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A Jurisprudential Anatomy of the Legal Status of the Concept of Sustainable Development in Nigeria

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ABSTRACT: *The foundation of sustainable development was first laid as "eco development" in the 1972 Stockholm conference at Sweden, which was held following the problems associated with the anthropogenic over exploitation of natural resources for demographic and economic growth that was facing both industrialized and unindustrialized states. However, it was given prominence by the report of "Our Common Future" published in 1987 after the convocation of the United Nations World Commission on Environment and Development (WCED) chaired by Mrs. Harlem Brundtland, and was continuously amplified by subsequent international instruments, regional treaties and national laws respectively, notwithstanding the seeming uncertainty of its legal status which varies from state to state. The fundamental purpose of this paper is to x-ray the legal status of the concept of sustainable development under the Nigerian corpus juris.*

KEYWORDS: sustainable development, legal status, Nigerian jurisprudence.

INTRODUCTION

The foundation of sustainable development was first laid as 'eco development'[2] in the 1972 Stockholm conference which was held following the problems associated with the over exploitation of natural resources for demographic and economic growth that was facing both industrialized and unindustrialized countries. However, it was given prominence by the report our 'our common future' published in 1987 after the convocation of the United Nations World Commission on Environment and Development (WCED) chaired by Mrs. Harlem Brundtland. It referenced ecological and economic challenges such as famines, drought, debts, plaguing Africa as its conceptual basis, that Africa's inability to pay their huge debts has forced them to resought to the sale of agricultural commodities and over use of their fragile soils, which is now turning good lands into deserts.[3] The definition of sustainable development is quite complex and unclear,[4]

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[2] Principle 2 Stockholm Declaration which States that Natural Resources of the Earth including Air, Water, Flora, Fauna and especially representative samples of Natural Ecosystem, must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate

[3] J Thornton and S Beckwith, Environmental Law (1997) 23.

[4] P Birnie and Others, International Law and the Environment (3rd edn, Oxford University press 2009) 54.

as several writers have defined the phrase sustainable development in different perceptions. The most acceptable meaning of sustainable development and its original conceptualization is the one given by Brundtland commission report wherein it defined sustainable development as;

...development that meets needs of the present without comprising the ability of future generations to meet their own needs. The term contains within it two key concepts: the concepts of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[5]

Simply put, the fundamental elements of sustainable development are

i. Equity towards future generations or passing a clean and healthy environment to future organizations,
ii. Equity within our generation or addressing the global economic inequalities and
iii. Integrating environmental protection into development process.[6]

Even though the concepts of integrating environmental protection into development policies and intergeneration equity constitute the substratum of the rights or obligations equation in any legal framework of sustainable development, poverty alleviation is also important, especially when setting obligations for developing states.[7]

Before sustainable development became popularized through the instrumentality of our common future by the World Commission on Environment and Development (WCED) in 1987, other international instruments such as the 1946 International convention for the regulation of Whaling, 1972 Stockholm declaration,[8] the UN Charter of Economic Rights and Duties of States[9] and the

[5] The World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 43 & 46.

[6] F P Shyami, 'Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with Particular Reference to South Asia' (2000) 12 *Sri Lanka Journal of International Law 35, 37 and 38; E E Okon, 'The Environmental Perspective in 1999 Nigerian Constitution' (2003) 5 (4) Environmental Law Review* 256.

[7] E B Weiss, 'International Equity: A Legal Framework for Global Environmental Change' in Edith Brown Weiss (ed), *Environmental Change and International Law* (United Nations University Press 1992), 385, 398-397. Paragraph 5 of the 2002 Johannesburg Declaration on Sustainable Development, which states that 'we assume a collective responsibility to advance and strengthen the Interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental development – at the local, national, regional and global levels'. The three core areas area are reduced to the specifics or basic elements in paragraph 4 of part 1, which deals with "Our Common Vision' in *The Future We Want*, UNGA, resolution A/66/L/56 of 24 July 2012. www.un.org/en/sustainablefuture/accessed 28 June 2021.

[8] Principle 1 of the 1972 Stockholm Declaration, which states, among other things, that man bears a solemn responsibility to protect and improve the environment for present and future generations. <http://sitemaker.umich.edu/drwcasebook/files/stockholm_declaration.pdf October 19 2020.

[9] UN General Assembly Res. 3281 (xxix), UN GAOR 29th Sess., Supp. No. 31 (1974) 50. Reproduced in (1975) 141.L. M. 251.

World Conservation Strategy: Living Resources Conservation for Sustainable Development (WCS) contained some elements of sustainable development. as a matter of fact, the introduction of the WCS deals with living resources conservation for sustainable development and paragraph 4 of the introduction defines conservation as the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generation while maintaining its potential to meet the needs and aspiration of future generations. Sustainable development underpins the five environmental instructions adopted at the United Nations Conference on Environment and Development,[10] but its basic characteristics and implementation targets are outlined in the 1992 Rio Declaration and Agenda 21 as follows: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[11] "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it".[12] According to the said agenda 21:

Humanity stands at a defining moment in history; we are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfillment of basic needs; improved living standards for all better protected and managed ecosystems and a safer, more prosperous future....[13]

The concept of sustainable development presents a kind of developmental mode different from those of the past in the sense that it has embedded in it environmental consciousness such that it tries to avoid or prevent the problems of environmental pollution, degradation, social and ecological damage both on a worldwide and local scale that were caused by previous modes. Hence, it aims at preventing the exhaustion of natural resources, showing respect for the environment as well as striking a balance between the necessities to satisfy present societal needs while ensuring that future generations will have the means to satisfy their own societal needs. This can be achieved through the combination of the elements of environmental governance with fairness and economic efficiency. In essence, the basic aim of sustainable development is to find a long-lasting balance in the combination of economic, social and environmental aspects of human existence in order to achieve this long-lasting balance, it becomes essential for there to be good governance which will be reflected in the implementation of policies and actions with regard to sustainable development.

[10] The Instruments are (1) Rio Declaration, (2) Agenda 21, (3) Convention on Biological Diversity, (4) United Nations Framework Convention on Climate Change (UNFCCC), and (5) Principles/Elements of the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest.
[11] Principle 3, Rio Declaration
[12] Principle 4, Ibid
[13] Agenda 21, Para 1.1, Chapt. 1

Many international environmental law treaties make explicit or implicit references to the essential tents of sustainable development.[14] Sustainable development is also referred to in other international agreements, such as trade and investment treaties and WTO agreements.[15] International courts and tribunals have embraced sustainable development as a source of law and policy when addressing treaty implementation and the interpretation of norms.[16] This can be seen in judicial instances ranging from the International Court of Justice[17] to regional courts, including those that address related fields, such as the Inter-American Court of Human Rights,[18] the African Commission on Human and People's Rights,[19] specialized panels and tribunals such as the International Tribunal for the Law of the Sea[20] and the Dispute Settlement Body of WTO.[21]

Recently, sustainable development has been incorporated into the larger global agenda by the 2030 agenda for Sustainable Development and the sustainable development Goals.[22] The Goals can be seen as specific indicators for sustainable development and represent a significant milestone. However, questions remain as to the extent to which the sustainable development principles represent binding or non-binding rules or indeed whether they should constitute a source of law. Some have suggested that this reflects the need for further analysis and a need for the codification of sustainable development principles into a source of law. Others hold that this could undermine the dynamic aspect of sustainable development. Another concern relates to the fact that sustainable development still awaits its effective implementation as a holistic legal concept with regard to addressing the relationship between international environmental law and other fields of

[14] Manamata Convention on Mercury (2017); Paris Agreement (2015); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Dissertation, particularly in Africa (1994); Vienna Convention for the Protection of the Ozone Layer (1988); Montreal Protocol on Substances that Deplete the Ozone Layer (1989).

[15] N Schrijver, "Advancements in the Principles of International Law on Sustainable Development". In Marie-Claire Cordonier Segger and H. E. Judge C. G. Weeramantry, edn., Sustainable Development Principles in the Decision of International Courts and Tribunals, 1992 – 2012 (Routledge, 2017), pp. 98-102.

[16] C G Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals,* 1992 – 2012.

[17] General List No. 135, in Gabcikovo-Nagymaros Project (*Hungary v. Slovakia*) Judgment I. C. J. Reports 2010; Whaling in the Artic (*Australia v. Uruguay*), Judgement I.C.J. Reports 2014J.

[18] Inter-American Court of Human Rights: *Saramaka People v. Suriname*, Judgment, 28 November 2007; *Yakye Axa Indigenous Community v. Paraguay*, Judgment, 31 August 2001. See also Africa Commission on Human Rights and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Right Group International (on Behalf of Endorois Welfare Council), v. Kenya, Communication* No. 2i76/03/2009.

[19] Africa Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, 2001.

[20] Volga Case (*Russian Federation v. Austria),* 42 ILM 159 (2003); MOX Plant (*Ireland v. United Kingdom*), Order of 13 November 2001; Southern Bluefin Tuna (*Australia v. Japan)* Order of 27 August 1999; M/V Saiga (*Saint Vicent and the Grenadines v. Guinea)* Case No. 1, Order of 21 November, 1997.

[21] Reports from WTO: China – Measures Related to the Exportation of Various Raw Minerals, WT/DS394/AB/R, WT/DS395/AB/R, 30 January 2012; Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS58/AB/R, 12 October 1998.

[22] United Nations Sustainable Development Goals (2015)

international law.[23] Sustainable development is fundamentally anchored on the pillars of environmental, economic and social sustainability.

The Legal Status of Sustainable Development

The fundamental problem facing the Nigerian judicature and other policy makers in the course of implementation and enforcement of environmental regulations and promoting sustainable development in the Nigerian environmental governance is whether it is a moral or legal concept. If it is the latter, has it metamorphosed into a legal principle or the rule of law having a normative value? Unfortunately, most literature on sustainable development ignored the fact that enforcement, implementation or promotion of sustainable development, especially by the courts and policy makers, is a matter of legal reasoning.[24] In theory, legal reasoning is a hierarchical form of reasoning which established relationship of inferiority and superiority between units and levels of legal discourse.[25] The status of either a moral or a legal concept is a measure of its acceptability within the legal debate and its power to affect legal decision making.[26] Therefore, the normative value of sustainable development bestows legal weight on it, which in turn influences its application in environmental governance, legislative and academic discourses and by the courts in the administration of environmental justice.

In determining the legal status of sustainable development, it is required to identify its position within the hierarchy of environmental law. Judge Trindade rightly pointed out that while a great part of contemporary expert writing continues, somewhat hesitantly, to refers to sustainable development as a 'concept' there are also those who seem today to open- mindedly admit that it has turned out to be a general principle of international law.[27]Olawuyi argues that sustainable development has become one of the recognized general principles of international environmental law, and there is evidence to suggest that it is maturing into a custom of international law.[28] Interestingly, few commentators support the idea that sustainable development has attained the status of international custom and this article is strongly in agreement with such view.

The Nexus between the Environment and the Legal Status of Sustainable Development

The millennium development goal report 2005 (2005 MDG) on the progress made toward achieving the MDGs affirms that most countries are committed to the principles of sustainable

[23] C Voigt, 'Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law' (Martinus Nijhoff, 2015).
[24]L Fagbohun, 'Law and Policy in Nigeria : The Deliemma of the Concept of Sustainable Development' (Lagos State University Centre for Environment and Science Education 1991) 1, 37 - 38
[25]M Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8(4) European Journal of International Law' 566.
[26] J M Gillroy, 'Adjudication Norms, Dispute Settlement Regime and International Tribunals: The Status of Environmental Sustainability in International Jurisprudence' (2006) 42 (1) Stanford Journal of International Law 1,2.
[27] Argentina v. Uruguay (2010) ICJ Report 125 particularly (138) 177.
[28] D S Olawuyi, The Principles of Nigerian Environmental Law (AfeBabalola University Press 2015) 75.

development and have incorporated them into their national policies and strategies.[29] This is an indication of a general state practice to integrate sustainable development into national policies and strategies. Regrettably, the 2005 MDG went further to state that this has not resulted in sufficient progress to reverse the loss of the world's environmental resources. The 2015 millennium development goal's report[30] reveals that efforts to ensure global environmental sustainability have shown mixed results throughout the last two decades. Certainly, more people now have access to improved source of water and sanitation facilities, consumption of ozone-depleting substances have reduced by 98 percent. The proportion of urban population living in slums in the developing regions has reduced from 39 percent in 2000 to about 30 percent in 2014, and protected areas of terrestrial and inland waters have increased to 15.2 percent while 8.4 percent of coastal marine areas under national jurisdiction have come under protection. These notwithstanding, much work remains for the post-2015 development agenda, overexploitation of marine living resources, threatening aquatic ecosystems and livelihoods, protection of only 0.25 percent of the high sea areas, deforestation, increase in the absolute number of urban residents living in slums, water and food insecurity, and risk of extinction of many plant and animal species.

The implication of all these is that the integration of sustainable development into national policies and programmes has not been very effective, given the extent of environmental problems solved. This is attributed to a number of reasons, one of which arguably is the legal status of sustainable development or the legal weight assigned to the concept.

Contrary to this perspective, Judge Trindade in his separate opinion in Pulp Mills on the Rivers Uruguay[31] argues that 'the attitude of some of contemporary expert writings trying to see if a given principle, such as sustainable development, has attained the status of a norm of customary international law, or has been recognized in conventional international law, simply misses the point, and is conceptually flawed'.[32]

He mentioned as an example the brief invocation, in passim, of the principle of good faith in the majority judgment in the Pulp Mills case (in relation to the operation of the mechanisms of cooperation under the 1975 Statute of River of Uruguay) and immediately linking such brief invocation of the principle to customary international law, simply misses the point, and is conceptually flawed;.[33] Key position[34] and standing above[35] which Trindade or other authors referred to by him sued in describing general principles of law connote power relations between general principles and rule of custom or norm of law. Probably, little oversight on the part of Judge

[29]United Nations, Millennium Development Goal Report 2005 (United Nations 2005) 30.

[30] United Nations, The Millennium Development Goals Report 2015 (United Nations 2015) 52-61.

[31]Argentina v Uruguay (2010), Judgment, I.C.J. Reports 14.

[32]Ibid (17) 132.

[33](2010) Judgment, I.C.J. Report 14 (145) and (175) 191.

[34] Ibid (39) 141

[35]Ibid (41).

Trindade, he does not inform the parties in the case, his fellow judges, and readership, on the exact power relationship existing between general principles and rule of custom or norm of law and whether the character of a general principle could for whatever reason change. In fact, the existence of a hierarchy in international and domestic law is indubitable. This has been the case with international law since the introduction of the concept of *jus cogens* into international law, pursuant to the Vienna Convention which provides that peremptory norm of general international law.[36] For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Similarly, Article 103 of the United Nations Charter,[37] gives precedence to obligations under the charter over commitment under other treaties, and obligations ergaomnes,[38] International Law has established a category of ergaomnes (Latin word meaning toward all') obligations, which apply to all states. Whereas in ordinary obligations the defaulting state bears responsibility toward particular interested states, which are parties to the treaty that has been breached. Ergaomnes, is closely bound up with the concept of *Jus Cogens*.[39] The use of concepts such as fundamental law, the supremacy of the constitution or basic norm in Kelson's pure theory of law in municipal law strongly suggests the existence of a hierarchy of municipal laws. In *Attorney-General Abia State v Attorney General Federation*,[40]the Supreme Court of Nigeria, referring to Section 1(1) and 1(2) of the 1999 Constitution explained the hierarchy of Nigerian laws thus;

The constitution is called the ground norm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. By the provisions of the constitution; followed by the National Assembly come next to the Constitution; followed by those made by the House of Assembly of a State. By virtue of section 1(1) of the Constitution, the provisions of the Constitution take precedence over any law enacted by the National Assembly even though the National Assembly has the power to amend the Constitution itself.

It is important to note that there is no doubt that graduation of norms is a necessary feature of international law and municipal legal system.[41] For instance, in the North Sea Continental Shelf

[36] Vienna Convention on the Law of Treaties, 1969, Article 53

[37] UN Charter, Article 103.

[38]International Law; Hierarchies of sources and norms, encyclopedia Britannica, www.britannica.com/topic/erga-omnes> accessed June 30, 2020.

[39] P B Stephan, "The Political Economy of *Jus Cogen*' (2011) 14 (4) Vanderbilt Journal of International Law 1073, 1081-1103.

[40](2002) 6 NWLR (Pt 763) 264.

[41] J H HWeiler and L P Andrea, 'The Structure of Change in International Law or is There a Hierarchy of Norms in International Law' (1997) 8 (4) European Journal of International Law 545, 564.

Cases,[42] the ICJ recognized the fact that a rule while only conventional or contractual in its origin can pass into the corpus juris of international law. In Nigeria, the decisions of the Supreme Court on some of the provisions of chapter II of the 1999 constitution provides a good example of graduation of norms at the municipal level. Chapter II of the 1999 constitution deals with the fundamental objectives and directive principles of State policy.[43] Its cardinal characteristics is the non-justifiability by virtue of section 6(6) (c) of the 1999 constitution, which provides to the effect that judicial powers shall not, except as otherwise provides in the constitution, extend to any issue or question as to whether any question, act of omission by any authority or person, any law or any judicial decision is in conformity with Chapter II. In Olafisoye's case[44] the Supreme Court decided that the provisions of Chapter II of the 1999 Constitution are justiciable if the National Assembly legislates on them based on the provisions of Item 60(a) of the exclusive Legislative List of the Second Schedule to the 1999 Constitution. With the enactment of the NESREA Act, which under section 1(1) established the Agency; section 1(2) vests the Agency with the power to enforce environmental standards, regulation, rules, policies and guidelines, one cannot rightly argue again that environmental obligation of the State under section 20 of the 1999 Constitution is not justiciable. In effect, the ordinary legal provision on the environment entrenched in section 20 of the 1999 Constitution has transmuted to a legal obligation or duty by virtue of section 1(1) and (2) of the NESREA Act.

The Impact of Courts Decisions and Treaties towards the Enhancement of Sustainable Development in Nigeria and across Africa

The larger proportion of legal scholars' view on the impact of African Commission and African Court Jurisprudence on domestic courts and national law is that very few domestic courts in Africa refer to them. Furthermore, notwithstanding that Nigeria has incorporated the African Charter into domestic law; Nigerian courts are yet to explicitly refer to case law of regional courts in Africa. However, in a recent judgment of the Nigerian Supreme Court in *Centre for Oil Pollution Watch v NNPC,* the court expressly relied on the provisions of Article 24 of the African Charter, section 33(1) of the Nigerian Constitution and section 17 (4) of the Oil Pipelines Act to hold that the right to environment can be justiciable in Nigeria and hence, these instruments recognized the fundamental rights of Nigerians to a clean and healthy environment[45].

Arguably, things are changing and some domestic courts in Africa have expressly referred to the case law from the African Commission and African Court. Dinokopila avers that domestic courts that have referred to the African Commission in their jurisprudence includes courts in South Africa, Ghana, Zimbabwe, Gambia, and Kenya.[46] For example, some municipal courts have relied

[42] North Sea Continental Shelf, Judgment, (1969) ICJ Report 3.

[43] Chapter II of the CFRN, 1999 (as amended); CFRN, 1999, S. 20.

[44] *Adebiyi Olafisoye v Federal Republic of Nigeria* (2004) 4 NWLR (Pt 864) 580.

[45] *Center for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019) 5 NWLR 518.

[46] B Dinokopila 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in Charles Fombad (edn) Constitutional Adjudication in Africa (Oxford University Press, 2017) 232

on the African Charter and African Commission's decisions or case law to find breaches of human rights.[47] For example, in 2015, the High Court of Kenya in Eric Gatari case relied on provisions of the African Charter and African Commission case law on freedom of association to protect the rights of sexual minorities in Kenya.[48] Furthermore, the Supreme Court of Zimbabwe in *Kachingwe and Others v Minister of Home Affairs and Commissioner of Polic*e suggested that the decisions of the African Commission were of persuasive authority in the country.

Academics and legal pundits argue that the impact of the African charter has been modest but significant on the continent.[49] In Nigeria and South Africa, several litigants rely on the charter to ventilate their rights in a plethora of cases. Arguably, a major limitation or barrier to the enforcement of the African Charter is the way intentional law/ratified treaties are received or implemented in Member State. This is exemplified by the so-called 'dualist and monist' divide. In dualist countries, treaties are not applied nationally, unless incorporated via municipal legislation. On the other hand, in monist countries, international law applied directly. However, the dualist-monist dichotomy has been argued to be inappropriate to analyse the reception of international law by African countries.[50] The overarching view is that in Africa, civil law countries are monist and common law countries are dualist in nature. However, this does not always reflect the reality or practice in some of these countries. For example, even though Kenya is a 'dualist' country, it has recently amended its constitution to make ratified treaties directly applicable without the need for parliamentary domestication.[51] Furthermore, in monist states such as Cote d'Ivoire, the African Charter and ratified international instruments or treaties are said to have a higher status than its constitution and in Ethiopia, international human rights treaties including the African Charter 'have a status higher than ordinary legislation, and are equal in status to the Constitutions. Despite the criticisms of the monist-dualist dichotomy in Africa, once a dualist state incorporates or transforms a treaty into domestic law, it is free to assign which ever status it would give to it. The monist/dualist issues remain relevant because dualist states need a 2-step process: ratify and incorporate, whilst in monist states only one-step needed: once ratified it applies automatically – but may still be subject to the national constitution. Notwithstanding, these advances by the African Charter on the continent, some parts of Africa are still mired in gross violations of environmental and human rights. Hence, African countries should not just sign and ratify (and in some instances, domesticate the African Charter, they should endeavour to respect and enforce it. otherwise, the African Charter will remain a paper tiger.

[47] M Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' 7 (1) International Human Rights Law Review 1, 18-19.

[48] Eric Gitari v. Non-governmental Organization Coordination Board and 4 Others, Petition 440 of 2013, (2015) eKLR (High Court of Kenya at Nairobi, 24 April, 2015)

[49] O Okafor, 'The African Human Rights System and International Institutions' (Cambridge University Press 2007).

[50]M Barnard, 'Legal Reception in the AU against the Backdrop of the Monist/Dualist Dichotomy' 48 (1) (2015) *Comparative and International Law Journal of Southern Africa* 144.

[51] V Ayeni, 'The Impact of the African Charter and Women's Protocol in Nigeria' in Centre for Human Rights, The Impact of the African Charter and Women's Protocol in selected African States (PULP 2016)

Notwithstanding the fact that Nigerian courts are reluctant to expressly cite African Commission and African Court in their judgments, the African Charter has had a significant influence on Nigerian Courts and laws. For instance, in a recent Supreme Court decision in Nigeria, some of the Justices in Center for Oil Pollution Watch v. Nigerian National Petroleum Corporation explicitly referred to Sections 20 and 30 of the Nigerian Constriction, Section 17(4) of the Oil Pipelines Act and Article 24 of the African Charter to hold that the right to a clean and healthy environment can be recognized under the Nigerian Law.[52] This case has liberalized locus standi of NGOs in environmental matters in Nigeria thereby improving access to environmental justice and promoting sustainable development for litigants, victims, and communities in Nigeria. The case under consideration is the first time that the Nigerian Supreme Court justified the right to the environment and declared same justiciable in Nigeria. This judgment creates a binding judicial precedent in Nigeria and all subordinate courts in the country are expected to follow it. Under Nigerian law, socio-economic rights are neither justiciable nor enforceable, unlike civil and political rights. Hence, the decision in the COPW and NNPC has made environmental right a socio-economic right, justiciable in Nigeria. It should be however noted, that these comment by the Supreme Court Justices on right to environment were made obiter and right to environment was not an issue directly before the court. On the other hand, this decision can serve as a Launchpad or judicial springboard to further develop the evolving environmental jurisprudence around economic and social rights in Nigeria, thereby giving sustainable development concept a stronger and more solid footing.

The Supreme Court in the case under review further stated that being a domesticated treaty, the African Charter is part of Nigerian law and as long as Nigeria remain a signatory to the African Charter and other relevant international treaties on the environment, the Nigerian Courts would continue to protect and vindicate the human rights entrenched in such international mechanisms.[53] A major criticism of the decision is that the court did not refer to SERAC case or case law of the African Commission or Africa Court. Arguably, reference or reliance on the SERAC case and the jurisprudence of regional courts, including sub-regional judiciaries would have added more nuance or clarity to environmental right analysis in the judgment. Notwithstanding the criticism of the judgment in the case under review, the case evidences the extent and the positive impact of the African charter on domestic law in sustainable development in Nigeria. Although, the Supreme Court in the Oil Pollution Watch case did not expressly refer to the SERAC decision, one of the Justice (Justice Nweze) in a public lecture given in 2017, explicitly mentioned reliance on the SERAC case as one of the strategies of extending environmental rights in Nigeria.[54] Justice Nweze delivered the leading judgment in the Oil Pollution case. Arguably, the SERAC case was a persuasive influence on Justice Nweze, notwithstanding that he and the other Justices did not expressly refer to the SERAC case and other relevant case law from sub-regional and regional

[52]*Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019) 5 NWLR 518, 587, 597-598

[53]Ibid.

[54] C CNweze, 'Constitutional Adjudication for Democratic Consolidation in Nigeria: The role of The Supreme Court' 16th Justice Idigbe Memorial lecture, which held at the University of Benin (UNIBEN, 2017) 34.

courts in the judgment in Oil Pollution case.[55] Also, Justice Nweze in his public lecture enjoined the National Assembly in Nigeria 'to rise to the occasion and constitutionalise socio-economic rights as some African countries have done. This is the only way of eradicating poverty and illiteracy; confronting diseases and mitigating hunger and hardship in the land.

Many domestic courts in Africa are yet to cite the precedents of the African Court. For example, the South African Constitutional Court is one of the most international law-friendly courts in Africa.[56] However, the Constitutional Court cited the judgment of the African court for the first time in June, 2020.[57] Thus, Dinokopila argues that there is little evidence of the use of the African Court by domestic courts in Africa. This is arguably due to the fact that the African Court, in comparison with the African Commission is a recent development. A major problem is the lack of information on the number of domestic courts that have cited the precedents of the African Court on domestic courts in Africa.

Legal Status of Sustainable Development under the Nigerian Environmental Governance

It is easy for any environmental expert to claim that sustainable development has been integrated into the Nigerian corpus juris, but determining its legal status or weight may not be as easy as expected. The 1999 constitution contains environmental provisions, but there is no specific provision on sustainable development. Since it is not possible to examine the legal status of sustainable development in the plethora of Nigerian legislation on the environment,[58]it is necessary to concentrate on the national policy on environment and the NESREA act because of their overarching effect on all aspects of the environment. This section also examines the status of sustainable development in the desertification control and drought mitigation regulations and the wetland, River Banks and lake shores protection regulations made under the NESREA act.

National policy on the environment: The first national policy on the environment (NPE) launched by the Federal Government on 27 November 1989 was drastically reviewed in 1999 with the aim of incorporating new concepts, principles, and changes into the environmental governance adopted in the Rio Declaration on environment and development and the other 1992 Rio instruments. Paragraph 2 of the NPE states in general term that the goal of the NPE is to achieve sustainable development in Nigeria.[59] Paragraph 3.0 of the NPE categorically states that the NPE is basically a programme of actions rooted in a conceptual frame within which the linkages

[55] C CNweze, 'Justiciability or Judicialization: Circumventing Armageddon through the Enforcement of Socio-economic Rights' 15(1) (2007) African Yearbook of International Law Online/Annuaire African de droit international Online 107

[56] D Tladi, 'Interpretation and international law in South African Courts: The Supreme Court of Appeal and the Al Bashire Saga' 16(2) (2016) *African Human Rights Law Journal* 310,311.

[57] The Constitutional Court in *New National Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19)* (2020) ZACC 11 (11 June 2020) made remarkable reference to the decision of the African court in *Mtikila v. Tanzania.*

[58] E EOkon, 'The Constitution and the Protection of the Environment in Nigeria' in Azinge Epiphany, and AdedejoAdekunle, (edn) Administration of Justice and Good Chief Justice of Nigeria (NIALS 2011) 323-369.

[59]NPE, Paragraph 2(a-e)

between environmental problems on the one hand and their causes, effects, and solutions, on the other hand, can be discerned.

Describing the policy as a programme of action agrees with most dictionary definitions of policy as a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions. Understanding policy in this context is also not too different from Dworkin's definition of policy as that stranded that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.[60] The social feature includes the environment.
By expressing sustainable development as a programme of actions in the NPE it is at best a soft law. This must have informed the federal government's decision to clearly list in paragraph 3.0(a-e) of the NPE the different ways of achieving the policy and by extension sustainable development. One of the ways is to give it legal clothing. This is the basis of paragraph 3.0(d) of the NPE which states thus 'enactment of necessary legal recommended by this policy'. To actualize the provision paragraph 3.0(d) of the NPE, the NESREA Act and other environmental legislation were enacted. Section 7(a) of the NESREA Act stipulates as part of the Agency's functions the enforcement of policies (NPE inclusive) on environment matters.

NESREA Act: The legal status of sustainable development in the NESREA Act will ordinarily depend on whether it is placed in the recital or the operative part. Incidentally, the drafters and legislators of modern statutes have jettisoned the use of preambles and recitals except in constitutions and in rare cases when domesticating treaties. In line with this new trend, the NESREA act does not have recital. This implies that any provision on sustainable development will be in the operative part of the Act. In that case, the status of sustainable development will depend on whether it is expected in a general or specific mandatory language. Section 1(2) of the NESREA Act provides that the agency shall have, among others things, the responsibility for 'the … and sustainable development of Nigeria's natural resources… in general'. Going by this provision, sustainable development is expressed as a rule of law, which creates a duty for the agency to ensure its enforcement, particularly when a combined effect of sections 2(a) and 7(a) the NESREA Act provides that the agency shall be the enforcement agency for the purpose of ensuring compliance with the sustainable development of Nigeria's natural resources.

The crucial question that begs for answer then is whether sustainable development is expressed in section 1(2) of the NESREA Act in general or specific terms bearing in mind that neither section 37 nor any other section of the NESREA Act specifically defines 'sustainable development'. Regrettably, the national assembly did not adopt its common meaning as publicized in the Brundtland Commission Report. Meanwhile, as shown in the introductory part of this article, there is still an unresolved controversy regarding the exact meaning of sustainable development. As it stands, in the NESREA Act, sustainable development is the rule of law but expressed in general

[60] R M Dorwkin, The Model of Rules. Yale Law School Legal Scholarship Repository, faculty Scholarship Series, Paper 3609 (1967) 23.http://digitalcommons.law.yale.edu/fss_papers/3609>accessed 28 June 2020

terms. Considering its diverse meanings, it has some elements of uncertainty. That reduces its rule potency thus pushing it to the side of a general principle or principle of law. According to Dworkin, a principle means a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. On the other hand, rules are applicable 'in an all-or-nothing' standards.

In Duncan's perspective, the two great social virtues of formally realized rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty.[61] The two are distinct but overlapping. Official arbitrariness means the sub rosa use of the criteria of decision that are inappropriate given the underlying purpose of the rule. These range from corruption to political bias. Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the state, this increases the likelihood that private activity will follow the desired pattern.

Indeed, the power of the agency to enforce sustainable development of Nigeria's natural resources could be hindered by non- legal factors, especially politics and economics. These are the major reasons why the NESREA Act is very explicit that the agency's functions do not extend to oil and gas sector.[62] Uncertainty in the meaning of sustainable development means that both the agency and individuals or organizations it may prosecute can raise conflicting claims as well as resort to factors not contemplated by the agency. For instance, the requirement of sustainable development, which is more of a procedural element of sustainable development, could be an issue of conflict. Meanwhile, the effectiveness of substantive legal provisions to protect the environment hinges upon accompanying procedural provisions to facilitate their enforcement.[63]

Ascertaining the legal status of sustainable development under the NESREA Act is further complicated when viewed from the perspective that sustainability of natural resources or the environment is expressed as sometimes an objective, other times a purpose or a principle in some of the regulations made under the NESREA Act, for instance, regulation 2 of the national environmental (Desertification control and drought mitigation) regulations, 2011 expressly states that the objectives of part 1 (General provisions on desertification control) of the regulations are to…

a. Encourage the sustainable use of fuel wood through the use of more efficient and energy saving devices with a view to encouraging their wider use and adoption at all levels…

b. Ensure sustainable agriculture and range management practices, improved animal husbandry and management of water resources in the desertification prone areas with a view to

[61]K Duncan, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1985.

[62]NESRA Act, Section 7(g), 8(g) (k)(i)(m) (n) and 30(4).

[63]P Kameri-Mbote and C Odore, 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009-2010) 10 Sustainable Development Law and Policy 31- 38 and 83-84, 35.

achieving sustainable livelihood, poverty reduction and wealth creation; through introduction of modern and affordable production technologies to resource poor farming communities.
In contrast, regulation 3 of the national environment (Wetland, river banks and lake shores protection) regulations, 2009 provides that 'the following principles shall be observed in regulating all wetlands;
a. Wetland resources shall be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological functions and services;
The interesting aspect of expressing sustainability as objectives or principle in the two mentioned regulations is that it is not expressed as a political statement. Rather, it is expressed in a precise manner and in the form of obligatory statements among other concrete lists of measurable criteria by which the effectiveness of the NESREA Act and the respective regulations are to be assessed, thus offering the legislature a unique opportunity to take a degree of control over the executive's post- legislative conduct.

The Persuasive Influence of SERAC's Case in Nigeria and Across Africa
The African Commission in the SERAC case made five orders or recommendations that the Nigerian government should adhere to.[64] One of the orders was a directive that the Nigerian government 'stops all attacks on Ogoni communities' and to permit 'citizens and independent investigators free access to the territory'. During the SERAC case, the Nigerian government accepted that it had exacerbated the environmental problems in the Niger Delta. The government posited via a note verbale delivered to the African commission that 'there is no denying the fact that a lot of atrocities were and are still being committed by oil companies in Ogoni land and indeed in the Niger Delta area'.[65] The Nigerian government further averred that it had initiated remedial mechanisms to alleviate the suffering of the Ogoni people. These include the creation of the Federal Ministry of Environment, Niger Delta Development Commission (NDDC) and a judicial commission of inquiry to investigate the issues of human rights violations amongst other measures to ameliorate the impacts of the activities of the oil IOCs on the Niger Delta and the environment.[66] The Nigerian government in recent years has established more interventionist agencies such as the Ministry of Niger Delta Affairs, the National Environment Standards and Regulations Enforcement Agency (NESREA) and National Oil Spill Detection and Response Agency (NOSDRA) amongst others and measures (for example , the Amnesty programme for repentant militants) to ameliorate the suffering in the Niger Delta, however, some of these measures cannot be directly traced to the SERAC decision and all the orders or recommendations in the SERAC case are yet to be fully implemented in Nigeria. The general consensus in academic literature is that the aforementioned governmental initiatives have been ineffectual.[67] The United

[64]F Viljoen, 'The African Human Rights System and Domestic Enforcement' in Malcom Langford et al (edn) Social Rights Judgments and the Politics of Compliance: Making it Stick (Cambridge: Cambridge University Press, 2017) 352.
[65]SERAC Case, Para. 42
[66]SERAC Case, Para. 30
[67]N Ojukwu- Ogba, 'Legislating Development in Nigeria's Oil-Producing Region: The N.D.D.C. Act Seven years on' 17(10 (2009) African Journal of International and Comparative law 136.

Nations Environment Programme (UNEP) environmental assessment on Ogoni land was conducted at the behest of the Nigerian government and two different Nigerian presidents, Goodluck Jonathan and Mohammadu Buhari have tried to implement the UNEP report and unfortunately, progress has been very slow.[68]

Following the SERAC decision, there appears to be some direct engagement by the African commission to ascertain whether the Nigeria government did fully comply with the decision. For example the African Commission concluding observations in 2008, advised the Nigerian government to establish an 'effective monitoring mechanism for the implementation of decisions of regional and domestic bodies on violations of the rights in the Niger Delta.[69] However, it is unsure, if the Nigerian government did actually get back to the African Commission on whether it explicitly implemented the SERAC decision. Notwithstanding, the criticisms of the implementation of the SERAC decision in Nigeria, it has positively impacted on sustainable development and environmental protection in the country because the Nigerian government actually created governmental agencies as a direct response to the SERAC case (as highlighted in the *note verbale).*

Furthermore, some domestic courts in Africa have directly referred to the SERAC case in their jurisprudence. For example, the South African constitutional court in *president of the republic of South Africa v Modderklip Boerdery*(*Pty*) Ltd referred to the African commission's decision in SERAC. Arguably, the constitutive Act of the AU does not explicitly promote sustainable development as a norm under the AU legal order. However, the position of this section is that an application of Verschuuren's framework on sustainable development as legal norm in international law evidences the notion that the various AU treaties on environment and regional courts have engaged in norm creation on sustainable development in Africa. Thus, sustainable development is a norm which is implicit in the Constitutive Act. The contention of this paper is that, notwithstanding that domestic and regional (including that the case-law on sustainable development in domestic, regional, and sub- regional courts can form part of the body of norms under the emergent AU law, it is suggested that this also contributes to the emergent continental legal system with superlative national qualities.

The Applicability of International Sustainable Development Instruments in Nigeria

Nigeria as a member of the international community, is taking steps together with other member states to achieve the global objective of sustainable development. Nigeria is a signatory to and has ratified a number of international treaties and conventions. These include the 1972 London convention on the prevention of Marine Pollution by Dumping of Wastes and Other matters, the

[68]Amnesty International 'Nigeria: No Clean- Up, No Justice: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoni Land, Nine Years on' (June 2020). https://www.amnesty.org/en/documents/afr44/2514/2020/en/<accessed 30 June 2020.

[69]Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria, 10-24 November 2008, para 40 https://www.achpr.org/sessions/concludingobservation?id=77<accessed 18 November 2019

1973 Washington Convention on the Control of International Trade in Endangered Species of Wild Fauna and Flora, the 1982 United Nations Convention on the Law of the Seas, the 1992 Rio Declaration on Environment and Development, the 1992 United Nations Framework Convention on Climate Change, its 1997 Kyoto Protocol and 2015 Paris Agreement, the 1993 United Nations Convention on Biological Diversity, the 1996 Comprehensive Nuclear Test Ban Treaty and the 1998 Bamako Convention on Hazardous Wastes, amongst others.

The enforcement of these international instruments within the Nigeria's jurisdiction is intrinsically linked to the status of international law vis-à-vis the municipal laws of Nigeria. While treaties undoubtedly create binding obligations on states that have signed or ratified them, the applicability of these treaties within the legal system of a state takes a different route entirely, and this route is split into two paths: monism and dualism.

States who embrace the monist approach are of the belief that international law exist in the same universal legal order as their own municipal law, and upon becoming a signatory to an international treaty, such treaty becomes automatically applicable within their jurisdiction, gaining so much influence to the point that in the event of a conflict between the international treaty and their municipal laws, the former takes precedence. On the other hand, states who take up the dualist approach believe that international law and municipal laws exist in separate legal orders and should not be mixed together. In their opinion, international law does not supersede municipal law and its application within the legal system of the state depends on whether it has been domesticated by the legislative body of that state as contained in the relevant laws.

Section 12(1) of the 1999 constitution provides that 'no treaty between the federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'. The effect of this is that Nigeria takes up the dualist approach requiring a process of incorporation for any treaty to have its provisions enforceable in Nigerian courts. In Fawehinmi's case [70] the court validated the applicability of the African Charter which was already incorporated into Nigeria's municipal law, and held that such law was binding and the courts must give effect to it just like other municipal laws within the jurisdiction of the courts.

Also, in T*he Social and Economic Right Action Centre and the Centre for Economic and Social Rights (SERAC) v Nigeria*,[71] the Applicants (NGOs) filed a complaint against the Federal Government of Nigeria at the African Commission on Human and People's Rights regarding their condoning of and lackadaisical attitude towards the environmentally degrading activities of oil companies on Ogoni land, Niger Delta area of Nigeria. The activities of these oil companies had resulted in oil spillages, contaminating the water and soil of the community, thereby depriving them of their economic sustenance and also creating health problems. The commission in interpreting Article 24 of the African Charter recognized Nigeria's domestication of the Charter,

[70]*Abacha v Fawehinmi (2000) 6 NWLR 228.*
[71]*SERAC v Federal Government of Nigeria Judgment No.ECW/CCJ/JUD/18/12.*

and held that the provisions vesting rights in the Charter could be invoked in Nigeria's courts by its citizens, thus, rendering Nigeria bound to take measures to promote environmental sustainability and prevent environmental degradation.

From the above, it is evident that the various international environmental treaties that Nigeria has signed or ratified are only applicable or can only be the basis of an action or claim before the Nigerian courts if the treaty has been incorporated into law by the National Assembly, otherwise, it remains just an international treaty, although signed but inapplicable within the Nigerian legal system. It should be noted that this attitude is however frowned at by the international community because the rationale behind signing treaties is to foster peace, unity and cooperation amongst member states and each member state is expected to enforce the provisions of the treaties in accordance with the modalities prescribed by their laws.

Thus, on the basis of Articles 26 and 27 of the 1969 Vienna Convention on Law of treaties which reiterates the *pacta sunt servanda* principle and provides that a party cannot use its municipal laws to justify its failure to perform an international obligation, where Nigeria refuses to domesticate or incorporate the various international environmental laws and treaties it has signed to, the state risks being guilty of violating an international obligation.

CONCLUSION

The concept of sustainable development presents a kind of developmental mode different from those of the past in the sense that it has embedded in it environmental consciousness such that it tries to avoid or prevent the problems of environmental pollution, degradation, social and ecological damage both on a worldwide and local scale that were caused by previous modes. Hence, it aims at preventing the exhaustion of natural resources, showing respect for the environment as well as striking a balance between the necessities to satisfy present societal needs while ensuring that future generations will have the means to satisfy their own societal needs. This can achieved through the combination of the elements of environmental governance with fairness and economic efficiency. In essence, the basic aim of sustainable development is to find a long-lasting balance in the combination of economic, social and environmental aspects of human existence in order to achieve this long-lasting balance, it becomes essential for there to be good governance which will be reflected in the implementation of policies and actions with regard to sustainable development. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it. The right to development must also be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.