

PROMOTING THE RIGHT TO A HEALTHY ENVIRONMENT THROUGH CONSTITUTIONALISM IN NIGERIA

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ABSTRACT: *Environmental degradation can have negative consequences, both expressly and impliedly, for the actual attainment of human rights. For instance, the rights to life and human dignity are only achievable where people can have access to an ecologically balanced environment devoid of degradation. Similarly, the enjoyment of other fundamental rights like food, freedom of worship, good working environment, education and health can also be affected by an unhealthy or unwholesome environment. In recognition of the vital connection between human rights and the environment, many global instruments and national Constitutions have recognised the right to a healthy environment. The 1999 Constitution of the Federal Republic of Nigeria is one of such national Constitutions that acknowledge the need to safeguard the environment. The article argues however that the non-justiciable provision of the Nigerian Constitution constitutes a serious threat to citizen's enjoyment of the right to a clean and healthy environment.*

KEYWORDS: Constitutionalism, Ecologically Balanced Environment, Sustainable Development, Environmental Right, Human Right

INTRODUCTION

Since the early 1970s, the famous provision of Principle 1 of the Stockholm Declaration has encouraged many national constitutional provisions to acknowledge the right to a clean and wholesome environment as a fundamental right under national laws.¹ Thus, at the global, regional or national levels, relevant provisions have been incorporated into instruments and Constitutions mandating the States to guarantee a healthy environment to its citizens and giving rights to them.² In 1990, the United Nations General Assembly possibly stimulated by the language of the 1983 World Commission on Environment and Development [WCED] which propagated the concept of sustainable development, admitted that all "individuals are entitled to live in an environment adequate for their health and well-being."³ The 1987 Brundland Report that was a by-product of the WCED did not only intertwine social, economic, and

¹ For an overview of such constitutional provisions, see for example, the report of the UN Commission on Human Rights, *Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, Annex III. See also generally Pallemmaerts, M. (2004). "Proceduralizing Environmental Rights: The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context," in *Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable*. United Nations Environment Programme/ The Geneva Environment Network/Swiss Agency for the Environment, Forests and Landscape, pp.15-22.

² Earthjustice. (2004). *Issue Paper: Material for the 60th Session of the UN Commission on Human Rights*. San Francisco, 2004, p. 80.

³ UN General Assembly Resolution 45/94, 14 December 1990.

environmental concerns but also recognised the "fundamental right to a healthy, life-enhancing environment."⁴

Similarly, the 1994 Draft Declaration of Human Rights and the Environment⁵ boldly asserted that "human rights, an ecologically sound environment, sustainable development" are interdependent and inseparable.⁶ The Draft Declaration further conferred on all persons the liberty from pollution, environmental degradation and activities that negatively impacts on the environment, portend danger to life, health, livelihood and well-being within or outside national frontiers.⁷ The 1981 African Charter on Human and Peoples' Rights⁸ equally identifies with the right of all peoples to "a general satisfactory environment favourable to their development."⁹

In Nigeria, though the Nigerian government under its "environmental objectives" stated under the "Fundamental Objectives and Directive Principles of State Policy" of Chapter 2 of the Constitution undertakes to protect and improve the environment and safeguard it,¹⁰ yet the potency and enforceability of the provision has been whittled down by another constitutional provision which renders the entire provisions of the said Chapter non-justiciable.¹¹

This work contends that in view of the connection between human rights and environmental concerns, it is imperative that the Nigerian government should constitutionalise and render the right to a clean and healthy environment justiciable and enforceable in the face of violations. The work would be argued from the perspective of the continued environmental degradation experienced in the Niger Delta area of Nigeria as a result of oil exploration and exploitation activities being carried out by oil companies.

Meaning of human right

There is no universally acceptable definition of the concept, human right. Different definitions of the term have been proffered by several scholars and jurists. A few of such definitions would be given here. Osita Eze, for instance, defines the concept as "demands or claims which individuals or groups make on society, some of which are protected by law and become part of the *lex lata* while others remain aspirations to be attained in the future."¹² In the view of Mike

⁴ See United Nations General Assembly. *Report of the World Commission on Environment and Development: Our Common Future*, 1987. A/42/427 of August 4, 1987, paragraph 4.5, sub-paragraph 97. Available at <https://www.google.com/ur?q=http://www.un-documents.net/our-common-future.pdf&sa=U&ved=0ahUKEwiH86PRg5rMahXJXhoKHbkcCulQFgghMAC&usg=AFQjCNGNRsd6LVZI Mafg3Fo9yF55cTNOkg>. Accessed on 19 April, 2016.

⁵ See Draft Declaration of Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex 1. Available at <https://www1.umn.edu/humanrts/instree/1994-dec.htm>. Accessed on 23 April 2016. This is one of the foremost global declarations of principles on human rights and the environment.

⁶ *Ibid*, Part I, Paras.1, 2 and 5.

⁷ *Ibid*, Part II, Para. 5.

⁸ Also known as 'the Banjul Charter.' See 1520 U.N.T.S. 217 (June 26, 1981); OAU Doc.CAB/LEG/67/3rev.5; 21ILM 58 (1982). Adopted 27 June 1981, entered into force 21 October 1986. The African Charter has been domesticated in Nigeria as required by section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria for it to have a legal binding force in the country. See generally the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, *Laws of the Federation of Nigeria* 2004.

⁹ *Ibid*, Article 24.

¹⁰ See Constitution of the Federal Republic of Nigeria 1999, section 20.

¹¹ *Ibid*, section 6(6)(c).

¹² Eze, O. (1984). *Human Rights in Africa*. London: Macmillan Press, p. 5. This definition has been a subject of criticism as the assertion that human rights are claims made by persons on the society fails to depict the actual

Ikhariale, human rights are innate in man as they are entrenched in man by a divine nature and thus, “positive law” lacks the potency of either eliminating or creating them, but rather to “protect them.”¹³

Another definition of human right is that advocated by Jack Donnelly. He stated that “[h]uman rights are a complex and contested social practice that organizes relations between individuals, society, and the state around a distinctive set of substantive values implemented through equal and inalienable universal rights.”¹⁴ He contended further that human rights exist not for a mere human existence but “for an existence that gives a deeper human moral reality.”¹⁵ Similarly, Maurice Cranston has posited that:

*[A] human right by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he is human.*¹⁶

However, it has been contended by a scholar that the question regarding whether or not a right falls within the parameter of a human right cannot accurately be resolved through the application of “standardised set of criteria.”¹⁷ Thus, he suggested that certain benchmarks would only assist in defining whether a claim meets the requirements as a human right or not.¹⁸ Accordingly, Philip Alston has recommended that human right should, *inter alia*, exhibit a fundamental significant social value; be important, inexorably to varying extent throughout a world of sundry value systems; be consistent with extant body of international human rights law; be qualified for identification by reason that it is a clarification of the United Nations Charter obligations, a reflection of customary law rules or an articulation that is declaratory of general principles of law; must be harmonious or at least not obviously discordant with States’ general practice as well as being adequately specific in a way as to give rise to recognisable rights and duties.¹⁹ In the words of Philippe Sands, human rights procedures “have begun to define the content of participatory rights in the environmental domain.”²⁰

Evolution of environmental right under international environmental law

It is an acknowledged fact that at the time when the United Nations Organisation was established in 1945, the issue of environmental pollution was neither regarded as a domestic

attribute of human rights as “entitlements of human beings by the mere fact of their humanity.” Osita Eze’s definition obviously ignores the fact that human rights are inherent and inalienable. See Ogbo, O.N. (2003). *Human Rights Law and Practice in Nigeria* (2nd Revised Edition). Enugu: Snap Press Ltd., p. 3.

¹³ Ikhariale, M. (1995). 5 *Journal of Human Rights Law Practice*, p.58, cited in Ogbo, O.N. (2003). *Human Rights Law and Practice in Nigeria*, *ibid* at p. 4.

¹⁴ Donnelly, J. (2005). “Human Rights.” Working Paper No. 23. Available at <http://www.du.edu/gsis/hrhw/working/2005/23-donnelly-2005.pdf>. Accessed on 18 April 2016.

¹⁵ Donnelly, J. (1985). *The Concept of Human Rights*. New York: St. Martin’s Press, p. 39.

¹⁶ Cranston, M. (1962). *Human Rights Today*. London: Ampersand Books, p.40. See also Donnelly, J. (1985). *The Concept of Human Rights*, *ibid*, pp.1-2.

¹⁷ Gibson, N. (1990). “The Right to a Clean Environment.” 54 *Saskatchewan Law Review*, 6 at p. 7.

¹⁸ *Ibid*, p.6.

¹⁹ Alston, P. (1984) “Conjuring Up New Human Rights: A Proposal for Quality Control.” 78 *American Journal of International Law*, 607 at pp.614-615. See also Gibson, N. (1990). “The Right to a Clean Environment,” *ibid*.

²⁰ See Sands, P. (2004). “Human Rights and the Environment,” in *Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable*. United Nations Environment Programme/ The Geneva Environment Network/Swiss Agency for the Environment, Forests and Landscape, p.28.

danger nor deemed as a global problem that could attract worldwide conflict capable of adversely affecting human health, socio-economic wellbeing and stability. This point finds support in the fact that in the entire United Nations Organisation's Charter,²¹ the word "environment" is absent.²²

However, in the years after the coming into existence of the United Nations Organisation, issues bothering on the need to guarantee environmental protection and rights have taken the front burner.²³ For instance, in the past few years, the world has seen various accidental and deliberate incidences of severe environmental degradation such as the *Torrey Canyon* incident in 1967,²⁴ the 1978 *Amoco Cadiz* tanker oil spill,²⁵ the environmental assault occasioned by late Iraqi strongman, President Saddam Hussein, which turned the Kuwaiti oil fields into a scorched wasteland,²⁶ the 2010 Gulf of Mexico oil spill²⁷ and the recent oil spillage in the Sundarbans' Shela River in Bangladesh.²⁸

In the face of this unfortunate scenario, it is worthy of note that the tendency towards constitutional acknowledgement of the right to a healthy environment first gained recognition at a global forum which took place in 1972 during the United Nations Conference on Human Environment.²⁹ It was proclaimed that "man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life

²¹ The Charter of the United Nations Organisation was signed on 26 June 1945 in San Francisco at the conclusion of the United Nations Conference on International Organisation. It came into force on 24 October 1945.

²² French, H. "The Role of the United Nations in Environment Protection and Sustainable Development." *Encyclopedia of Life Support System*. Available at <http://www.eolss.net/Ess-sampleAllChapter.aspx>. Accessed on March 16, 2014.

²³ A United Nations Special Rapporteur, Mrs. Fatma Ksentini, had noted in her report, which was a product of a study commissioned by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, that the condition of the environment in modern times has been identified as a global challenge and consequently should be tackled internationally "in a co-ordinated and coherent manner and through the concerted efforts of international community." See the Final Report by Mrs. Fatma Zohra Ksentini, E/CN.4/Sub.2/1994/Corr.1, Para. 117. See also French, H. "The Role of the United Nations in Environment Protection and Sustainable Development." *Encyclopedia of Life Support System*, *ibid*.

²⁴ 6 ILM, 1967, p. 480.

²⁵ See *BBC on This Day* (1978, March 24). "1978: Tanker Amoco Cadiz splits in two." Available at: <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid2531000/2531211.stm>. Accessed on 7 May, 2014.

²⁶ See Chilcote, R. (2003, January 3) "Kuwait still recovering from Gulf War fires." Available at: <http://edition.cnn.com/2003/WORLD/meast/01/03/sproject.iqr.kuwait.oil.fires/>. Accessed on March 18, 2014.

²⁷ See generally, United Nations Environment Programme (2010, August). "The Gulf of Mexico Oil Spill: The World's Largest Accidental Offshore Oil." Available at: <https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?articleid=65>. Accessed on March 21, 2014. See also Centre for Biological Diversity (2010). "Gulf Disaster: End Offshore Drilling Now." Available at: <http://www.biologicaldiversity.org/>. Accessed on March 21, 2014.

²⁸ See "Bangladesh oil spill threatens rare dolphin." *The Punch*. (2014, December 12). Available at <http://feedproxy.google.com/~r/punchng/NEWS/~3/rOzWAENLmhs/>. Accessed on December 12, 2014.

²⁹ Held at Stockholm from June 5 to 16, 1972. The Conference adopted what has now been popularly called "the 1972 Stockholm Declaration," a set of 26 Principles aimed at inspiring and guiding "the peoples of the world in the preservation and enhancement of the human environment." See *Report of the United Nations Conference on the Human Environment*, Stockholm, June 5-16, 1972, U.N.Doc. A/CONF.48/14/Rev. 1, U.N. Sales No.E.73.II.A.14, (1972). See also UN DOC. A/CONF/48/14/REV.I. See also 11 I.L.M. 1416 (June 16, 1972). Available also at: <http://www.unep.org/Document.Multilingual/Default.asp?documentid=97&articleid=1503>. Accessed on January 17, 2014.

itself.”³⁰ Principle 1 of the Declaration balances man’s right with his obligation to protect the environment. It posited that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” Consequently, it declared that man has a “solemn responsibility to protect and improve the environment for present and future generations.”

Similarly, another “soft law,” the 1992 Rio Declaration on Environment and Development,³¹ in recognising the sovereign right of States, in accord with the Charter of United Nations and the principles of international law to exploit their own natural resources pursuant to their own environmental and developmental policies,³² postulated that sustainable development is essential because of human beings and as a result, *homo sapiens* “are entitled to a healthy and productive life in harmony with nature.”³³ In essence therefore, the maintenance of a safe, adequate, clean and healthy environment is crucial to man’s well-being and to a meaningful enjoyment of his fundamental human right, including the right to life itself. The 2002 World Summit on Sustainable Development held in Johannesburg also admitted the attention being given to the conceivable connection between environment and human rights.³⁴

Although the United Nations has not so far expressly professed the reality of a right to a clean and satisfactory environment regardless of suggestions for it to do so,³⁵ it is nonetheless, a welcome development that the right to an adequate environment has been acknowledged under the 1948 Universal Declaration of Human Rights,³⁶ the International Covenant of Economic, Social and Cultural Rights³⁷ as well as under the Convention on the Right of the Child³⁸ and

³⁰ See Proclamation 1 of the 1972 Stockholm Declaration.

³¹ 1992 Declaration of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev. I, *Report of the United Nations Conference on Environment and Development*, Vol.1, New York. See also Rio Declaration on Environment, United Nations Conference on Environment and Development, UN.Doc. A/CONF.151/6/Rev.1, (1992), reprinted in 31 *International Legal Material* 874 (1992). A text of the 1992 Rio Declaration is also available online at <http://habitat.igc.org/agenda21/rio-dec.html>. Accessed on 27 December 2013.

³² *Ibid*, Principle 2.

³³ *Ibid*, Principle 1. Susan Glazebrook has however argued that the emphasis on sustainable development at Rio de Janeiro conference was because of the inability to arrive at an agreement on the insertion of a clause on the right to environment during the drafting of the Rio Declaration. See Glazebrook, S. “Human Rights and the Environment.” *Human Rights in the Pacific*, 293 at pp. 297-298. See also Shelton, D. (1992). “What Happened in Rio to Human Rights?” 3 *Yb Int’l Env L* 75 at p.82.

³⁴ See *Johannesburg Plan of Implementation*. Available at: <http://www.johannesburgsummit.org>. See also generally Perrez, F. X. (2003). “The World Summit on Sustainable Development: Environment, Precaution and Trade - A Potential for Success and/or Failure.” 12 *Review of European & International Environmental Law* (RECIEL) 12-22.

³⁵ Gibson, N. (1990). “The Right to a Clean Environment.” 54 *Saskatchewan Law Review*, 6 at p. 7. See also Alston, P. (1984) “Conjuring Up New Human Rights: A Proposal for Quality Control.” 78 *American Journal of International Law*, 607 at p.612.

³⁶ See Article 25(1) which provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family...”

³⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entered into force on 3 January 1976, in accordance with Article 27. Specifically the ICESCR recognises, *inter alia*, the right to an adequate standard of living (Article 11[1]); the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12[1]); and the right to the improvement of all aspects of environmental and industrial hygiene (Article 12[2][b]).

³⁸ Adopted by the United Nations General Assembly on 20 November 1989. The Convention in consideration and recognition of the inherent dignity and of the equal and indisputable rights of all members of the human family as the bedrock of freedom and peace in the world enjoined in its Article 29 (1)(e) that the education of the child shall be directed towards the “development of respect for the natural environment.” However, Article XI (2)(g) of the

a number of other Constitutions of various countries of the world, some of which would be examined in this article.

Is environmental right a human right?

Regardless of their distinct early developments, human rights law and environmental law share a significant identical component. Both are considered as a “challenge to, or limitation on, the traditional understanding of State sovereignty as independence and autonomy.”³⁹ Even from contemporary standpoint, it is evident that human rights and the environment are intrinsically interweaved, as the rights to life and dignity of human persons, *inter alia*, depend on protecting the environment as the foundation for all life.⁴⁰ The interlink between the condition of the human environment and the enjoyment of fundamental human rights was first acknowledged by the United Nations General Assembly towards the end of the 1960s.⁴¹ In a similar manner, the 1992 Rio Declaration recognised that human beings are entitled to a healthy and productive life in harmony with nature as well as the right of appropriate access to environmental information and the opportunity to public participation in environmental decision-making.⁴²

Yves Lador has also stressed the fact that human rights cannot be safeguarded without the protection of the environment where people reside and that environmental rights can only be realised when human rights are respected. According to the scholar, the twin areas of human and environmental rights are integrally connected and should therefore be “approached in a coherent and co-ordinated way.”⁴³ He submitted that the absence of an ecologically healthy environment can correspondingly breach other rights such as the right to health or to food and deprivation of children from enjoying their rights to education.⁴⁴ Joanna Razzaque also

OAU Charter on the Rights and Welfare of the Child provides on the other hand that the education of every child shall be directed in such a manner as to “the development of respect for the environment and natural resources.”

³⁹ Perez, F. (2004). “Key Questions Concerning the Human Rights and Environment Debate-An introduction,” in *Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable*. United Nations Environment Programme/ The Geneva Environment Network/Swiss Agency for the Environment, Forests and Landscape, p.4. See also Reisman, W. M. (1990). “Sovereignty and Human Rights in Contemporary International Law.” 84 *American Journal of International Law* 866.

⁴⁰ Perez, F. (2004). “Key Questions Concerning the Human Rights and Environment Debate-An introduction, *ibid*.”

⁴¹ See United Nations General Assembly Resolution 2398 (XXII) of 1968. Available at

⁴² See *Rio Declaration on Environment and Development*, Principles 1 and 10; 31 I.L.M. 876 (1992).

⁴³ See generally Lador, Y. (2004). “The Challenges of Human Environmental Rights,” in *Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable*. United Nations Environment Programme/ The Geneva Environment Network/Swiss Agency for the Environment, Forests and Landscape, pp.7-13.

⁴⁴ *Ibid* at p.8. See also See Adeoye, G. (2013, June 14). “Lamentations of Niger Delta villagers: We no longer get fishes to catch in our creeks.” *The Punch*, where a parent lamented that keeping her children in school had become increasingly challenging due to the effect of oil pollution in her community. Available at <http://www.punchng.com/feature/lamentations-of-niger-delta-villagers-we-no-longer-get-fishes-to-catch-in-our-creeks/>. Accessed on 15 June 2013. See also See Human Rights Watch (1999, January). *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, at p.60, where it was stated that “[e]ven a small leak can thus wipe out a year's food supply for a family, with it wiping out income from products sold for cash. The consequences of such loss of livelihood can range from children missing school because their parents are unable to afford the fees, to virtual destitution.” Retrieved from <http://www.hrw.org>. Accessed on March 31, 2013.

underscored the point that “the recent trend of case law suggest that it is difficult to have a clear-cut division between human rights cases and environmental cases.”⁴⁵

Razzaque’s view finds support in the Fatma Zohra Ksentini’s Report⁴⁶ which admitted that:

*The relationships between the environment, development, satisfactory living conditions, dignity, well-being and individual rights, including the rights to life, constitute recognition of the right to healthy and decent environment, which is inextricably linked, both individually and collectively to universally recognised fundamental rights standards and principles...*⁴⁷

Philippe Cullet has also expressed a similar view. According to Cullet:

*...it has already become apparent that preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of, inter alia, the rights to health, to food and to life including a decent quality of life. The close link with these rights clearly shows that a right to environment can easily be incorporated into the core of the human rights protection whose ultimate purpose is the blooming of the personality of all human beings in dignity.*⁴⁸

This work therefore argues that in view of the inseparable intercourse between human rights and environmental rights, the answer to the posed question is answered in the affirmative.⁴⁹ In this regard, environmental rights encompass several rights such as the right to a clean and safe environment, the right to act to protect the environment along with the right to information, to access to justice, and to participate in environmental decision-making.⁵⁰

Notion of sustainable development and environmental right

⁴⁵ See generally Razzaque J. (2004). “Environmental Human Rights in South Asia: Towards Stronger Participatory Mechanisms,” in *Human Rights and the Environment, Proceedings of a Geneva Environment Network Roundtable*. United Nations Environment Programme/ the Geneva Environment Network/Swiss Agency for the Environment, Forests and Landscape, p.31. See Razzaque, J. (2002). “Human Rights and the Environment in South Asia.” *Journal of Environmental Policy and Law*, Vol. 32 No. 2, pp.99-111.

⁴⁶ Human Rights and the Environment: Final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9, (1994).

⁴⁷ *Ibid* at p. 8, para.31.

⁴⁸ Cullet, P. (1995). “Definition of an Environmental Right in a Human Rights Context.”

13 *Netherlands Quarterly of Human Rights* 25 at p.26. Also available at <http://www.ielrc.org/content/a9502.pdf>. See also The Realization of Economic, Social and Cultural Rights - Final Report Submitted by Mr. Danilo Tirk, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1992/16 at p. 32.

⁴⁹ See also generally the Fatma Ksentin Report, *ibid*, Chapter V, paras. 161-234, which examines the effects of the environment on the overall enjoyment of basic human rights like the right to self-determination and permanent sovereignty over natural resources; rights to life, health, food, safe and healthy working conditions, housing, information, popular and public participation, association and cultural rights.

⁵⁰ Rhuks, T. (2010). “The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India.” 3 *NUJS LAW REVIEW* 423 at p.428. See also Lorenzen, M. *Background Paper on the Project Environmental Human Rights*. Available at <http://www.anped.org/docs/background%20document.doc>, cited by Temitope Rhuks, *ibid*. See also See generally, International Institute for Environment and Development (2001). *Environment and Human Rights: A New Approach to Sustainable Development*. Available at http://www.capacity.org.uk/downloads/IIED_Human_Rights.pdf.

The need to find equilibrium in the relationship between man and the ecosystem with a view to their harmonious co-existence within the earth surface necessitated the need for sustainable development concept which has remained the substratum of the contemporary environmental protection. As noted earlier, the 1972 United Nations Conference on the Human Environment provided the foremost platform where the developed and developing countries gathered together to define and articulate the entitlements of human beings to a healthy and wholesome environment. The Conference deliberated on the connection between the environment and economic growth and consequently laid the basis for the advent of the concept of sustainable development⁵¹ as a "satisfactory resolution to the environmental versus development dilemma."⁵² The popular Stockholm Declaration which afterwards was adopted at the conference paved the way for other conferences and global meetings on matters related to environment and sustainable development.

Among these was the 1983 World Commission on Environment and Development (WCED) whose 1987 Brundtland Report not only intertwined social, economic, and environmental concerns as well as provided guidance for wide-ranging worldwide solutions,⁵³ but also recognised the "fundamental right to a healthy, life-enhancing environment"⁵⁴ The Report appreciated the fact that "the environment does not exist as a sphere separate from human actions, ambitions, and needs, and therefore it should not be considered in isolation from human concerns."⁵⁵ Flowing from this recognition, the Report called on the governments, both at the global and national levels, to "recognize and protect the rights of present and future generations to an environment adequate for their health and well-being."⁵⁶

The Rio Declaration has also reinforced the position that conservation of natural resources is the core of the concept of sustainable development. It advocated that that in order to achieve sustainable development, environmental protection shall constitute an inseparable part of the developmental process which cannot be dealt with in isolation.⁵⁷

The African charter and the right to a satisfactory environment

Article 24 of the African Charter on Human and Peoples' Rights asserts that all people shall have the right to a general satisfactory environment suitable to their development. It is notable that this provision does not explicitly acknowledge this environmental right as an "individual

⁵¹ The Brundtland Report presented the famous definition of "sustainable development" as being a "development that meets the need of the present without compromising the ability of future generations to meet their own needs." See generally Brundtland, G. (Ed.). (1987). *Our Common Future: The World Commission on Environment and Development*. Melbourne: Oxford University Press, p.43. This definition no doubt certifies that justice between generations will be realised because it requires that a country's natural capital be conserved and passed on to future generations unharmed.

⁵² Rhuks T. (2010). "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India." 3 *NUJS Law Review* 423 at p.424.

⁵³ *Ibid.*

⁵⁴ See United Nations General Assembly. *Report of the World Commission on Environment and Development: Our Common Future*, 1987. A/42/427 of August 4, 1987, paragraph 4.5, sub-paragraph 97. Available at <https://www.google.com/ur?q=http://www.un-documents.net/our-common-future.pdf&sa=U&ved=0ahUKEwiH86PRg5rMAhXJXhoKHbkcCulQFgggMac&usg=AFQjCNGNRsd6LVZI Mafg3Fo9yF55cTNOkg>. Accessed on 19 April, 2016.

⁵⁵ See "The History of Sustainable Development in the United Nations". Available on line at <http://www.uncsd2012.org/history.html>. Retrieved on 27 June, 2012.

⁵⁶ See United Nations General Assembly. *Report of the World Commission on Environment and Development: Our Common Future*, 1987. A/42/427 of August 4, 1987, paragraph 4.5, sub-paragraph 97, *op. cit.*

⁵⁷ See Principle 4 of the Rio Declaration.

right” but on the contrary, as a “collective right” conferred on “all peoples.”⁵⁸ Interestingly, the potency of this provision was tested before the African Commission in *The Social and Economic Rights Action Centre and Anor v. Nigeria*.⁵⁹

In this case, two non-governmental organisations (NGOs), namely, the Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) lodged a complaint with the African Commission on Human and Peoples’ Rights against the Nigerian government. It was alleged that the ‘destructive’ operations connected with the exploitation and exploration of oil resources in Ogoni land in Rivers State of Nigeria had resulted in environmental degradation, health problems, killings of protesters, illegal disposal of toxic wastes, poisoning of land, air and water.

The African Commission in interpreting this provision in combination with other provisions of the African Charter found the Nigerian government in grave violation of the guaranteed rights of the oil bearing communities. The Commission stated that:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources....The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16 (3)... already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual...⁶⁰

In recognition of the vital relationship linking a clean and safe environment with economic and social rights and how it affects the quality of life and safety of the individual, the African Commission on Human and Peoples Rights resolved that “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is

⁵⁸ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, for instance, is more forthright in its construction. Contrary to the couching of the African Charter, it unequivocally recognises an individual right, stating that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.” See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Adopted in San Salvador on 17 November 1988. It entered into force in 1999 and has a binding force on at least thirteen States in Central and South America; 28 ILM 161 (1989), Article 11.

⁵⁹Also known as “*The Ogoni Case*”. Communication 155/96. Retrieved from <http://www1.umn.edu/humanarts/africa/comcases/155-96b.html>. The decision in the case was given at the 30th Ordinary Session of the African Commission of Human and Peoples’ Rights, held in Banjul, The Gambia on 13th - 27th October 2001. The text of the petition may be consulted at <http://www.cesr.org/text%20files/nigeria.PDF>.

⁶⁰ See Paragraph 52 of the Commission’s Judgment. It is submitted that most of the problems, if not all, highlighted in the Ogoni complaint in the instant case are found right across oil producing areas of the Niger Delta of Nigeria today, affecting hundreds of communities.

harmful to physical and moral health."⁶¹ While Dinah Shelton has noted that the decision of the African Commission in this case has charted "a blueprint for merging environmental protection, economic development, and guarantees of human rights,"⁶² Erica-Irene Daes has gone further to summarise the principle in this case in the followings words:

*The principle of this case, that even lawful State authority must be exercised in a manner that protects and respects human rights, is a general and widely understood principle in the field of human rights. Its application in regard to indigenous peoples' rights to natural resources suggests that States' legal authority over lands and resources of indigenous peoples may be sharply limited where these lands and resources are critical to the human rights of the indigenous peoples.*⁶³

Though the decision of the African Commission vividly shows that there is a nexus between environmental pollution and human right *vis-a-vis* the responsibility of the government to protect people from such environmental damage it is uncertain however, whether a complaint founded on a contravention of the right to a satisfactory environment will succeed in isolation from the right to health or any other right entrenched in the African Charter.⁶⁴

Similarly, in another environmental right case before the Economic Community of West African State Community Court of Justice, *SERAP v. Federal Republic of Nigeria & others*,⁶⁵ it was contended that the lack of effective clean-up exercise of impacted sites had greatly aggravated the human rights and environmental degradation of the oil producing communities of the Niger Delta of Nigeria. The Court in ordering the restoration of the impacted sites highlighted that the import of Article 24 of the African Charter was that every State must adopt appropriate measures to maintain the quality of the environment to the satisfaction of the human beings who live there and to enhance their sustainable development.⁶⁶

An attempt by the Nigerian government to argue that the plaintiff's claims were founded on mere policy directives under the country's Constitution and consequently were not justiciable or enforceable was rebuffed by the ECOWAS court. The court noted that

...the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and

⁶¹ Para. 51.

⁶² Shelton, D. (2002). "Decision Regarding Case 155/96." 96 *American Journal of International Law* 937 at p.942.

⁶³ Erica-Irene A. Daes, "Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty over Natural Resources." A Final Report of the Special Rapporteur Submitted to the United Nations. E/CN.4/Sub.2/2004/30 of 13 July 2004, p.16, para.50.

⁶⁴ Linde, M. and Louw, L. (2003). "Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication." 3 *African Human Rights Law Journal*, 167 at pp. 176, 178.

⁶⁵ *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic Nigeria*. General List No. ECW/CCJ/APP/08/09; Judgment No. ECW/CCJ/JUD/18/12, decided on December 14, 2012 at ECOWAS Court of Justice, sitting at Ibadan, Nigeria.

⁶⁶ *Ibid* at paras.100, 101 and 121.

*the African Charter on Human and Peoples' Rights....once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.*⁶⁷

This view is consistent with Article 5 (2) of the International Covenant on Economic, Social and Cultural Rights to which Nigeria is party.⁶⁸ The court concluded that “invoking lack of justiciability of the concerned right, to justify non accountability before this Court, is completely baseless.”⁶⁹

Position under the constitution of the federal republic of Nigeria 1999⁷⁰

The 1999 Constitution of Federal Republic of Nigeria (as Amended) makes provision for the environmental objectives of the government. The constitutional provision mandates the government to “protect and improve the environment and safeguard the water, air and land, forest and wild life in Nigeria.”⁷¹ With the incorporation of this provision into the 1999 Constitution, hopes were raised that environmental issues have at least been recognised as a constitutional subject in the country. This is particularly so as a careful perusal of the constitutional provision reveals that the wording of the section is quite wide,⁷² though it fails to set out how the government would actualise this romantic environmental objective.⁷³

The major setback of this constitutional provision is that it has been rendered non-justiciable by virtue of section 6(6)(c) of the 1999 Constitution.⁷⁴ The import of this constitutional limitation is that the observance by the Nigerian government of environmental objectives principles is not obligatory but purely directory. As a writer rightly points out:

⁶⁷ *Ibid* at paras.35, 36.

⁶⁸ The said Article states that “[n]o restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.”

⁶⁹ See *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic Nigeria*, *op. cit.* para. 38.

⁷⁰ Now Cap.C23, *Laws of the Federation of Nigeria* 2004.

⁷¹ See section 20 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended). In *Attorney-General, Lagos State v. Attorney-General, Federation* (2003) 2 NWLR (Pt. 833) 1, the Supreme Court of Nigeria held *inter alia*, that the main object of section 20 of the 1999 Constitution is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other convenience.

⁷² Fagbohun, O. (2010). *The Law of Oil Pollution and Environmental Restoration: A Comparative Review*. Lagos: Odade Publishers, p.317.

⁷³ This is unlike some other countries' Constitutions which stipulates the measures the government would adopt to realise its environmental goals. Some excellent examples of such constitutional provisions which state the mechanism for the actualisation of its environmental objectives are for instance, section 24 of the 1996 Constitution of the Republic of South Africa and Article 38 of the 1993 Constitution of the Republic of Seychelles which do not only recognise the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment but also state the mechanisms to be adopted by the respective countries to ensure the effective realisation of the right. These constitutional provisions would be discussed later in this Chapter.

⁷⁴ Section 6 (6)(c) of 1999 Constitution is to the effect that the judicial powers conferred on the courts established under the 1999 Constitution shall not, unless as otherwise provided by the 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 judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.

With the way the provision is structured, one conclusion that can easily be reached is that it is a middle-ground between two extremes formulated by a system that is not desirous of initiating any environmental change which may disturb its economic direction and strategies. In the face of obvious realities that require a country like Nigeria to give a strong effective Constitutional 'bite' to her environment protection strategies, it must be emphasised that a constitutional provision like section 20 is an initiative that is grossly incapable of catalyzing desired environmental policy performance.⁷⁵

Notwithstanding the non-justiciability of the provision of section 20 of the 1999 Nigerian Constitution, victims of environmental rights have had recourse to the provisions of the domesticated African Charter on Human and Peoples' Rights. In *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others*,⁷⁶ the applicant, who instituted the action as a human rights matter and in a representative capacity for himself and on behalf of the Iwherekan community in Delta State of Nigeria, contended that the constitutionally guaranteed fundamental rights to life and dignity of human person provided under the Constitution of Federal Republic of Nigeria, 1999 and reinforced by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁷⁷ inevitably includes the right to clean poison-free, pollution-free and healthy environment and that consequently the continued flaring of gas in the area constituted a grave violation of the applicant's constitutional rights. Applicant's submission in this regard was upheld by the court and the respondents restrained from further flaring of gas in the said community.⁷⁸

However, it is submitted that continued reliance on the right to a satisfactory and adequate environment entrenched in the African Charter on Human and Peoples' Rights, which as noted earlier, has been ratified and embodied into our municipal law,⁷⁹ is not a safe foundation as the National Assembly⁸⁰ may chose at any time to amend, modify or repeal the statute and the courts of law as well as victims of environmental rights in Nigeria would be helpless in such a situation. As Lord Denning M.R. rightly noted in *Macarthy's Ltd. v. Smith*:⁸¹

⁷⁵ Fagbohun, O. (2010). *The Law of Oil Pollution and Environmental Restoration: A Comparative Review*, op. cit., pp.317-318.

⁷⁶ A Federal High Court Benin decision in Suit No. FHC/B/CS/53/05 of November 14, 2005. Also reported as *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others* (2005) AHRLR 151. The court placed heavy reliance on the provisions of the domesticated African Charter on Human and Peoples' Rights in arriving at its decision.

⁷⁷ Cap A9, *Laws of the Federation of Nigeria* 2004.

⁷⁸ This decision has been described in some quarters as a "classic, triumphal human rights story, in which the politically powerless communities of the Niger Delta use human rights to beat back the Goliath of corporate-backed government power." See Sindén, A. "An Emerging Human Rights to Security from Climate Change: The Case Against Gas Flaring in Nigeria." *Legal Studies Research Paper Series*, No. 2008-77, p. 12. But notwithstanding the victory in this case, the Nigerian government in active connivance with operating oil companies still flare gas with reckless abandon in the Niger Delta areas where petroleum activities are carried out. Various gas flare out dates have repeatedly been fixed and ignored by both the government and operating oil companies.

⁷⁹ See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9, *Laws of the Federation of Nigeria* 2004.

⁸⁰ Under the Nigerian 1999 Constitution, the legislative powers of the Federal Republic of Nigeria are vested in The National Assembly for the Federation. It consist of a Senate and a House of Representatives-see section 4 (1) of the Constitution of the Federal Republic of Nigeria.

⁸¹ (1979) 3 All E.R. 325.

*If the time should come when our Parliament deliberately passes an Act with the intention of repudiating a treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.*⁸²

The possibility of such legislative action was not lost to the Nigerian Supreme Court in the case of *General Sani Abacha and 3 Others v. Chief Gani Fawehinmi*,⁸³ where the court was considering, *inter alia*, the status and effect of the incorporation of the African Charter into our municipal legislation. With particular regard to a likelihood of modification of a ratified treaty by a country, the court acknowledged that:

*...a State is always at liberty if it deems desirable due to domestic circumstances or international considerations to legislate a law inconsistent with its treaty obligations....Once the State decides to exercise such right through a legislation the courts in that country are bound to follow the promulgated law...*⁸⁴

Ogundare, J.S.C. was more forthright in the *Abacha* case when he pointed out that although the domesticated African Charter enjoyed “a greater vigour and strength” than any other national law, yet such enjoyment of global aroma did not “prevent the National Assembly...from removing it from our body of municipal laws by simply repealing” it and that “whether such modification or repeal is wise or just is not a judicial question.”⁸⁵

Hence, this work strongly advocates the recognition of enforceable environmental rights in the Nigerian Constitution. Providing for enforceable environmental protection rights at the constitutional level has a number of potential advantages, namely, it is an acknowledgment of the prominence the country attaches to environmental protection; it offers the prospect of unifying principles for legislation and regulations;⁸⁶ it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.⁸⁷

Other possible benefits associated with the adoption and incorporation of an enforceable right to an ecologically balanced and healthy environment at the constitutional level is that it would also afford opportunities for better access to justice and accountability. As it has been rightly opined, the “existence of a constitutional right to healthy environment gives concerned citizens or communities a set of tools that may be effective in addressing problems despite the absence

⁸² *Ibid* at p. 329.

⁸³ (2000) FWLR (Pt. 4) 533.

⁸⁴ *Ibid* at p. 598.

⁸⁵ *Ibid* at p. 598. See also *Chae Chin Ping v. United States*, 130 US 181.

⁸⁶ Since environmental law is not a strictly defined area of law, but one whose provisions overlap other areas of law, an advantage of constitutionalising enforceable environmental goals is that it provides an all-encompassing legal-normative framework for directing enforceable environmental policy of the government.

⁸⁷ Hayward, T. (2005). *Constitutional Environmental Rights*. New York: Oxford University Press Inc., p.6.

of legislation.”⁸⁸ This is because such environmental constitutional rights provisions can offer a safeguard against loopholes and ambiguities in environmental protection statutes.⁸⁹

Thus, it is not enough therefore, for a country to entrench constitutional provisions which are merely declaratory of the government’s responsibility to safeguard environmentally sound development, sustainable use of natural resources as well as the maintenance of a safe, clean, ecologically balanced, satisfactory and healthy environment for the citizens without a corresponding right of the citizens to enforce such environmental rights in the event that they are violated.

Right to a healthy environment in other countries

As noted earlier, the incorporation of a right to the protection of a healthy, clean and satisfactory environment in the Constitutions or an obligation for the government to protect the environment or to make a careful use of a country’s natural resources has become a popular concept over the last few decades. Indisputably, the Constitutions of a number of countries across the globe have explicitly recognised the right to a healthy and protected environment.⁹⁰

⁸⁸ See Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, Mission to Costa Rica, 8 April 2014, U.N. Doc. A/HRC/25/53/Add.1, p. 30.

⁸⁹ See generally, Human Rights and the Environment: Regional Consultation on the Relationship between Human Rights Obligations and Environmental Protection, With a Focus on Constitutional Environmental Rights. Held on 23-24 January 2014, Johannesburg, South Africa. Convened by the United Nations Independent Expert on Human Rights and the Environment with the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa, pp.6-8, paras. 19-25. It is an open-secret that several anti-pollution laws in Nigeria have inherent flaws which often favour the polluter rather than the victims. See for instance the Oil in Navigable Waters Act, Cap. 06 *Laws of the Federation of Nigeria* 2004 which aside from creating about eight anti-pollution offences also created special statutory defences whereby the polluter can escape liability under the Act-section 4 thereof.

⁹⁰Ebeku, K. S. A. (2003). “The Right to a Satisfactory Environment and the African Commission.” 3 *African Human Rights Law Journal*, p. 149. Shelton and Kiss list the following countries in which there are constitutional provisions for the protection of the environment in one form or the other: Angola, Argentina, Belgium, Benin Republic, Brazil, Bulgaria, Burkina Faso, Byelorussia, Cape Verde, Cameroon, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Germany, Ecuador, El Salvador, Eritrea, Ethiopia, Equatorial Guinea, Philippines, Finland, Georgia, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Netherlands, Nepal, Nicaragua, Niger, Nigeria, Palau, Panama, Papua, New Guinea, Uganda, Ukraine, Uzbekistan, Paraguay, Peru, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Tajikistan, Taiwan, Tanzania, Thailand, Togo, Turkmenistan, Turkey, Venezuela, Vietnam, Yugoslavia, Zambia. See Shelton, D. and Kiss, A. (2005). *Judicial Handbook on Environmental Law*. Nairobi: United Nations Environmental Programme, p. 7. See also May, J. R. (2005-2006). “Constituting Fundamental Environmental Rights Worldwide.” *Pace Environmental Law Review*, 113 at pp.138-182 (Appendix A and B), where the writer also makes a list of national Constitutions that recognise environmental rights. On March 1, 2005, France amended its Constitution to incorporate “the rights and obligations defined by the *Charter of the Environment* of 2004.” The amended constitutional provision states that “each one has the right to live in a balanced and respectful environment of health.” See also generally Articles 1-10 of the *Charter of the Environment* of 2004. See also Lavrysen, L. and Theunis, J. (2007). “The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective.” In: Larmuseau, I. (Ed.), *Constitutional Rights to an Ecological Balanced Environment*. Report of the International Conference organised by the Flemish Environmental Law Association, in collaboration with the European Environmental Law Association, Gent: Vlaamse Vereniging Voor Omgevingsrecht, p. 9.

On the African continent, the Constitutions of Mali,⁹¹ Togo,⁹² Democratic Republic of Congo,⁹³ the Republic of South Africa and the Republic of Seychelles, among many others, provide excellent examples where the right to clean and healthy environment is constitutionally recognised. With regard to the position in the Republic of South Africa, section 24 of the 1996 Constitution of the Republic of South Africa (as Amended)⁹⁴ provides for the protection of the environment for the benefit of both the present and future generations.⁹⁵ In the same vein, by the provisions of Article 38 of the 1993 Constitution of the Republic of Seychelles⁹⁶ the State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment.

Other countries outside the African continent also enshrine constitutional provisions regarding the protection of the environment in their respective Constitutions. For instance, Article 51A (g) of the Indian Constitution boldly declares that “it shall be the duty of every citizen of India...to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”⁹⁷ The Spanish Constitution of 1978 also enshrines a constitutional provision for the right to a clean environment. It states that “[e]veryone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it.”⁹⁸ Similarly, Article 66(1) of the Portuguese Constitution states that “everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.”

In addition, judicial pronouncements by courts of law in various countries have recognised the right to a clean, healthy and ecologically balanced environment. The Indian Supreme Court, for example, has observed that the right to life preserved in Article 21 of the Indian Constitution

⁹¹ Article 15 of her 1992 Constitution provides that “every person has a right to a healthy environment. The protection and defense of the environment and the promotion of the quality of life is a duty of everyone and of the State.”

⁹² Article 41 of the 1992 Constitution of Togo (as Amended) states that “[e]very person has the right to a healthy environment. The State sees to the protection of the environment.”

⁹³ Article 53 of the 2005 Constitution of the Democratic Republic of Congo declares that all “persons have the right to a healthy environment that is favourable to their development. They have the duty to defend it. The State ensures the protection of the environment and the health of the population.” Article 54 of the Constitution goes further to state that “[a]ny pollution or destruction resulting from an economic activity gives rise to compensation and/or reparation.”

⁹⁴ See also section 29 of the erstwhile 1994 post-Apartheid Constitution which stated that “[E]very person shall have the right to an environment which is not detrimental to his or her health or well-being.”

⁹⁵ It is submitted that the reference to the protection of the environment “for the benefit of present and future generations” under the South African Constitution is traceable to the well-known Brundtland definition of sustainable development. See Scholtz, W. (2005). “The Anthropocentric Approach to Sustainable Development in the National Environmental Management Act and the Constitution of South Africa.” *Journal of South African Law*, pp.69, 75.

⁹⁶ As amended by Act No. 14 of 1996.

⁹⁷ To be gleaned from this Indian constitutional provision is the fact that the responsibility of protecting the environment in India is saddled on “every citizen” unlike the position in Nigeria where that obligation is on the “State”. See section 20 of the *Constitution of the Federal Republic of Nigeria*, 1999 (As Amended). Section 13 of the said Nigerian Constitution goes further to assert that it shall be the obligation and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of the Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2 of the Constitution.

⁹⁸ The Spanish constitutional provision is laudable as it has a constitutional sustainable development flavour which does not only promote the protection of the environment solely for the benefit of mankind but also for the benefit of the ecosystems. Aside from criminal or administrative sanctions, it equally recognises restoration of the impacted sites as a form of remedy for environmental pollution. See generally Article 45 thereof.

comprises the right to enjoyment of pollution-free water and air for the full enjoyment of life.⁹⁹ Likewise, the Supreme Court of Costa Rica has ruled that the right to health and the protection of the environment are essentially necessary in order to fully enjoy the right to life.¹⁰⁰

The Supreme Court of the Philippines has also ruled that the mere fact that the right to a balanced and healthy environment is enshrined in Article 16 of the country's Constitution¹⁰¹ does not necessarily imply that the right was less important. According to the Court, the right to a balanced and healthy environment entails among other things, the obligations of a prudent and rational management of the national resources. Consequently, the court recognised the right of a group of children to protest, in the interest of future generations, against a large number of deforestation licenses which had been delivered and which would cause very serious damage to the rainforest.¹⁰²

The Nepal's Supreme Court has also pronounced on the enforceability of the right to a clean and healthy environment, even though the provision came within the constitutional principles and objectives of the Nepali government. The court reasoned that though the principles and objectives may be facially unenforceable,¹⁰³ a disregard or violation of their provisions makes them enforceable.¹⁰⁴

Additional evidence for the existence of an enforceable right to a healthy, clean and ecologically balanced environment may be found in the pronouncements of global human rights tribunals. Considerably, a number of global human rights Committees, Commissions or Tribunals have steadily accepted the application of rights to a healthy environment to situations

⁹⁹ See the case of *Subash Kumar v. State of Bihar* (1991) A. I. R. 420. Also cited in the *Compendium of Summaries of Judicial Decisions in Environmental –Related Cases*. United Nations Environmental Programme, Nairobi, p.124. In the case, the Petitioner filed a public interest petition in terms of Article 32 of the Constitution, alleging contravention of the right to life protected by Article 21 of the Constitution, arising from the pollution of the Bokaro River by the sludge/slurry discharged from the washeries of the Tata Iron and Steel Company Limited (TISCO). It was alleged that as a result of the release of effluent into the river, its water was neither fit for drinking purposes nor for irrigation. In another development, the Indian Supreme Court had noted that whenever ecological concerns are brought before it, it is bound to keep Article 48A of the Indian Constitution in mind (this constitutional provision enjoins the State to endeavour to protect and improve the environment and to safeguard the wildlife of the country). See also the case of *Sachidanand Pande v. State of West Bengal* (1987) A.I.R. 1109, where the petitioner sought the court's intervention contending that the government's decision to allot land from a zoological garden for the construction of a luxury hotel would result in serious environmental degradation. See also the case of *M. C. Mehta v. Union of India (Tanneries)* (1988) A.I.R. 1115.

¹⁰⁰ Sala Constitucional de la Corte Suprema de Justicia, Decision No 6918/94, 25 November 1994, *Presidente de la sociedad Marlene SA v. Municipalidad de Tibas*. Cited in Lavrysen, L. and Theunis, J. (2007). "The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective." In: Larmuseau, I. (Ed.), *Constitutional Rights to an Ecological Balanced Environment*. Report of the International Conference organised by the Flemish Environmental Law Association, in collaboration with the European Environmental Law Association, Gent: Vlaamse Vereniging Voor Omgevingsrecht, p. 12.

¹⁰¹ Which forms part of the "Declaration of Principles and State Policies" and not of the "Bills of Rights."

¹⁰² See the Filipino Supreme Court case of *Juan Antonio Oposa and others v. The Honourable Fulgencio S. Factoran and others*, G. R. No. 101083. Cited in the *Compendium of Summaries of Judicial Decisions in Environmental –Related Cases*, op cit., pp.143 - 144.

¹⁰³ Article 24(1) of the Nepal's Constitution states that "the Principles and Policies contained in this Part shall not be enforceable by any court."

¹⁰⁴ *Prakash Mani Sharma v. Minister of Council*, Writ Nos. 2961 and 2052 cited in Bruch, C. et. al. (2001). *Environmental Governance in Africa*. Washington, D. C: Institutions and Governance Program/World Resources Institute, p. 17. See also *Compendium of Summaries of Judicial Decisions in Environmental –Related Cases*, op cit., p.166.

regarding life-threatening environmental damage.¹⁰⁵ The case of *E.P.H. v. Canada*¹⁰⁶ illustrates this point vividly. In the case, Canadian residents claimed that radioactive waste that remained at the various dumpsites after the government had carried out a clean-up operation constituted serious risks to health as well as amounted to a grave violation of Article 6 of the International Covenant on Civil and Political Rights for the present and future generations.¹⁰⁷ Although the Committee held the case to be inadmissible,¹⁰⁸ it noted that the case raised serious concerns regarding the responsibility of State Parties to protect human life.¹⁰⁹ With respect to the question as to whether a Communication could be filed on behalf of “future generations,” the Committee treated the Claimant’s reference to “future generations” as a mere expression of concern purporting to put into due perspective the significance of the issue canvassed in the Communication.¹¹⁰

It could be seen from the various jurisdictions that indeed the right to a healthy environment as well as the enjoyment of other categories of human rights are interrelated and multifaceted in such a manner that their attainment depends largely on healthy environmental settings.

Remedies for environmental rights violation

Both Principle 10 of the Rio Declaration and the 1994 Draft Declaration of Human Rights and the Environment require that effective access to judicial and administrative proceedings, including redress and remedy be provided in national legislation to enable victims of environmental harms seek appropriate redress.¹¹¹ These provisions are of paramount significance in this section of the work as it is intended here to examine some judicial remedies that could be resorted to by victims of environmental pollution.

¹⁰⁵Kalas, P.R. (2001). “International Environmental Dispute Resolution and the Need for Access by Non-State Entities”. 12 *Colorado Journal of International Environmental Law*, 191 at p.217. See also Ebeku, K. S. A. (2003). “The Right to Satisfactory Environment and the African Charter.” 3 *African Human Right Journal*, p. 153.

¹⁰⁶See *E.P.H. v. Canada*, Communication No. 67/1980, Reported in 2 *Selected Decision of the Human Rights Committee under the Optional Protocol* (1990) 2. The case is also available at: <http://www1.umn.edu/humanrts/undocs/html/67-1980.htm>. Accessed on 26 July, 2014.

¹⁰⁷The International Covenant on Civil and Political Rights (ICCPR) was adopted on 16 December 1996. Article 6(1) states that: “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

¹⁰⁸The Communication was declared inadmissible as a result of the failure of the Claimant and the persons she represented to exhaust all available domestic remedies as required by Articles 2 and 5 (2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights prior to instituting the matter before the Human Rights Committee. It was submitted in this respect that numerous recourses in torts were available to persons who contended that the presence of radio-active materials in various sites in Port Hope, Ontario, constituted a risk to the health of the residents. The State Party further contended that the Communication, in so far as it related to “future generations”, was inadmissible by virtue of Article 1 of the Optional Protocol to the Covenant, which does not confer the right to submit a Communication on behalf of future generations. In her response to the State Party’s objection, the Claimant posited that the domestic legal remedies referred to by the State Party would be ineffective in removing the waste and furthermore, that the duration of the legal action would unreasonably prolong the application of a remedy. A text of the Optional Protocol to the ICCPR is available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>. Accessed on 26 July, 2014.

¹⁰⁹The Committee noted that the Claimant could similarly invoke *inter alia*, the Canadian Charter of Rights and Freedoms, especially section 7 thereof, which guarantees the right to life, liberty and security of the person.

¹¹⁰See *E.P.H. v. Canada*, Communication No. 67/1980, *op. cit.* at para. 8 (a). Available at: <http://www1.umn.edu/humanrts/undocs/html/67-1980.htm>. Accessed on 26 July, 2014.

¹¹¹The wordings of the 1994 Draft Declaration of Human Rights and the Environment is to the effect that “[a]ll persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm,” Part III, para.20 thereof.

Nuisance

The tort of nuisance is the most frequently used common law remedy in environmental litigations. Nuisance is an act or omission that is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public, when it is a public nuisance, or his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, when it is private nuisance.¹¹² The remedy of nuisance is statutorily codified in section 11(5) (a) of the Oil Pipelines Act 1956.¹¹³

However, the use of the tort of nuisance as a remedy in environmental litigations arising out of petroleum operations in the Niger Delta area of Nigeria has attracted some setbacks. For instance, like negligence action, an action in nuisance is not particularly concerned with improving environmental conditions of the impacted sites. The primary objective is the restoration of the human victim to the original, pre-injury state, irrespective of how the environment was adversely impacted.¹¹⁴

Secondly, in a highly technical industry like the Nigerian petroleum industry, to establish a case of nuisance, the claimant would require expert scientific evidence “regarding causation and the scope of the harm and remediation necessary.”¹¹⁵ This may be inaccessible or too expensive to the “largely unschooled and poor victims of oil pollution” in the Niger Delta area to afford, though the oil companies with colossal financial resources at their disposal would be able to secure such requisite expert evidence in rebuttal of the claimant’s claims.¹¹⁶

In *Seismograph Service (Nigeria) Ltd. v. Robinson Kwavbe Ogbeni*,¹¹⁷ the plaintiff sued for nuisance caused by the defendants, their servants or agents in the course of carrying out seismic operations around the area of the plaintiff’s building which resulted in damage caused to the building. At the trial court, the plaintiff led no expert evidence, whilst an expert witness for the defence testified that the explosive charges could not damage anything even within 10 yards of the shot. However, the trial judge did not act on the expert’s evidence, contending that the expert evidence was not absolutely necessary. He presumed that the damage must have been caused by the seismic operations and consequently awarded the plaintiff damages. On a further appeal to the Supreme Court, the judgement was set aside. The apex court held that expert evidence was necessary to link the damage to the seismic operations and that the plaintiff failed to discharge the onus on him to establish such connection.¹¹⁸

¹¹² *Lase Fajuke v. Kupoluyi* (2005) All FWLR (Pt.277) 833 at p.840.

¹¹³ Cap.O7, *Laws of the Federation of Nigeria* 2004. It stipulates that a licensee shall pay compensation to “to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection not otherwise made good.”

¹¹⁴ This highlights a significant shortcoming of nuisance as a reliable remedy for environmental damage. See also Latham, M. *et.al.* (2011). “The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart.” *Fordham Law Review*, Vol. 80, Issue 2, at p.754.

¹¹⁵ See also Latham, M. *et.al.* (2011). “The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart,” *ibid* at p.753.

¹¹⁶ Ekpu, A. O. O. (1995). “Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria.” *Denver Journal of International Law and Policy*, Vol. 24, No.1, p.93.

¹¹⁷ (1976) All NLR 163.

¹¹⁸ *Ibid* at pp. 173-176. See also *Seismograph Service Limited v. Onokpasa* (1972) All NLR 347 at p. 352. See also *Seismograph Service (Nigeria) Limited v. Esiso Akporuovo* (1974) 6 S.C.119 at p.136.

Thirdly, the tort of private nuisance provides remedy for activities affecting a possessory interest in land and thus, may unlikely be open to a claimant who claims personal injury as a result of oil pollution.¹¹⁹ In *Amos v. Shell BP Petroleum Development Company of Nigeria Ltd & Anor*,¹²⁰ the plaintiffs instituted the action in a representative capacity claiming, *inter alia*, that the defendants in the process of oil mining operations built large earth dam across their creek which resulted in serious flooding upstream and drying up the downstream of the creek. It was also the plaintiffs' claim that the action of the defendants hindered the movement of canoes and seriously paralysed their economic and agricultural activities.

In dismissing the action, the court noted that since the creek was a public waterway, its blocking amounted to a public nuisance for which the plaintiffs lacked the capacity to sue in the absence of any evidence that they suffered any special harm over and above that of the general public. It was further held by the court that the plaintiffs could not maintain the action in a representative capacity for special damages since the losses were suffered individually and each individual must plead and cogently establish his or her special individual loss.¹²¹

Injunction

An injunction is a court order commanding, mandating or restraining an action. To obtain an order of injunction, a claimant must establish that there is no plain, adequate and complete remedy at law available to him and that an irreparable damage would be caused to him except the relief is granted.¹²² In oil pollution cases, the courts have always been reluctant in granting an injunctive order, possibly due to the economic argument. Thus, in *Allar Irou v. Shell BP*,¹²³ the trial court declined to grant an order of injunction sought by the plaintiff whose land, fish pond and creeks had been contaminated by the defendant's petroleum operations. The argument of the court was that nothing should be done to disrupt the operations of the business of oil exploration and ancillary activities which is the major source of the country's revenue.¹²⁴

But in *Gbemre v. Shell Petroleum Development Company of Nigeria Limited*,¹²⁵ apart from granting some declaratory reliefs sought by the applicant, the court also restrained the respondents from further flaring of gas and to take prompt steps towards ensuring the stoppage

¹¹⁹ *Thomson- Schwabb v. Costaki* (1956) 1 W.L.R. 335 at p.338. See also Ekpu, A. O. O. (1995). "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria," *op. cit.*

¹²⁰ (1977) 6 S.C. 109.

¹²¹ See also *Lawani v. West African Portland Cement Co.*, (1973) 3 U.I.L.R. (Pt. 4) 459. See also *Umuede v. Shell BP* (1975) 9-11 S.C. 155.

¹²² Garner, B. A. (Ed.). (2004). *Black's Law Dictionary* (8th ed.). United States of America: Thomson West, p. 800.

¹²³ Suit No. W/89/71 (Unreported), decided by the High Court of Justice, Warri Judicial Division on 26 November, 1973.

¹²⁴ See also *Boomer v. Atlantic Cement Co.* 26 N.Y. 2d 217, 257 N.E. 2d 870, 309 N.Y.S. 2d 312, 1970 N.Y., where neighbourhood land owners instituted an action for damages and an injunction against a large cement plant near Albany alleging injury to property from dirt, smoke and vibration emanating from the cement plants. It was held that the defendant maintained a nuisance, but an injunction was declined because the economic value of the defendant's operation outweighed the consequences of the injunction. There was evidence before the court that the cement company had invested over \$45, 000,000 in the plant and had employed over 300 people there. The case is also available at <http://www.casebriefs.com/blog/law/torts/torts-keyed-to-epstein/traditional-strict-liability/boomer-v-atlantic-cement-co/>. Accessed on 2 April, 2015.

¹²⁵ (2005) AHRLR 151.

of further flaring of gas in the Iweherakan community in Delta State of Nigeria.¹²⁶ However, in most oil pollution cases, the courts do often award damages as an alternative to granting an order of an injunction.¹²⁷

Damages

Damages is a pecuniary compensation or indemnity which may be recovered in the court by any person who has suffered loss, detriment or injury, whether to his person, property, or right through the unlawful act or omission or negligence of another.¹²⁸ The rationale behind the compensatory theory for award of damages is to restore the injured party to the position he or she was in prior to the harm.¹²⁹ In relation to the measure of damages for injury affecting land, for instance, pollution of land and rendering it unfit for cultivation, the normal measure of damage is the amount of the diminution of the value of the land. This will be the cost of making good the damage done.¹³⁰

Thus, in *Shell Petroleum Development Company Limited v. Farah*,¹³¹ where the plaintiffs/respondents sued the defendant/appellant in 1989 at the Bori High Court in Rivers State for an extensive damage done to their land as a result of an oil-blow out which occurred in July 1970, the court held that a land owner whose arable land which generates income is damaged and rendered unproductive by oil-blow out, as in the instant case, can recover damages under any or all of the above mentioned heads of measure of damages.¹³² Consequently, the Court of Appeal affirmed the ₦2million earlier awarded the plaintiffs/respondent by the trial court for diminution of the value of the land as well as awarded damages for *inter alia*, loss of income for the period of 19 years whereby the land was rendered unproductive by reason of the oil pollution.¹³³

¹²⁶ It is worthy of note that *Gbemre's* case was approached from the human right angle unlike the earlier case of *Allar*. However, despite the landmark judicial pronouncement in *Gbemre's* case and the statutory prohibition of gas flaring in the country, gas flaring still continues in the Niger Delta area with reckless abandon.

¹²⁷ See for example the case of *Mon v. Shell BP Petroleum Development Company of Nigeria* (1970-72) 1 R.S.L.R. 71 at pp.73-74, where the trial court awarded the sum of ₦200 to the plaintiff as general damages for oil pollution. In *Boomer v. Atlantic Cement Co, supra*, the court awarded the Plaintiffs permanent damages of \$185,000.00 rather than issue an order for an injunction. But in his dissenting decision in the *Boomer* case, Jasen, J. had noted that "[i]n permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbours so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement." See also "*Boomer v. Atlantic Cement Co., Inc.*" Available at <http://www.law.berkeley.edu/faculty/rubinfeld/LS145/boomer.html>. Accessed on 2 April, 2015.

¹²⁸ *Shell Petroleum Development Company (Nigeria) Limited v. Tiebo & 4 others* (1996) 4 NWLR (Pt. 445) 657 at p. 680.

¹²⁹ Often epitomised in the Latin maxim, *restitutio in integrum*. See *Tiebo's* case, *Ibid* at p.680.

¹³⁰ For example, in *Marsden v. Calbrook Trading Co* (1954) C.L.Y. 890, the court awarded as damages for trespass to land the cost of making good the damage caused. Similarly, in *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch. D 113, where houses in the possession of the plaintiff were flooded, the plaintiff was held entitled to recover, *inter alia*, the cost of repairing the damage to them.

¹³¹ (1995) 3 NWLR (Pt. 382) 148.

¹³² *Ibid* at pp. 192-193.

¹³³ *Ibid* at pp.193-197. Onalaja, J.C.A. in his contribution in the case noted that the decision in the case would serve as a "beacon light to Oil Mineral Producing Areas of Nigeria as to the certainty of the legal rights of the citizens in claims for compensation arising from oil spillage or blow out. It is also a guidance to the oil companies in settlement of compensation arising from oil spillage, or blow out." *Ibid* at p.198. See also *Shell Petroleum*

However, where a claimant's claim relates to special damages, then strict proof is required.¹³⁴ In the *SERAP v. Federal Republic of Nigeria & others*,¹³⁵ the plaintiff's claim for monetary compensation of one Billion US Dollars to the victims was dismissed by the ECOWAS court since in the reasoning of the court, the plaintiff had neglected either in its application or all through the whole proceedings to "identify a single victim to whom the requested pecuniary compensation could be awarded."¹³⁶

Declaratory Reliefs

An action for declaration is a useful and vital procedural process or means for determining and deciding a point of law or the construction of a document or ascertaining the existence of a right or obligation of a party as well as the determination of the validity of orders or decisions of inferior courts or tribunals or administrative bodies. It is a very essential tool in a great variety of ways and circumstances including resolution of disputes contested by parties before the court.¹³⁷

A court does not grant a declaratory relief merely on admission of parties because the court must be satisfied that the claimant by his cogent and credible evidence is entitled to the declaratory relief sought.¹³⁸ In this regard, a party seeking a declaratory claim in the constitution must establish before the court that he has a constitutional interest to protect and that the interest is violated or breached to his detriment. Such violated interest must be substantial, tangible and not vague, intangible or caricature. Consequently, the claim must disclose a cause of action vested in the claimant and the rights and obligations or interest of the claimants which have been breached.¹³⁹

It is incumbent therefore, for a claimant in an action for a declaratory relief to prove his case and not for the defendant to disprove the claimant's claim. Accordingly, where the claimant on his own evidence failed to establish his claim for declaration, his claim would be dismissed.¹⁴⁰ It is worthy of note that in the case of *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others*,¹⁴¹ the applicants sought for various declaratory reliefs which included *inter alia*, that the guaranteed fundamental rights to life and dignity inescapably included the right to clean poison-free, pollution-free and healthy environment; that the provisions of sections 3(2) (a)(b) of the Associated Gas Reinjection Act as well as Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984 which permitted Nigeria to continue flaring gas were inconsistent with the applicants' rights to life and/or dignity as

Development Company of Nigeria limited v. Adamkue (2003) 11 NWLR (Pt. 832) 533, where the appellate court upheld the lower court's award of ₦249, 106,601 as special damages and professional fees for expert witness.

¹³⁴ *Shell Petroleum Development Company of Nigeria Limited v. Kwameh Ambah* (1999) 2 S.C.N.J. 152 at p. 164; (1999) 3 NWLR (Pt. 593) 1. See also *Shell Petroleum Development Company of Nigeria Limited v. Tiebo VII* (2005) All FWLR (Pt. 265) 990 at pp. 1013, 1016, 1008, 1009 and pp. 1018-1019.

¹³⁵ *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic Nigeria*. General List No. ECW/CCJ/APP/08/09; Judgment No. ECW/CCJ/JUD/18/12, decided on December 14, 2012 at ECOWAS Court of Justice, sitting at Ibadan, Nigeria.

¹³⁶ *Ibid*, at paras. 114, 117.

¹³⁷ *Mafimisebi v. Ehuwa* (2007) All FWLR (Pt. 355) 562 at p. 601.

¹³⁸ *Ndayako v. Dantoro* (2004) All FWLR (Pt. 216) 390 at p. 410.

¹³⁹ *Inakoju v. Adeleke* (2007) All FWLR (Pt. 353) 3 at 97.

¹⁴⁰ *Ayanru v. Mandilas Ltd.* (2007) All FWLR (Pt. 382) 1847 at p. 1860.

¹⁴¹ Unreported Suit No. FHC/B/CS/53/2005. See also (2005) AHRLR 151, per Nwokorie, J. Decided on 14th November 2005, Federal High Court, Benin-City Judicial Division.

guaranteed under the 1999 Constitution and the domesticated African Charter. In the face of overwhelming evidence adduced by the applicant the court granted the reliefs sought.

CONCLUDING REMARKS

The article sought to promote the right to a healthy environment through constitutionalism in Nigeria. It examined *inter alia*, the relationship between human rights and the environment and argues that environmental degradation has the possibility of affecting the realisation and enjoyment of other categories of enforceable fundamental rights, such as the right to life, food, health, education, and even the right to freedom of worship. In view of the prominent position the condition of the environment plays in the human life and well-being, the article articulates that the right to a clean and healthy environment should be rendered enforceable under the Nigerian Constitution as it is obtainable in some other countries.

The step towards rendering the right to a clean environment justiciable in Nigeria lies with the legislature. In this regard it is noteworthy that Item 60 (a) of the Exclusive Legislative List of the 1999 Constitution specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution. It is therefore, incidental or supplementary for the National Assembly to enact a law or amend the Constitution in such a manner as to enable the government and the citizens to enforce the observance of the right to a clean environment.¹⁴²

Adopting such a constitutional approach, the article maintains, has a number of advantages. First, it unequivocally demonstrates the seriousness with which the Nigerian government attaches to environmental concerns. Second, incorporating an enforceable right to a healthy or ecologically balanced environment into the body of the Constitution would offer prospects for better access to justice and accountability. Third, in the event of an infraction of such a right or obligation, victims of an environmental degradation can approach the court of law to seek for an appropriate redress or remedy. Fourth, it fortifies the right to a healthy environment against unnecessary politicisation by the legislature since it is more difficult to amend a constitutional provision than it is to amend a mere statute like the domesticated African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.¹⁴³

¹⁴² See in *Re Olafisoye* (2004) All FWLR (Pt. 198) 1106 at pp. 1155-1156. See also *Attorney-General, Ondo State v. Attorney-General, Federation* (2002) FWLR (Pt. 111) 1972 at 2069-2070.

¹⁴³ Section 9(3) of the Constitution of the Federal Republic of Nigeria 1999 makes provision for the mode of altering constitutional provisions. It requires for instance that for alteration to be effected to the provisions relating to Fundamental Rights contained in Chapter 4 of the Constitution, an Act of the National Assembly for that purpose shall not be passed by either House of the National Assembly except the proposal is sanctioned by the votes of not less than four-fifths majority of all members of each House, and also consented to by resolution of the Houses of Assembly of not less than two-thirds of all the States of the Federation. Satisfying such constitutional pre-conditions is always cumbersome to meet.