

## Chapter 4

### **Domestic adjudicative institutions, developing countries and sustainable development:**

#### **Linkages and limitations**

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#### **4.1 Introduction**

This chapter investigates the role of courts and other formal adjudicative institutions of developing countries in promoting sustainable development. A consistent message from several international instruments and forums such as the Sustainable Development Goals (SDGs) 2015 and the 2015 Paris Agreement of the United Nations Framework Convention on Climate Change (UNFCCC) is that sustainable development requires the efforts and contributions of every part of society, including the public and private sectors at the national level. This message is implicit from the meeting of the Intergovernmental Panel on Climate Change (IPCC) held in Incheon, South Korea on 6 October 2018.<sup>2</sup> Under the umbrella of ‘strengthening the global response in the context of sustainable development’, the IPCC’s Special Report on Global Warming of 1.5°C<sup>3</sup> noted the need for ‘adaptation options specific

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<sup>2</sup> The 48th session of the Intergovernmental Panel on Climate Change (IPCC 48) held from 1-5 October 2018 in Incheon, Republic of Korea. <http://sdg.iisd.org/events/48th-session-of-the-ipcc/> accessed 7 November 2018.

<sup>3</sup> IPCC’s Special Report on Global Warming 2018

file:///F:/sr15\_headline\_statements%20Climate%20change,%20sustainable%20development,%20consumption,%20CSR%20report%202018.pdf, D3, D7 accessed 28 October 2018.

to national contexts'. In stressing the need for '[s]trengthening the capacities for climate action of national and sub-national authorities, civil society, the private sector, indigenous peoples and local communities [to] support the implementation of ambitious actions' the IPCC highlighted the importance of participatory public and private institutions in sustainable development. It may be noted that participatory institutions have made a real difference to the effectiveness of public health programmes in regions like Western Europe and Latin America (Falletti and Cunial, 2018). Nonetheless, while the IPCC itself epitomises the interaction of scientific knowledge and policy involving different powerful actors at the global level, there is the question of the attitude, responsibility, influence and decision-making processes of key formal and informal actors within national jurisdictions where sustainable development policies are practically implemented. Bansal (2002), for example, argued that one of the challenges to effective corporate participation in sustainable development is its institutionalisation in 'the regulations, norms and mindsets'.

At the national level, the courts and other formal adjudicative institutions act in establishing, clarifying and regulating the nature and interaction of different components of society. Different segments of the public and private sectors interact with other persons and organisations within and outside their sectors and sub-sectors and enforce rules and standards with contractual parties. In the context of sustainable development, the adjudicative institutions play a vital role in ensuring the enforcement of standards. As Burger et al (2017:8) observed, '[l]itigation has arguably never been a more important tool to push policymakers and market participants to develop and implement effective means of climate change mitigation and adaptation'. Stakeholders such as public interest organisations are increasingly resorting to judicial intervention in climate change and other sustainable development matters, especially in the more developed countries (Ghaleigh, 2010:34-35; Bähr et al, 2018:194-221). For instance, the US Supreme Court recently dismissed the Federal Government's attempt to halt

a flagship climate change litigation, *Juliana v United States*,<sup>4</sup> from proceeding to trial at the lower court.<sup>5</sup> *Juliana* alleges that the United States government's affirmative actions caused climate change, violated the younger generation's constitutional rights to life, liberty, and property, and failed to protect essential public trust resources.

Nonetheless, when adjudicative institutions are limited by endogenous factors such as incompetence, corruption and detached attitude to the public interest, the result can be detrimental to the global and national sustainable development priorities and to victims of harmful and unsustainable practices. The recent *Agouman v Leigh Day* case illustrates this.<sup>6</sup> The original cause of action arose from the dumping of harmful waste by a multinational company (Trafigura) in Cote D'Ivoire which caused personal injuries and environmental damage. The dumping was facilitated by the country's inefficient regulatory institutions and occurred after several other countries refused to permit Trafigura to offload the toxic waste within their jurisdictions. Although it claimed that the toxic waste was dumped by an independent contractor it appointed in good faith, Trafigura settled the legal proceedings brought by a group of victims and paid a substantial compensation.<sup>7</sup> However, the victims could not access the compensation fund when it was transferred to public authorities in Cote D'Ivoire by their UK-based legal representatives. The compensation fund was mostly diverted by powerful actors in Cote D'Ivoire in collusion with the nation's corrupt judiciary. An English High Court held that the legal representatives were in breach of a duty of care to the victims because they ought to have foreseen that Cote D'Ivoire's judicial administration system would

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<sup>4</sup> *Juliana v United States* 6:15-cv-1517 -TC US D. Or, (2016).

<sup>5</sup> *United States v. Juliana* U.S. District Court for District of Oregon 18-73014 SC (2018).

<sup>6</sup> *Agouman v Leigh Day* [2016] EWHC 1324.

<sup>7</sup> See *Motto v Trafigura Ltd* [2011] EWCA Civ 1150 (on costs).

abuse the compensation fund. In other words, the legal representatives ought to have considered the prevailing institutional circumstances.

*Fijabi v Nigeria Bottling Company Plc*<sup>8</sup> provides a contrasting perspective on the role of adjudicative institutions. In that case, the Nigerian regulatory authorities declined to act despite evidence that the local franchisee of the global multinational, Coca Cola, was selling beverages containing very high levels of benzoic acid preservative. Notwithstanding that the benzoic content was much higher than the maximum level considered unsafe for consumption by the regulatory authorities of the UK and other European jurisdictions, the company insisted that the beverages were suitable for the Nigerian market. Local regulators acquiesced to the company's position and even refused to demand relevant warning labels on the products. A Nigerian court, however, referenced the available best international standards in its decision to uphold the consumers' right to health in the circumstances. Both the company and the regulators have appealed the judgment.

The cases suggest the existence of adjudicative institutions that are disconnected from the ideals and mechanisms of sustainable development in those developing countries. The consequences can be far-reaching. As the *Johannesburg Principles on the Role of Law and Sustainable Development* adopted by the Global Judges Symposium (2003) held in August 2002 noted with respect to environmental protection:

'an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial

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<sup>8</sup> Suit No. LD/13/2008 of 15 February 2017.

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

The vital position of adjudicative institutions in sustainable development has been recognised in different jurisdictional contexts. On the one hand, the relatively high standards of environmental protection in EU policy can be attributed to the role of the European Court of Justice (ECJ) in confirming the approach in several cases (Jacobs, 2006). On the other hand, the modest interest in sustainable development in the US has been traced to the attitude of the country’s Supreme Court (May, 2009).

Focusing mainly on environmental protection in Nigeria, this chapter provides a robust account of the linkages between sustainable development and adjudicative institutions and highlights the latter’s roles in the interaction of public and private stakeholder groups. It proceeds on the basis that adjudicative institutions are a key stakeholder group for sustainable development that can undertake regulatory, normative and cognitive roles as defined in Scott’s (2001, 2008) typology of institutions. The close connection between science and policy in environmental governance (Lidskog and Sundqvist, 2015), for example, highlights the imperativeness of effective knowledge-based policy and practice and its communication to formal and informal segments of society. The tripartite institutions model developed here (based on the above discussed regulatory, normative and cognitive elements of institutions) helps in this chapter for identifying appropriate mechanisms for the creation, diffusion and dissemination of sustainable development knowledge across different (public and private) strata of society. Adjudicative institutions that embrace their normative and cognitive institutional roles will see the cases before them as only a template and can, for example, make statements having wider significance than those cases. The statements can reference individual and organisational behaviours and existing legal, cultural and business practices arising within and outside the cases before the adjudicative institutions and compare them to other practices, research

findings, scientific debates and even theoretical models of sustainable development. The tripartite framework developed in this chapter shows that existing scholarship reflects a limited application of the institutional model and highlights the need for framing interpretation in its broader institutional contexts. In focusing mainly on explicit constitutional and statutory provisions, existing scholarship arguably signposts the regulatory role of the courts whereas the wider institutional ambit of their roles includes conscious normative and cognitive influences on public and private institutional actors. We argue that the roles of the adjudicative institutions include the constitutionalisation, universalisation, globalisation and enforcement of standards, norm internalisation and transmission, stakeholder empowerment, reshaping of customs and acting as institutional champions for sustainable development. Nonetheless, we identify some obstacles to effective sustainable development roles for adjudicative institutions and propose solutions for tackling them. These barriers include lack of explicit provisions, narrowly focusing on compensatory remedies, locus standi, *forum non conveniens* and choice of law.

While it is generally acknowledged is that the law occupies a central role in advancing environmental protection (Gunningham, 2009) and other sustainable development agendas, the role of the courts is on-going debate (Pedersen, 2019). One of the earliest contributions to the role of adjudication institutions in environment protection is Joseph Sax's (1971) *Defending the environment*, in which he championed the notion of using private court actions to protect the public trust. Gunningham (2009) argued that the concept of environmental governance has emerged to demonstrate the role of both public and private actors in advancing environmental protection. McAuslan (1991) adopted the institutional approach in examining the role of the courts in environmental matters. Nonetheless, this chapter is unique in applying Scott's (2001, 2008) tripartite classification of institutions to investigate the role of adjudication institutions in sustainable development. The classification facilitates concrete proposals for programmatic

participation of public and private institutions in sustainable development. The chapter therefore provides original contributions to the debate in identifying the formal and informal roles of adjudicative institutions and demonstrating the complementarity of those roles with certain limitations imposed by legal frameworks. The primary reference to developing countries is another distinguishing feature from existing studies which mostly focus on environmental matters before the courts of the more advanced countries (e.g. McAuslan, 1991; May, 2009; Pedersen, 2019). Similarly, Jacobs (2006) examined the role of the ECJ in environmental protection. The modest number of works that address the developing country context (e.g. Preston, 2005; Kameri-Mbote and Odote, 2009) are often limited in scope to the formal interpretative functions of the courts as opposed to their wider regulatory, normative and cognitive institutional roles.

The chapter is organised as follows. It, firstly, examines the meaning of institutions and locates adjudicative institutions within the framework of institutions for promoting of sustainable development. It demonstrates that adjudicative institutions are a stakeholder group for sustainable development before outlining their roles in a developing country context. The chapter then highlights impediments to the effectiveness of adjudicative institutions for sustainable development and offers solutions to conclude that these obstacles are not insurmountable.

## **4.2 Institutions and Adjudication**

A starting point for understanding the role of the courts and formal adjudicative institutions is the institutional theoretic model. As Misangyi et al (2008) explained, the institutional theory confirms that actions and behaviours are determined or influenced by the institutional environment. Li et al (2008:328) similarly argued that the theory ‘offers a powerful explanation of both individual and organisational actions and processes’. The institutional theory is centred

around the concept of ‘institutions’ which Hoffman (1999) described as ‘rules, norms, and beliefs that describe reality for the organisation, explaining what is and is not, what can be acted upon and what cannot’ (Hoffman, 1999:351). The institutional theory is, therefore, mostly applied to investigate intra and inter-organisational behaviour and interaction (Misangyi et al (2008). However, the theory can have a broader application to social relationships. In this regard, institutions are explicit and implicit rules and norms (Powell and DiMaggio, 1991) that guide and provide standards of, and impose constraints on, behaviour of actors within society (North, 1990; Scott, 2001).

Although they all potentially influence behaviour, institutions do so in different ways. Consequently, Scott (2001, 2008) has suggested the existence of regulatory, normative and cognitive or cultural institutions as the pillars of the institutional framework. Regulatory institutions are formal laws, rules and regulations and their coercive enforcement. Unlike the informal normative and cognitive institutions, regulatory institutions are explicit and, as a result, potentially more easily amended or adaptable in changing circumstances. While normative institutions refer to consciously shared norms, values, beliefs and expectations for behaviour and social interaction, cognitive/cultural institutions provide implicit, unconscious and symbolic interpretative frames (see also Zucker, 1977; Scott, 2001; Pillay and Kluyers, 2014).

The three categories of institution are not mutually exclusive- regulatory institutions can influence normative and cognitive institutions and equally be influenced by them. Due to the complementary nature of the three categories of institution and their comparable potential to influence behaviour, the desired goal may not be achieved if one category, especially regulatory institutions, is prioritised over and above the others. This is demonstrated by anti-corruption studies (Goddard et al, 2016; Pillay and Kluyers, 2014; Persson et al, 2013; Misangyi et al, 2008; Uberti, 2016), which have linked the apparent ineffectiveness of Nigeria’s anti-



corruption drive to its focus on regulatory institutions (Ijewereme, 2015). The new institutional economics approach similarly highlights the importance of efficient formal and informal institutions for development, particularly in developing countries (Acemoglu and Robinson, 2008; Rothstein, 2011).

Within the regulatory category are adjudicative institutions that are meant to establish public structures for ensuring the rule of law. For sustainable development, these institutions can be general courts or specialised tribunals such as India's National Green Tribunal and Kenya's Environment and Land Court established in 2010 and 2011 respectively. Ideally, the rule of law refers to an effective legal system which, among other things, protects rights, enforces obligations and ensures prompt, fair, transparent, credible and consistent dispute adjudication. As a governance indicator (Davis and Trebilcock, 2008; Desta and Hirsch, 2012), the rule of law can influence other governance indicators (Kaufmann et al, 2009) such as governmental effectiveness, equality of opportunity and development within countries. Due to its impact on public and private good governance, the rule of law is fundamental to the achievement of sustainable development (Sachs, 2012). As demonstrated by a study on judicial attitude to environmental protection in different jurisdictions (Kotzé, 2009:3), a legal system that provides a framework for the effective application and enforcement of rights and obligations is an essential complement to constitutional and legislative provisions.

In addition to clarifying the structural aspects of institutions, the institutional theory reflects a contextual approach. This is an acknowledgment of diversity of needs between countries and regions (Kang and Moon, 2012) that can affect the identification and prioritisation of sustainable development agendas. For example, sustainable development as defined by the Brundtland Report (United Nations, 1987) is a compromise (Rajamani, 2003) between environment protection and economic growth to reflect sensitivity to local needs, including poverty alleviation in developing countries. Similarly, Principle 7 of the Rio Declaration

acknowledged a principle of common but differentiated responsibility which sought to impose greater obligations on developed countries for achieving sustainable development relative to their contributions to global environmental pollution.<sup>9</sup> Furthermore, while paragraph 1 of the 2015 SDGs Declaration suggests a global standardisation objective, paragraph 22 states that ‘[e]ach country faces specific challenges in its pursuit of sustainable development’ and paragraph 56 refers to ‘different national realities, capacities and levels of development and respecting national policies and realities’.

The institutional theoretic model, therefore, has a two-fold role in sustainable development. First, it is useful in identifying the types, levels and complementarity of public and private structures for achieving a collective goal such as sustainable development. Second, it highlights the need for local sensitivity in sustainable development. The next part of this chapter considers the roles of formal domestic adjudicative institutions in this regard.

### **4.3 Domestic Adjudicative Institutions and Sustainable Development**

A key role of domestic adjudicative institutions is the interpretation and clarification of laws, regulations and principles and proactively applying them in enforcing or promoting internationally agreed sustainable development principles. However, the role of adjudicative institutions may depend on the content of the national constitution, their interpretation of constitutional provisions, and the relationship between international instruments and national law. The third condition largely depends on the extent national law permits direct enforcement of international instruments (Coomans, 2006; Liebenberg, 2007). In Nigeria, for example, the Constitution is the supreme law and prevails over any other laws which are invalid to the extent

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<sup>9</sup> See also Art 3(1) and 4(1) of the United Nations Framework Convention on Climate Change 1992.

of their inconsistency with it.<sup>10</sup> The Constitution provides the legal basis for the division of governmental powers and enshrines the principle of separation of powers between the federal, state and local governments.<sup>11</sup> Legislative powers are conferred on the National Assembly and the House of Assembly for the federal and state governments respectively<sup>12</sup> while the President and Governors exercise the respective executive powers.<sup>13</sup>

Nigeria's Constitution confers the judicial powers on federal and state courts, which can review laws, including written and unwritten laws.<sup>14</sup> In this respect, the Constitution specifically empowers the judicial institutions to review laws and regulations and executive actions and decisions. Section 4(8), for instance, stipulates that 'the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law' while section 6(6)(b) extends judicial powers to 'to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'. These provisions confirm the jurisdiction of adjudicative institutions and the application of constitutional principles in determining rights and obligations in horizontal and vertical disputes. For example, in *Agbai v Okogbue*,<sup>15</sup> the Supreme Court held:

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<sup>10</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended), ss.1(1) (3).

<sup>11</sup> *Ibid*, s.4, Second Schedule.

<sup>12</sup> *Ibid.*, s.4.

<sup>13</sup> *Ibid*, s.5.

<sup>14</sup> *Ibid*, s.6.

<sup>15</sup> [1992] 7 NWLR (Part 204) 391 at 442 *per* Wali JSC.

‘[A]ny customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our courts.’

Arguably, sustainable development claims can invoke civil rights in relation to the SDG goals and involve legislative and executive actions for the implementation of appropriate strategies. In these circumstances, the Nigerian adjudicative institutions can review the decisions, actions and practices of the legislative and executive arms of government and those of other persons and groups, including in matters of sustainable development. The adjudicative institutions can interpret sustainable development provisions and standards in the wider context of legal, political and constitutional complexities and, in that regard, can undertake regulatory, normative and cognitive institutional roles (see Figure 1) as outlined below.

#### **4.4 Constitutionalisation of Sustainable Development**

Constitutionalisation is the entrenchment of rights or protections in a written constitution because they are deemed to be fundamental in acting as a platform from which the expression and vindication of other rights or other interests can be founded and is a measure of the importance of the rights or interests protected (Hirschl, 2004). There are a few instances of constitutional references to sustainable development, however, in the constitutions of several jurisdictions, sustainable development does not enjoy the same level of significance like ‘traditional’ human rights. For instance, sustainable development-related matters contained in Chapter II of Nigeria’s Constitution are unenforceable and merely aspirational unlike Chapter

IV's fundamental rights. Furthermore, only Chapter IV rights are capable of expeditious judicial enforcement through a special fast-track mechanism.<sup>16</sup>

Nonetheless, adjudicative institutions can play a regulatory institutional role by facilitating the constitutionalisation of sustainable development despite a lack of explicit constitutional provisions. This is by providing indirect furthering of sustainable development as a constitutional ideal through the fundamental (human) rights provisions. For instance, while the Associated Gas Re-injection Act 1979 permitted gas flaring despite its adverse environmental impact, in *Gbemre v Shell Petroleum Development Company Nigeria Limited*,<sup>17</sup> a Nigerian court invalidated the statute for violating the right to life guaranteed by section 33 of the Constitution. The court's holding that the right to life includes a right to a safe environment free from noxious pollution by gaseous substances constitutes an indirect promotion of sustainable development as a constitutional right. It confirms Lord Reid's (1972:22) assertion that 'the practical answer is that *the law is what the judge says it is*'.

Another indirect method for constitutionalisation of sustainable development is by using international human rights instruments to interpret constitutional provisions. This anthropocentric approach flows from Principle 1 of the 1972 Stockholm Declaration on the Human Environment (United Nations, 1973) which stated that 'man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself'. The 1987 Brundtland Report (United Nations, 1987) similarly

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<sup>16</sup> Section 46 of the Constitution and the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 made pursuant to section 46.

<sup>17</sup> (2005) AHRLR 151 (NgHC 2005).

confirmed that ‘every human being has the right to a clean and safe environment conducive to their health and well-being’. International human rights instruments can, therefore, be a reference source for directly enforceable remedies or act as an interpretative guide to relevant national law provisions (Viljoen, 2007). For instance, the Netherlands court partly decided *Urgenda* case with reference to the European Convention on Human Rights.<sup>18</sup>

Nonetheless, indirect constitutionalisation may depend on how national law treats international treaties. For instance, in a dualistic system like Nigeria, section 12(1) of the Constitution provides that a treaty must be expressly incorporated by domestic legislation to be part of local law. For this reason, the African Charter on Human and Peoples Rights 1981 is part of Nigerian law having been expressly incorporated by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act. Constitutionalisation may be difficult in the absence of a local implementing legislation and, in fact, some may regard it as judicial usurpation of legislative powers. The legislature is conferred law making powers which include the enactment of legislation to incorporate supra-national rights and obligations into the domestic legal system. Judicial intervention to constitutionalise such rights without an explicit legislation may be viewed as an encroachment into the legislative sphere and a violation of the principle of separation of powers between the arms of government.

Furthermore, there are substantive and procedural aspects of constitutionalisation of international instruments. Substantively, adjudicative institutions need to recognise that treaties have moved from their original conception as instruments for regulating only inter-state

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<sup>18</sup> *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)* [2015] Verdict, The Hague District Court C/09/456689/HA ZA 13-1396 (2015), paras.4.51-4.53.

behaviour to encompassing the rights and obligations of private persons (Yoo, 1999:1968). There is the need to acknowledge that the ‘real object’ of some treaties is to ‘regulate the activities of individuals and private entities’ (Chayes and Chayes, 1995:14). This realisation may make it easier for the adjudication of sustainable development matters and resolution of interests therein.

Constitutionalisation can also remove procedural barriers to enforcement and allow rights guaranteed by international instruments to be claimed using a procedure similar to the constitutionally-guaranteed rights. For example, while the African Charter confers a direct right of action on aggrieved persons, neither it nor the local enabling legislation provides a specific procedure for its enforcement. However, Nigeria’s Supreme Court has held that the African Charter can be enforced like a local legislation<sup>19</sup> and claims can be commenced by a writ or other permissible procedure such as the Fundamental Rights (Enforcement Procedure) Rules.<sup>20</sup> While there is no express provision in the Constitution or a statute to justify the decisions, the direct application of the African Charter under the incorporation legislation would have been meaningless in the absence of any enforcement procedure. Order II Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 2009 implemented this decision by making the African Charter rights enforceable through the Rules in the same manner as the fundamental rights in Chapter IV of the Constitution.

#### ***4.4.1 Norm Internalisation and Transmission***

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<sup>19</sup> *Nemi v The State* [1994] 1 LRC 376.

<sup>20</sup> *Abacha v Fawehinmi* [2000] 6 NWLR (Part 660) 228 at 293-294; 348-349.

Adjudicative institutions can undertake normative and cognitive institutional roles by championing sustainable development in their interpretative functions. Nonetheless, they will need to internalise appropriate sustainable development norms before transmitting those norms to other social actors. Internalisation refers to the sense of compliance through voluntary acceptance triggered by personal motivations (Viljoen, 2007:23). Motivational postures, which determine whether social actors display commitment, resistance, engagement or game-playing towards a goal, are the

‘sets of beliefs and attitudes that sum up how individuals feel about and wish to position themselves in relation to another social entity...Postures are subjective – they bind together the cognitive, emotional and behavioural components of attitude. They provide the narrative within which the authority’s message is given meaning. They have coherence for the self and are socially acceptable to significant others’ (Braithwaite, 2009:20).

Motivations are necessary for the horizontal and vertical sharing of shared norms, trust, identity and objectives among social actors even in regulatory arenas (Etienne, 2013). It is an implicit reference to the intuitive, emotional and other human aspects of judges (Brennan, 1998:3; Schauer, 2009:114) as the adjudicative institutions, a point acknowledged by some judges. For example, the US judge, Judge Benjamin Cardozo (1921:167), observed that ‘deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge.’ More recently, a UK judge, Sir Terence Etherton (2010:740), highlighted the potential influence of judges’ ‘personal outlook based on personal experience, and their judicial philosophy’ on judicial decisions.



In other words, adjudicative institutions need to demonstrate and apply a belief in the sustainable development goals. This is particularly due to the need to balance sustainable development against competing private and national economic goals. The co-existence of sustainable development and competing economic goals is implicit in the Brundtland Report's definition of sustainable development (United Nations, 1987) as 'development that meets the need of the present without compromising the ability of future generations to meet their own need'. However, the definition does not advocate the pre-eminence of economic priorities. The 2002 Johannesburg World Summit on Sustainable Development's declaration that economic, social and environmental factors are 'interdependent and mutually reinforcing pillars of sustainable development' (United Nations, 2002, Resolution 1, para.5) reinforces the point that economic factors should not be a sole determinant for decisions.

In relation to environment-polluting gas flaring, for example, the Global Gas Flaring Reduction Partnership suggested that 'in theory, the economics of associated gas dictates that operators will reduce flaring and venting until the marginal costs of gas utilization in a field exceed the marginal benefits' (World Bank, 2004:25). When the cost of facilities and programmes for preventing pollution exceeds the potential liability, in fact, pollution then becomes an economically viable option for oil companies. This may explain the persistence of environmental pollution in oil producing developing countries like Nigeria (UNEP Report, 2009).<sup>21</sup> In *SERAP*,<sup>22</sup> the Court of Justice of the Economic Community of West African States

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<sup>21</sup> See *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) AHRLR 151 (NgHC 2005).

<sup>22</sup> *SERAP v Federal Republic of Nigeria* ECW/CCJ/JUD/18/12.

confirmed that Nigerian authorities often refrain from enforcing environmental regulations against oil companies operating in the Niger Delta region.

Therefore, even when sustainable development goals are constitutionalised or embedded in national law, it still rests on adjudicative institutions to balance the goals against private property rights and national economic considerations (Kysar, 2012). The motivation of adjudicative institutions is central in determining the wider significance of sustainable development in this context. For example, the Costa Rican Supreme Court in *M.M Levy y Asociacion Ecologista Limonense v Ministerio del Ambiente y Energia*<sup>23</sup> and the Chilean Supreme Court in *Pablo Orrego Silva v Empresa Pange SA*<sup>24</sup> demonstrated a pro-sustainable development approach by applying constitutional environmental rights provisions to respectively invalidate major oil and gas and hydroelectric dam projects.

However, adjudicative institutions are constrained in their normative and cognitive institutional roles if they favour economic and other factors over sustainable development. For example, the US federal courts routinely favour constitutional protection of property rights over environmental rights (Wald, 1992; O’Leary, 1989) and the Nigerian judiciary’s pro-economic bias relegates environmental considerations to the background (Ebeku, 2007). This attitude has, in turn, brought about the relatively low success rates of environmental litigation in Nigeria and an increasing resort to transnational environmental litigation mainly against major corporate polluters. Several environmental pollution cases have been instituted in jurisdictions

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<sup>23</sup> Supreme Court of Colombia Decision 2001-13295, Expediente 00-007280-0007-CO, 21/12/2001.

<sup>24</sup> *Pablo Orrego Silva v. Empresa Pange SA* Supreme Court of Chile 5<sup>th</sup> August 1993.

like the US, UK and Netherlands due to a perceived lack of access to justice in Nigeria.<sup>25</sup> In contrast to the largely pro-economic position of Nigerian courts, a South African court in *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs BP*<sup>26</sup> insisted:

‘Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.’

The pro-sustainable development approaches of the South African, Costa Rican and Chilean Courts prove that adjudicative institutions in developing countries can play an important role

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<sup>25</sup> See *Ken Saro Wiwa et al v Royal Dutch Petroleum Co et al* (2008) No. 96 Civ 8386 (KMW); *Kiobel v. Royal Dutch Petroleum Co.*, (2013)133 S.Ct. 1659; *The Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC); *A.F. Akpan v. Royal Dutch Shell, Plc & SPDC* Court of Appeal of the Hague (December 18, 2015) Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA. 09-1580; *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria (SPDC) Ltd and Lucky Alame and Others v Royal Dutch Shell plc, The Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).

<sup>26</sup> 2004 (5) SA 124 (WLD) < [http://www.saflii.org/ za/cases/ZACC/2007/25.html](http://www.saflii.org/za/cases/ZACC/2007/25.html)> accessed 08 April 2015.

in curtailing economic development goals in favour of sustainable development notwithstanding the pressure from the governments at domestic levels to accelerate developmental pursuits regardless of its impact on sustainable development goals.

The question may arise as to practical consequences of the interpretative role of adjudicative institutions in sustainable development. The attitude of these institutions will determine the rights and obligations of private persons as well as the powers of administrative agencies. Pedersen (2019) found that the UK courts, in balancing competing interests in environmental protection, often adopt the position of administrative agencies being challenged by private claimants. The courts appear to interpret pro-sustainable development provisions strictly especially when the provisions conflict with economic development programmes of public and private persons. This is exemplified by a recent decision of the Court of Appeal regarding the ‘presumption in favour of sustainable development’ in paragraph 14 of the National Planning Policy Framework (NPPF). The Ministerial foreword to the NPPF confirms that ‘[d]evelopment that is sustainable should go ahead, without delay – a presumption in favour of sustainable development that is the basis for every plan, and every decision...’ The court, however, decided that the NPPF is a policy instrument that does not have statutory force and as such the policy presumption of sustainable development cannot override the statutory ‘presumption of development plan’ in section 38(6) of the Planning and Compulsory Purchase Act 2004.<sup>27</sup>

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<sup>27</sup> *Barwood Strategic Land II LLP v East Staffordshire Borough Council & Anor* [2017] EWCA Civ 893. See also *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 (p.1449H, Lord Craig), (p.145B, Lord Hope); *Secretary of State for Communities and Local Government v BDW Trading Ltd. (T/A David Wilson Homes (Central, Mercia and West Midlands))* [2016] EWCA Civ 493 para.21 (Lindblom LJ).

#### 4.4.2 *Universalisation of Standards*

The adjudicative institutions' normative and cognitive roles include the promotion of universalisation of sustainable development standards by basing their reasoning on applicable international instruments. The backdrop is the requirement by the 1969 Vienna Convention on the Law of Treaties for 'good faith' interpretation of 'the ordinary meaning' of expressions used in treaties and to reflect their 'context' and 'object and purpose'. Universalisation may be possible even when relevant international treaties are not directly enforceable in national law. In *Urgenda*, for instance, the Netherlands court acknowledged the 'reflex effect'<sup>28</sup> of international instruments notwithstanding that the claimant could not directly ask for their enforcement. Another illustration is Nigeria which, although it has not incorporated the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), is a signatory state. A court suggested that 'in view of the fact that Nigeria is a party to the convention, courts of law should give or provide teeth to its provisions.'<sup>29</sup> This indicates that CEDAW standards can be applied in determining whether rules and practices are discriminatory. Some African national courts have also referenced international instruments 'seamlessly, without noting or explaining the binding nature or level of persuasive authority' (Adjami, 2002).

Universalisation of standards helps to 'create a template which can be applied only if we infuse them with the factual circumstances of a given society, of its own patterns of disadvantage, the structure of its ruling elites, and its prevailing symbolic meanings of stigma' (Sadurski,

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<sup>28</sup> *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)* [2015] Verdict, The Hague District Court C/09/456689/HA ZA 13-1396 (2015) para.4.43.

<sup>29</sup> *Muojekwu v Ejikeme* [2000] NWLR (Part 657) 402 at 436 per Tobi JCA.

2004:154). It has, for instance, facilitated the recognition of ‘the value of human rights vocabulary as a discourse-as an international language of claim against an oppressive state or an oppressive culture’ and demonstrated that ‘human rights language is today used everywhere around the world to linguistically frame resistance to oppression’ (Stacy, 2004:174). While some may object to universalism in areas such as human rights (Mutua, 2004; Osiatynski, 2004) as being mainly Western ideological or cultural imposition, international instruments can help to establish common minimum standards and principles within the global diversity of societies and cultures (Schwartz, 1990). Universalism can, for instance, tackle the existence of ‘regulatory arbitrage’ (UNEP, 2016) arising from inconsistent standards that corporations and other social actors can exploit.

Therefore, while international instruments can provide a framework for the universalisation of sustainable development standards, the interpretative role of adjudicative institutions is critical, especially when the institutions are confronted by incompatible or challenging national rules and practices. In *SERAP v Federal Republic of Nigeria*,<sup>30</sup> the African Commission on Human and Peoples Rights referred to article 4 of the African Charter in holding that persistent environmental pollution of Nigeria’s Niger Delta region through oil extraction constitutes an infringement on the people’s right to life. Similarly, Nigerian courts<sup>31</sup> have upheld the

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<sup>30</sup> *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*  
Judgment No. ECW/CCJ/Jud/18/12.

<sup>31</sup> For *e.g.* *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710; *Ubani v Director, S.S.S.* [1999] 11 NWLR (Part 625) 129; *Abacha v Fawehinmi* [2000] 6 NWLR (Part 660) 228.

superiority of the African Charter over local laws, except the Constitution which is the supreme law. In *Abacha v Fawehinmi*,<sup>32</sup> the Supreme Court held:

‘The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act... is a statute with international flavour. Being so, therefore, [sic]...if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the Legislature does not intend to breach an international obligation...But that is not to say that the Charter is superior to the Constitution...’

This decision enables the application of the African Charter rights over inconsistent and conflicting local legislation and creates a platform for the universalisation of sustainable development standards in line with international standards by Nigeria’s adjudicative institutions.

#### **4.4.3 *Glocalisation of Standards***

While universalism may reject the cultural relativist notion that standards are determined by different cultures (Brems, 2004:214), the reality is the existence of diverse cultures globally. This creates a tension between universalism and cultural identity rights in matters such as human rights (Brems, 2004:214; Stacy, 2004:165). Due to different governance indicators (Desta and Hirsch, 2012; Kaufmann and Kraay, 2015), development can be country-specific and reflect culturally-adapted practices (Robertson, 2009). In fact, Principle 7 of the Rio Declaration acknowledged disparities in the relative sustainable development obligations and

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<sup>32</sup> [2000] 6 NWLR (Part 660) 228 at 289.

contributions of developed and developing countries.<sup>33</sup> The SDGs also acknowledge that ‘different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities’ (Paragraph 59). Paragraph 63 further asserts that ‘each country has primary responsibility for its own economic and social development’. These suggest that, despite the overall universalism objective of Paragraph 1, the SDGs recognise the need for glocalisation – combined international and local standards- of sustainable development.

This raises the question of whether international sustainable development standards can be combined effectively with local priorities. The attitude of adjudicative institutions is likely to be critical in this regard. If an attitude is ‘a relatively enduring organisation of beliefs, feelings, and behavioural tendencies towards socially significant objects, groups, events or symbols’ (Hogg and Vaughan, 2005:150), effective glocalisation can be determined, to a large extent, by the adjudicative institutions’ pronouncements and actions which can signpost appropriate standards for other social actors. Adjudicative institutions can acknowledge certain minimum standards to which local rules and practices must be subject. For example, while most of the human rights provisions of the African Charter are also contained in Chapter IV of Nigeria’s Constitution<sup>34</sup> and can be enforced like national laws,<sup>35</sup> some national and sub-national rules

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<sup>33</sup> See also Art 3(1) and 4(1) of the United Nations Framework Convention on Climate Change 1992.

<sup>34</sup> See the observation of Ogundare JSC in *Abacha v Fawehinmi* [2001] 51 WRN 29 at 83.

<sup>35</sup> *Nemi v The State* [1994] 1 LRC 376 (Supreme Court).



and practices can be contrary to the Charter. In that regard, Nigerian courts have declared the superiority of the Charter in several human rights cases.<sup>36</sup>

Another globalisation role of adjudicative institutions is to acknowledge, enforce and promote national rules and practices that exceed minimum international sustainable development standards. For example, in *Juliana*, the court insisted that '[t]here is no contradiction between promising other nations the United States will reduce CO<sub>2</sub> emissions and a judicial order directing the United States to go beyond its international commitments to more aggressively reduce CO<sub>2</sub> emissions'.<sup>37</sup>

#### **4.4.4 Stakeholder Empowerment**

A consistent sustainable development theme is the necessity of involving all segments of society, including individuals and groups, in promoting sustainable development. On the one hand, individuals are encouraged to adopt more 'sustainable' life choices leading to the growing influence of sustainable consumption messages directed at consumers and other persons. This constitutes 'a simple pathway for engaging and involving the public at large in the development of lifestyle changes that are considered necessary to achieve sustainable development' (Warren, 2003:78). On the other hand, individuals are also being encouraged to take sustainable production into consideration as a sustainable development 'obligation'. In more advanced economies, business practices seem to equate sustainable development with environmentally friendly products and services (Cho, 2015) while sustainability reporting

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<sup>36</sup> For e.g. *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710; *Ubani v Director, S.S.S.* [1999] 11 NWLR (Part 625) 129; *Abacha v Fawehinmi* [2000] 6 NWLR (Part 660) 228.

<sup>37</sup> *Juliana v United States of America*, Opinion and Order [2016] The United States District Court for the District of Oregon 6:15-cv-01517-TC US D. Or, (2016), 15.

along the lines of sustainable production and consumption is increasingly popular even beyond the more environment proximate sectors (Higgins et al, 2015; KMPG, 2011).

In other words, individuals are expected to participate actively in promoting sustainable development. It is increasingly being recognised that participation rights for individuals can be essential for the promotion of sustainable development. For example, Principle 10 of the Rio Declaration<sup>38</sup> confirms that

‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.’

Participation requires the recognition of ‘rights’ for individuals and groups as stakeholders. Essentially, individuals and groups are recognised as ‘right-holders’ for their own benefit, for the benefit of other persons like the future generations, or for the benefit of some things such as the environment. According to Merrills (1996:31), ‘[r]ights cannot exist as free-floating abstractions, but need rights’ holders, for the function of rights...is to mark out protected areas for the benefit of someone or something, and so the concept of a right without a rights-holder is a contradiction in terms’. Therefore, the individual participation rights can include collective goals such as sustainable development and, in fact, need not reflect anthropocentrism or be constrained to individual benefits or interests. Dworkin (1978:12) similarly noted that ‘[i]ndividual rights are political trumps held by the individuals. Individuals have rights when,

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<sup>38</sup>Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them'. Individual participation rights can be enforced against public and private persons using the instrumentality of adjudicative institutions.

#### **4.4.5 Addressing Vulnerability of Sustainable Development 'Victims'**

Sustainable development discourse suggests that unsustainable practices are not 'victimless' activities. The future generations<sup>39</sup> are key stakeholders and potential victims, hence the Brundtland Report (United Nations, 1987:43) asked countries to 'ensure that the environment and natural resources are conserved and used for the benefit of present and future generations'. The living are also stakeholders in sustainable development.<sup>40</sup> Unsustainable practices can reduce life enjoyment and opportunities for people, increase poverty and lead to adverse physical and mental health. In *Legality of Threat or Use of Nuclear Arms* case,<sup>41</sup> the International Court of Justice pointed out that the environment 'is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.' The *Agouman v Leigh Day* case cited above illustrates the direct impact of unsustainable practices on the health of workers, residents and host communities.

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<sup>39</sup> See *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)* [2015] Verdict, The Hague District Court C/09/456689/HA ZA 13-1396 (2015); *Juliana v United States of America*, Opinion and Order [2016] The United States District Court for the District of Oregon 6:15-cv-01517-TC US D. Or, (2016); *Greenpeace Nordic Association & others v Norway Ministry of Petroleum and Energy* [2016] Oslo District Court.

<sup>40</sup> See *Greenpeace Nordic Association & others v Norway Ministry of Petroleum and Energy* [2016] Oslo District Court; *KlimaSeniorinnen* case discussed in Bähr et al (2018).

<sup>41</sup> *Legality of Threat or Use of Nuclear Arms*, ICJ Advisory Opinion of 8 July 2006, para.28.

Nonetheless, the case also demonstrates the vulnerability of victims to whims and exploitative conduct of powerful social actors like corporations and regulatory authorities. Although provided in relation to fiduciary duties, Justice Wilson's reference to vulnerability in the Canadian case of *Frame v Smith* (1987) is pertinent here. The judge referred to vulnerability as 'the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave Inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power'.<sup>42</sup> The contrasting libertarian approach ignores vulnerability factors existing between stakeholders who are viewed as having equal power of awareness and enforcement of their rights.

In the context of sustainable development, victim vulnerability includes impediments imposed by national legislation and regulatory authorities. Notwithstanding these obstacles, the adjudicative institutions may be able to refer to international best standards for determining human rights to life, health and safe environment and tortious duty of care which may be closely linked to some aspects of sustainable development. After all, as Lord Bridge stated in *Caparo v Dickman*, a duty of care incorporates the concepts of proximity and fairness that are 'convenient labels to attach to the features of different specific situations which...the law recognises pragmatically as giving rise to a duty of care of a given scope.'<sup>43</sup> In *Fijabi* cited above, the Nigerian court overcame the position of the local regulatory authorities by referring to an international human right to health.

The awareness of vulnerability factors will enable adjudicative institutions to promote sustainable development related corrective and distributive justice in the substance and

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<sup>42</sup> *Frame v Smith* (1987) 42 DLR (4th) 81, para.45 (Wilson J).

<sup>43</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605, [14], per Lord Bridge.

procedures of adjudication. Corrective justice (Weinrib, 2002:349) in this regard justifies the provision of remedies for stakeholder victims of wrongful conduct. On the other hand, distributive justice allows reference to sustainable development principles in the allocation of stakeholder rights and obligations. As Frederick Douglass (1955:434) stated, ‘where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organised conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.’

#### ***4.4.6 Promoting Appropriate Corporate Governance and Corporate Social Responsibility***

As noted above, sustainable development requires stakeholder involvement. A prominent stakeholder group is corporations. While corporations are one of the primary agents for national economic development and can assist in tackling sustainable development issues such as poverty eradication (which is Goal 1 of the SDGs), they can perpetrate unsustainable practices having a huge impact on present and future generations, such as persistent oil pollution by oil companies in Nigeria’s Niger Delta region leading to the destruction of entire ecosystems in the region.

Corporate activities can be constrained by regulatory authorities and when these authorities are incapable of imposing, or unwilling to impose, sustainable standards on corporations, it may be left to individuals and groups in a weak regulatory institutional context to approach the adjudicative institutions. The effective awareness of their triple institutional role by adjudicative institutions is critical to ensuring that corporations adopt pro-sustainable development corporate governance models. In this regard, corporate governance can be described as ‘the system of checks and balances, both internal and external to companies, which ensures that companies discharge their accountability to all their stakeholders and act in a socially responsible way in all areas of their business activity’ (Solomon, 2007:14). In a

foreword for *Global Corporate Governance Forum*, Adrian Cadbury similarly suggested that corporate governance ‘is concerned with holding the balance between economic and social goals and between individual and communal goals...The aim is to align as nearly as possible the interests of individuals, corporations and societies’ (World Bank, 2003).

The extent to which corporations are willing to demonstrate a wider responsibility for sustainable development may be dependent on the institutional environment. If corporate governance can be regarded as ‘the determination of the broad uses to which organisational resources will be deployed and the resolution of conflicts among the myriad participants in organisations’ (Daily et al, 2003:371), the determination can be influenced by the existence and effectiveness of formal and informal institutions in what is likely to be a balancing act. As the stakeholder model acknowledges, ‘companies have to operate within a complex [structure] of social and economic relationships, and that the most successful companies attempt to get each of these rights in what is often a difficult balancing act’ (Waterman Jr, 1994:26). Corporations may be more amenable to adopting appropriate practices if they can predict that the adjudicative institutions will frown upon unsustainable practices and impose sanctions, including compensatory and punitive ones.

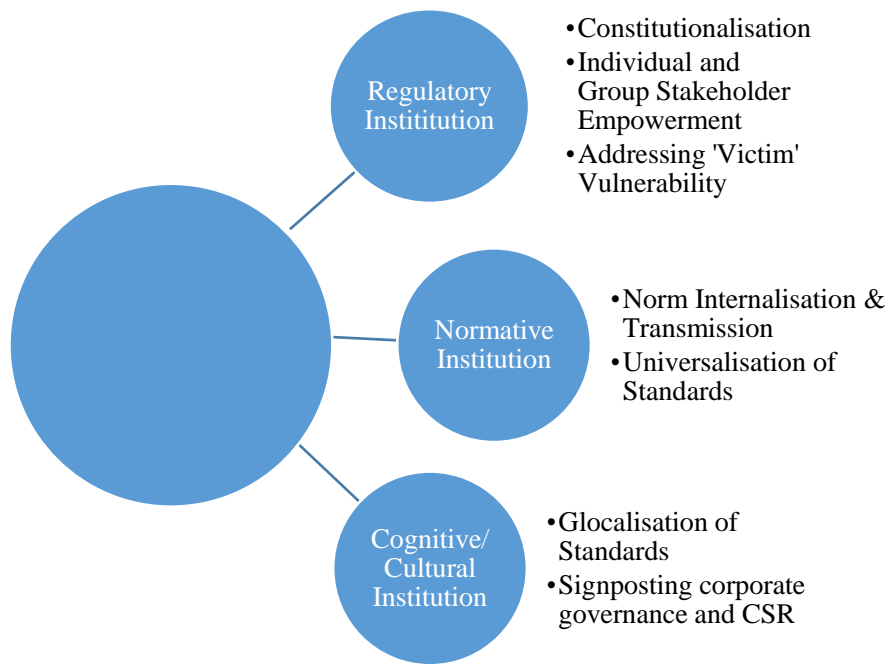
However, if sustainable development plays little or no role in the decisions and processes of adjudicative institutions, corporations will feel unfettered and decline a stakeholder approach while allowing ‘competitive individualism’ to reign with its lack of attention to the collective interest in sustainable development. In a debate in the UK House of Lords, Lord Avebury even acknowledged that under the shareholder primacy model ‘in most cases, the success of the company is dependent on its ability to continue damaging the environment’<sup>44</sup> As Hamilton

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<sup>44</sup> House of Lords debate, 6 February 2006, col.6C266. Available at: <https://publications.parliament.uk/pa/ld200506/ldhansrd/vo060206/text/60206-32.htm>

and Clarke (1996:39) argued, however, the stakeholder model can be ‘the most viable alternative to the competitive individualism which has left many casualties in society, and arguably damaged the quality of life for everyone’. The conflict theory similarly suggests that corporate managers are more likely to be opportunistic and selfish (Gautier and Pache, 2015; Osemeke and Adegbite, 2016) if there are inter-stakeholder struggles for limited resources (Ford and Hess, 2011).

When corporations are confronted by pro-sustainable development adjudicative institutions, they may adopt a corporate social responsibility (CSR) approach that aligns with it. The common pool resources studies (Gabaldon and Gröschl, 2015), suggest that corporate sustainable development obligations and CSR often reference similar moral justifications. CSR of this type will normally reference compliance with both national rules and international best standards to avoid liability under explicit national legislation and judge-made rules such as a tortious duty of care that could easily be stretched to include international best standards. The orthodox view is that CSR ‘actions basically are voluntary, that is, they go beyond what is legally required’ (Dam and Scholtens, 2012). CSR has been, therefore, been defined as ‘a firm’s voluntary actions to mitigate and remedy social and environmental consequences of its operation’ (Fransen, 2013:213). Nonetheless, CSR is not entirely motivated by altruistic reasons and is often in response to institutional pressures, which could include adjudicative institutions. The European Commission (2011:3) has therefore observed that ‘[c]ertain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility’.



*Figure 1: Adjudicative Institutions and Sustainable Development*

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#### **4.5 Overcoming Limitations of Adjudicative Institutions**

The preceding discussions have shown that adjudicative institutions are a critical component of sustainable development promotion. Nonetheless, the adjudicative institutions' potential roles can be impeded by a few substantive and procedural factors. While the substance of rules can indicate the standards of behaviour, procedural matters can equally signpost conduct that is acceptable or discouraged. As DiMaggio and Powell (1991:20) noted, institutions also include 'rules of procedures that actors employ flexibly and reflexively to assure themselves and those around them that their behaviour is reasonable'. Procedural rules that prevent the enforcement of substantive standards of behaviour can, in effect, demonstrate a lack of those standards. The substantive and procedural obstacles will now be discussed.

##### **4.5.1 *Explicit Standards***



At the substantive level, explicit provisions are required to promote sustainable development. When express provisions for sustainable development exist in written law, it is easier for adjudicative institutions to declare acts, decisions or practices unenforceable or an infringement of the law.<sup>45</sup> Moreover, legislation can be quicker and more direct than judicial decisions which depend on the claimants' ability and willingness to institute proceedings. Suggesting the merits of legislative intervention in the context of gender discrimination, a Nigerian court stated:

'[T]he abrogation of such obnoxious practice...rests absolutely with the legislature of the state that still clings to such absurdity...[and the legislative] authorities that are in a position to do so will hasten the interment of a custom that has outlived its usefulness and has become counter-productive'.<sup>46</sup>

Nigeria's Constitution comprises of eight chapters, seven of which provide enforceable provisions on governance, civil and political rights and judicial matters. Chapter II contains some sustainable development-related objectives and policy foundations, including section 20 which refers to a governmental duty to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. However, section 6(6)(c) explicitly declares the unenforceability of these aspirational objectives.<sup>47</sup> Placing sustainable development among the enforceable traditional fundamental rights in Chapter IV will, therefore, evince the significance attached to it and render it less susceptible to short-term economic goals of policymakers. This is a realistic prospect due to the attitude of Nigerian courts. Unlike their largely conservative approach to interpreting civil rights, Nigerian courts adopt a more liberal

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<sup>45</sup> See the observation of Tobi JCA in *Muojekwu v Ejikeme supra* at 430.

<sup>46</sup> *Muojekwu v Ejikeme* [2003] 5 NWLR (Part 657) 402 at 438-439 (Olagunju JCA).

<sup>47</sup> See *NNPC v Fawehinmi* (1998)7 NWLR pt. 559.

and proactive approach to Chapter IV fundamental rights. In the Chapter IV case of *Nweke v State*, the Supreme Court reiterated that

‘it is a formidable prescription that their provisions should not be subjected to “the austerity of tabulated legalism.” On the contrary, [the provisions]...call for a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to...’<sup>48</sup>

An explicit incorporation of sustainable development goals, as opposed to indirect promotion, amongst the traditional fundamental rights will, therefore, open these goals to a ‘generous interpretation’ by adjudicative institutions in a proactive and liberal manner geared towards the fulfilment of the internationally recognised sustainable development goals within the domestic arena.

#### **4.5.2 *Locus Standi***

A major procedural hurdle to the promotion of sustainable development in several countries is the locus standi doctrine (the right or capacity to bring a claim). Usually, claimants are required to demonstrate a direct personal interest in, and personal loss arising from, a cause of action. For example, in *Oronto Douglas v Shell Petroleum Development Company Limited*,<sup>49</sup> the claimant sought to compel the Defendant to carry out an environmental impact assessment before oil drilling. The Nigerian court dismissed the claim on the basis that the claimant was not directly affected and thus lacked the locus standi.

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<sup>48</sup> *Nweke v. State* (2017) LPELR-42103(SC). See also *Odubu v. Stephen* (2012) LPELR-19792.

<sup>49</sup> (1998) LPELR-CA/L/143/97.

While some jurisdictions have watered down locus standi through statutes<sup>50</sup> and judicial decisions,<sup>51</sup> it remains a significant obstacle to environmental protection (Kameri-Mbote, 2009) and other sustainable development claims. Unless it is possibly disguised as a personal injury or human rights claim like some climate change cases (see Ghaleigh, 2010:34-35; Bähr et al, 2018), sustainable development is usually targeted at protecting the public interest which may disqualify claims by individuals and stakeholder groups who are not public authorities. A jurisdiction desirous of promoting sustainable development therefore needs to relax locus standi rules. For instance, aimed at easing access to the courts,<sup>52</sup> Order XIII of Nigeria's Fundamental Rights Enforcement Procedure Rules 2009 (FREPR) made pursuant to section 46(3) of the

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<sup>50</sup> See Section 32(1)(e) of the National Environmental Management Act 107 of 1998 (NEMA) of South Africa, Section 3(4) of the Environmental Management and Coordination Act (EMCA) No. 18 of 1999 of Kenya and the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 of Nigeria.

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

<sup>52</sup> Paragraph 3 of the Preamble to the Fundamental Rights Enforcement Procedure Rules 2009.

Constitution, allows claims by any ‘concerned’ persons whether they have a personal interest or not. This has opened opportunities for NGOs and advocacy groups to file claims on behalf of individuals and for public interest matters. However, this relaxed approach to locus standi is strictly limited to the fundamental rights in Chapter IV of the Constitution and does not apply to sustainable development claims brought under any other constitutional provisions or in accordance with international instruments. For example, in *The Registered Trustees of the Socio-Economic Rights & Accountability Project v Attorney General of the Federation*<sup>53</sup> the court confirmed that public interest groups could not rely on the FREPR for claims under the African Charter.

A relaxed locus standi rule will also enable the protection of the environment and the interests of future generations and other sustainable development stakeholders that are unable to bring their own claims. For example, in *Urgenda*, a Netherlands court allowed a claim by a group set up ‘to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands’.<sup>54</sup> In *Minors Oposa v Secretary of the Department of the Environment and Natural Resources*,<sup>55</sup> the Philippines’ Supreme Court allowed 44 minors to sue for themselves and on behalf of future generations. The court accepted that unsustainable logging could affect the future generations’ ability to benefit from the country’s natural resources. In granting standing to sue, the court stated: ‘We find no difficulty in ruling that they can, for themselves,

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<sup>53</sup> Suit No. FHC/ABJ/CS/640/2010, Judgment of the Federal High Court, Abuja, delivered on 29 November 2012.

<sup>54</sup> *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)* [2015] Verdict, The Hague District Court C/09/456689/HA ZA 13-1396 (2015) paras.2.2, 4.10.

<sup>55</sup> *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources* (S.C., January 1994) (Phil.), 33 I.L.M. 173 (1994).

for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned...<sup>56</sup> In *Juliana*,<sup>57</sup> a US Federal District Court permitted a claim by 21 children on behalf of future generations. The court acknowledged the need for judicial mechanisms to protect the climate change-related environmental interests of future generations.<sup>58</sup> Judge Aiken observed that ‘Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.’ Similar litigation on behalf of future generations have been instituted in some places. For instance, Greenpeace and the Nature and Youth environmental group filed a lawsuit in November 2017 over Norway's failure to abide by its constitutional obligation to safeguard the environment for future generations. The claimants challenge and seek the nullification of ten licences issued by the Norwegian government for exploration in the Barents Sea in order to protect the interests of future generations (Leestma, 2017).

#### **4.5.3 Remedies**

A critical factor for enforcing rules or instituting litigation before the adjudicative institutions is the availability of appropriate remedies for claimants. It has been noted that claimants’ recourse to tort law may be due to its compensatory nature (Ward, 2003) while financial outcome is often a key factor for legal representatives (Meeran, 2011). In the case of

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<sup>56</sup> *Ibid*, 835.

<sup>57</sup> United States District Court, D. Oregon, Eugene Division, 217 F.Supp.3d 1224 (D. Or. 2016).

<sup>58</sup> *Juliana v United States of America*, Opinion and Order [2016] The United States District Court for the District of Oregon 6:15-cv-01517-TC US D. Or, (2016), 18-28.

multinational corporations and other corporate defendants, there may be significant financial rewards for claimants and their representatives even when cases are settled out of court. For example, in respect of environmental pollution and human rights claims for its operations in Nigeria, the Royal Dutch Shell settled the US case of *Ken Saro Wiwa*<sup>59</sup> and the English case of *Bodo Community*<sup>60</sup> after paying significant sums as compensation. In *Ajuwa v. Shell Petroleum*,<sup>61</sup> a Nigerian trial court awarded US\$1.5 billion as compensation for oil pollution-related injuries, destruction of farmlands and contamination of streams. Following the intermediate court's reversal of the decision, a subsequent appeal is pending before Nigeria's Supreme Court.<sup>62</sup>

While a compensatory remedy, especially if coupled with an environment clean-up order, may be regarded by claimants and their legal representatives as a successful outcome of a national or transnational adjudication, its overall suitability for sustainable development is doubtful. Financial awards to private claimants, who are not required to advance sustainable development, can be used for addressing personal socio-economic concerns. As a reactive remedy, compensation may not provide a comprehensive, sustainable and long-term framework due to its backward-looking nature and narrow scope while harms to the sustainable development cause can be long-lasting and take many years to redress. Moreover, certain classes of claimant, such as NGOs and public interest groups, may be unable to demonstrate

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<sup>59</sup> *Ken Saro Wiwa et al v Royal Dutch Petroleum Co et al* (2008) No. 96 Civ 8386.

<sup>60</sup> *The Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

<sup>61</sup> *Dr Pere Ajuwa v Shell Petroleum* (2011) 11 SC 207.

<sup>62</sup> See also *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah* (2001) 5SC (Pt 11) 1.

sufficient financially ascertainable losses to be compensated. A more holistic and proactive approach is therefore necessary to provide and entrench responsibility and accountability for sustainable development for and across different segments of society. As Lozano et al (2008, 35-36) observed, ‘only if responsibilities are shared in areas of common interest, assuming the active collaboration of all social actors, society itself and enterprise, in collaboration with the state, can today’s social and environmental challenges be met.’

This may require a range of remedies, including injunctive reliefs, orders for regulatory changes and enforcement. According to the New Zealand court in *Thomson*, it is important that ‘[r]emedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body’.<sup>63</sup> A good range of remedies can also render ‘surrogate protection’ of sustainable development unnecessary by providing direct protection routes. ‘Surrogate protection’ (Taylor, 1998) applies, for instance, when a right to a clean environment is not claimed and the environment, which is not being protected *per se*, is sought to be protected by establishing claims to property or other environmental goods that entitles one to a peaceful enjoyment of such property and the environment it is attached to. A more direct route through remedies will enable the needs of future generations to be protected in line with the Brundtland Report’s definition of sustainable development (United Nations, 1987). This is also reinforced by the Rio Declaration which states that ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’ (United Nations, 1992). Furthermore, the Philippines’ case

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<sup>63</sup> *Thomson v Minister for Climate Change Issues* (2017) NZHC 733, 133.

of *Juan Antonio Oposa v. Fulgencio S. Factoran Jr.*,<sup>64</sup> demonstrates that private claimants can seek to restrict environmentally harmful activities for future generations.

#### **4.5.4 *Forum Non Conveniens***

Another procedural barrier is the *forum non conveniens* doctrine which, like its application in transnational human rights and tort litigation (Baldwin, 2007; Meeran, 2011; Aristova, 2018), can ultimately affect the substance and results of sustainable development claims arising in developing countries. As formulated by the House of Lords in *Spiliada Maritime Corp v Cansulex*,<sup>65</sup> foreign courts can decline jurisdiction over a claim when a court in another jurisdiction is clearly a more suitable forum, due to the parties' interests and the interest of justice. Nigerian claimants have been frustrated by *forum non conveniens* after approaching foreign jurisdictions to prosecute environmental pollution claims, often against Nigerian companies and their foreign parent companies. Lack of access to justice is one of the reasons claimants adduce for seeking remedies in the courts of the more advanced countries where a defendant corporation's corporate base or parent company is located. An example is *Bodo Community*<sup>66</sup> which the parties settled out of court.

Although *Lungowe v Vedanta Resources Plc*,<sup>67</sup> the cause of action which arose in Zambia, suggested that the English jurisdiction was possible for environmental pollution occurring in a

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<sup>64</sup> *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr* G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993).

<sup>65</sup> [1987] AC 460.

<sup>66</sup> *The Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

<sup>67</sup> *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2016] EWHC 975.



developing country, the more recent case of *Okpabi v Royal Dutch Shell Plc*<sup>68</sup> demonstrates a firm stand by the English courts against such transnational litigations. In that case, the English court declined jurisdiction because of *forum non conveniens* over claims against a UK-based parent company (Royal Dutch Shell) for environmental pollution allegedly committed by its Nigerian subsidiary (Shell Petroleum Development Corporation (SPDC)). The court reasoned that a foreign court should be circumspect in passing qualitative judgments on other sovereign nations' legal systems and insisted that 'claims by Nigerians against a Nigerian company about events in Nigeria, governed by Nigerian law, should be heard in a Nigerian court.' Justice Fraser stressed:

'There is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigerian company.'<sup>69</sup>

In the US, claimants once relied on the Alien Torts Act in relation to environmental pollution and personal injury cases occurring in Nigeria. An example was *Ken Saro Wiwa v Royal Dutch Petroleum Co*<sup>70</sup> which the parties settled out of court. However, the Supreme Court later decided in *Kiobel v Royal Dutch Petroleum Co.*<sup>71</sup> to decline US jurisdiction on *forum non*

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<sup>68</sup> The case was jointly filed with *Lucky Alame and Others v Royal Dutch Shell plc, The Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC).

<sup>69</sup> *Ibid*, 123.

<sup>70</sup> *Ken Saro Wiwa et al v Royal Dutch Petroleum Co et al* (2008) No. 96 Civ 8386.

<sup>71</sup> *Kiobel v. Royal Dutch Petroleum Co.*, (2013)133 S.Ct. 1659.

*conveniens* grounds. In *Kiobel*, Chief Justice Roberts explained that the *forum non conveniens* doctrine is to prevent judicial interference in foreign policy.

To overcome the obstacles posed by *forum non conveniens*, legislators and courts of the more advanced countries need to recognise the global imperative of sustainable development. This includes the acknowledgement that certain claims of environmental pollution, personal injury or human rights are practically for the advancement of global sustainable development. This can be achieved by regional or multilateral treaties. For instance, the Brussels Convention,<sup>72</sup> the Brussels Regulations<sup>73</sup> and the Lugano Convention<sup>74</sup> on jurisdiction in civil and commercial matters prevent the application of *forum non conveniens* in matters affecting signatory EU and European Free Trade Association members. However, the intention to exclude the doctrine from sustainable development claims needs to be explicit. For instance, the application of the Brussels Regulation to the Environmental Liability Directive<sup>75</sup> based

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<sup>72</sup> Article 5(3)(5) and Article 6(1) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated version CF OJ L 299, 31.12.1972, 32–42.

<sup>73</sup> Article 7(2)(5) of the Brussels Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>74</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007, pp.3–41 (Lugano Convention).

<sup>75</sup> Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

claims by public authorities is contentious due to the lack of explicit provisions (Bogdan, 2009; Collins and Harris, 2012; Dickinson, 2008).

Even among developing countries, it may be useful to establish regional or multilateral treaties to ensure a wider jurisdictional scope for sustainable development. Treaties of this kind will disallow courts from declining jurisdiction if sustainable development is explicitly stated as a non-excludable matter. In *Owusu v Jackson*,<sup>76</sup> for example, the ECJ held that *forum non-conveniens* is incompatible with article 4 of the Brussels Regulation, a position two later decisions reiterated.<sup>77</sup> A *forum non-conveniens* limiting treaty exemplifies the need for international cooperation for sustainable development as acknowledged in several forums. The recent meeting of the IPCC stressed the importance of international cooperation in creating a global ‘enabling environment’ for sustainable development and as a ‘critical enabler for developing countries and vulnerable region’.<sup>78</sup>

*Forum non-conveniens* can also be overcome by unilateral or multilateral provisions ascribing sustainable development responsibility to certain classes of social actors. In the Netherlands (Ryngaert, 2013), for example, the courts exercise jurisdiction based on attribution of responsibility to parent companies for their subsidiaries’ acts and omissions. This has been

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<sup>76</sup> *Owusu v Jackson* C-281/02 Judgment of the Court (Grand Chamber) 1 March 2005 ECLI:EU:C:2005:120.

<sup>77</sup> *Turner v Grovit* Case C-159/02 and *Gasser v Misak* Case C-116/02.

<sup>78</sup> IPCC’s Special Report on Global Warming 2018

[file:///F:/sr15\\_headline\\_statements%20Climate%20change,%20sustainable%20development,%20consumption,%20CSR%20report%202018.pdf](file:///F:/sr15_headline_statements%20Climate%20change,%20sustainable%20development,%20consumption,%20CSR%20report%202018.pdf), D7.

applied to environmental pollution cases from Nigeria.<sup>79</sup> Consequently, the Netherlands has become attractive to transnational environmental claims against multinational corporations, particularly from oil-producing developing countries such as Nigeria (Enneking, 2012, 2014; Ryngaert, 2013).

#### **4.5.6 Choice of Law**

Under international law, jurisdiction is almost entirely territorial and exercised by domestic regulatory institutions, which creates possible disparities in laws. International law (De Jonge, 2011; Omoteso and Yusuf, 2017) does not really intervene even when there are lax regulatory standards arising from governance failures, especially in developing countries. For instance, it was reported in 2016 that some Swiss companies profited from ‘regulatory arbitrage’ between the European regulations and lax standards of African countries (UNEP, 2016). The companies sold ‘Africa-standard’ fuels that greatly exceeded the sulphur levels permitted by Switzerland and other European countries (Guéniat et al, 2016). *Agouman v Leigh Day*<sup>80</sup> and the Rana Plaza building collapse in Bangladesh (Taplin, 2014) also highlight the respective lax standards of Cote D’Ivoire and Bangladesh in environmental and personal injury matters.

In adjudication, ‘choice of law’ rules determine the applicable substantive law when the elements or effects of a cause of action concern two or more territorial jurisdictions such as

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<sup>79</sup> See *Milieudefensie v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.BY9854; *A.F. Akpan v. Royal Dutch Shell, Plc & SPDC* Court of Appeal of the Hague (December 18, 2015) Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA. 09-1580.

<sup>80</sup> *Agouman v Leigh Day* [2016] EWHC 1324.

cases involving multinational companies. In EU Member States, the law of the place of the cause of action is normally the applicable law.<sup>81</sup> Nonetheless, insistence on the place of the cause of action can encourage ‘double standards’ (Meeran, 2011:14) when the standards are clearly lax or lacking. This can also be problematic when the law of the place contains access to justice obstacles such as short limitation periods, statutory prohibition of claims and restriction and assessment of remedies (Meeran, 2011:16-17).

As suggested above with regards to *forum non conveniens*, there can be a two-fold solution to the choice of law difficulties in sustainable development claims. First, provisions in national law can trigger the application of best international standards when a choice of law situation arises. In *Fijabi*,<sup>82</sup> a Nigerian court considered the UK beverages content rules and implicitly referenced international best standards in determining the scope of a tortious duty of care. The second solution is for a multilateral treaty that explicitly permits reference to international best standards.

#### **4.6 Conclusion**

Sustainable development is a long-term collective action issue. Just like anticorruption, the need for a ‘role model’ (Persson et al, 2013: 465) is imperative across different strata of society in developing countries. This chapter, therefore, draws insights from the institutional theoretic model, particularly Scott’s (2001, 2008) regulatory, normative and cognitive/cultural institutions framework, to investigate the roles of adjudicative institutions in promoting

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<sup>81</sup> Articles 4 and 7 of the Rome II Regulation on the Law Applicable to Non-contractual Obligations, No 864/2007.

<sup>82</sup> Suit No. LD/13/2008 of 15 February 2017.

sustainable development in developing countries. The tripartite institutions framework makes a significant contribution in emphasising the knowledge and communicative elements of sustainable development flowing from key social actors such as adjudicative institutions to other segments of society. This may not be possible if, as in scholarly and policy discussions, the role of adjudicative institutions is regarded as regulatory only and is concentrated on explicit constitutional and statutory provisions. The tripartite framework demonstrates the broader institutional contexts of adjudication with practical consequences for the sustainable development agenda. If, in addition to their regulatory function, adjudicative institutions accept their normative and cognitive institutional roles they can, for example, consciously provide interpretative frames with wider significance than the cases before them. When adjudicative institutions make references to theoretical models, scientific evidence, scholarly debates and practices from other jurisdictions and sectors, it can signpost appropriate individual and organisational behaviours and direct public and private actors on whether changes need to be made to advance sustainable development. The nature of the relationship between scientific knowledge and policy at the global level is in fact debated in environmental governance studies (Lidskog and Sundqvist, 2015). In any event, it is critical that sustainable development knowledge is shared by key public and private social actors such as adjudicative institutions and corporations.

Using environmental protection as a case study and making references to national laws and court decisions, the chapter provides original arguments that contribute significantly to the advancement of sustainable development. It demonstrates that adjudicative institutions have core roles in manifesting a commitment to sustainable development, affirmation of applicable global standards and vertically and horizontally influencing other social actors and segments of society. The regulatory role of adjudicative institutions includes constitutionalisation of sustainable development, empowerment of individuals and stakeholder groups and addressing

vulnerability of actual and potential victims of unsustainable practices. In their normative role, adjudicative institutions can ensure the internalisation and transmission of sustainable development values. Their cognitive role includes reshaping local practices by promoting effective glocalisation and appropriate corporate governance and social responsibility for sustainable development.

Nonetheless, there are impediments to the effectiveness of adjudicative institutions as this chapter singularly demonstrates. First, adjudicative institutions are better equipped with explicit sustainable development provisions in national law. The technical hurdle of *locus standi* need to be relaxed to allow individuals<sup>83</sup> and public interest groups<sup>84</sup> to bring claims to protect the environment, future generations and other stakeholders who may not be able to protect themselves. In addition to compensation, the range of remedies can be broadened to include other remedies that can directly promote sustainable development goals. A relaxed approach can tackle obstacles posed by *forum non conveniens* and choice of law doctrines to sustainable development. Moreover, the support of other regulatory institutions is essential to the effectiveness of adjudicative institutions. It does not augur well for sustainable development if, for example, governments routinely ignore decisions and pronouncements of adjudicative institutions.

What is not in doubt is the fact that adjudicative institutions can be institutional champions for sustainable development in developing countries. The adjudicative institutions can frame sustainable development standards and national priorities by reference to scientific evidence

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<sup>83</sup> See *Asghar Leghari v Republic of Pakistan* [2015] WP No 25501 Lahore High Court Green Bench [2015] Orders of 4 September 2015 and 14 September 2015.

<sup>84</sup> See *Greenpeace Nordic Association & others v Norway Ministry of Petroleum and Energy* [2016] Oslo District Court.

and best international and local standards. They can influence other regulatory institutions and social actors by recognising their symbolic position and using it to proactively advance sustainable development. The role of adjudicative institutions is, therefore, not simply the enforcement of standards but extends to scrutinising, reviewing and directing appropriate actions, including preventive measures. Adjudicative institutions need to assume responsibility for sustainable development and demand accountability from other public and private institutions and social actors.

The role of the courts in the developing country context has received modest attention in the mass of studies on environmental protection and sustainable development. This chapter is unique in applying the institutional approach to identify adjudicative institutions within both formal and informal structures and processes for promoting sustainable development in the developing country context. The institutional theoretic model has also enabled the advancement of arguments that cut across the public-private law divide and demonstrate that the formal and informal roles of the adjudicative institutions are complemented by the substantive and procedural legal impediments that are not insurmountable.

Although this chapter is primarily focused on adjudicative institutions, it aims to make a contribution of much broader significance in terms of scholarship and practical effects. It provides a framework grounded on regulatory, normative and cognitive classification for understanding and advancing sustainable development by public and private actors beyond those undertaking adjudicative functions. For example, government agencies, industry associations and nongovernmental organisations addressing poverty reduction, labour standards, renewable energy and other aspects of sustainable development may be more effective if they comprehend the broader significance of their roles transcending expressions of regulatory standards. The framework reflects the wider formal and informal institutional context of sustainable development and does not focus exclusively on explicit constitutional



and statutory roles of formal institutions. In discussing the role of an administrative agency, for instance, the framework will help to demonstrate the agency's normative and cognitive institutional roles in addition to highlighting its formal regulatory functions in other areas of sustainable development and not just the protection of the environment. Similarly, for private actors like corporations with the capacity to research, create, track, apply and disseminate knowledge and use it to address social challenges, the regulatory, normative and cognitive framework developed here can assist in the design and implementation of sustainable development-themed CSR programmes to operate within and outside the organisation, for example, the supply and purchasing chains. It can help corporations and policymakers to ensure that CSR programmes have a meaningful impact on the attitudes, decisions and behaviours of corporate insiders like employees and managers as well as the supply and purchasing chains and other external persons.

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