

TACKLING ENVIRONMENTAL CHANGE IN CONTEMPORARY AFRICA: THE PROSPECTS OF CUSTOMARY ENVIRONMENTAL LAW*

Abstract.

Climate change has diminished environmental stability and increased the global surface temperature by almost 5 °C in the last 27 years. The world has negative changes in the environment. The quality of the environment has globally deteriorated. Human activities on the environment account for large chunk of climate change. Surely, we must work, eat and live comfortably with all our needs met, but at the same time, we must ensure our continuous existence by protecting the planet earth. To achieve this, we must appreciate the principle of sustainability and abide by the policies put in place to protect the environment. This paper uses doctrinal research methodology to x-ray prospects of customary environmental law options to tackling environmental change in Africa. It was found that customary environmental law offers many options that could be utilised in checking environmental degradation and change. It was recommended, inter alia, that African countries should revamp those age-long customary law measures and strengthen them via legislative actions for effective environmental sustainability.

Key words: Law, Environmental Change and Customary Law.

1. Introduction

Climate change is one of the greatest challenges facing mankind in the present generation. It is a process by which the Earth's climate system responds to altered concentration of greenhouse gases (GHGs) in the atmosphere.¹ Science proves that the greenhouse effect is a natural process that regulates the earth's temperature by keeping the earth warmer than it ordinarily should be, thus, enabling the earth to absorb energy from the sun in the form of solar radiation. When this happens, about one-third of this energy is reflected leaving the rest to be absorbed by different other components of the climate system such as the atmosphere, the ocean, the land surface, and the biota.² The energy so trapped by the earth is then balanced over a period of time by outgoing radiation of the earth's atmospheric system which takes the form of long waves and invisible infrared energy. The magnitude of this outgoing radiation is affected partly by the temperature of the earth's atmospheric system.³ Similarly, anthropogenic factor contributes to increasing atmospheric concentration of GHGs and aerosols which could occasion regional and global warming.⁴

The concept of climate is often used to denote changes in the statistical distribution of weather patterns occurring for an extended period of time.⁵ The Intergovernmental Panel on Climate Change (IPCC) sees climate change as a variation in the mean state of the climate, persisting for an extended period of time (typically decades or longer).⁶ According to the United Nations Framework Convention on Climate Change (UNFCCC), climate change is a change of climate attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is, in addition to natural

* **AGOM Ucha Caroline** is a Lecturer in Faculty of Law, Ebonyi State University, Abakaliki: email: agomuucha@gmail.com. and

****NWODEH, Paul** is a Lecturer in Faculty of Law, Ebonyi State University, Abakaliki: email: abazelaw8@gmail.com.

¹OG Amokaye, *Environmental Law and Practice in Nigeria* (University of Lagos Press, 2004) 405.

²Ibid.

³JT Houghton, BA Callander and SK Varney (eds.) *Climate Change: The Supplementary Report to the IPCC Scientific Assessment, IPCC 1992* (Cambridge University Press, 1992) 200.

⁴Global warming is used to describe an increase in the average global temperature, climate and climate related parameters such as temperature, precipitation, soil moisture and sea level. The major anthropogenic (man-made) GHGs which contribute to global warming and should be regulated include: Carbon dioxide (CO₂), Methane (CH₄), Nitrous oxide (N₂O) and Chlorofluorocarbons (CFCs).

⁵"Climate Change" available at <http://www.en.wikipedia.org/climate-change>. Accessed last on 10th August 2017.

⁶IPCC 5th Assessment Report of November 2014

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climate variability, observed over comparable time period.⁷ There is observed increase in the altitude of climate change impacts in Nigeria as well as in other developing countries over the years.⁸ Seasons of the year are occurring irregularly, there is more frequent occurrence of drought, heat is becoming more intense, there is unprecedented level of flooding in coastal areas, rainfall starts late and ends earlier than usual, there is persistent low crop yield, high level of pests and diseases invasion of farms, etc. All these are products of climate change feedbacks. Climate change is in turn necessitated by both anthropogenic and natural factors.⁹ IPCC reports three key findings in relation to climate change as follows:

- a. Human influence on the climate system is manifest;
- b. The more we disrupt our climate, the more we risk severe pervasive and irreversible impacts;
- c. We have the means to limit climate change and build more prosperous, sustainable future.¹⁰

Scientists and Space Engineers maintained that the average temperature of the earth is on the increase.¹¹ This is consequent on the continuous emission of greenhouse gases into the environment due to industrialisation and urbanisation culminating in global warming.¹² Global warming has been linked to the emission of greenhouse gases which produce greenhouse effects and heat up the environment. Among other gases of greenhouse effects include: carbon monoxide and carbon dioxide which are produced by power stations, industrial processes and transportation; methane arising from decomposition of organic wastes in landfills, herds of cattle; nitrous oxide arising from livestock production; chlorofluorocarbons (CFCs).¹³

Climate change, reported to have higher propensity to intensify in the future years, has left much to be desired as per means to deal with the menace.¹⁴ There are similarly too few government policies and strategies to address climate change impacts in Sub Sahara Africa. It is obvious that the world's climate is changing fast, thus, generating new threats and manifestations. The IPCC maintained that Africa is one of the continents adjudged most vulnerable to climate change due to "multiple stresses and low adaptive capacity", and that though some adaptation is taking place "this may be insufficient for future changes in climate".¹⁵ Again, about seventy percent (70%) of Africans depend on small scale rain-fed agriculture.

Nigeria is strategic in Africa for her land mass and population. About forty-two percent (42%) of Nigeria's GDP is generated from agriculture and agro-allied undertakings.¹⁶ The climate change

⁷United Nations Framework Convention on Climate Change of 21st March, 1994.

⁸Weart, S., *The Discovery of Global Warming* (Cambridge: Harvard University Press, 2003) p. 240.

⁹Data from the National Bureau of Statistics (NBS - a Nigerian data gathering agency) indicate variation in such climatic elements as rainfall and temperature. For example, the mean annual rainfall in Akwa Ibom, Ondo and Rivers States was as high as 2,618.6mm, 1,699.5mm and 1,644.8mm respectively in 1994. This decreased to 180.2mm, 121.2 and 203.1mm respectively in 2004 (NBS, 2005; 2007). It is obvious from the foregoing that both local and global actions exert negative consequences on the climatic conditions of Nigeria.

¹⁰ IPCC 5th Assessment Report of November 2014.

¹¹The US National Aeronautic and Space Administrator and the British Meteorological Office reported in 1991 that the earth was overheating since the previous years.

¹²JT Houghton, B. A. Callander and S. K. Varney, no.3.

¹³OA Fagbohun, "Law and Climate Change in Nigeria" A Paper presented at the 2010 Edition of the Faculty of Law, University of Ilorin Law Workshop on the 13th May 2010; available at <http://www.africaportal.org/publications/pdf>. Accessed last on August 4th 2019.

¹⁴JR Fleming, *Historical Perspectives on Climate Change* (Oxford University Press, 1998) 208

¹⁵IPCC 2007, IPCC Fourth Assessment Report released after the 19th session of IPCC held at Bangkok April 30th; available at <https://www.niwa.co.nz/climate/climate/climate-variability-and-change/the-intergovernmental-panel-on-climate-change/ipcc-fourth-assessment-report-2007>; accessed on August 4th 2019. See also IPCC 2007: "Impacts, adaptation and vulnerability". Contribution of Working Group II to the Assessment Report of the Intergovernmental Panel on Climate Change. (UK: Cambridge University, Press., 2007); accessed on August 4th 2019.

¹⁶FM Onu and ME Ikehi, "Mitigation and Adaptation Strategies to the effects of Climate Change on the Environment and Agriculture in Nigeria" available at <http://www.researchgate.net/publication/27995746>; accessed on 5th August 2019.

impacts are very perceptible in most communities in Nigeria ranging from the Sahel in the north to the rainforest and coastal zone in the south. The population strength resulting in high poverty level and quest for economic growth are taking huge tolls on Nigeria's natural resources. Climate change impacts similarly compound current pressures on these resources. Drought in the north, for example, has occasioned poor crop yields, water scarcity and compulsory migration. In the south, the persistent rise in sea level has resulted to increased risk of flooding, salt water infringement and dislocation of people and livestock. Erosion allied with heavy rainfall and flooding is currently a recurrent threat in most ecological zones in Nigeria, especially in the rainforest where mudslides is persistent. Loss of biodiversity is now a common phenomenon in all ecological zones of Nigeria and this trend only renders natural resource-dependent communities more vulnerable.¹⁷

Most households in all the uplands, wetlands and fishing communities are vulnerable to flooding, windstorms, erosion and drying of streams. People in the fishing communities are more vulnerable to sea level rise. These hazards may persist in the communities in the future. Mudslides and landslides could similarly arise in their communities due to the current climatic situation.¹⁸ In spite of the global concern and the apparent vulnerability of the Nigerians to climate change, mitigation measures and adaptation strategies have received the least attention even in contemporary times.¹⁹

This paper therefore sets to x-ray customary law options to reduction of climate change in Africa for sustainable climate engineering.

2. Conceptual Framework

2.1 Environment

The environment is often conceived in terms of the place of human, plants and animal existence.²⁰ That is to say, where man lives and develops. It includes the air, land, water, vegetation, the surrounding and the whole ecosystem.²¹ The environment may be conceived generally as a matrix of physical, social, cultural and aesthetic factors which affect and determine the form, character, relationship and survival of individuals, communities.²² To Wikinson and Wyman, environment means “all the interacting factors and circumstances that surround, influence and direct the growth and behaviour of individual beings, groups, species and communities.”²³ This aligns with the view in *US v. Amadio*²⁴ where the court held that environment is;

The totality of the physical, economic, cultural, aesthetic, and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of people's lives. The surrounding conditions, influences or forces which influence or modify.

¹⁷Ibid; see also: G. Muhammed, M. M.Jaliye, S. Usman and E. Baniwa, “Adaptive Strategies to Climate Change Variability and Change in Rural Communities”. *Proceedings* of the 16th Annual National Conference of Agricultural Extension of Nigeria (AESON). March 2011; L. E. Nwosu, Climate Change and Food Security: Implication for Effective Agricultural Extension Services in Nigeria. *Proceedings* of the 17th Annual National Conference of Agricultural Extension of Nigeria (AESON). March 2012.

¹⁸EE Obioha, “Climate variability, Environmental Change and Food Security nexus in Nigeria” (2009) *J. Hum. Ecol.* 26(2), 107-121.

¹⁹ Ibid.

²⁰CA Omaka, *Municipal and International Environmental Law* (Lions Unique Concepts, 2012) 1.

²¹CA Omaka, “Limitation of Action and Pre Action Notice under S. 29(1) and (2) of the Federal Environmental Protection Agency Act Cap 131 LFN 1990’ *Environmental and Planning Law Review*, Vol.1, No. 1, 2004 (International Journal on Environmental and Planning Law) 125-132.

²²JG Ram, and DC Wooten, (eds) *Environment Impact Analysis Hand Book* (MC Graw Hill Publishers, 1980) 5-8. This definition was adopted by the court in the case of *A-G Lagos v. AG Federation & 35 Ors* [2003] FWLR (pt 168), 909 at 946 SC

²³ FF Wikinson, and M. Wyman, (eds) *Environmental Challenge Living for Tomorrow's World* (Athouse Press, 1986) 1

²⁴ 215 F. 2d 605 (7th Cir. 1954). This definition aligns with the Black's Law Dictionary.

The Constitution of the Federal Republic of Nigeria 1999²⁵ itemised the following components of the environment: the water, air and land, forest and wildlife, all layers of the atmosphere, all organic and inorganic matter and living organisms and the interacting natural systems that include component referred to in the foregoing paragraphs.²⁶

Environment is therefore the product ‘of man’s understanding and experience of his surroundings which is unendingly shaped by man’s usage and interaction with it’.²⁷ Thus, the United Nations Stockholm Conference on Human Development declares that ‘man is both creature and moulders of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth.’²⁸ Man is at the centre of the environment. The UN General Assembly²⁹ accordingly asserts that mankind is part of nature and its life depends on the uninterrupted functioning of natural system which ensures the supply of energy and nutrients.³⁰ A pragmatic conception of the environment is that it encompasses the complex relationship existing between the ecosystem and its inhabitants. Scientists elucidate that the environment is the product of a complex ecological system in which human beings and other living and non living organisms coexist. Environment, in this context, is made up of and pigeonholed into physical and cultural environment.³¹

The Stockholm Conference of June 1972, emphasized the right of mankind to sanity of environmental that guarantees decent life to man. This target can only be achievable where the natural resources of the earth are safeguarded. Mankind has taken too much into the natural environment in a bid to satisfy his complex need in the industrialized world. The quality of the environment is presently declining; the flora and fauna that help to balance the ecosystem are fast disappearing. Today, climate change resulting from the depletion of the ozone layer and green house effects is threatening the flora and fauna. Man also partakes from these environmental vagaries occasioned by his own vary activities. The earth is therefore facing the ripple effects of the environmental change.

2.2 Environmental Change

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²⁵ The Constitution of the Federal Republic of Nigeria 1999 as amended, S 20. This section is akin to SS. 37 NESREA Act and 63 EIA Act.

²⁶ It is however absurd that this said section falls within chapter 2 of the constitution which is non-justifiable: *Okogie v. AG Lagos* [1981] I NCLR 218; *A-G Ondo v. A-G Fed. & 35 Ors* [2002]9 NWLR (pt 772), 222 SC

²⁷ O G Amokaye, *Environmental Law and Practice in Nigeria* (University of Lagos Press, 2004) 4

²⁸ Preamble, para I, Report of the United Nations Conference on Human Development and Environment, Stockholm 1972 A/CONF. 48/Rev, (New York, 1972) 3

²⁹ In adopting the Environment Ideals in World Charter for Nature; UNGA Resolution 7 (xxxvii) of October 28th 1982

³⁰ Ibid; These definitions appear to hinge more on the anthropocentric philosophical foundations, hence, man is usually emphasized above every other components of the environment

³¹ The physical environment is the natural environment which consists of the biosphere, atmosphere hydrosphere, and lithosphere and their inherent resources while the cultural aspect comprises the people in specific location including human settlements, cultural, historical and religions aspects of human activities.

³² “Climate Change” available at <http://www.en.wikipedia.org/climate-change>; accessed on 10th August 2019.

³³ IPCC 5th Assessment Report of November 2014

³⁴ United Nations Framework Convention on Climate Change of 21st March, 1994.

All these are products of climate change feedbacks. Climate change is in turn necessitated by both anthropogenic and natural factors.³⁵ IPCC reports three key findings in relation to climate change as follows:

- i. Human influence on the climate system is manifest;
- ii. The more we disrupt our climate, the more we risk severe pervasive and irreversible impacts;
- iii. We have the means to limit climate change and build more prosperous, sustainable future.³⁶

2.3 Indications of Environmental Change

There are clear indications of increase in the altitude of climate change impacts in the globe including Nigeria as well as in other developing countries over the years.³⁷ Ripples of climate change stare the world in the face and threaten our collective existence on daily basis. Instances of climate change ripples between the later part of 2017 to early 2018 includes Hurricane Harvey; California Fires of 8th - 25th November 2018; Hurricane Michael 10th October 2018; Indonesia Earthquake and Tsunami on the 28th of September, 2018; Hurricane Florence of 13th August 2018; Super Typhoon Mangkhut September 9, 2008; Tropical Storm Lane (After effect) -23rd August 2018; California Wildfires of July 23rd 2018; Japan Flooding and Mudslides 1st week of July 2018; Mount Fuego Eruption of June 3rd 2018; Mount Kilauea Eruption – May 25th 2018; India Dust Storm - May 2nd 2018; Cyclone Josie - 31st March, 2018; New England Bomb Cyclone - 2nd March, 2018; Papua New Guinea Earthquake - 26th February 2018; Oaxala Earthquake - 16th February, 2018; Hualien Earthquake - 6th February, 2018; Windstorm Friederike – 17th - 19th January, 2018; Montecito Mudslides - 9th January, 2018; Santa Barbara Thomas Fire - December 2017 – 8th January 2018, etc. Indications of climate change in Africa include drought, flooding, increase in the sun’s intensity and excessive heat, desertification, late arrival of raining season, crop failure, coastal flooding, etc.

2.4 Customary Law

Like every other concept in law, customary law has been variously defined.³⁸ The Evidence Act³⁹ defined custom as a rule which in the particular district, has, from long usage, obtained the force of law. The Black’s Law Dictionary⁴⁰ similarly defined customary law as “law consisting of customs that are accepted as legal requirement or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of social and economic system that they are treated as if they were law.” Emphasis in all these definitions hinges on ‘custom’ as a validating force for rules of conducts and as that which gives those rules obligatory quality in a particular district or locality.⁴¹ Customary law:

...consists of a variety of different types of principles, norms, and rules. Some of them state wide and general principles of morality and public policy to constitute an apparently enduring ideological framework for justice. Such principles of wide connotation ...can be adapted to changing conditions and standards.⁴²

³⁵Data from the National Bureau of Statistics (NBS - a Nigerian data gathering agency) indicate variation in such climatic elements as rainfall and temperature. For example, the mean annual rainfall in Akwa Ibom, Ondo and Rivers States was as high as 2,618.6mm, 1,699.5mm and 1,644.8mm respectively in 1994. This decreased to 180.2mm, 121.2 and 203.1mm respectively in 2004 (NBS, 2005; 2007). It is obvious from the foregoing that both local and global actions exert negative consequences on the climatic conditions of Nigeria.

³⁶ IPCC 5th Assessment Report of November 2014.

³⁷ S Weart, *The Discovery of Global Warming* (Harvard University Press, 2003) 240.

³⁸ CNN White, “African Customary Law: the Problem of Concept and Definition” *Journal of African Law* Vol. 9 No. 2 (1965) 82.

³⁹Cap E 14 LFN 2010 in S. 2 (1). This definition was adopted by the Supreme Court per Nwokedi JSC in *Agbai v. Okagbue* [1991] NWLR (Pt. 204) 391 at 416.

⁴⁰7th Edn. (West Pub. Co.1999) 391

⁴¹ To this, Ngwakwe raises objection and maintains that even though at some point they are related, law and custom are not synonymous. While custom depends on acceptable practice, law exerts obligation. EC Ngwakwe, *African Customary Law: Jurisprudence, Themes and Principles* (Ave Maria Academic Publishers, 2013) 102; JO Assein, *Introduction to Nigerian Legal System* (Sam Bookman Publishers, 1998) 15

⁴²M Gluckman, ed. *Ideas and Procedures in African Customary Law* (Oxford University Press, 1969) 9 - 10.

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In *Owonyin v. Omotosho*⁴³ Bairaman F.J. referred to customary law as “a mirror of accepted usage”. In *Aku v. Aneku*;⁴⁴ the Court of Appeal held that custom or usage means:

The unrecorded tradition and history of the people which has ‘grown’ with the ‘growth’ of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or subject matter to which it relates.

The Supreme Court⁴⁵ defined customary law as ‘the organic or living law of the indigenous people of Nigeria regulating their lives and transactions which controls the lives and transactions of the community subject to it’. In *Bakare Alfa v. Arepo*⁴⁶ the court referred to customary law as ancient rules of law binding on a particular community and which rules do change with the time and the rapid development of social and economic condition.⁴⁷

Rules of customary law must have existed from antiquity and continued to exist up to the material time. This does not in any way connote that such rules is so rigid that it cannot change to blend with the current milieu.⁴⁸ Similarly, rules of customary law are applicable in a particular locality. This is to the effect that the customary law of a given society may be homogenous in that society but not with the other, even though, there may appear some resemblance. Customary law therefore is the common law of the people. It is the living (organic) law of the indigenous people which regulate their daily lives and transactions. It is organic because it is not inert. It is dogmatic in that it pedals the totality of the activities of the community wherein it operates. Rules of customary law import justice to the lives of all subject to it.⁴⁹

2.5.1 Sources of Customary Environmental Law

The meanings assignable to the expression ‘sources of law’ may be varied.⁵⁰ It could denote formal sources, that is, that which gives the law its validity.⁵¹ It could refer to legal sources, that is, the direct means by which law is made or comes into existence.⁵² Jurists have identified this source by different names; Kelsen refers to it as the ‘grundnorm’ (basic norm).⁵³ Hart prefers to call it ‘rule of recognition’.⁵⁴ To Salmond, it is the ‘ultimate legal principle’.⁵⁵ Sources like statutes, judicial precedent and custom are envisaged here. According to Hart; “a source is simply the causal or historical influence

⁴³[1961] 1 All NLR 304. This was adopted by the Supreme Court in *Kimdey & Ors v. Military Governor of Congola State & Ors* [1988] 2 NWLR (Pt. 77) 445; see *Zaidan v. Mohssen* [1973]11 SC 1 at 21 and *Exparte Ekpenga* unreported FSC. 204/1961 on 30/4/62, where Ademola C.J.F referred to customary law as “the common law of the people”

⁴⁴[1991] 8 NWLR (Pt. 209) 280; See also *Ojisua v. Aiyebilehim* [2001] 11 NWLR (Pt. 723) 44 at 52; where Niki Toby JCA (as he then was) distinguished between custom and customary law.

⁴⁵Per Obaseki JSC in *Oyewumi v. Ogunesan* [1990] 3 NWLR (Pt. 137) at p. 137. This was given approval in *Dang Pam v. Dang Gwom* [2000]1WRN 51 at 63; *Yaktor v. Governor of Plateau State* [1997] 4 NWLR (Pt. 498) 216 at 228-229.

⁴⁶[1963] WNLR 95

⁴⁷Similarly in *Salau v. Aderigbibe* [1963] WNLR 80, the court sees customary law as ‘those rules of conduct which the people of a particular locality have come to recognise as governing them in their relationships between themselves and things.

⁴⁸AA Kalajo, *Customary Law in Nigeria Through the Cases* (Spectrum Books Ltd, 2000) 1

⁴⁹*Ibid*, 1-2.

⁵⁰Four different meanings assignable to the expression depending on whether ‘formal’ or legal sources are being contemplated are identifiable. MC Okany, *Nigerian Commercial Law* (Africana – Fep. Pub. Ltd., 1992) 6; Appadorai, 61 - 62

⁵¹Ngwakwe, no. 41, 34

⁵²Appadorai, 62

⁵³H Kelsen, *The General Theory of Law* (Russell & Russell, 1961) 61.

⁵⁴HL A Hart, *The Concept of Law* (Clarendon Press, 1961) 97.

⁵⁵J Salmond, *Jurisprudence*, (11th Edn Sweet and Maxwell, 1937) 137.

of a given rule of law at a given time and place...⁵⁶ Sources of law means those remote and immediate causes which explain the contents of law and with the organs through which the state either creates law or grants legal recognition to rules previously not authoritative.⁵⁷ Sources of customary environmental law include:

2.5.1

Custom is a generally observed course of conducts which are either deliberately or accidentally repeated until they ossified into habits. Custom forms, to a great extent, the major source of law. According to Park:

...But from a purely numerical viewpoint they (statutory and other received laws) are of less account than customary law... At present, however, the vast majority of the inhabitants of Nigeria conduct most of their activities in accordance with and subject to customary law; and if all courts of whatever status is considered, far more cases are decided under customary law than under any of the other laws in force in the country.⁵⁸

Custom, thus, regulates most activities in the communities. In such a society, all the structures and institutions are either created or recognised by the custom for them to function. Therefore, the king's command, elders-in-council, age grades, legislations and proverbs which sometimes encapsulate legal principle, obligations to accept and obey law are all rooted in custom. Sanctions in customary law was in the form of fear of social stigma or some kind of supernatural penalty.⁵⁹

2.5.2 Religion (Divine Source)

This source of law originated from God (divine theory of origin). Mankind in his relationship with God and his fellow beings has always been regulated by divine injunctions. In the primitive societies, custom and law are intricately woven with religion. All rules of life accordingly had religious sanctions. Some rules of customary law are obeyed and enforced by associating such rules with a particular deity or branding same 'Nso-ala'. For instance, defecating into water or under fruit trees, on or near the road, cutting down young trees arbitrarily, setting fire to bushes indiscriminately, killing a pregnant animal or one in labour, catching birds with their eggs or young ones, etc.

2.5.3 Taboo

This consists of any conduct or behaviour or set of conducts or behaviours which are prohibited for religious or customary reasons. Taboos have their roots in religious beliefs and were vehemently observed to avoid evil or misfortune befalling the community, the family or the individual who breached the taboos himself. Taboos could also be associated with God (gods, deities), spirits or morality, etc.⁶⁰ Consistent observance of taboos over a long period of time hardened precepts of taboos into rule of law.

⁵⁶ Sources of law may similarly mean written materials from which we obtain knowledge of what the law is or was at a given time. That is, literary sources of law. In this sense, statutes, law reports, books of authority are regarded and relied upon as sources of law. It may furthermore, denote the factors that have influenced the development of law and to which the content of law may be traced. That is, historical or material sources. Here, custom, religious beliefs, ideas of reasonableness, natural justice, conscience, public policy, and in civil law, professional practice and juristic opinions are all sources of law. Ngwakwe., 35; Obilade *op.cit.* 55.

⁵⁷ Appadorai, 61-62

⁵⁸ AE W Park, *Sources of Nigerian Law* (Sweet & Maxwell, 1964) 65.

⁵⁹ Ngwakwe; even in highly civilised societies, some customs began to receive the force of law with its enforcement by sovereign political authority. For instance, the common law of England consists mainly of customs accepted by the courts of law which in course of time consolidated into the common law of England.

⁶⁰ Ibid, 79 – 80.

2.5.4 Customary Legislation

In traditional Africa, legislation may be legislation by king's decree, command or proclamation,⁶¹ legislation by king-in-council, institutional legislation, legislation by public assembly or judicial legislation.⁶² Legislation is a source of customary law both in kingly and acephalous societies.

3. Theoretical Framework

3.1 The Root of Customary Environmental Law in Jurisprudence

3.1.1 Natural Law Theory

According to Cicero, 'natural law means right reason in agreement with nature.'⁶³ The naturalists,⁶⁴ believe that law is ordained by divine Supreme (God) and handed down to man. This law can be discerned by human reason or derived from human nature. Natural law is reflective of moral codes which are set in the heart of men by the creator enjoining them to do good and refrain from evil.⁶⁵

The hardcore of the natural law school are:

- a. God the creator is the ultimate ruler of all creation and things. He is the just law giver and judge unto all persons and nations.
- b. The laws of God are divine, spiritual and natural. These laws are morally just, fair, good and universally applicable to all persons in the world on equal basis.
- c. Every reasonable man is imbued with the ability to discern the divine laws in action in nature all around him and all over the world.
- d. The divine laws set standard for men as to what man-made laws ought to be.
- e. Man-made (positive) laws ought to reflect morality, fairness, justice and righteousness like divine laws.
- f. Any man-made law that fails to accord with divine laws in qualities deserves not to be called law or obeyed by the people.⁶⁶

The primary principle that man should strive to pursue what is good and refrain from evil means that man can decide what is good by reflecting on his own impulses and nature.⁶⁷ Natural law, therefore, is believed to direct men in conscience and thus, influence the formulation and determination of any

⁶¹In this situation, the instruments, orders, directives, proclamations, or judgment of the sovereign are bound to be obeyed by his inferior subjects. African societies of the kingly or chiefly form accord with this category while such societies as are acephalous or segmented do not since central administration and hierarchical organisational structures were lacking.

⁶²A.N Allot cited in Ngwakwe op cit, 81; the first and second types of legislation are mostly seen in centrally organised political societies like the kingly or chiefly societies. The third and fourth types of legislation are mostly popular in acephalous and segmented society while the last type is seen mostly in societies with vertically structured hierarchical judicial institutional systems. Judicial legislation gives rise to precedent. In pre-colonial era, therefore, customary law regulated all aspect of the \individual relationship inter se. The customary law evinces different aspect of law and acted as the grundnorm; Oyewo et al, *A Survey of African Law and Custom with Particular Reference to the Yoruba Speaking Peoples of South Western Nigeria* (Jator, 1999) 28.

⁶³MT Cicero, *The Republic*, 22-23, cited in EO Malemi, *The Nigerian Legal Method*, (2nd edn, Princeton Pub. Co. Ltd, 2012) 21.

⁶⁴The naturalists' perception of law has varied with its various exponents over time. Such exponent includes, Aquinas, St Augustine, Immanuel Kant, David Hume, John Finnis, etc.

⁶⁵T Aquinas, *Summa Theologica I*, cited in RVM. Dias 472 – 473; F Adaramola, *Jurisprudence*, (4th edn, LexisNexis, 2008) 13; this was the court position in *A-G Fed. & Anor v. Chukwuemeka Agwuna* [1995] 4 NWLR (pt. 388) 234 – 249.

⁶⁶*Iffie v. AG Bendel State* [1987] 4 NWLR (pt. 67) p. 972; *Guardian Newspapers & Ors v. A G Federation* [1995] 5 NWLR (pt. 398) 703; *Mogaji & Ors v. Board of Customs & Excise* [1982] 3 NCLR 552; *Governor of Lagos v. Ojukwu* [1986] 1 NWLR (pt.18) 621; *DPP v. Shaw* [1961] 2 All E R 446; *DPP v. Whyte* [1972] A C 849.

⁶⁷Adaramola.

positive law.⁶⁸ The naturalists propose that human dignity, rights and duties cutting across race, colour, age, religion or level of civilisation is rooted in law.⁶⁹

Natural law in its modern concepts means the basic elements of justice, guarantees of equality and other basic human right.⁷⁰ Natural law is associated with emphasis on equality, fairness and morality as important factors for survival. This includes equality, fairness and moral rectitude towards all creatures (flora and fauna) of the earth. This principle of equality, fairness and moral rectitude towards all creatures evinces in the concept of environmental ethics which believes that human beings as well as other creatures form important part of the earth.⁷¹ Men should thus bear this in mind and treat other creatures of the earth with respect, equitably, morally and ethically.⁷² Environmental ethics deals with the moral and ethical relationship existing between man and the environment. It raises the issue of man's obligation to preserve and care for the non-human world.⁷³ It is therefore unethical to plunder the earth's resources with impunity and undue regard to the principle of sustainability. Again, this principle of environmental ethics was well articulated into the customary law of various communities even before it was coined. This shows that customary law is a drawdown of natural law. For instance, some communities protected the flora and fauna with moral principle of taboos interwoven with customs and enforced same using collective efforts.⁷⁴ Some animal and tree species were branded totems and protected under the customary laws of these communities. This aligned with the view of Grisez⁷⁵ that the tenets of natural law demands, *inter alia*, the following:

- a. People should not regard nature as mere material for exploitation.⁷⁶
- b. People must cooperate with the creator in dealing with nature.
- c. Technology tends to obscure human cooperation with the creator.⁷⁷
- d. Contemplation of natural beauty fulfils both human beings and nature.

3.1.2 Theory of Sustainable Development

The theory of sustainable development provides a link between man and his natural environment. Development is traditionally recognized as the process by which a country provides for its entire population all the basic needs of life like clothes and shelter, and provides every one of her citizens with the opportunity to contribute to the very process through employment as well as scientific and technological breakthrough.⁷⁸ The UN Declaration on the Right to Development declares that 'Right to development involves the interest of developing countries to control and enhance their own

⁶⁸EC Ngwakwe, *African Customary Law: Jurisprudence, Themes and Principles* (Ave Maria Academic Publishers, 2013) 44.

⁶⁹Ibid, 45.

⁷⁰This concept of equality and right influenced the writers of the declaration of American Independence, who in 1776 wrote; "... We hold these truth to be self evident, that all men are endowed with certain inalienable right, that among these are life, liberty, and the pursuit of happiness"; See American Declaration of Independence, available at <http://www.historytoday.com/Robert-hole/am...>, visited last on 14th Jan 2016. The belief on the natural law also influenced the French Revolution of 1789 and Declaration of the Rights of Man.

⁷¹This is appropriately encapsulated in the principle of intra-generational and inter-generational equity.

⁷²<http://www.conserve-energy-future.com/...> Accessed last on 30th June, 2017; *Trail Smelter Arbitration Case (United States v. Canada)* 33 AJIL (1939-1941) 3 RIAA 1965; *Lac Lanoux Arbitration Case (France/Spain)* 24 ILR p. 119.

⁷³R Gillaspay, "Environmental Ethics and Human Values: Definition and Impact on Environmental Problems" available at study.com/.../environmental-ethics-human... accessed on at 30th June, 2019.

⁷⁴CA. Omaka *Municipal and International Environmental Law, Op. Cit.*, 29

⁷⁵Grisez, Germain, "The Way of the Lord Jesus" available at www.twotlj.org/G-2-10-B.html accessed on 3rd July 2019.

⁷⁶This aligns with the decision of the Arbitral Commission in *Gabcikovo-Nagymaros Project Case (Hungary/Slovakia)* ICJ Reports 1997, 7; 116 ILR, 1

⁷⁷This agrees with the decision in *Corfu Channel Case (United Kingdom v. Albania)* ICJ Reports 1949; 4 at 22; 16 AD, 155. Equality of all creature and need for communality and fair treatment of creature, *inter se*, is therefore implicit in the natural law theory and forms the basis of most United Nations affirmative action on environment.

⁷⁸M Decleris, "The Law of Sustainable Environment, General Principles: A Report for the European Commission" (Luxumburg; 2000) available at <http://www/europa.en.int> accessed on 14th Sept. 2019.

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development (including the right to exploit its natural resources, the right of all people to enjoy a minimum quality of right).⁷⁹

The Declaration further sees development as a comprehensive process that involves political freedom and equality of opportunity for all in their access to basic resources, education, health services food, housing, employment and the fair distribution of income.⁸⁰ The strategy should foster participation and ownership and should embrace the public and private sectors, the community, families and the individuals. This approach would place the human person at the centre of the development paradigm⁸¹ Sustainability similarly concerned itself with ensuring the dynamic equilibrium between nature and man for the co-existence of both within the earth surface. It has to do, in the words of Brudthland, with ‘development that meets the needs of the present without compromising the ability of the future generation to meet their own needs’.⁸² Sustainability includes the conservation of the ecosystem as an eternal source of natural resources for man. Sustainability of the ecosystem is said to exist where restraints is exercised in relation to exploitation of the ecosystem by man for any kind of development. It is usually conceived in terms of (a) conservations and recovery of the adequate natural resources to enthrone a qualitative development policy (b) integration of environmental, cultural, social and economic criteria in the planning and execution of developmental policies in both public and private sector.⁸³

Sustainable development can thus be defined in terms of the technical but narrow prospective of an increase in any country’s wealth production that is, the gross income devoid of parallel reduction or degradation of natural capital. One good thing with this definition is that it ensures that justice between generations will be realized since it demands that a country’s natural capital resources be conserved so as to pass same to the future generations. Principles 3 and 4 of the Rio Declaration maintained that conservation of natural resources is the plank of sustainable development. This entails that natural resources should be protected against risk of reduction, depletion, extinction or degradation.⁸⁴

4. Customary Law Options to Environmental Protection

Customary law regulated the environment in the pristine times and formed the basis of modern environmental law. The environment was treated with respect and animal species were exploited with some restraints. The concept of sustainable development was written in the hearts of every adult in the environs and this formed the guiding principles regulating the use of the natural resources. These rules were reinforced with the instrumentality of taboos and were strictly adhered to. For instance, mountains and rivers have always existed since creation and accorded a pride of place in African customary law. The earth (land) is however accorded the highest respect. Customary law rules ensured the maintenance of a balanced ecosystem and preserved the flora and fauna. Rules of customary law to prohibited indiscriminate cutting down fruit trees, bush burning, defecating into water, on or near the road, under a tree, or in one’s farm, etc. It was also wrong to deface the earth, mountains, valleys or hills. Pregnant animal or any female animal in labour were not killed. Mother animals with its young ones were also protected. Animals mating were not killed. Certain classes of animals were regarded as totems and were prohibited from being killed. Every community has sacred forests, ponds and rivers where animals or fishes therein were not to be killed. Land was allowed time to fallow before it was cultivated by practicing shifting cultivation, etc. In fact, every living thing was regarded as children of the living God and respected as such. By prohibiting certain anthropogenic activities capable of negative impacts on the environment, the ozone layer was protected, green house gases were regulated, the oxygen – carbon

⁷⁹Amokaye.

⁸⁰ Ibid.

⁸¹UNGA Resolution 41/128 Annex, Dec. 4th 1986.

⁸²Supra n. 79.

⁸³M Robinson, “Constructing an International Financial Trade and Development Architecture: The Human Right Dimension” in HI, Steiner and P Alson (eds) *International Human Rights in Context, Law, Politics and Morals*, (2nd edn. Oxford University Press, 2002) 1311 – 1312.

⁸⁴JL Sax, “Taking Private Property and Public Rights” (1971)81 *Yale Law Journal*, 149.

balance of the earth was maintained. This haphazard approach as they may seem were very effective and paid off in good climate management until the industrial era.

5. Conclusions

Environment is perceived as the totality of nature and the natural resources; including the cultural heritage and the infrastructures essential for socio-economic activities.⁸⁵ This perception is holistic in that the intrinsic relationship between man and the natural environment vis-à-vis the quest to secure harmonious relationship among them inter se is taken into consideration. Howbeit conceived, the environment is very central to the survival of man and every other biological group and community. We depend on the environment for our sustenance – food, shelter, fuel, medicine and other materials. The nature of the environment affects our health, comforts, happiness, availability of food, tranquility of our states or localities, movement, physical structures, biodiversity, *and so forth*. Developing nations, especially African states are more vulnerable to environmental change and more constrained financially in battling the resultant challenges owing to paucity of fund, insufficient technology, poverty and population pressures.⁸⁶ These developing nations are highly dependent on climate-induced activities. Nigeria, for instance, is dependent on rain-fed agriculture, livestock and hydropower generated energy for electricity. More so, most African states depends on the developed nations for technology to drive their economy in the areas of air, land and water transportations, commerce and industries, household appliances, etc.⁸⁷ Most of the times, these machines and equipments are substandard or of second hand quality and are not environmentally friendly. Presently, environmental problems such as coastal flooding, desertification, erosion, deforestation and urban pollution have almost tripled the threat to national development since the last decade.⁸⁸ Africa's contributions to the percentage increase in global greenhouse gases has been induced by factors such as land and agricultural practices, population pressure, energy generation and consumption and oil exploration and refining. Consistent change in the environment without adequate measures to check same spells doom for man. It is given the foregoing that we recommend as follows:

a. Legislative Action: since rules of customary law are rendered mere facts before the court by the received laws, legislation action is imperative in this regard to incorporate areas of comparative advantages of customary law into statutes in order to enhance its obligatory compliance, hence, lessen the level of activities that detract from effective climate protection.

Public Awareness: creation of awareness to effectively apprise the general public on the issue of climate change is imperative. This will, no doubt, inform the public of their activities that engender climate change forcing and make for a change in attitude towards the environment generally.

Green Revolution: government and public spirited individuals should invest in green revolution. Plants, flowers and trees should be planted in streets, roads, homes and farms to help stem the tides of climate change.

Enforcement of Customary Law: customary laws that are not repugnant to natural justice, equity and good conscience; incompatible with legislations or against public policy, especially in the areas of environment protection and climate change should be enforced by the court in order to unleash unto the society their comparative advantages.

⁸⁵This is to the effect that it “environment” is not an abstraction but represents the living space, the quality of life and the very health of human beings including generations unborn this is the advisory opinion expressed by the ICJ in Legality of the Threat or use of nuclear weapon ICJ Reports 1996 241-242 para 29.

⁸⁶U Cubasch and R Voss, “The influence of Total Solar Irradiance on Climate” *Space Sci. Rev.* (2000) 94, 185–198.

⁸⁷OG Amokaye, “Implementing Climate Change Convention at Domestic Level: Problems and Prospects in Nigeria” A Research Paper Submitted to UNFCCC Secretariat Bonn, 31st October, 1999.

⁸⁸CA Omaka, 66.