

TRIGGERING ENVIRONMENTALISM THROUGH ACCESS TO COURT: IMPERATIVE OF DEEPENING THE RECOGNITION OF THE RIGHT TO HEALTHY ENVIRONMENT IN NIGERIA

DESENCADear O AMBIENTALISMO ATRAVÉS DO ACESSO À JUSTIÇA: IMPERATIVO DE APROFUNDAR O RECONHECIMENTO DO DIREITO A UM AMBIENTE SAUDÁVEL NA NIGÉRIA

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Abstract: The environment is increasingly emerging as a critical component of the socio-economic development of average Nigerians as it has not only been valuable to traditional societies for their nutritional and health needs, but also, crucial to the realization of fundamental rights. This is more pertinent as it relates to the inhabitants of the Niger Delta region of Nigeria where the activities of oil multinational companies has made the region to be synonymous with oil pollution, devastated environment and human right abuses. Unsurprisingly, Nigerian courts are increasingly being called upon to adjudicate on issues relating to pollution and other environmental abuses by both private and public persons within the oil sector. Most times, environmental disputes are brought to the court in Nigeria as tortious cases seeking compensation for damages. Remedies can also be sought under statutory laws or as writ petitions under the fundamental human right enforcement procedure rules. The latter implicates the provision of a human right to healthy environment under statutory laws, and whether such right is recognised as binding by the courts in Nigeria. This paper explores how environmentalism can be triggered in Nigeria through the judicial recognition of the right to a satisfactory environment. It recognises that there are some efforts towards such judicial recognition of the right. However, it argues that to promote environmentalism in Nigeria, there is a need to deepen judicial recognition of the right by detailed pronouncements on the justiciability of the right.

Keywords: Environmentalism. Right to a healthy environment. Human rights. Socio-economic development.

Resumo: O meio ambiente está emergindo cada vez mais como um componente crítico do desenvolvimento sócio-econômico dos nigerianos médios, pois não só tem sido valioso para as sociedades tradicionais por suas necessidades nutricionais e de saúde, mas também, crucial para a

realização dos direitos fundamentais. Isto é mais pertinente, pois diz respeito aos habitantes da região do Delta do Níger da Nigéria, onde as atividades das empresas multinacionais petrolíferas tornaram a região sinônimo de poluição por petróleo, ambiente devastado e abusos dos direitos humanos. Sem surpresas, os tribunais nigerianos estão sendo cada vez mais chamados a julgar sobre questões relacionadas à poluição e outros abusos ambientais por pessoas privadas e públicas dentro do setor petrolífero. Na maioria das vezes, as disputas ambientais são levadas ao tribunal na Nigéria como casos tortuosos que buscam compensação por danos. Os recursos também podem ser procurados sob leis estatutárias ou como petições por escrito sob as regras fundamentais do procedimento de aplicação dos direitos humanos. Esta última implica a provisão de um direito humano a um ambiente saudável sob leis estatutárias, e se tal direito é reconhecido como obrigatório pelos tribunais na Nigéria. Este documento explora como o ambientalismo pode ser desencadeado na Nigéria através do reconhecimento judicial do direito a um ambiente satisfatório. Reconhece que há alguns esforços para tal reconhecimento judicial do direito. Entretanto, argumenta que para promover o ambientalismo na Nigéria, há necessidade de aprofundar o reconhecimento judicial do direito através de pronunciamentos detalhados sobre a justiciabilidade do direito.

Palavras-chave: Ambientalismo. Direito a um meio ambiente saudável. Direitos humanos. Desenvolvimento sócio-econômico.

I. Introduction

A clean, healthy, or satisfactory environment is increasingly emerging as a critical component of the socio-economic development of average Nigerians as the environment has not only been valuable to most traditional societies for their nutritional and healthcare needs, but also, crucial to the realization of fundamental human rights in Nigeria. Regarding the latter, it is apparent from the decisions and comments of several human rights bodies and commentators that human rights and environmental protection are intricately linked and not mutually exclusive.¹ Hence, it follows that the degradation of the environment would adversely affect the enjoyment of human rights within an affected community. Considering the adverse effect of environmental degradation on the enjoyment of human rights as well as the overall achievement of sustainable development, it is not surprising that Nigerian courts are increasingly being called upon to adjudicate

¹ See Dinah Shelton, "Human Rights, Environmental Protection, and the Right to Environment" (1991) 28 *Stanford JIL* 103; Michael R Anderson, "Individual Rights to Environmental Protection in India" in Alan E. Boyle & Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 199; and Sumudu Atapattu, "The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law" (Winter, 2002) 16 *Tulane Env'tl. L J* 65 at 74. See also *Subash Kumar v State of Bihar* (1991) 1 SCC 598; *Dr M Farooque v Bangladesh* (1997) 49 DLR 1; and *Judgement Concerning the Gabčíkovo-Nagymaros Project*, International Court of Justice, 25 September 1997, (1998) 37 *ILM* 162 at 204 (per Justice Weeramantry).

on issues relating to pollution and other environmental abuses by private persons, public-spirited persons and non-governmental organizations (NGOs), particularly against transnational oil companies (TNCs) operating mostly within the Niger Delta region of Nigeria. Indeed, the activities of these oil companies have made the region to be synonymous with oil pollution, devastated environment and human right abuses.² The environmental devastation in the region is exacerbated by the government's lack of capacity and unwillingness to regulate the environmental impacts of oil production activities as evidenced in the generally poor enforcement record of environmental regulations by governmental agencies in Nigeria.³ In such state of affairs, access to court or judicial justice is increasingly emerging as a powerful tool for environmental protection as it enables aggrieved persons, and other concerned persons or NGOs, to challenge environmental decisions or actions by governments or private bodies that adversely affect or would affect their interests, or be in breach of existing environmental regulations.⁴ Regarding the latter, access to judicial justice in instances of environmental degradation or pollution, constitutes an effective strategy for holding environmental polluters including TNCs accountable for the adverse consequences of their activities.⁵

Access to court for victims of environmental degradation is usually dependent on the intersection of two factors vis-à-vis the legal rights and procedural gateways which are created in law, and the complaints and petitions brought mainly by private individuals

² See Environmental Rights Action/Friends of the Earth Nigeria and Climate Justice Programme, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (Amsterdam, The Netherlands, June 2005); Human Rights Watch, *THE OGONI CRISIS: A Case-Study of Military Repression in South Eastern Nigeria*, Vol. 7, No.5 (July 1995) 11-25 & 29-34, available at <http://www.hrw.org/legacy/reports/1995/Nigeria.htm>; and Scott Pegg & Nenibarini Zabbey 'Oil and water: the Bodo spills and the destruction of traditional livelihood structures in the Niger Delta' (July 2013) 48 (3) *Community Development Journal* 391. For more information on such alleged killings, see Human Rights Watch, *THE NIGER DELTA: No Democratic Dividend* (HRW, October 2002), available at reliefweb.int/.../6146118D21ACF7FF85256C600076D219-hrw-nga-22oct.pdf.

³ For a discussion of the factors influencing such poor enforcement record, see Emeka Polycarp Amechi, 'Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment' (2009) 5/2 *Law, Environment and Development Journal* (2009) 107 at 110-119.

⁴ See Emeka Polycarp Amechi, 'Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development' (2015) 21 (3) *African Journal of International and Comparative Law* 383 at 383. (hereinafter Amechi II)

⁵ Ibid. See also JG Frynas, 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 (3) *The Journal of Modern African Studies* 363; and Anderson, *op cit* note 1 at 199 & 226.

and businesses.⁶ Regarding the first factor which is essentially institutional, environmental disputes are mostly brought to the court in Nigeria as tortuous cases seeking compensation for damages. In this respect, the tortuous remedies available in trespass, nuisance, strict liability, and negligence, are essentially available to an individual claiming damages for infringement of his or her private rights as the interests protected by the tort system are always direct harms to an individual or legally recognised entity.⁷ Likewise, remedies can be sought under statutory laws or as writ petitions under the fundamental human right enforcement procedure rules. The latter implicates the provision of a human right to a healthy environment under statutory laws, and whether such a right is recognised as binding by the court. Such judicial recognition is important as it enhances access to judicial remedies for victims of environmental degradation who otherwise would have been denied access to justice because of the burdensome procedural rules associated with the tort rules or statutory remedies.⁸ In addition, it enables citizens, public-spirited individuals and NGOs to use the courts as instruments of change not only in enforcing environmental regulations against the State and private individuals, but also in compelling the State to enforce, adopt, and where necessary, amend environmental regulations.⁹ The latter is consistent with the idea of environmentalism, which is a general term used to refer to concern for the environment and particularly actions or advocacy to limit negative human impacts on the environment.¹⁰

This paper explores how environmentalism can be triggered in Nigeria through the judicial recognition of the right to a satisfactory environment. It argues that while there are some efforts towards such recognition, there is a need for further detailed

⁶ See Michael Anderson, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC, Paper for Discussion at WDR Meeting, 16-17 August 1999, available at <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf>. (hereinafter Anderson II).

⁷ See *Hunter & others v. Canary Wharf Ltd* (1997) A.C. 55; (1997) 2 All E.R. 426

⁸ For example, where a cause of action arises in private law, failure to discharge the onerous burden of proof associated with reliance on tort rules, has led to the failure of many environmental cases. See *Chinda and 5 Others v Shell-BP Petroleum Development Company* (1974) 2 RSLR 1; and *Shell Petroleum Development Company v Chief W. W. Amachree and 5 Others* (2002) FWLR 1656.

⁹ See Alan Boyle, 'Human Rights and Environment: Where Next' (2012) 23 *Eur. J. Int'l. L.* 613 at 613.

¹⁰ See Anna R. Davies, 'Environmentalism' in Audrey Kobayashi (ed), *International Encyclopedia of Human Geography*, 2nd ed (Elsevier, 2020) 259-264

pronouncements on the justiciability of the right in order to deepen judicial recognition of the right as well as enhance environmentalism in Nigeria.

II. The Right to a Healthy Environment under the Nigerian Legal Framework

Presently, the right to a healthy environment in Nigeria is arguably manifested in two forms vis-à-vis implied right under section 20 of the Nigerian constitution on the state duty to protect the environment;¹¹ and explicit right to a satisfactory environment favourable to development under article 24 of the African Charter on Human and Peoples Rights (Ratification) Act.¹² It will be illustrative to examine the various manifestations in a detailed manner.

(a) Implied recognition under section 20 of the Nigerian Constitution

The Nigerian constitution does not explicitly provide for a right to a healthy environment. Rather, it provides among its Fundamental Objectives and Directive Principles of State Policy, that '[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.'¹³ This provision while placing a mandatory duty on the State to direct its policies towards achieving the above environmental objective,¹⁴ does not place any corresponding legal right on the citizens to enforce such provision or any other provisions of the Chapter in the event of non-compliance by the State.¹⁵ Hence, it has been construed by the Nigerian courts as incapable of imposing any justiciable obligation on the government.¹⁶ The effect of these decisions is that the provisions of Chapter II of the Nigerian Constitution are now

¹¹ Constitution of the Federal Republic of Nigeria, 1999.

¹² Cap. A9, Laws of the Federation of Nigeria, 2004. (Hereinafter African Charter Ratification Act).

¹³ *Op cit* note 11 at s 20. These Fundamental Objectives and Directive Principles are essentially a set of guidelines designed to secure the 'national' targets of social well-being, social justice, political stability, and economic growth in accordance with the espoused vision of the Preamble to the Constitution. See Dejo Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan L. Rev.* 56 (2006).

¹⁴ *Ibid*, at s 13.

¹⁵ *Ibid*, at s 6 (6) (c). It provides that '[t]he judicial powers vested in [the courts]...shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.'

¹⁶ See *Okogie (Trustees of Roman Catholic Schools) and Others v. Attorney-General, Lagos State* (1981) 2 NCLR 337; and *Adewole v Jakande* (1981) 1 NCLR 152.

regarded as mere declarations or ‘cosmetic constitutional provisions’,¹⁷ while their constitutional weight lies at the moral level.¹⁸ Nevertheless, the decision in *Okogie (Trustees of Roman Catholic Schools) and Ors v Attorney-General, Lagos State*, seemed to suggest that the provisions of the Chapter can be made justiciable by appropriate implementation legislation provided the fundamental rights of any citizen or any other expressed constitutional provision are not infringed.¹⁹ This has been reaffirmed by the Nigerian Supreme Court in *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria*,²⁰ that

[a]s to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, s. 6 (6) (c)... says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them ... the Directive Principles can be made justiciable by legislation.²¹

The Nigerian judicial attitude to the Directive Principles is influenced by the initial position of the Indian Supreme Court with regard to the justiciability of article 48A of the Indian Constitution, which is similar to section 20 of the Nigerian Constitution.²² However, the judicial position changed in India with “the Court’s appreciation of the relationship between directive principles in Part IV and fundamental rights in Part III as one of harmony and not conflict”.²³ This was evident in *Minerva Mills v Union of India*,²⁴ where the Supreme Court observed that “Part III and Part IV of the Constitution together constitute the commitment to social revolution and they together are the conscience of the Constitution. . . The two paths are like the two wheels of a chariot, one no less important than the other”. It is from this philosophy of harmonious construction and consequent elevation of the constitutional importance of the Directives Principles, that the Supreme Court began interpreting fundamental rights under Part III

¹⁷ Olowuop cit note 13, at 58-59.

¹⁸ See *Okogie case* op cit note 16 (per Mamman Nasir JCA); and Peter Oluyede, *Constitutional Law in Nigeria* 1ed. (Evans Press) 174.

¹⁹ Ibid.

²⁰ (2002) 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.) [Ondo State].

²¹ Ibid.

²² See *State of Madras v Champakam Dorairajan* (1951) AIR (SC) 226 at 252; and *Mohd Nanif Qureshi v State of Bihar* (1958) AIR (SC) 731.

²³ Shubhankar Dam & Vivek Tewary, ‘Polluting Environment, Polluting Constitution: Is a “Polluted” Constitution Worse than a Polluted Environment?’ (2005) 17 (3) *Journal of Environmental Law* 383 at 385.

²⁴ (1980) AIR (SC) 1789.

in the light of the provisions of Part IV.²⁵ In the area of environmental protection, the Court recognised the right of every Indian to live in a healthy or pollution-free environment by utilising the environmental provisions of Part IV to flesh out the constitutional right to life.²⁶ In recognising a constitutional right to a clean environment, the Court drew inspiration from article 48-A enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the Constitution.²⁷ However, the drawback of this approach is that the victim has to prove that the environmental pollution has violated one of his human rights. If this link cannot be established, then the action will fail.²⁸

Chapter II of the Nigerian Constitution does not contain a provision similar to article 51A of the Indian Constitution. Despite this, Indian decisions constitute persuasive precedents for Nigerian courts. Thus, when confronted with a similar situation, Nigerian courts are urged to reinterpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, in order to uphold the constitutional right of every Nigerian to live in a healthy environment. The importance of such recognition is that it will enhance the ability of a person to obtain legal redress against the State and private individuals when his/her environment is threatened by the action of the State or private individuals. Likewise, making such a connection would enable the extension of the constitutional duty of protecting the environment directly to those whose health and well-being are not directly affected by environmental degradation. This is due to the fact that the Fundamental Rights (Enforcement Procedure) Rules, 2009, provides for public interest litigations in the human rights field.²⁹

(ii) *Explicit recognition under article 24 of the African Charter Ratification Act*

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act transformed the provisions of the African Charter on Human and

²⁵ See Dam & Tewary *op cit* note 23 at 386; and Anderson *op cit* note 1 at 214.

²⁶ See Dam & Tewary *ibid*; and Anderson *ibid*, at 215-216. For the judicial decisions, see Subash Kumar case *op cit* note 1; *L.K. Koolwal v Rajasthan* (1988) AIR 2 (High Court of Rajasthan); *Charan Lal Sahu v Union of India* (1990) AIR (SC) 1480; *T. Damodhar Roa v Municipal Corp of Hyderabad* (1987) AIR 171 at 181; and *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213.

²⁷ *Ibid*.

²⁸ See Atapattu *op cit* note 1 at 99.

²⁹ Para 3(e)

Peoples' Rights,³⁰ into municipal law in Nigeria. Thus, the provisions of the Charter are now part of Nigerian law.³¹ This Act forms part of existing Nigerian legislation recognised under the Constitution and has such effect until modified by the appropriate authority.³² The domestication of the Banjul Charter in Nigeria extends the corresponding obligations not only to the State (government of Nigeria) but also, to private persons in Nigeria.³³ Thus, any person who considers that any of the rights including the socio-economic rights provided by the Act in relation to him or her, is impaired or threatened by the conduct of the State or private individuals can bring an action in any of the Nigerian high courts depending on the circumstances of the case for appropriate relief.³⁴ The procedure to be used is the same as those provided for the enforcement of fundamental rights under Chapter IV of the Constitution. This is due to the fact that the 2009 Fundamental Rights Enforcement Procedure Rules in its preamble stated as one of its overriding objectives,³⁵ the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act with "a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them".³⁶

Furthermore, the preamble defines fundamental rights as including "any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act".³⁷ Such explicit definition under the Rules should have rested any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment. This assertion finds support in the fact that prior to the adoption of the 2009 FREP Rules, it has already been held by the Court of

³⁰ OAU Doc.CAB/LEG/67/3 rev.5, 21 Int'l Leg. Mat. 58 (1982). (Hereinafter Banjul Charter)

³¹ See Nigerian Constitution, *op cit* note 11; and *Abacha v Fawehinmi* (2000) FWLR 585G-P; 586A-C; & 653G.

³² *Ibid*, at S. 315. See also *Abacha* case, *ibid*, at 596C-E.

³³ See Emeka Polycarp Amechi, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation' (2010) 6/3 *Law, Environment and Development Journal* (2010) 320 at 327. (hereinafter Amechi III).

³⁴ See *Abachacase*, *op cit* note 31 at 590E-H & 591A; and *Ogugu v the State* (1994) 9 NWLR (Part 366) 1.

³⁵ Fundamental Rights (Enforcement Procedure) Rules, 2009, entered into force on 1 December 2009, available at [http://www.access to justice-ng.org/articles/New%20FREP%20Rules%20.pdf](http://www.access%20to%20justice-ng.org/articles/New%20FREP%20Rules%20.pdf). (Hereinafter FREP 2009 Rules).

³⁶ *Ibid*. Para 3 (a) of the Preamble.

³⁷ Order 1 (2).

Appeal in *Abia State University v Anyaibe*,³⁸ that since the erstwhile 1979 Rules were made pursuant to section 42(3) of the 1979 Constitution (now section 46(3) of the 1999 Constitution), they form part of the Constitution and have the same force of law as the Constitution. It should be noted that despite such lofty objective stated in the preamble to the FREP Rules 2009, article 24 and other provisions of the Act are still subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it.³⁹ In essence, the definition of a fundamental right under the Rules to include any right under the African Charter Ratification Act does not place rights under the Act on the same fundamental level with rights guaranteed under Chapter IV of the Nigerian Constitution. This is due to the fact that, unlike constitutional rights, rights under the Act are still not immune from alteration, modification, or suspension by the Legislature in the ordinary process of legislation.⁴⁰

However, the validity of the 2009 FREP Rules, a subsidiary legislation in endowing particularly the socio-economic rights in the Act with fundamental flavour has been questioned. Critics point to the fact that the affirmation of the justiciability of socio-economic rights as one of the lofty overriding objectives is listed only in the Preamble to the 2009 FREP Rules. A preamble, they argue is ‘a mere introductory statement that carries little or no weight in law.’⁴¹ Most importantly, critics pointed out that the FREP Rules cannot confer the status of justiciability on socio-economic rights in Nigeria.⁴² They argued that the 1999 Constitution only allows the protection of civil and political rights, and hence, only those rights in chapter IV of the 1999 Constitution which are also in the African Charter Ratification Act are justiciable in Nigeria.⁴³ At the root of such argument is the notion that the provisions of chapter II of the constitution which as earlier noted have been declared unjusticiable, “represents the constitutional guarantee of

³⁸ (1996) 3 NWLR (Pt 439) 646

³⁹ See *Abacha case*, *op cit* note 31, at 586F-G.12 (1).

⁴⁰ See *Amechi III*, *op cit* note 33 at 327-330.

⁴¹ See Abiola Sanni, ‘Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The need for far-reaching reform’ (2011) 11 *African Human Rights Law Journal* 511 at 524-524.

⁴² *Ibid*, at 524-527. See also Enyinna Nwauche, ‘The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?’ (2010) 10 *African Human Rights Law Journal* 502 at 511-512.

⁴³ See Lawrence A. Atsegbua, Vincent Akpotaire & Folarin Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ambik Press, Benin City, 2010) 204.

economic, social and cultural rights in Nigeria”.⁴⁴ Specifically as it concerns the right to environment, the critics pointed to the supposedly inherent conflict between section 20 of the Constitution which they construed as providing for an implied right to environment, and that of article 24 of the African Charter Ratification Act.⁴⁵ As argued by Atsegbua *et al*, “it is doubtful if the [African] Charter [Ratification Act] can be used to elevate environmental rights from non-justiciable rights to justiciable rights”.⁴⁶ Flowing from this, the affirmation by the FREP Rules of the justiciability of socio-economic rights in the Act despite the loftiness goes to no avail.

The implication of the above arguments is that the justiciability of these socio-economic rights including the right to a healthy environment is still contentious. This endures despite the fact that Chapter II of the Constitution does not provide for socio-economic rights *per se*. Thus, there should be no question of inconsistency with the socio-economic rights under the African Charter Ratification Act.⁴⁷ Likewise, section 6(6) (c) of the 1999 constitution did not expressly mention the Act, despite being a latter statute, and should not, therefore, be construed as implicitly overriding the explicit socio-economic rights provided under the Act.⁴⁸ However, the contentious nature of the right may be about to change with the affirmation of the justiciability of the right to a healthy environment by the Nigerian Supreme Court in *the Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*.⁴⁹

III. Judicial Attitude towards the Recognition of the Right to a Healthy Environment in Nigeria

As earlier noted, the right to a healthy environment is only impliedly provided under the Nigerian constitution, while until recently, the justiciability of the right as expressly provided under the African Charter Ratification Act is contentious. The previous state of affairs had not only created uncertainty as to the justiciability of the

⁴⁴ Solomon T. Ebobrah, ‘The Future of Economic, Social and Cultural Rights Litigation in Nigeria’ (2007) 1 (2) *Review of Nigerian Law and Practice* 108 at 113-114.

⁴⁵ See Atsegbua *et al op cit* note 43..

⁴⁶ *Ibid*.

⁴⁷ See Dakas C.J. Dakas, ‘The Implementation of the African Charter on Human and Peoples’ Rights in Nigeria (1986-1990) 3 *University of Jos Law Journal* 39

⁴⁸ See Abacha case, *op cit* note 31 at 596C-E.

⁴⁹ (2019) 15 NWLR (pt 1666) 518. (hereinafter *COPW v NNPC*).

right, but also led to a situation whereby victims of environmental pollution as well as those interested in championing their cause are wary of relying on the right in environmental litigations against the oil industry.⁵⁰ This is exacerbated by the nature of such environmental litigation in Nigeria where evidence has shown “the increased reliance of Nigerian lawyers on contingency fees”.⁵¹ Considering the fact that lawyers working on contingency fees do not receive payment in the event of losing any case, it is highly improbable that such lawyers for the fear of the unknown would seek to rely on such contentious right in litigating against prominent opponents like oil MNCs.⁵² Such fear is not totally misplaced as the Nigerian judiciary has generally shown an unfavourable disposition towards environmental protection by particularly prioritising the economic interests of the Nigerian government in the operations of oil MNCs over the environment.⁵³ Furthermore, the non-reliance on the right in environmental litigation affects the rate at which the judiciary would be able to adjudicate on the justiciability or otherwise of the right to a healthy environment in civil suits between oil TNCs and victims of environmental degradation in Nigeria. Indeed, it is litigants and their lawyers who determine which disputes will reach the courts, when and how often courts will be petitioned, and how intensively conflicts will be pursued.⁵⁴ This is not surprising as one of the key characteristics of the court system is that it is essentially reactive and driven by social forces. That is, in most cases, the court will only commence proceedings, receive evidence, and give judgement once a litigant have petitioned it.⁵⁵ Thus, considering the bias against reliance on the right to a healthy environment in environmental litigation, there is a paucity of judicial decisions on the justiciability of the right in Nigeria. Despite this, it is instructive to examine the few judicial decisions involving the justiciability of the right in Nigeria.

⁵⁰ See Rhuks Ako, Ngozi Stewart & Eghosa .O. Ekhatior ‘Overcoming the (non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria’ in Alice Diver & Jacinta Miller, *Justiciability of Human Rights Law in Domestic Jurisdiction* (Springer 2015) 137.

⁵¹ Frynas, *op cit* note 5 at 147.

⁵² See Ako et al, *op cit* note 50 at 137-138.

⁵³ See *Chinda and 5 Others v Shell-BP Petroleum Development Company* (1974) 2 RSLR 1; *Oronto-Douglas v. Shell Petroleum Development Company and 5 Others*, Unreported Suit No. FHC/ CS/573/93, delivered on 17 February 1997. See also Engobo Emeseh ‘Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: a Case Study of the Petroleum Industry in Nigeria’ (2006) 24(4) *Journal of Energy & Natural Resources Law* 574 at 603.

⁵⁴ See Anderson II, *op cit* note 6 at 21-22.

⁵⁵ *Ibid*, at 7.

The first of such decision is *Jonah Gbemre v. SPDC Shell Petroleum Development Company Nig. Ltd. and 2 Ors*,⁵⁶ where the Federal High Court (Benin Division) held that that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their fundamental rights to life (including healthy environment) and dignity of human person as enshrined in the constitution.⁵⁷ It further held that "these constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution-free healthy environment".⁵⁸ In essence, the Federal High Court appeared to have followed the Indian precedent by purposefully interpreting the fundamental rights to life and human dignity under sections 33 & 34 of the 1999 Constitution to contemplate the right to a clean and healthy environment.⁵⁹ Remarkably, the Court granted an order of perpetual injunction restraining Shell and NNPC "whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community and are to take immediate steps to stop the further flaring of gas in the applicant's community".⁶⁰ The judgement marked a watershed in the environmental litigation against the oil industry in Nigeria as it ingeniously conceptualized environmental protection in human rights terms, and hence the exercise of the court's "inherent jurisdiction to grant leave to the applicants who are bona fide citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999".⁶¹

Furthermore, in making its orders, the court was principally motivated by the protection of the environment and human rights rather than the economic interests of the oil industry and thus, didn't hesitate in granting the perpetual injunction sought despite the negative economic implications. However, whatever hope the decision in Gbemre's case might have given to victims of environmental degradation regarding the judicial recognition of the right to a healthy environment and curbing excess of the oil

⁵⁶ (2005) AHRLR 151 (NgHC 2005).

⁵⁷ Ibid, 5 paras 3-4.

⁵⁸ Ibid.

⁵⁹ For the potential impact of the decision, see E. Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria (2007) 51 (2) JAL 249.

⁶⁰ *Op cit* note 56 at 6 para 5.

⁶¹ Ibid, at 5 para 2.

MNCs, turned out to be premature.⁶² This is due to series of events which played out in the aftermath of the decision and which allegedly indicated a high level of state interference and complicity.⁶³ As pointed out by Peter Roderick, then a co-Director of the Climate Justice Program,

the fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law.⁶⁴

In contrast to the Gbemre case, a Federal High Court sitting in Port-Harcourt in *Ikechukwu Opара & Ors v. Shell Petroleum Development Company Nig. Ltd. and 5 Ors*,⁶⁵ held that the fundamental right to life could not be interpreted to include the right to a healthy environment. Unlike the decision of the court in the Gbemre's case which had similar facts, it adopted a restrictive interpretation of the application of the 1979 Fundamental Rights Enforcement Procedure (FREP) Rules 1979 to the provisions of the African Charter Ratification Act. Thus, it struck out the suit on grounds of procedural defects *inter alia* that the rights created by the African charter were beyond the definition ascribed to fundamental rights as contemplated by section 46 of the 1999 Nigerian Constitution and cannot be enforced by means of 1979 FREP Rules. This is despite the fact that the Nigerian Supreme Court had in several decisions held that any person who felt that any of the rights provided by the Act in relation to him is infringed or threatened by conducts of the State or private individuals can bring an action in any of the several Nigerian high courts depending on the circumstances of the case for appropriate relief.⁶⁶ Indeed, the Court in *Abacha v Fawehinmi* recognised the right of any such victim to proceed against the violator of the Charter's rights (which invariably includes environmental polluters) "by way of either a Writ or any other permissible procedure including the Fundamental Rights (Enforcement Procedure) Rules 1979".⁶⁷ Perhaps, the

⁶² See Ako et al, *op cit* note 50 at 238.

⁶³ Ibid.

⁶⁴ Friends of the Earth International Press Briefing, Shell fails to obey gas flaring court order, May 2, 2007, available at <http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007> accessed 26 July 2016.

⁶⁵ Suit No. FHC/PH/CS/518/2005.

⁶⁶ See *Abachacase*, *op cit* note 31 at 590E-H & 591A; and *Ogugu case*, *op cit* note 34.

⁶⁷ Ibid.

Federal High Court was wary of giving a purposive interpretation to the right to life as it would ultimately lead to the grant of an injunctive remedy against operators in the Nigerian oil industry.

Presently, in *COPW v NNPC*, the Supreme Court recognises the right to a healthy environment as a human right in Nigeria, and hence, has settled the question of the justiciability of article 24 of the African Charter Ratification. This is apparent in the statement of Kukere-Ekun to wit:

...Section 33 of the 1999 Constitution guarantees the right to life while Section 20... provides that “the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country”. See also article 24 of the African Charter on Human and Peoples’ Rights, which provides “All people shall have the right to a general satisfactory environment favourable to their development”. These provisions show that the Constitution, the Legislature and the African Charter on Human and Peoples’ Rights, to which Nigeria is a signatory, recognise the right to a clean and healthy environment to sustain life.⁶⁸

Similarly, Eko stated:

... and I agree, that in order to broadly determine locus standi, under environmental rights as human rights,⁶⁹ article 24 of the African Charter on Human and Peoples’ Rights should be read together with sections 33(1) and 20 of the ‘Constitution on the role of the State in preserving the environment for the health and by extension (lives) of Nigerians”, and that “it is apparent that the right to a healthy environment is a human right in Nigeria”. ... The African Charter on Human and Peoples’ Rights, an international treaty, having been domesticated, forms part of our corpus juris. For as long as Nigeria remains signatory to the African Charter..., and other international treaties on environment and other global issues, for so long also, would the Nigerian courts protect and vindicate human rights therein.⁷⁰

As important as the above pronouncements may be towards the judicial recognition of the justiciability of the right to a healthy environment in Nigeria, it should be noted that the suit wasn’t really concerned with justiciability of the right to a healthy environment in Nigeria. This is unlike the prior Federal High Court cases that specifically dealt with the impacts of environmental pollution on human health and well-being including the right to a healthy environment. Indeed, *COPW v NNPC* dealt principally

⁶⁸*COPW v NNPC* cit note 49 at 587 D-F

⁶⁹ The Justice seemed to confuse the case as dealing with representative standing when obviously, it is a citizen suit. But such confusion extended to the argument of the Amici Curiae.

⁷⁰*COPW v NNPC* cit note 49 at 597-598H-C.

with the vindication of the locus standi of non-governmental organizations in environmental citizen suits. This is big plus for environmentalism in Nigeria as it would enable public spirited individuals and NGOs in challenging either government efforts or failures to manage or regulate the environment, or to sue statutory or private entities regarding their activities on public or private lands that violate specific statutory standards. However, as will be seen in the next section of this article, apart from the scanty pronouncements on the justiciability of the right in Nigeria, the Supreme Court failed to pronounce itself on the nature of the right and available remedies.

IV. Deepening Judicial Recognition of the Right to a Healthy Environment

As noted above, *COPW v NNPC* was instituted as an environmental citizen suit rather than an environmental representative suit that usually deals with the infringement or threatened infringement of the right to a healthy environment. Environmental citizen suit may be instituted either to challenge government efforts or failures to manage or regulate the environment, or to sue statutory or private entities to enjoin the latter's activities on public or private lands that violate specific statutory standards.⁷¹ The latter, which aims at complementing existing regulatory enforcement efforts, has been described as giving real enforcement 'teeth' to public law.⁷² In environmental citizen suit, there is usually no need to prove environmental harm to the environment provided that it can be proved that the emission limit values or any other provisions of environmental regulations have been breached by the activities of the regulated parties.⁷³ Although, it is inevitably that in the instant suit dealing with the right of an NGO to sue for the reinstatement, restoration and remediation of impaired and/or contaminated environment and provision of potable water as a substitute to soiled and contaminated rural streams, would inevitably result in a discussion of the right to a healthy environment particularly where human health and well-being are concerned. Such discussion was reflected albeit in a perfunctory manner in the concurring judgements of only two out of

⁷¹ See J.E. DiMento, 'Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research' (1977) *Duke Law Journal* 409.

⁷² D. Mossop, *Citizens Suits Tools for Improving Compliance with Environmental Law* 1 & 3. <http://www.aic.gov.au/media-library/publications/proceedings/26/mossop.pdf>.

⁷³ See Jonathan H. Adler, 'Stand or Deliver: Citizen Suits, Standing, and Environmental Protection' (2011) 12 *Duke Environmental Law & Policy Forum* 12 at 56-59.

the seven justices that decided the case. The implication of such a perfunctory discussion in *COPW v NNPC*, is that Supreme Court failed to pronounce itself on the core content and minimum obligations imposed by the right on the government and private persons such as the oil MNCs operating within the Niger Delta region of Nigeria. This failure would not augur well for the use of the right in environmental litigation as lawyers would still prefer to take their chances with the onerous tort rules which at least, they are conversant with their nature and limitations.

Thus, when presented with the opportunity by litigants, there is a need for deepening the judicial recognition of the right in Nigeria. In essence, there should be detailed judicial pronouncements on the nature of the right, particularly on its substantive contents such as the kind of conservation envisaged by the right. It is to be expected that the environmental conservation envisaged under the right should be the type that would enhance the well-being of Nigerians by securing for them an ecologically sustainable development and use of natural resources. Likewise, the court should determine the environmental quality that the States are obliged to respect, promote and protect through legislative and other measures; and the degree of pollution and environmental degradation that the States are obliged to prevent and the degree that should be allowed in a given situation in order not to stultify socio-economic development in the country. Regarding this, it would be far-fetched to assume that the Nigerian courts would envisage an ideal environment free from all types of pollution and ecological degradation as not only is such an environment virtually impossible to attain, but also such an environment would definitely not be conducive to the socio-economic development of Nigeria.⁷⁴ Rather, it is suggested that when called upon, the Nigerian judiciary should adopt the position of the European Court of Justice (ECJ) which has repeatedly held that not every instance of pollution or ecological degradation will lead to a violation of Article 8 of the European Convention for the Protection of Human Rights

⁷⁴ The fact that Nigeria and other developing countries might need to pollute to certain extent in order to sustain their socioeconomic development, which is reflected in the international environmental principle of Common But Differentiated Responsibility, has been recognised in the Climate Change Convention and its Kyoto Protocol leading to lack of binding commitments on developing countries. See Article 3, United Nations Framework Convention on Climate Change, New York, 9 May 1992, 1771 UNTS 107 and Article 5, Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, 1522 UNTS 29.

and Fundamental Freedoms that is usually invoked in cases involving environmental concern.⁷⁵ According to the Court,

the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment.⁷⁶

The Court further held that such harmful or adverse effects of pollution and ecological degradation must attain a certain minimum level or severity if they are to fall within the scope of Article 8.⁷⁷ This can be attained when “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”.⁷⁸ The assessment of the minimum level or severity by the Court is relative and depends on all the circumstances of the case such as the intensity and duration of the nuisance, its physical and mental effects, and general environmental context.⁷⁹ Thus, the Court will usually find no arguable claim under Article 8 if ‘the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city’.⁸⁰ This was evident in *Moreno Gomez v. Spain*,⁸¹ where the applicant complained of noise and disturbances from nightclubs near her home, the Court held that “[i]n view of its [noise] volume – at night and beyond permitted levels – and the fact that it continued over a number of years, ...there has been a breach of the rights protected by Article 8”.⁸²

⁷⁵ See *Hatton and others v. the United Kingdom*, Judgement of 8 July 2003, 2003 ECHR 338 (Grand Chamber) at paras. 129 & 130 and *Powell and Rayners v. the United Kingdom*, European Court of Human Rights, Judgement of 21 February 1990, 1990 ECHR 2, at para. 45.

⁷⁶ See *Kyrtatos v. Greece*, European Court of Human Rights, Judgement of 22 May 2003, Application no. 41666/98, 2003 ECHR 242, para. 52.

⁷⁷ See *Fadeyeva v. Russia*, European Court of Human Rights, Judgement of 9 June 2005, Application no. 55723/00 (Chamber), at para. 69.

⁷⁸ *Lopez-Ostra v. Spain*, 1994 ECHR, series A, No. 303C, para.

51. See also *Guerra and others v. Italy*, European Court of Human Rights, Judgement of 19 February 1998, 1998 ECHR 7, para. 57.

⁷⁹ *Fadeyeva v. Russia*, *op cit* note 77 at para. 69.

⁸⁰ *Ibid.*

⁸¹ *Moreno Gomez v. Spain*, European Court of Human Rights, Judgement of 16 November 2004, 2004 ECHR 633.

⁸² For similar decisions from African countries, see *Hichange Investments (Pty) Ltd v. Cape Produce Co (Pty) Ltd and others*, High Court of South Africa, Eastern Cape Division, 2004 (2) SA 393.; and *Peter Kinuthia Mwaniki and Others v. Peter Njuguna Gicheha and Others*, High Court of Kenya, Civil Case 313 of 2000, 2006 eKLR.

Finally, there is a need for judicial pronouncement on whether the range of remedies in human rights suits, is also available for citizens relying on the right in environmental litigation. This is important considering the Nigerian judiciary's aversion to the grant of injunctive reliefs in oil pollution cases. As aptly observed by Frynas, "seeking compensation for damage offers the plaintiff greater prospects of success than injunctions".⁸³ Injunction offers the best avenue for preventing actual or threatened degradation of the environment.⁸⁴ Thus, the reluctance to grant injunctive reliefs has given an unfair leeway to operators in the Nigerian oil sector as evidenced in the statement made by a Shell Manager in 1998 that "the law is on our side because in the case of a dispute, we don't have to stop operations".⁸⁵ It should be noted that the fact that victims of environmental pollution would be able to access the range of remedies available in human rights litigation, is important in enhancing environmentalism in Nigeria as despite some identifiable limitations,⁸⁶ reliance on the right in instances of environmental pollution and other degrading activities, represents "a better avenue of obtaining environmental justice in Nigerian courts than reliance on the onerous tort rules".⁸⁷ This would ultimately translate to better environmental attitude and performance amongst operators in the Nigerian oil sector as they know that they would be held judicially accountable for their environmentally degrading practices in court. Indeed, a judiciary exhibiting sensitivity to environmental problems by upholding the right of the citizens to live in a healthy and safe environment can stimulate more resort to the judiciary for settling environmental problems.⁸⁸ This is not surprising because as aptly noted by Judge C.G. Weeramantry,

The tone ...set [by the judiciary] through the tenor of its decisions influences societal attitudes and reactions towards the matter in question. This is all the more so in a new and rapidly developing area. Judicial decisions and attitudes can also play a great part in influencing

⁸³ *Op cit* note 5 at 123.

⁸⁴ J.R. May & E. Daly *Handbook on Environmental Constitutionalism* 3rd ed. (United Nations Environment Programme, 2009) 71.

⁸⁵ *Ibid*.

⁸⁶ See E.P. Amechi *Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009*, In *Ensuring Access to Justice for Victims of Environmental Degradation* (2010) 6(3) *Law, Environment and Development Journal* 320 at 327-329 (hereinafter Amechi IV).

⁸⁷ *Ibid*, at 329.

⁸⁸ See United Nations Environment Programme (UNEP) *Judges & Environmental Law: A Handbook for the Sri Lankan Judiciary* (2009, Environmental Foundation Limited, Sri Lanka) 175.

society's perception of the environmental danger and of the resources available to society with which to contain it.⁸⁹

V. Conclusion

Environmentalists have always sought to use the courts as instruments of change, particularly where there is a sufficiently gross failure by the state and its regulatory agencies to adopt or enforce environmental regulations to uphold basic human rights including socio-economic and cultural rights. Hence, the importance of access to court to the promotion of environmentalism in instances where the other two branches of government failed to fulfil their responsibilities to the environment. One of the factors determining access to court is the legal rights and procedural gateways which are created in law. Regarding this, *COPW v NNPC*, not only vindicated the locus standi of non-governmental organizations in environmental citizen suits but also recognised the right to a healthy environment as a fundamental human right in Nigeria. However, the suit is not concerned with justiciability or otherwise of the right, and unsurprisingly, the Supreme Court failed to pronounce itself on the core content and minimum obligation imposed by the right. This failure would not augur well for the use of the right in environmental litigation as lawyers would still prefer to take their chances with the onerous tort rules which at least, they are conversant with their nature and limitations. Hence, to trigger environmentalism using the court system, it is argued that there is a need for deepening the judicial recognition of the right in Nigeria by detailed judicial pronouncements on the nature of the right, particularly on its substantive contents as well as the available remedies for successful litigants. In recognition of the fact that the court system is essentially reactive and driven by social forces, that is, only the complaints and petitions brought mainly by private individuals and businesses would trigger judicial intervention in any matter, it is suggested that the independent bar and environmental NGOs in Nigeria must start this process of deepening the judicial recognition of the right, by reliance on the right in environmental litigations.

⁸⁹Ibid, at 174.

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