identified the common deficiencies in environmental statements in the following areas: the description of the types and quantities of wastes that will be created by the project; identification and scoping of potential impacts; treatment of the risk of accidents; assessment of impact significance; treatment of

[41] Luke Sandham and Hester Pretorius, 'A review of EIA Report Quality in the North West Province of South Africa' (2008) 28 Environmental Impact Assessment Review 229.
[42] ibid.
[43] L. Laivina, J. Pubule and M. Rosa, 'A multi-factor Approach to Evaluate Environmental Impact Statements' (2014) 12(3) Agronomy Research 967, 970.
[44] Norman Lee and Raymond Colley, 'Reviewing the Quality of Environmental Statements' (1991) 62(2) Town Planning Review 239, 242. The Environmental statement review package has been developed by Lee and Colley as a yardstick for assessing the quality of environmental statements submitted as part of the requirements for environmental assessments, set out in the United Kingdom Planning Regulations. It is designed to assist local planning authorities and other regulators, developers, consultees, consultancies etc.
[45] ibid, 244.

alternatives; bias and misplaced emphasis in presentation and the absence of a non-technical summary. [46]

This thesis adopts the criteria set out in the Environmental Statement Review Package above, in its assessment of the quality of environmental impact assessment reports. The reason for this is that this package, although originally made for the UK, has since been successfully applied to other national contexts.[47]

An examination of the reports under review reveal that in all reports concerned, the project, local environment and base-line conditions are well described. The key impacts of the development are assessed, alternatives and mitigation of impacts are addressed and the result of the findings of the EIA are communicated. However, to determine the quality of information provided, a more detailed analysis of the review areas is necessary. Thankfully, this has been addressed by Sandham and Pretorius who have set out the categories and sub-categories of the four review areas.[48]

In Sandham and Pretorius' review criteria, review area two is concerned with the identification and evaluation of key impacts. Specifically, Review Categories 2.1 and 2.2 require environmental impact assessment reports to define and identify the key impacts of the proposed activity on the environment. This reflects section 3(1) of Nigeria's Environmental Impact Assessment Act which demands that significant environmental issues are to be identified and studied before activities likely to affect the environment are undertaken. Therefore, to determine the quality of EIA in respect of this review area, it is necessary to examine the reports to discover the key environmental impacts recorded therein.

A review of the eight reports under consideration revealed that the key environmental impacts identified are not sufficiently broad to cover the range of environmental problems

[46] ibid, 246.
[47] ibid, 239.
[48] Sandham and Pretorius (n 41) 233.

referred to in the Environmental Impact Assessment Act. Also, impacts are often limited to local problems and do not include wider issues, the transboundary effects of the development and other global challenges. In the EIA report for the proposed Granite Quarry (project 7) for instance, the potential impacts of the projects that were identified include: problems with air quality, noise generation, destruction of vegetation, soil contamination, disturbance of wildlife and loss of wildlife habitat, waste generation, respiratory hazards, risk of traffic accidents, disturbance of the visual quality of the local landscape etc. Clearly, the EIA has identified only potential local impacts of the project. Mining activities such as this, could have more serious effects on the environment. In the first place, the entire granite quarrying process (consisting of the preparation of the site, mining, transport and comminution) involves the use of electricity, diesel and explosives all of which lead to the emission of significant amounts of greenhouse gases.[49] Greenhouse gases are a major cause of climate change which has far-reaching consequences, especially for developing countries like Nigeria.

Further, air pollution from quarrying activities have transboundary effects which results in 'trans-oceanic and trans-continental plumes of Atmospheric Brown Clouds' (ABCs) which can obstruct sunlight and cause surface dimming.'[50] Granite quarrying may also affect surface and ground water[51] and this too can affect the environment beyond the site of the activity.

Still on the quality of information in EIA reports, under Review Area Four of Sandham and Pretorius' review criteria, it is provided that in the communication of results, EIAs should be

[49] Suthirat Kittipongvises, Orathai Chavalparit, Chakkaphan Sutthirat, 'Greenhouse Gases and Energy Intensity of Granite Rock Mining Operations in Thailand: A Case of Industrial Rock-Construction' (2016) Environmental and Climate Technologies 64, 69-70.

[50] V. Ramanathan and Y. Feng, 'Air Pollution, Greenhouse Gases and Climate Change: Global and Regional Perspectives' (2009) 43 Atmospheric Environment 37.

[51] Sasikala Chandran and Sarath Chandran, 'Impact of Granite Quarry on Human Life and Environment: A Case Study of Vellarada Panchayat of Thiruvananthapuram District, Kerala' (2015) Proceeding of International Conference on Climate Change and the Developing World 342, 345.

unbiased. In contravention of this requirement however, reports examined seem to have been produced to ensure approval of projects. The benefits of the projects are often emphasized, not much of the impacts are identified and there is no real consideration of alternatives. In the Extension 2 Oil Palm Development (project 6), while the environmental and social impact assessment report contained a detailed description of the project and its rationale,[52] potential environmental and health impacts of the activity on the environment were not fully identified[53] and the consideration of alternatives was rather poor. After identifying four alternatives— (1) Do nothing alternative (2) Alternative location for the project (3) Alternative methods for plantation development and (4) small holder development—the full development of the project (as planned) was the option adopted.[54] No reasons were given for the adoption of this option over other alternatives. Because the information in the report does not offer a balanced view of the EIA, it is not of a quality that promotes effective access to information.

7.3.2 Theme Two: Participation in the Environmental Impact Assessment Process

All projects reviewed recorded some evidence of stakeholder engagement in the EIA process. Consultations were reported to have been carried out at an early stage of the projects for the purpose of ensuring that the views and concerns of stakeholders are integrated into the EIA

[52] These are usually economic considerations and other issues such as job creation, provision of infrastructure etc.

[53] The potential impacts of the activity were limited to local problems arising from the pre-construction stage up to the decommissioning of the project, but no mention was made of other problems which may affect the environment beyond that in which the development activity is carried out.

[54] Final Report of the Environmental and Social Impact Assessment of the proposed Extension 2 Oil Palm Development (n 6) xxiii.

process. This was done through interviews, questionnaires, focus group discussions and meetings with community elders, landlords, women leaders, groups and relevant authorities.

A careful examination of the consultation process revealed that there was a general preference for the use of questionnaires and interviews over focus group discussions and stakeholder meetings. One reason for this is that interviews are an effective part of the public participation process, useful for obtaining in-depth information.[55] Focus groups on the other hand, although a useful way of discovering the issues and concerns of people in a group or community, often consist of a small group of people, whose views may not represent the community's position on the issue concerned.[56]

In this subsection, the effectiveness of public participation in the EIA process will be assessed viz-a-viz the public participation model developed in chapter three of this work. In developing the public participation model, this thesis examined three sub-questions relating to public participation in decision-making, namely: Who can participate in environmental decision-making? How should the public be notified about opportunities for participation in the making of decisions relating to EIA? What forms of participation should be used in the environmental impact assessment process? Drawing on these sub-questions, the contrasting view of learned authors, legislation and international best practice principles, this thesis posits that in this work:

> Public participation refers to the early, meaningful and direct involvement of individuals and groups (as opposed to through

[55] James Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizens Involvement* (Jossey-Bass, 2005) 190.
[56] United States Environmental Protection Agency, 'Public Participation Guide: Focus Groups' <https://www.epa.gov/international-cooperation/public-participation-guide-focus-groups> accessed 4 May 2019.

elected representatives, administrative bodies, experts or interest groups) who are interested in or affected by a proposed intervention, in decision-making.

Based on the definition of public participation above, certain elements are necessary for ensuring effective public participation and are discussed below.

7.3.2.1 *Early Involvement*

As earlier noted,[57] effective public participation is best assured where there are provisions for participation at an early stage of project planning. This requirement appears to be met in all projects under review. In the American Tower Corporation Project for the Construction of Two Base Transceiver Stations (Project 4) for instance, it is reported that consultation with project communities began at a very early stage of the project. It involved meeting with community leaders, landlords, groups and relevant authorities. Similar provisions are contained in the reports of other projects.

Perhaps, one reason why the early involvement of members of the public/stakeholders in the decision-making process has been recorded in all projects under review is the need to fulfil the legislative requirement relating to public comments. Under section 17(1)(c) of the EIA Act for instance, 'every screening or mandatory study of a project and every mediation or assessment by a review panel must include a consideration of… comments concerning those effects received from the public…' As the screening exercise (involving the initial

[57] A detailed discussion of the requirements of early participation has been made in chapter five above. See pages 146-148.

environmental evaluation and site verification) occurs at an early stage of the EIA process,[58] it functions to provide room for the timely involvement of the public/stakeholders in the making of decisions relating to projects.

However, as earlier noted,[59] in Nigeria, it is common for public participation to begin at a very late stage of a project— when the construction of the development has begun and most decisions in respect of the project have been taken. In some cases, there are no avenues for public participation altogether despite huge claims in environmental impact assessment reports to the contrary. In the Extension 2 Oil Palm Development Project (project 6) for instance, despite claims that public participation took place, together with statistical representations in the EIA report, members of the Okomu community supported by non-governmental organisations have led protests in which they contend that Okomu Oil Palm Company (the project proponent) has continued its deforestation activities in the forest reserves without evidence of an inclusive environmental impact assessment, thereby impacting on the environment of the host community and the displacing over 60,000 rural farmers.[60]This situation reflects the limitation of dealing with documents, and raises questions as to the veracity of claims of early participation in EIA reports generally.

7.3.2.2 *Meaningful Participation*

Participation refers to a process through which members of the public, having considerable influence on the decision-making process, can shape policy or decisions that concern them;

[58] Screening is the second stage described in the EIA process flowchart. It occurs immediately after the registration of the project and submission of the project proposal to the Federal Ministry of Environment. See Figure 7, page 74.
[59] Text to n 125 in ch 5.
[60] Environmental Justice Atlas, 'Okomu Oil Palm Plantation, Edo State, Nigeria' (30 June, 2017) <https://ejatlas.org/conflict/oil-palm-plantation> accessed 14 September 2018.

and the extent to which stakeholders are permitted to shape, impact on, or control the decision-making process differs from consultation.

In all the reports analysed, public participation is generally evoked as both an information dissemination mechanism and a process of gathering information from the public, rather than as an activity through which the public influence decision-making. In the EIA for the Akpakun-Murtala Mohammed Airport Route No. F269 Project (project 1) for instance, it is reported that consultation involved the use of questionnaires to both obtain information about the history and cultures of the communities and ensure that the thoughts and expectations of members of the community are considered. Also, in respect of the Itobe-2 Coal Power Project (project 2), consultation was carried out to notify stakeholders of the nature, scale and timing of the project.[61]

In the view of Lawal, Bouzarovski and Clark, one reason for the lack of meaningful participation in the EIA process is that 'the approach to public participation in Nigeria is more top-down than bottom-up.'[62] Hence, unlike bottom-up theorists who believe that policymaking occurs at the local level, the top-down approach is most concerned with influencing policy at the central level, through policy designers who are believed to be the central actors.[63] This appears to be the case in Nigeria, considering that the preferred form of engagement used for environmental impact assessments is public hearing (through community stakeholders' meeting and town hall meetings), which according to Shittu and Musbaudeen 'neither yields a two-way dialogue nor meaningfully engages the public in affairs that are of broader concerns to the community.'[64] A determination of the

[61] EIA of Itobe-2 Coal Power Limited for the 300mw Coal-fired Power Plant (n 8) 116.
[62] Akeem Lawal, Stefan Bouzarovski and Julian Clark, 'Public Participation in EIA: the Case of West African Gas Pipeline and Tank Farm Projects in Nigeria' (2013) 31(3) Impact Assessment and Project Appraisal 226, 229.
[63] ibid.
[64] Ayodele Shittu and Abiodun Musbaudeen, 'Public Participation in Local Government Planning and Development: Evidence from Lagos State, Nigeria' (2015) 3(2) Covenant University Journal of Politics and International Affairs 20, 28.

meaningfulness of public participation in the projects under review will be made through an analysis of the key requirements of meaningful participation— (i) direct involvement of (ii) affected and interested members of the public.

7.3.2.2.1 Direct Involvement of Individuals and Groups

All reports and administrative records analysed featured a direct engagement with members of the public as well as stakeholder involvement. A bulk of the data is often obtained through questionnaires, key informants, (traditional rulers, women and youth leaders, chairman council of chiefs) focus groups, and interviews. In addition, at the community level, it is usual for stakeholders (including the village chief, village council members and representatives of youth and women and social groups) to be consulted during the EIA process.

Public participation is not tantamount to stakeholder involvement. While stakeholder involvement limits opportunities for participation to those directly affected by the subject matter, public participation on the other hand is part of a larger scheme to make policy-making more democratic.[65] Public participation is wider in scope than stakeholder involvement. In some of the projects reviewed, members of the public were not directly involved in the EIA process, public participation took the form of consultation with village chiefs and the representatives of women and youths. Since stakeholder consultation falls short of public participation properly so-called, it is safe to conclude that public participation in the EIA process in Nigeria is not always carried out effectively.

[65] Salomons and Hoberg (n 35) 70.

7.3.2.2.2 The 'Affected and Interested' Members of the Public Entitled to Participate?

'The public' entitled to participate in environmental decision-making are natural and juristic persons who have an interest in the outcome of a project, and who may be positively or negatively affected by it.[66] A critical analysis of the reports of the projects under review has shown that to a large extent the decision as to who is entitled to participate is taken by project proponents, based on their subjective judgments.

Therefore, while in the EIA project for the Construction of Base Transceiver Stations (project 4), questionnaires were administered through a stratified random sampling of respondents within 50 meter radius of the proposed site of the project, in the Project for the Construction of a Granite Quarry (project 7), although the Elebiseghe community was made up of 814 households, only ten per cent of the total number of households were used as sample size because of 'the homogenous nature of the population traits.'[67] Similarly, in the EIA for the construction of the Proposed Akpakun-Murtala Mohammed Airport Route No. F269 (project 1), consultation involved the use of questionnaires which were '*distributed to selected persons within the community*,'[68] just as in the OML 83/85 Integrated Full Field Development Project (project 3), assessment survey was carried out '*discreetly'* in each of the eight communities using an unrepresentative sample size[69] According to the report for the OML 83/85 Integrated Full Field Development Project, the projected population figures for each of the eight KEFFEES communities are as follows:

[66] Anne Glucker, Peter Driessen, Arend Kolhoff and Hens Runhaar, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) 43 Environmental Impact Assessment Review 104, 109.
[67] Final Report for the Proposed Granite Quarry at Ofoso, Idanre Local Government Area, Ondo State- Nigeria (2017) 80.
[68] Emphasis added. EIA of the Construction of the Proposed Akpakun-Murtala Mohammed Airport Route No. F269 Lagos State (2015) 45.
[69] Emphasis added. EIA of OML 83/85 Integrated Full field Development Project, Offshore Bayelsa State (2018) 207.

COMMUNITY	MEN	WOMEN	TOTAL
Koluama 1	1710	1507	3217
Koluama 2	1753	1720	3473
Ezetu 1	5089	5248	10337
Ezetu 2	1710	2790	3473
Sangana	1066	847	1913
Foropa	14400	21600	36000
Fish Town	1398	1295	2693
Ekeni	3876	6324	10200

Figure 12: Population Figures for the Eight KEFFES Communities in the EIA for OML 83/85 Integrated Full Field Development.

However, the total responses obtained from the communities were as follows:

COMMUNITY	NUMBER OF PARTICIPANTS
Koluama 1	112
Koluama 2	137
Ezetu 1	112
Ezetu 2	96
Sangana	120
Foropa	126
Fish Town	104
Ekeni	79

Figure 13: T*otal Number of Responses for the Eight KEFFES Communities in the EIA For OML 83/85 Integrated Full Field Development*

When compared with the total population of the communities, the number of responses obtained are rather too low, especially as regards Ezetu 1 and Foropa communities which have a population of 10,337 and 36,000, respectively. This therefore raises the issue of sufficiency of public participation. Clearly, the number of responses received is not

proportionate to the total number of people in each community. In view of this disproportion, it is impossible to conclude that public participation in this project was effective.

7.3.2.3 *Public Participation in the EIA Process in Nigeria: The Wider Context.*

The fact that public participation in the EIA process is recorded in the reports of all projects under consideration is not in doubt. Indeed, in the reports of these projects, participation was said to be achieved through questionnaires, meetings, focus group discussions and interviews. Hence, like the right of access to information, according to the EIA report, most of the legal requirements for effective public participation in the EIA process have been met by the proponents of the projects under review. However, beyond these general claims, the key question is, is there evidence that participation takes place?

While it is true that public participation can be inferred from the content of EIA reports, photographic evidence, transcript of interviews and minutes of meetings which are sometimes annexed to EIA reports, these documents are not necessarily enough proof of public participation. Nevertheless, assuming public participation always takes place, it is important to discover how these processes are designed and within what local contexts.

Several factors have been identified as crucial to the success or otherwise of public participation processes. Reed and others argue that the outcome of public engagement in decision making processes is usually determined by certain contextual socio-economic, institutional and cultural factors.[70] They identify power dynamics and the values of those engaged in the decision-making process as some of the factors which in no small measure affects the outcome of public engagement activities.[71] Similarly, Brooks, Waylen and Mulder

[70] Mark Reed and others, 'A Theory of Participation: What Makes Stakeholder and Public Engagement in Environmental Management Work?' (2018) 26(1) Restoration Ecology, s7.
[71] ibid.

in evaluating the factors connected with the success or failure of public engagement in community-based conservation projects, found that project designs which feature capacity building as well as community characteristics such as tenure rights, local traditions and cultural beliefs were influential in producing desired outcomes.[72]

In this subsection therefore, the effectiveness of public participation in the EIA process will be evaluated in terms of the design of the participation process, the cultural and institutional context within which participation is carried out, and the adequacy of public participation.

7.3.2.3.1 Designing the Public Participation Process

An examination of the EIA projects under review reveal a preference for the passive rather than active modes of participation, hence the use of consultation over two-way engagement methods. But does consultation ensure that the decision-making power of the public correspond to the spatial scale of the issue under consideration?

As earlier noted,[73] although used interchangeably, participation and consultation are quite distinct concepts. Participation which refers to a process through which stakeholders having considerable influence on the decision-making process, can shape policy or decisions that concern them; and can be distinguished from consultation by the extent to which stakeholders are permitted to shape, impact on, or control the decision-making process.[74] Regrettably, in all projects analysed, the public participation design adopted was the top-down one-way communication and/or consultation.

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[72] Jeremy Brooks, Kerry Waylen and Monique Mulder, 'How National Contexts, Project Design and Local Community Characteristics Influence Success in Community-Based Development Projects' (2012) 109 (52) Proceedings of the National Academy of Sciences of the United States of America 21265, 21267.

[73] Text to n 90 in ch 3.

[74] Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement' (1998) International Institute for Environment and Development, Environmental Planning Issues No. II, 3 <http://pubs.iied.org/pdfs/7789IIED.pdf> accessed 13 September 2017.

Although the EIA Act neither prescribes the type of participation mechanism to be used nor endorses a mode of engagement for public participation, it is submitted in this work that the two-way deliberation/ coproduction approach (whether top-down or bottom-up) is most appropriate, if public participation, properly so called, is to be achieved. This is because unlike one-way consultation, deliberation/coproduction involves two-way discussions between the decision-maker and the public, which gives the decision-maker a better understanding of the concerns and opinions of the public and ensures that they are considered before a decision is made on the project.[75]

7.3.2.3.2 The Cultural and Institutional Context Within Which Participation is Carried Out.

Several studies have stressed the link between local contexts and the outcome of public participation processes. A study by Cashmore, Bond and Cobb for instance found contextual variables to be influential in the outcome of stakeholder involvement processes, even more than EIA procedures and ideologies.[76] Likewise, Blicharska and others found context dependency to be more instrumental to successful environmental management than legal frameworks,[77] Therefore, the fact that local circumstances play a role in determining the success or failure of public participation in the EIA process is not in doubt.

A rather interesting practice is one which consultation is done through native chiefs and community leaders, as a way of taking local context into account. In many respects, this

[75] Reed and others (n 70) s9.
[76] Matthew Cashmore, Alan Bond, and Dick Cobb, 'The Contribution of Environmental Assessment to Sustainable Development: Toward a Richer Empirical Understanding' (2007) 40(3) Environmental Management 516, 528.
[77] Blicharska and others, 'Context Dependency and Stakeholder Involvement in EIA: The Decisive Role of Practitioners' (2011) 54(3) Journal of Environmental Planning and Management 337, 338.

practice of recognizing the absolute power of village chiefs and council of elders over all other individuals in the community is a function of colonialism, and violates the rights of members of the public to take part in the making of decisions that affect them.

The British colonialization policy in Nigeria was to rule through the native chiefs of their own subjects.[78] This policy, otherwise known as indirect rule rests on two administrative principles— decentralization and continuity.[79] Decentralization made it possible for the colonial government to delegate its powers to those local people in the provinces that were capable of taking on the responsibility.[80] The principle of continuity on the other hand was adopted to ensure that unforeseen circumstances (which withdraw colonial officers from the provinces) and leave of absences, did not affect the smooth and continuous running of the different departments of the colonial government, as well as the relationship between colonial officers and native rulers.[81] From an administrative convenience point of view, decentralization and continuity were quite successful policies, but what effects do they have on procedural justice principles? Are these practices consistent with modern ideas of governance which recognise the rights of individuals to participate in decision-making?

The British colonialization policies left behind certain attitudes and believes that are inconsistent with the functioning of modern societies. In the words of Lugard, 'the object of the system adopted in Nigeria is to make each *emir* or paramount chief, assisted by his judicial council an effective *ruler* over his own people[82]… the authority of the emir over his own people is *absolute.*'[83] This system left the average Nigerian with a culture of not questioning constituted authority. In certain communities, it is uncommon for individuals to

[78] John Lugard, 'Principles of Native Administration' in Robert Collins, James Burns and Erik Ching (eds), *Historical Problems of Imperial Africa* (Mark Wiener Publishers, 1994) 109.
[79] ibid, 101.
[80] ibid, 106-107.
[81] ibid, 107-108.
[82] Ibid, 111.
[83] Emphasis added. ibid, 113.

oppose the decision of the village chiefs. Clearly, in relation to EIAs, this practice is inconsistent with the right of public participation in decision-making.

Of even greater concern is the capacity for bias where too much decision-making power is in the hands of one village chief or a few people that make up the council of elders. The problems associated with centralization of decision-making have been aptly captured by Redoano who argues that 'under a centralized system… policy makers are essentially monopolists and if a special interest manages to capture the regulator, there might be no recourse for those parties that are adversely affected.'[84]

7.3.2.3.3 *The Adequacy of Public Participation*

The reports under consideration referred to some form of public involvement in the EIA process, especially by way of consultation. However, while this recognition for matters of procedure is remarkable, to be successful in producing the desired outcome, the public must be sufficiently engaged in the EIA process. In identifying the criteria for effective participation, Eneji and others noted that for participation to be effective, it must be ongoing, as this continuity ensures that the views and concerns of members of the public are more useful.[85] Gunderson, commenting on when the public should participate expressed the view that in participatory processes, public engagement takes place 'earlier in the process and at more points during the process.'[86] Thus, public participation is not a single event, it is a process made up of a number of activities by a project proponent, throughout the full lifespan

[84] Michaela Redoano, "Does Centralization Affect the Number and Size of Lobbies?" (2010) 12(3) Journal of Public Economic Theory 407, 408.
[85] V. Eneji and others, 'Problems of Public Participation in Biodiversity Conservation: The Nigerian Scenario' (2009) 27 (4) Impact Assessment and Project Appraisal 301, 305.
[86] Ryan Gunderson, 'Global Environmental Governance Should be Participatory: Five Problems of Scale' (2018) 33(6) International Sociology 715, 730.

of a project to both inform the public and obtain their views.[87] The importance of adequate public participation has been aptly captured by Reed and others in the following words;

> The extent to which engagement (via deliberation) shapes the values of participants is highly dependent on the temporal scales over which engagement occurs. It is therefore necessary to match the length and frequency of engagement to the goals of the process recognizing that changes in deeply held values (that may be at the root of the conflict) are likely to take longer than changes in preferences, which may be influenced over shorter timescales through deliberation.[88]

In all the projects reviewed, consultation of members of the public was reported to have taken place at an early stage of the project. The aim of this is to notify members of the nature and scope of the development, and to inquire about their concerns and expectations. Beyond this, there is no evidence of further engagement with the public. This is the case across all projects reviewed and is common practice in Nigeria.

[87] United States Environmental Protection Agency, 'Public Participation Guide: Introduction to Public Participation' <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> accessed 25 April 2019.
[88] Reed and others (n 70) 14.

7.3.3 Theme three: The Right to Redress in the Environmental Impact Assessment Process.

Since EIA ensures that environmental considerations are taken into account in decisions on projects that may adversely affect the environment, the object of the EIA process is to inform decision-makers and members of the public of the environmental effects of executing a proposed project; and to foster the involvement of the public in the overall decision-making process.[89] This means that, unlike the rights of access to information and public participation in decision-making, issues of access to justice fall outside the scope of the EIA process. Understandably, there is no evidence of access to justice recorded in both the EIA reports and administrative documents. However, since the right of access to justice seeks to ensure that members of the public can challenge act and omissions of private persons and public bodies which are inconsistent with environmental laws, it remains relevant to this research. In the light of this, this subsection seeks to address the following key questions: is there evidence of access to justice in environmental impact assessment matters? Is there an adequate platform for court-based interventions within the projects under review?

7.3.3.1 *Is there Access to Justice in the Environmental Impact Assessment Process?*

Despite nearly 30 years of EIA legislation in Nigeria, the law and practice of environmental impact assessments have remained relatively underdeveloped. One reason for this is the lack of understanding on the part of project proponents and members of the public about the scope of environmental assessments and the goals which they are set up to achieve. Because Nigeria is a developing country with many local communities lacking basic social amenities,

[89] Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs* (1st edn, Environmental Law Alliance Worldwide 2010) 19.

development projects are often fully embraced, regarded as a blessing, and an opportunity for economic and social advancements, except where the property rights of members of the community are affected. The effects of this on the right of access to justice in environmental matters is that members of the public do not readily approach the court to challenge acts and omissions of both the project proponents and the regulatory agency which contravene the Environmental Impact Assessment Act.

Most challenges against development projects have been carried out through the activities of non-governmental organisation. NGOs act as watchdogs, through their activities, they ensure compliance with the provisions of the EIA Act. In the Extension 2 Oil Palm Development Project (project 6) for instance, the activities of non-governmental organisations sparked some controversy and led to community action. Non- governmental organisations such as Environmental Rights Action and Friends of the Earth Nigeria (ERA/ FoEN) and other civil society groups led representatives of Owan and Okomu communities in Edo State- Nigeria, to enjoin the Edo State government to uphold the Revocation Order previously issued in respect of 13,750 hectares of land in the Okomu and Owan forest reserves, which had been allocated to Okomu Oil Palm Company (a Belgian company).[90] The NGOs contended that Okomu Oil Palm Company has continued its deforestation activities in the forest reserves without evidence of an inclusive environmental impact assessment, thereby impacting on the environment of host communities and the displacement of over 60,000 rural farmers.[91] It was further alleged that there was no consultation or dialogue with farmers before their farm crops were destroyed, and compensation for these was either inadequate or not made.[92] The visible environmental and socio-economic impact of these activities include, biodiversity loss, water

[90] Environmental Justice Atlas (n 60).
[91] ibid.
[92] The Daily Times, 'Land grabbing: Communities Berate Okomu Oil over Alleged Displacement' (*Daily Times.* 17 June 2018) <https://dailytimes.ng/land-grabbing-communities-berate-okomu-oil-alleged-displacement/> accessed 14 September 2018.

pollution, loss of aesthetic value of land, deforestation, displacement of rural people, loss of livelihood, loss of heritage and traditional values etc. NGO activism with regards to this project has however been unsuccessful.

Generally, access to justice in relation to environmental impact assessments is hindered by the provisions of the EIA Act under which the decision of the Agency refusing or permitting a project to be carried out is final. There is no provision in the EIA Act for appealing a decision by the Agency which approves or rejects an EIA report and the execution of a project. The only mechanism for challenge in the circumstance is by way of judicial review. However, even with judicial review, the applicant must fulfil the requirement of standing as well as surpass barriers of cost, delays in the administration of justice and the unavailability of effective remedies, which is often difficult to achieve.

7.3.3.2 *Approved EIA Projects: Is There Room for Challenging the Decision of the Regulator?*

The focus of this sub-section is determining whether there are opportunities for challenging the decision of the Agency within the projects under review and identifying the mechanism in place to do so. Evaluating the place of Access to Justice within the EIA projects which are the subject of this thesis, requires an examination of Article 9 of the Aarhus Convention on access to justice in environmental matters.

Article 9(1) of the Aarhus Convention is to the effect that anyone who believes his or her request for information has not been considered, wrongfully refused, whether partially or fully, answered unsatisfactorily or otherwise not dealt with in accordance with the provisions of article 4 on access to information, can approach a court of law or other independent and impartial body established by law for a review.

Similarly, under article 9(2), the right of access to a court or other independent and impartial body established by law is guaranteed for members of the public with sufficient interest or maintaining the impairment of a right 'to challenge the substantive and procedural legality of any decision, act or omission' in relation to the right of public participation in decision-making.

Based on the foregoing, it is evident that in the conduct of environmental impact assessments, where relevant individuals and groups have not been consulted, or information is withheld from members of the public, this will be a platform for challenging the decision of the Regulatory Agency in a court of law or other independent or impartial body established by law. However, because of the peculiarity of the Nigerian situation in which the EIA Act does not provide for administrative review of its decisions, the only way members of the public can seek redress is by way of judicial review, on grounds of the irrationality of the decision of the Agency.

The preceding sub-sections identified several barriers to the enjoyment of the right of access to information including, corruption, poor quality of information in EIA reports, language barriers etc. However, according to the Aarhus Convention, for a cause of action to exist in relation to access to information, a request for information must have been made and same must have been ignored, refused wrongly, insufficiently addressed etc. As there is no evidence (in the EIA reports and other administrative documents held in relation to these projects) that a request for information was made, the right of access to justice under Article 9(1) cannot be successfully evoked.

In relation to public participation, a review of the EIA reports revealed that consultative, rather than deliberative approaches were used to engage the public in the decision-making process, and in most cases, stakeholders, as opposed to members of the host community were consulted. Generally, while the use of non-deliberative approaches is unlikely to constitute

good grounds for challenging the decision of the regulatory Agency,[93] a failure to engage those members of the public with sufficient interest in the outcome of the project in the decision -making process may provide a strong basis for judicial review. This is likely to be the case with regards to the Extension 2 Oil Palm Development (project 6), in which members of Okomu Community (with support from Friends of the Earth Nigeria) contend that the non-inclusive EIA process has led to land grabbing by the proponent and a loss of property rights on the part of members of the community.[94] However, this issue is yet to come before the court.

In a nutshell, while there are avenues for challenging regulatory decisions, these opportunities are not being utilised.

7.4 CONCLUSION

Despite legislative attempts at securing the procedural justice rights of access to information, public participation in decision-making and access to justice in environmental matters through the instrumentality of the Environmental Impact Assessment Act, there are still several drawbacks to the effective realisation of these rights in practice. The problem goes beyond legislative inadequacies and extends to a lack of understanding of the purpose of environmental impact assessments. Rather than engage effectively with matters of procedure in the environmental impact assessment process therefore, project proponents are concerned with securing approvals for development projects through embellished reports and half measures. To conform to the principles of international best practice, there is need to comply

[93] Section 57 of the Environmental Impact Assessment Act provides that 'an application for judicial review in conjunction with any matter under the Act shall be refused where the sole ground for relief established on the application is a defect in form or a technical irregularity.'

[94] Burag Gurden, 'The Palm Oil Crisis in Nigeria- and Beyond' (*Ecologist*, 8th September 2017) <https://theecologist.org/2017/sep/08/palm-oil-crisis-nigeria-and-beyond> accessed 18 September 2019.

with the letter and spirit of environmental legislation, while also addressing broader issues affecting the realization of procedural justice rights.

CHAPTER EIGHT

CONCLUSION.

8.1 SUMMARY OF KEY ARGUMENT

Although environmental governance at the international level has produced an impressive institutional machinery for the protection of the environment through State cooperation, this has not led to an improvement in the overall state of the environment. This is not quite surprising considering that unless international instruments, concepts and goals are complemented by a reformation of 'higher-order principles' involving changes in policy paradigms, goals and the hierarchy of these goals, they cannot be effectively implemented and enforced.[1] Indeed, as Mori puts it, 'changing the course of development requires more than learning and import of standards, regulations, policy instruments and technological solutions… it requires stronger political will in changing policy goals, policy paradigms and the role of the state.'[2]

Because the State is instrumental to the move towards a sustainable society, it should be 'strong' as to regulate environmentally damaging activities and promote environmental restoration; while also facilitating the redistribution of resources.[3] The State is best suited to perform this role because 'it enjoys a (virtual) monopoly of the means of legitimate coercion, and is therefore the final adjudicator and guarantor of positive law.'[4] Its power and legitimacy makes it the appropriate social institution to act as trustee of the environment.[5]

[1] Akihisa Mori, 'Sustainable Development and Environmental Governance in East Asia' in Akihisa Mori (ed) *Environmental Governance for Sustainable Development: East Asian* Perspectives (United Nations University Press, 2013) 6.
[2] ibid.
[3] Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (MIT Press, 2004) 11-12.
[4] ibid, 12.
[5] ibid.

The reality of the situation however is that States are not usually enthusiastic about making changes to the hierarchy of its economic and environmental policy goals. One reason for this lies in the fact the State is 'both the possible cause of, and solution to environmental problem'— its support for activities which cause irreparable damage to the environment is inconsistent with its efforts aimed at addressing environmental problems.[6] This much-needed motivation for change in policy considerations is often typical of local, national and international environmental organisations, local communities, international organisations, policy professionals, multilateral arrangements etc.[7]

Grass root organizations and public interest groups have in fact, made significant efforts to achieve justice in governmental plans, policies and programmes, and through their activities have attempted to influence governments' implementation of environmental, health, and civil rights laws.[8] Despite these efforts, environmental injustice and unsustainable developmental activities remain dominant in society today.

Besides the failure of governments (and indeed, law) to safeguard all people in society from harm, private sector activities which are geared towards maximizing profits and externalizing costs, the lack of consideration for the distributional impacts of policies and activities, the paucity of tools and mechanisms for implementing environmental justice, and the unequal access to these tool and mechanisms, have also been identified as responsible for environmental injustice.[9] Clearly, not much of government regulation utilize justice principles. Ensuring environmental justice calls for policies, plans, programmes, and

[6] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, 2013) 57.
[7] Mori (n 1) 6.
[8] Robert Bullard and Glenn Johnson, 'Environmentalism and Public Policy: Grassroots Activism and its Impacts on Public Policy Decision-making' (2002) 56(3) Journal of Social Issues 555.
[9] Economic and Social Research Council Global Environmental Change Programme, *Environmental Justice: Rights and Means to a Healthy Environment for All* (Special Issue No 7, Economic and Social Research Council Global Environmental Change Programme, 2001) 13.

activities that ensure the equitable treatment of people while also addressing present and 'historical injustices.'[10] As much of the environmental injustices faced by people and communities are occasioned or aggravated by 'procedural injustices in the processes of policy design, land-use planning, science, and law,'[11] policy decisions that consider the concerns and views of relevant stakeholders are better able to promote sustainable development and distributional justice.[12] Because of the centrality of their role, Petkova and others have argued in favour of the use of procedural justice principles for promoting environmental justice and sustainable development in the following way:

> An informed and educated public is better able to participate meaningfully in decisions that affect the environment. Informed and meaningful public participation is an effective instrument for integrating social and environmental concerns into decisions about economic policies and the management of natural resources such as energy, water, and land. Public access to redress and remedy is a way to hold decision-makers accountable to the public interest. Ensuring public access to information, participation, and justice in decision-making is a crucial step toward sustainable development.[13]

In the light of this, the central argument of this thesis is that because access to procedural justice rights is a key driver of environmental justice, in the face of government's non-commitment to the enforcement of its environmental laws, the people's lack of access to information, non-participation in decision-making, and lack of access to justice in respect of

[10] ibid.
[11] ibid.
[12] Elena Petkova and others, *Closing the Gap: Information, Participation and Justice in Decision-Making for the Environment* (World Research Institute, 2002) 15.
[13] ibid.

the environmental impact assessment of development projects, is largely responsible for the deplorable state of the Nigerian environment.

8.2 RESEARCH FINDINGS

The growing body of evidence in the environmental justice literature has shown that people of colour and low-income persons are increasingly faced with greater environmental and health risks than other members of the society.[14] Owing to their 'economic vulnerability', government and industries often take advantage of poor regions and communities for their unsafe operations.[15] In view of the fact that environmental injustice presents various difficulties to the wellbeing of people and communities, this thesis set out to discover how effectively the procedural (environmental) justice principles of access to information, public participation in decision-making and access to justice in environmental matters are recognised and integrated into the environmental impact assessment process in Nigeria.

This research finds that the public in Nigeria do not have access to environmental information, do not effectively participate in decision-making and have little or no access to justice in the environmental impact assessment process owing to several issues which are discussed below.

[14] Bullard and Johnson (n 8) 555.
[15] ibid, 574.

8.2.1 Are Members of the Public Fully Informed about Proposed Projects, Environmental Planning and Decision-making Throughout the Environmental Impact Assessment Process?

To determine whether members of the public (especially local communities) have access to information about development projects, plans, and decision-making. throughout the environmental impact assessment process in Nigeria, a set of three sub-questions were developed:

i. Who is entitled to receive environmental information?
ii. When is environmental information accessible?
iii. Is environmental information Adequate?

With reference to Article 4 of the Aarhus Convention, Nigeria's Environmental Impact Assessment Act, academic literature and case law, these sub-questions were critically analysed and a framework for evaluating access to information was then developed.[16] This framework established that for there to be access to information in Nigeria's environmental impact assessment process, all four of the following requirements must exist—

(1) Awareness: The public must be aware of the existence of environmental information and educated about how to obtain same.

(2) Accessibility: This takes into account the geographical location of the information, the time required to obtain information, the cost of obtaining information and ease of obtaining data.

(3) Comprehensibility: environmental information must be provided in a form that can be understood by those who require it.

[16] See p 108.

(4) Sufficiency: Adequate information must be provided to the public.

Based on a critical examination of the above requirements, in answer to research question one, this thesis posits that members of the public do not have access to information about development projects, plans, and decision-making in Nigeria's environmental impact assessment process. Several reasons account for this.

First, as discussed in chapter four,[17] to the extent that Nigeria's EIA Act requires the regulatory agency to provide information on EIA to the public,[18] it complies with the access to justice provisions of the Aarhus Convention and international best practice principles. However, the obligation to provide the public with access to information goes beyond the collection and dissemination of information. It in fact includes a duty to provide information to the public where a request for same is made. Unlike the Aarhus Convention, the right of access to Information as contained in Nigeria's EIA Act, only requires the regulatory Agency to provide information on EIA to the public without a corresponding right to members of the public to request for information. While it is true that a request for environmental information can be made pursuant to the Freedom of Information Act, because of the wide scope of exceptions to the disclosure of information recognised by this Act,[19] and the huge cost which may be associated with obtaining information contained in large records,[20] the public's right to request information under the Freedom of Information Act remains problematic.

More importantly, the evidence in chapters four and seven of this thesis show that owing to a failure to meet the requirements of access to information in the evaluation framework

[17] See p 124.
[18] Under sections 19(2) of the Environmental Impact Assessment Act for instance, the Agency is to provide the public with the screening report of the environmental impact assessments at the registry.
[19] Text to n 60 in ch 4.
[20] Text to n 67 in ch 4.

developed above,[21] there is a lack of access to information about environmental impact assessments in Nigeria. These requirements are discussed below.

(i) Awareness:

To amount to access to information, the public must be made aware of the existence of environmental information and how to obtain and use it. Thus, effective access to environmental information is often contingent on both the physical availability of information, and the provision of education on how information may be found, construed and utilized.[22]

I argue that for the requirement of awareness to be met, the public must be *effectively* informed of the availability of information. Hence, there is a violation of the right of access to information where (as is the practice in Nigeria) the regulatory agency directs that the public be made aware of the date(s) and venue(s) for the display of draft EIA reports, through radio announcements and advertisements in national dailies— mediums which, owing to the socio-economic status of people in rural communities, are not often available to them.

This problem is well illustrated in Itobe-2 Coal Power Project (project 2) where despite the findings of the socio-economic survey of the EIA that a high level of poverty and unemployment exists in the local community,[23] the regulatory agency approved the advertisement of the public notice for information and comments on the draft EIA report and the public display exercise, to be made in a national daily (the Daily Trust).[24] In view of the evidence that more than three quarters of the population regard themselves as unable to meet

[21] See p 108.
[22] Text to n 50 in ch 3.
[23] The survey revealed that more than three quarter of the population regard themselves as unable to meet their personal and family needs.
[24] This issue is discussed in detail in pages 223 - 224.

their personal and family needs,[25] the communication of information on the EIA to indigent people through newspapers, rather than town criers who are well known to be the most effective means of communication in rural settings,[26] is a clear disregard for the rights of people in rural communities to access information.

This issue is by no means peculiar to the Itobe-2 project. Indeed, in all eight projects under review, the communication of public notices for information and comments on draft EIAs have been made through national dailies and radio announcements. Unsurprisingly, concerns have been raised by members of local communities in respect of lack of access to reports.[27]

(ii) Accessibility of information:

The right of access to information is meaningless unless information on EIAs is accessible to those concerned, so that they are effectively informed of the EIA, and able to participate in it. This therefore means information must be accessible in terms of the mode in which it is communicated, its location, the cost of obtaining it, and the ease of doing so.

As is the case in all reports reviewed, in Nigeria's environmental impact assessment process, information in the EIA reports and other administrative documents, is often communicated in writing, in English language. The practice of providing information on environmental assessments in written form, and in English alone, fails to take the peculiarities and demographics of the country into account. Nigeria is a multilingual nation made up of different ethnic groups with over four hundred indigenous languages.[28] While the indigenous language of the local communities is their first language, the official language of the nation is

[25] Environmental and Social Impact Assessment of Itobe -2 Coal Power Limited for the 300MW Coal-Fired Power Plant as Part of the Four SPVs in the 1200MW CFPP at Ofu LGA, Kogi State-Nigeria (2014) p 103.
[26] Text to n 9 in ch 7.
[27] See p 225.
[28] R. Agheyisi, 'Minor Languages in the Nigerian Context: Prospects and Problems' (1984) 35(3) WORD 235.

English, which is often learnt through formal education. However, with an adult literacy rate of 56.9%,[29] illiteracy remains a major challenge in Nigeria and as such there is a low rate of proficiency in English. Therefore, the effect of providing information on environmental assessment in written form alone is that illiterate members of society can only enjoy a physical availability of information, without a substantive access to information. Hence, language is a basis for the abuse of the right of access to information. Information dissemination in the EIA process will be more effective where environmental information is communicated by spoken words, and in indigenous languages, especially at the consultation stage, the final EIA report is written in simple English and interpreters are used.

Besides language barriers, there is also the problem of lack of communication preferences. There are no arrangements for the provision of information in special formats such as large prints and braille, for those who can only access printed documents in this way. In the light of the foregoing discussion, it is evident that these barriers to access information must be eliminated if the realization of the right is to be achieved.

Further, in recognition of the fact that the public registry is the main means of providing information on environmental impact assessment in Nigeria,[30] this thesis contends that there is no access to information in Nigeria's EIA process, due to the geographic difficulties involved in obtaining information on the EIA of development projects.

An examination of the administrative records of all projects selected for this research revealed that the draft EIA reports are usually displayed in specific locations such as Federal and State Ministries of Environment, the EIA Registry and the Environment Library (both in the Federal Capital Territory of Nigeria), without other arrangements to suit the

[29] United Nations Educational, Scientific and Cultural Organization, 'National Literacy Action Plan for 2012-2015 Nigeria' (2012) 1. <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/Nigeria.pdf> accessed 23 April 2019.

[30] Section 21(3) of the Environmental Impact Assessment Act 1992 provides that before the regulatory agency makes a decision in respect of a project, it must give the public a chance to scrutinize and comment on the screening report and any record filed in the public registry.

circumstances of local people who are most affected by the development project. Limiting approved centers for the display of draft EIA reports to the premises of Federal, State and Local government departments and parastatals, rather than within the host community, present geographical challenges, and functions to deny people of their access to information. In the Itobe-2 Coal Power Project (project 2) for instance, the centres approved for the display of the draft EIA reports were the local government headquarters, the Federal Ministry of Environment, Lokoja (the State capital), the Federal Ministry of Environment Abuja (the federal capital), and the Environment Library Abuja. No provisions were made for inspection of the draft EIA within the local community concerned.

In the light of the foregoing, it is evident that the realisation of the right of access to information in the EIA process is being hindered by several cost implications which place an undue burden on poor people in rural communities. The fact that the regulatory agency often provides information through mediums which are not readily available to the public is a barrier to access to information. This research posits that owing to the mode of communication of information, the geographical difficulties involved in obtaining same, and the huge costs which may be associated with obtaining information,[31] information on environmental impact assessments is often inaccessible to the public.

(iii) Comprehensibility of information:

Like lack of awareness and inaccessibility, the incomprehensibility of information is responsible for the lack of access to information in EIA matters. Comprehensibility as the third requirement of access to information is not satisfied where the public is unable to understand the information provided. This may be the case where information is written in

[31] Text to n 67 in ch 4.

technical language, requiring an interpretation from experts to be meaningful to lay people. This was a common issue in some of the EIA reports which are the subject of this research[32]— expert interpretation of the impacts of development projects recorded in reports was not provided, despite the use of technical language and graphical representations. Access to information through EIA reports is clearly ineffective in cases such as this.

(iv) Sufficiency of information

This thesis has revealed that there is no access to information in Nigeria's EIA process because members of the public do not often receive adequate information about the environment. The fact that most corporations do not disclose information about the environmental and social impact of their activities, is well captured in case law[33] and the literature. A report by Amnesty International for instance, revealed that local people in the Niger Delta region of Nigeria are not often provided with enough information on the benefits and risks of projects during the environmental impact assessment process.[34]

Interestingly, in all eight projects reviewed, it was recorded that the public was provided with adequate information about the environmental and social risks associated with the projects. As such, in the Extension 2 Oil Palm Development Project (project 6), it is recognized that in addition to obtaining the comments and views of members of the host community, consultation was carried out in order to inform and educate stakeholders about the project, its justification, scope, and the potential and associated impacts. However, the recorded response

[32] This was the case in the EIA for the Proposed 220mw Independent Power Plant (project 8). See p 233.
[33] One of the issues brought before the court in the case o*f Social and Economic Rights Action Centre and Another v Nigeria* was that the Nigerian Government had withheld information about the impact of its oil exploration activities on the people of Ogoniland.
[34] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta Region* (Amnesty International Publications, 2009) 61.

of stakeholders and other members of the public convey an important message about the scope and quality of the information provided.

In all reports reviewed, despite the supposed education of members of host communities on the risks of development projects, no environmental concerns or objections were raised by the public. The comments and views of members of the public in respect of the projects are strictly geared towards securing community infrastructure rather than environmental considerations. In the Itobe-2 Coal Power Plant Project (Project 2), the response of community representatives at the disclosure meeting were particularly targeted at the local content arrangement, social infrastructure, and capacity building. This is not quite surprising considering that EIA reports often contain extensive information on the benefits of a project, but little or nothing on its risks. Driven by a lack of understanding of the purpose of EIAs therefore, host communities purport to endorse development projects, despite their adverse effects on the environment.

It is also not uncommon for impacts of development activities recorded in reports to be limited to local problems, without any consideration of wider issues, the transboundary effects of the developments and other global challenges. In the EIA report for the Proposed Granite Quarry Project for instance, the potential impacts of the projects that were identified include: problems with air quality, noise generation, destruction of vegetation, soil contamination, disturbance of wildlife and loss of wildlife habitat, waste generation, respiratory hazards, risk of traffic accidents, disturbance of the visual quality of the local landscape etc. Clearly, the EIA has identified only potential local impacts of the project. Mining activities such as this, could have more serious effects on the environment. In the first place, the entire granite quarrying process (consisting of the preparation of the site, mining, transport and comminution) involves the use of electricity, diesel and explosives all of which

lead to the emission of significant amounts of greenhouse gases[35] — a major cause of climate change. Secondly, air pollution from quarrying activities have transboundary effects, resulting in 'trans-oceanic and trans-continental plumes of Atmospheric Brown Clouds' (ABCs) which can obstruct sunlight and cause surface dimming.'[36] Finally, granite quarrying may affect surface and ground water[37] in environments beyond the site of the activity. Based on the foregoing, it is clear that in Nigeria's EIA process, not only is there is a lack of awareness of the existence of information, information on the environmental impact assessment of development projects are inaccessible, incomprehensible, and insufficient; and therefore, there is a lack of access to information.

8.2.2 Does the Environmental Impact Assessment Process Provide Members of the Public with Opportunities to Actively Participate in Decision-making and Environmental Governance?

To develop minimum requirements for public participation in decision-making, three sub-questions were posed in chapter three, critically examined, and used to evaluate the effectiveness of public participation in the EIA process in chapters five and seven of this thesis. These sub-questions are:

i. Who can participate in decision-making in the EIA process?
ii. How should the public be notified of opportunities for participation in the EIA process?

[35] Suthirat Kittipongvises, Orathai Chavalparit, Chakkaphan Sutthirat, 'Greenhouse Gases and Energy Intensity of Granite Rock Mining Operations in Thailand: A Case of Industrial Rock-Construction' (2016) Environmental and Climate Technologies 64, 69-70.
[36] V. Ramanathan and Y. Feng, 'Air Pollution, Greenhouse Gases and Climate Change: Global and Regional Perspectives' (2009) 43 Atmospheric Environment 37.
[37] Sasikala Chandran and Sarath Chandran, 'Impact of Granite Quarry on Human Life and Environment: A Case Study of Vellarada Panchayat of Thiruvananthapuram District, Kerala' (2015) Proceeding of International Conference on Climate Change and the Developing World 342, 345.

iii. What forms of participation should be used?

These questions produced a framework[38] for assessing public participation and established that public participation can only be adjudged effective if all the following criteria are met:

(1) It occurs early in the decision-making process

(2) It is open to members of the public

(3) It occurs through the adequate, timely and effective notification of the public, and

(4) There is active public involvement in the decision-making process.

Based on the evidence in the literature, Nigeria's Environmental Impact Assessment Act, newspaper publications, case law, EIA reports, and related administrative documents, this thesis finds that in Nigeria, there are limited opportunities for the public to participate in the making of environmental impact assessment decisions. Even where opportunities exist, participation is not often effective. In line with the evaluation criteria, public participation in the environmental impact assessment process in Nigeria is problematic for reasons discussed below.

***(i) Early participation*:**

The literature on public participation in the conduct of environmental impact assessment in Nigeria suggests that quite often, opportunities for public participation are made available very late in the EIA process when most decisions on variables such as size, location and type of project have already been taken.[39] An example is the Nigerian Liquefied Natural Gas

[38] See p 109 above.

[39] Anne Shepherd and Christi Bowler, 'Beyond the Requirements: Improving Public Participation in EIA' (1997) 40(6) Journal of Environmental Planning and Management 725, 727.

Project (NLNG) which was undertaken at Bonny, Rivers State, Nigeria wherein the mandatory EIA required for the project was not carried out until after the project had commenced.[40] Any involvement of the public at a stage where the project plan has already been devised may only amount to public relations, which functions either to justify already made decisions or avert conflict, but not for giving due consideration to the public input.[41] Therefore, although public participation in Environmental Impact Assessment in Nigeria seeks to ascertain the effect of development projects on the general wellbeing of individuals and societies, this goal has not been fully translated into practice.[42]

It is commendable that in all projects reviewed, consultation of members of the public was reported to have taken place at an early stage of the project. However, these consultations are usually aimed at notifying members of the public of the nature and scope of the development and enquiring about their concerns and expectations. The problem with this sort of 'participation' is not only its passivity (in terms of not actively engaging those consulted with the process), a single consultation event cannot ensure that the goal of participation is met. For participation to be effective, it must be ongoing, as continuity ensures that the views and concerns of members of the public are more useful.[43]

It is in the light of this that Gunderson expressed the view that in participatory processes, public engagement takes place 'earlier in the process and at more points during the process.'[44] Thus, public participation is not a single event, it is a process made up of a number of activities by a project proponent, throughout the full lifespan of a project to both

[40] Allan Ingelson and Chinenye Nwapi, , 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis'(2014) 10(1) Law, Environment and Development 35, 51.
[41] Shepherd and Bowler (n 39) 727.
[42] Akeem Lawal, Stefan Bouzarovski, and Julian Clark, 'Public Participation in EIA: The Case of West African Gas Pipeline and Tank Farm Projects in Nigeria' (2013) 31(3) Impact Assessment and Project Appraisal 226.
[43] V. Eneji and others, 'Problems of Public Participation in Biodiversity Conservation: The Nigerian Scenario' (2009) 27 (4) Impact Assessment and Project Appraisal 301, 305.
[44] Ryan Gunderson, 'Global Environmental Governance Should be Participatory: Five Problems of Scale' (2018) 33(6) International Sociology 715, 730.

inform the public and obtain their views.[45] Sadly, in all projects reviewed, beyond the initial consultation activity, there is no evidence of further engagement with the public. While this is common practice in Nigeria, it fails to ensure that the overall aim of participation is achieved.

(ii) Open participation:

As discussed in chapter three[46] although the terms 'stakeholders' and 'the public' have been employed in relation to public participation in environmental assessment and are often used interchangeably, this thesis argues that public participation is not akin to stakeholder involvement because while stakeholder involvement limits opportunities for participation to those with a direct stake on the subject matter, public participation on the other hand is part of a larger scheme to make policy-making more democratic.[47] Therefore, in this work, the public' entitled to participate in environmental decision-making are natural and juristic persons having an interest in the outcome of a project, and who may be positively or negatively affected by it.[48]

In Nigeria's environmental impact assessment process, participation in the EIA decision-making process (if any), is hardly ever open to members of the public. A critical analysis of the EIA reports reviewed has shown that to a large extent, the decision as to who can participate in the EIA decision-making process is taken by the project proponent, based on subjective judgment. For instance, while in the EIA project for the Construction of Base Transceiver Stations (Project 4), questionnaires were administered through a stratified

[45] United States Environmental Protection Agency, 'Public Participation Guide: Introduction to Public Participation' <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> accessed 25 April 2019.
[46] See pages 93 - 95.
[47] Geoffrey Salomons and George Hoberg, 'Setting Boundaries of Participation in Environmental Impact Assessment' (2014) 45 Environmental Impact Assessment Review 69, 70.
[48] Anne Glucker and others, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) Environmental Impact Assessment Review 104, 109.

random sampling of *respondents within 50 meter radius of the proposed site of the project*, in the project for the construction of a granite quarry (Project 7), although the Elebiseghe community was made up of 814 households, only 10 per cent of the total number of households were used as sample size because of "the homogenous nature of the population traits."[49] Similarly, in the EIA for the construction of the proposed Akpakun-Murtala Mohammed Airport Route No. F269, consultation involved the use of questionnaires which were "*distributed to selected persons within the community*,"[50] just as in the OML 83/85 integrated full field development project, assessment survey was carried out *discreetly* in each of the eight communities using an unrepresentative sample size[51]. No justification for these decisions were provided.

A rather interesting practice is one in which proponents of projects purport to satisfy the public participation requirement through the consultation of native chiefs and community leaders. This research argues that this practice of recognizing the absolute power of village chiefs and council of elders over all other individuals in the community is a function of colonialism and is inconsistent with the functioning of modern societies. Colonialism left the average Nigerian with a culture of not questioning constituted authority because it recognised *absolute authority*[52] of *rulers* over their own people.[53] As a result, in certain communities, it is uncommon for individuals to oppose the decision of the village chiefs. As discussed in chapter seven[54] of even greater concern is the capacity for bias where too much decision-making power is in the hands of one Village Chief, or a few people that make up the Council

[49] Final Report for the Proposed Granite Quarry at Ofoso, Idanre Local Government Area, Ondo State- Nigeria (2017) p 80.
[50] EIA of the Construction of the Proposed Akpakun-Murtala Mohammed Airport Route No. F269 Lagos State (2015) p 45.
[51]Emphasis added. EIA of OML 83/85 Integrated Full field Development Project, Offshore Bayelsa State (2018) p 207. Text to n 69 in ch 7.
[52] Text to n 82 in ch 7.
[53] Text to n 83 in ch 7.
[54] See p 249.

of Elders. This was the practice in some of the projects reviewed. In the Itobe -2 Coal Power Plant Project for instance, it is reported that a 'consultation programme was done to notify stakeholders of the nature, timing and scale of the project…community stakeholders includes royal father, village council members and representatives of the youth, women and social groups.'[55] This is inconsistent with the public's right of participation in decision-making.

(iii) Participation occurs through adequate timely and effective notification of the public

The basic principle of the Aarhus Convention that members of the public be made aware of opportunities for participation, is qualified by the inclusion of the requirement that the notice is given in an 'adequate, timely and effective manner'.[56] This means that in addition to informing the public early in the procedure of opportunities for participation, the notice must be adequate in terms of 'effectively targeting at least the public concerned with the decision',[57] and effective as to ensure that the public is reached, understands the notification, and participation is facilitated.[58] In this thesis, I argue that despite the timely notification of the public (as recorded in the EIA reports), because of the inadequacy and ineffectiveness of the notification, the above requirement is not satisfied.

As the EIA Flowchart[59] shows, after the submission of the draft EIA report by the project proponent, the draft report is reviewed by the Federal Ministry of Environment. The review process involves an in-house review, a technical/panel review, and the public display of the draft report. Hence, the regulatory agency usually directs the project proponent to make

[55] EIA of Itobe -2 Coal Fired Power Plant at Ofu, Kogi State, Nigeria (n 25) p 116.
[56] The meaning of 'adequate, timely and effective' have been discussed in pages 96 - 97 above.
[57] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014) 136.
[58] ibid, 135.
[59] See figure 7, p 74 above.

known to the public, the date(s) and venue(s) of the display of the draft EIA within a specified timeframe. This ensures that the public is notified at an early stage of the opportunity to participate (by scrutinising the report and submitting comments in that respect). However, as discussed in chapter seven above, because such notification is usually done through radio announcement and advertisement in national dailies which the public (especially those in local communities) do not necessarily have access to, it is neither adequate nor effective.

The lack of awareness about the existence of opportunities to take part in the making of environmental impact assessment decisions, poses a challenge to the realization of the goal of public participation. Therefore, public participation in Nigeria's EIA process is ineffective.

(iv) Active public involvement

Public participation refers to a process through which stakeholders having considerable influence on the decision-making process, can shape policy or decisions that concern them, and it differs from consultation by the extent to which stakeholders are permitted to shape, impact on, or control the decision-making process.[60] Therefore, while it is true that consultation presents the public with some form of involvement with the EIA process, to be successful in producing the desired outcome, the public must be sufficiently engaged in the EIA process, through active participation.

As discussed in chapter three above,[61] the two-way deliberation approach is most appropriate if public participation, properly so called, is to be achieved. This is because unlike one-way consultation, deliberation/coproduction involves two-way discussions between the decision-

[60] Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement' (1998) International Institute for Environment and Development, Environmental Planning Issues No. II, 3 <http://pubs.iied.org/pdfs/7789IIED.pdf> accessed 13 September 2017.
[61] See p 99.

maker and the public, which gives the decision-maker a better understanding of the concerns and opinions of the public and ensures that they are considered before a decision is made on the project.[62]

An examination of the EIA reports[63] reveals a preference for passive, rather than active modes of participation, hence the use of consultation and public hearings over two-way engagement methods. Public hearing through community stakeholders' meeting and town hall meetings do not involve a two-way dialogue nor produce meaningful engagement[64] Indeed, Shittu and Musbaudeen, while examining the scope of public participation in the Makoko and Iwaya communities of Lagos State, Nigeria, observed the frustration of Heads of Traditional Councils who expressed disappointment about the practicability of town-hall meetings, as several decisions reached at these meetings are disregarded by the relevant authorities in the formulation and execution of proposals and projects.[65] Hence, consultation through town hall meetings, public hearings etc. fall short of participation.

An analysis of the requirement of active participation is incomplete unless there is a consideration of women's right in this regard. A 2011 study of women's access to information in three oil producing communities in Nigeria found that rural women had limited access to environmental information and do not participate effectively in the EIA process.[66] This is still the case today, as barriers to the full integration of the Nigerian woman in political participation and decision-making are engendered by age-old customary laws and cultural practices which advance various forms of discrimination against women.

[62] Text to n 75 in ch 7.
[63] See p 214 above.
[64] Ayodele Shittu and Abiodun Musbaudeen, 'Public Participation in Local Government Planning and Development: Evidence from Lagos State, Nigeria' (2015) 3(2) Covenant University Journal of Politics and International Affairs 20, 28.
[65] ibid, 36.
[66] Caroline Akporido and Josephine Onohwakpo, 'Access to Environmental Information by Women in Some Selected Oil Producing States in Nigeria (2011) 2(1) Journal of Information and Knowledge Management 6.

It is usual for the consultation exercise in local communities to involve a limited number of people of high social standing. Characteristically, this people are the village chief, council of elders, women leader and representative of the youths. This was the case in the Itobe-2 coal power project for instance, in which the consultation carried out to inform stakeholders of the nature, size and timing of the project involved the royal father (village head), village council members, social groups and representatives of women and youths.[67] The situation was no different in the EIAs of Extension Two Oil Palm Development and the Base Transceiver Stations Development. The problem with this approach is that in most traditional settings in Nigeria, administrative offices are the preserve of male members of the community. This has been well illustrated by Onyemaechi who found female administrative title holding uncommon in the political system of the Igbos of south-eastern Nigeria.[68] Bassey and others, also noted that in accordance with the custom of the Efiks of southern Nigeria, men are the leaders of the community.[69] This means that in the stakeholder system of participation, the rights of rural Nigerian women to participate in EIAs are tied to the successful engagement of the women leader with the consultation process.

In the light of this, it is doubtful that women effectively participate in EIAs. This is more so considering that there was no direct involvement of women in some of the EIA projects reviewed. This thesis therefore concludes that the public (especially women) do not effectively participate in the EIA decision-making process and consultation exercise.

[67] Environmental and Social Impact Assessment of Itobe -2 Coal Power Plant (n 25) p 116.
[68] Uzoma Onyemaechi, 'Igbo Political System' <http://umunna.org/politicalsystems.htm> accessed 2 May 2019.
[69] Antigha Bassey and others, 'Gender and Occupation in Traditional African Setting: A Study of Ikot Effanga Mkpa Community Nigeria' (2012) 2(3) American International Journal of Contemporary Research 238, 242.

8.2.3 Are Legal and Administrative Review Procedures Available Under Nigeria's Environmental Impact Assessment Law, for Persons Affected and/or Interested in the Outcome of a Development Project to Challenge Decisions of Regulators?

Having examined the review procedures available for challenging the decision of the regulator, those entitled to seek a review of regulatory decisions and the requirements which these procedures must meet, in response to research question three, this thesis established that effective access to justice is best evaluated in terms of: *(1) the availability of review procedures (2) the scope of standing to sue and (3) the effectiveness of review procedures (with respect to equity and fairness, time, cost as well as the provision of adequate and effective remedies).*

This research concludes that, in the absence of an administrative review procedure within Nigeria's EIA Act, the review procedure available to aggrieved members of the public is judicial review. However, because of the limited scope of standing to sue, cost, time and lack of adequate and effective remedies discussed in chapter six above,[70] it is difficult for members of the public to have access to justice through judicial review.

Importantly, this research also examined the potential for access to justice within the projects reviewed and found that there is scope for challenging the decision of the regulatory agency which granted approval for these projects to be carried out. As the analysis in chapter seven revealed, because of the lack of awareness about the existence of environmental information, inaccessibility, incomprehensibility and insufficiency of such information, there is no access to information in the environmental impact assessment process. Here, a right to redress will arise from the provision of Article 9(3) of the Aarhus Convention under which members of the public have access to review procedures which contradict their national environmental

[70] These issues have been discussed extensively in chapter six above. See pages 180 -195.

laws. This is unlike Article 9(1) situations in which the cause of action arises from a failure to appropriately handle a request for environmental information because, there is no evidence that a request for information had been made, which had been improperly, or not been considered. Where a request for information has not been considered, wrongfully refused, answered unsatisfactorily or otherwise not dealt with, aggrieved persons can seek redress by virtue of the Freedom of Information Act.

Similarly, with respect to public participation, where in the conduct of environmental impact assessments, relevant individuals and groups have not been consulted (as is the case with the projects reviewed), this will be a platform for challenging the decision of the Regulatory Agency in a court of law. Under article 9(2) of the Aarhus Convention, the right of access to a court or other independent and impartial body established by law is guaranteed for members of the public with sufficient interest or maintaining impairment of a right 'to challenge the substantive and procedural legality of any decision, act or omission' in relation to the right of public participation in decision-making.

A review of the EIA reports revealed that consultative, rather than deliberative approaches were used to engage the public in the decision-making process, and in most cases, stakeholders, as opposed to members of the host community were consulted. Generally, while the use of non-deliberative approaches is unlikely to constitute good grounds for challenging the decision of the regulatory Agency, a failure to engage those members of the public with sufficient interest in the outcome of the project in the decision -making process, may provide a strong basis for judicial review. This is likely to be the case with regards to the Extension 2 Oil Palm Development in which members of Okomu Community (with support from Friends of the Earth, Nigeria) contend that the non-inclusive EIA process has led to land grabbing by

the project proponent and a loss of property rights on the part of members of the community.[71]

Finally, under Article 9(3) of the Aarhus Convention, wide powers are granted to members of the public to challenge acts and omissions of private persons and public bodies which contradict national environmental laws. This is likely to be the basis of actions challenging the undertaking of developmental activities on account of their environmental and socio-economic impacts. Again, with respect to the Extension 2 Oil Palm Development project, there is potential for securing the right of access to justice as defined by article 9(3) of the Aarhus Convention through the instrumentality of judicial review. This is because of the negative impact of the development on biodiversity, water quality, aesthetics, forests etc.

In conclusion, while there are avenues for challenging regulatory decisions in Nigeria, these opportunities are not being utilised. Even where aggrieved members of the public intend to seek redress, they are faced with several constraints including cost and standing which continue to impede on their rights to access justice.

8.3 CONTRIBUTION TO THE BODY OF KNOWLEDGE

As economic forces continue to threaten the integrity of the Earth's natural systems, it is increasingly being recognised that environmental governance at the national level is not effective, especially in the acknowledgement and consideration of the interest of less influential people.

This research has revealed that people in Nigeria (especially those in poor and disadvantaged communities) have been faced with environmental injustice issues. Without the recognition

[71] Burag Gurden, 'The Palm Oil Crisis in Nigeria- and Beyond' (Ecologist, 8th September 2017) <https://theecologist.org/2017/sep/08/palm-oil-crisis-nigeria-and-beyond> accessed 18 September 2019.

of procedural justice principles in law and practice (through legislation and in the environmental impact assessment process), these people will be continually imperilled by the adverse impact of development activities on the environment in their homes, playgrounds, workplaces etc. Not only is there a need for legislative amendment, to address environmental justice concerns, it is important that the rule of law is respected, corruption is tackled, and new policies take environmental and distributional impacts into account.

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