

# Constitutional and Judicial Approaches to Environmental Challenges

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## Abstract

The Research Paper ‘Constitutional and Judicial Approaches to Environmental Challenges’, takes us through the role of the Legal and Judicial System, in the protection of the Environment, and in the wider campaign against Environmental Degradation. The importance of Environmental Sustainability cannot be over-emphasized as a destroyed environment may also mean the end of the human race and even plants and animals. The paper looks at both the Nigerian perspective, as well as the global outlook. It looks at the Human Rights angle, which submits that destruction of the environment by industrial, corporate and government institutions, may be an offence against the Law since it infringes on the right of the ordinary citizen to live a healthy life in harmony with nature. In other words, since these human institutions have been responsible for the extinction of many animal species, they shouldn’t be allowed to extend their destruction to include the reduction of the quality of human life or even wiping out the human race. The paper looks into the extent to which the judicial system could help protect the common man from the forces of Environmental Degradation.

**Keyword:** Environmental challenges, environmental degradation, judicial system, government institutions, human rights, constitutional approaches.

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## INTRODUCTION

Undoubtedly, the environment consists of the entire physical, social, geographical, cultural, economic, and aesthetic surroundings which affect individuals, animals, communities, plants, and ultimately determine their form, character, relationship and survival [<sup>1</sup>]. Since June 1972, when the United Nations made a declaration on the human environment at Stockholm, the international community has become unrelenting on issues of environmental rights. In 1992, at the Rio De Janeiro Conference, the full import of a healthy environment as a core human right traction on a global pedestal [<sup>2</sup>]. The human rights index has become a good benchmark for judging the levels of civilization of people and nations. In relation to rights generally, environmental rights belong to the basic and fundamental rights like rights to shelter, freedom of

speech, right to life and to non-discrimination, which are interrelated, inter-dependent, inalienable and fundamental [<sup>3</sup>]. This right demands that, the quality of the air, water, food must be free from industrial impurities, chemicals, toxic and hazardous substances for the good of the rich and the poor alike and for plants.

Statistically, environmentally-related diseases are mainly perpetrated by the oil and gas industry as well as manufacturing industries in their operations. Additionally, the impact of climate change to the entire world and global heating are causing huge challenges to world safety.

### 1. Human Rights Dimensions

Human rights have been generally understood as the rights that exist for every human being for the simple fact of humanity. The environment plays a pivotal role to public health, community development and preservation of human populations. Nigeria has

<sup>1</sup> John G. Rau and David wooten (eds.) ‘Environmental Impact Analysis Handbook’, McGraw-Hill, NewYork, 1980, pg12.

<sup>2</sup> At the 1992 United Nations Conference on Environment and Development, Rio De Janeiro June3-14,1992. Declaration on Environmentand Development.

<sup>3</sup> OludayoAmokaye: Human Rights and Environmental Protection’ in UNILAG Journal of Human Rightslawvol.1,No 12007,p93

domesticated many international conventions on the protection of the environment and humanity.

It is on record that over sixty-two (62) Conventions have been passed by the International Community on environmental protection to save humanity. Some of the Conventions are:

- a) International Convention on Civil Liability for Oil Pollution Damage 1969(1969CLC), Brussels, 1969, 1976 and 1984.
- b) International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), London, 1990.
- c) Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 1981.

Domesticated laws include viz:

- i. 1999 Constitution of the Federal Republic of Nigeria; CapC23 LFN 2004.
- ii. Environmental Impact Assessment Act CapE12 LFN 2004
- iii. National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act, CAP N164 LFN 2007 (This Act repealed the Federal Environmental protection Agency Act CapF10 2004 by the Provisions of its S.36)
- iv. National Oil Spill Detection and Response Agency (Establishment) Act, CAPN157 LFN 2006
- v. Harmful Waste (Special Criminal Provisions) Act CapH1 LFN 2004
- vi. Land Use Act Cap L5 LFN 2004
- vii. Oil in Navigable Waters Act, CapO6 LFN 2004
- viii. Oil Pipelines Act CapO8 LFN 2004
- ix. PetroleumControlActCapP8LFN2004
- x. Petroleum Act CapP5 LFN 2004
- xi. West African Gas Pipeline Project (Special Provisions etc) Act Cap W8 LFN 2004.

## 2. Climate Change challenges:

Climate change threatens the effective enjoyment of a range of human rights including those to life, water, sanitation, food, health, housing, and economic development. National and multinational corporations have clearer realization of their legal obligation to contain the adverse effects of climate change and ensure that those affected by it, particularly women and children, the poor, disabled and those in vulnerable situations, have access to effective remedies and means of adaptation for better human dignity.

Current human rights frameworks spell out the responsibilities with respect to all human rights breaches, including those caused by environmental degradation. in tandem with the 2030 Agenda and the Paris Agreement on climate change, Stakeholders

worldwide are enjoined to promote a human rights-based approach to climate change action [<sup>4</sup>]. All States must act to mitigate negative impact and also respect communities affected by climate change.

These aspirations have the following Roadmap:

- i. Collaboration with partners to integrate human rights in environmental laws and policies;
- ii. Support for the inclusion of civil society in environmental decision-making processes, access to information and effective remedies for victims;
- iii. Assisting human rights mechanisms to address environmental issues, including climate change;
- iv. Advocacy on behalf of environmental human rights defenders and supporting efforts by the UN system to protect them;
- v. Research and advocacy to address human rights harms caused by environmental degradation, particularly to groups in vulnerable situations.

## 3. The Human Rights Perspectives

The 1972 Stockholm Declaration has about 26 declarations and inter alia, states that:

“Man has the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears solemn responsibility to protect and improve the environment for present and future generations....”

The Principle of the 1992 Rio Declaration on Environment and Development and Nigeria has domesticated many international conventions on the protection of the environment and humanity and provides that:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature [<sup>5</sup>].

Domestication of these principles can be gleaned, inter alia, from The Nigerian Constitution in Chapter II under the Fundamental Objectives and Directive Principles of State Policy [<sup>6</sup>] and also Chapter IV captioned fundamental rights which provide for unjustifiable fundamental rights.

The State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria [<sup>7</sup>].

<sup>4</sup> Office of the High Commissioner for Human Rights

<sup>5</sup>The Declarations definitely positively impacted on the environmental rights provisions in municipal laws of many nations of the world.

<sup>6</sup> Sections13-24 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

<sup>7</sup>Section 20 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

From 1960, when Nigeria became Independent, the Constitutions have consistently incorporated International Covenants on Civil and Political Rights (ICCPR). Thus, Human Rights provisions are justiciable by the courts with the power to give a purposive and wide interpretation. In *Okogie V Attorney General Lagos State* [8] Aguda J. had opined that:

Section 36 of the 1999 Constitution, as well as other provisions under chapter IV of same Constitution should be broadly and generously interpreted in order to give full recognition and effect to those Fundamental Rights and Freedoms.

All local and foreign Courts must join the bandwagon of international declarations for liberal and proactive interpretation especially where acts are carried out which result in environmental breaches. In *Shell Petroleum Development Co. Ltd v Farah* [9]. Onalaja JCA gave a *locus classicus* decision on citizens' rights, Oil pollution and other environmental breaches as follows:

There is a universal phenomenon of oil blow-out in the Oil industry as recorded in Alaska, United States of America over the EXXON Oil spillage saga and more recently in the Republic of Russia. The judgment of my learned brother is a guide and an appraisal of the law about Oil Spillage or blow-out in Nigeria now. It will serve as a beacon of 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 blowout.

#### 4. Environmental Rights under the Nigerian Constitution

Since 1991, the courts have made non-justiciable rights under Chapter II to be justiciable by relying on the domestication of the African Charter, of Human and Peoples Rights a regional instrument on Human Rights. In *Uzoukwu v Ezeonu II* [10], the Court Appeal held, inter alia, that:

There are other rights which may pertain to a person which are neither fundamental nor justiciable in the Court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution.

This judicial recognition of the rights under the Directive Principles was confirmed in *Abacha V Fawehinmi* [11] where the Supreme Court, relied on the domestication of the African Charter in Nigeria and upheld the decision of the Court of Appeal.

Specifically, the African Charter recognizes the rights of citizens to dignity and development. As a Constitution, it makes Nation states parties to the Charter with a legal obligation to adopt legislative and other measures to give effect to the rights [12]. Accordingly, the Nigerian Supreme Court, in *Abacha V Fawehinmi* [13] held that the Nigerian Government is obliged to respect its obligations under the Charter, as incorporated into domestic law through legislation [14]. The 1999 Nigerian Constitution specifically imposes a duty on the State to "protect and improve the environment and safeguard the water, air and land, forest and wild life of the country". Nevertheless, the Nigerian Constitution places the duty under unjusticiable provisions under Chapter 2 of the Constitution. However, Nigeria has set up the National Environmental Standards and Regulations Enforcement Agency (NESREA) to enhance capability to comply with its obligations on safeguarding the environment.

The Nigeria, Supreme Court and Court of Appeal boldly interpret the constitution especially on the justiciability of some rights under chapter II thereof [15]. Consequently, the combined effect of the ratification of the African Charter on Human and Peoples' Rights by the Nigeria [16] and the existing judicial pronouncements in *Abacha V Fawehinmi* [17] migrate towards justiciability for some of the rights provided for in Chapter II of the Constitution [18].

Indeed, both Chapters II and Chapter IV of the Nigerian Constitution must be read together [19], as this must be the intent of the lawmakers.

#### 5. Global Judicial Approaches to the Protection of the Environment

The courts have displayed ingenuity and astuteness in applying the necessary rules of interpretation (Mischief and Golden rules) in order to advance the rights to a clean and healthy environment as a necessary corollary of the right to life which can be enforceable under national constitutions. Viz:

##### i. Industrial Pollution: In *J.A. Adediran and*

<sup>12</sup> Article 1 African Charter on Human and Peoples' Rights

<sup>13</sup> *Supra*

<sup>14</sup> African Charter Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004

<sup>15</sup> Constitution of the Federal Republic of Nigeria 1999

<sup>16</sup> African Charter Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004

<sup>17</sup> *Supra*

<sup>18</sup> Constitution of the Federal Republic of Nigeria 1999

<sup>19</sup> *Ibid*

<sup>8</sup> [1981] 1 NCLR 218

<sup>9</sup> [1995] 3 NWLR (pt. 382) 148

<sup>10</sup> [1991] 6 NWLR (pt. 200) p. 708

<sup>11</sup> [1994] NWLR (pt. 306) p. 1

*Anor v. Interland Transport Ltd* [<sup>20</sup>] the Supreme Court of Nigeria held that a plaintiff has a right of action. The communities and individuals of an estate in Lagos Nigeria had a case in nuisance against noise, blocking of access roads, and unsafe environment for children.

- ii. **Blocking public streams by construction of dams:** In *Amos v. Shell DC Nig. Ltd* [<sup>21</sup>], the action of the defendants in building a dam to facilitate their operations had disrupted commercial agriculture and economic activities within the area. The defendants were held liable for public nuisance.
- iii. **Cement production and damages to crop, streams, building:** In *Jimoh Lawani v West Africa Portland Co* [<sup>22</sup>], the court admitted that the plaintiff's action was rightly brought for damages to crops, streams and buildings by cement production which was public nuisance.
- iv. **Gas flaring:** *Mr Jonah Gbenre v. Shell Petroleum Development Company Ltd* [<sup>23</sup>] *inter alia*, the Court, condemned the action of Shell and NNPC in continuing to flare gas in the course of their oil exploration and production activities in the applicants community. The court affirmed the activities as a violation of fundamental rights to life (including healthy environment) and dignity of human persons [<sup>24</sup>].
- v. **Disposal of copper waste into beaches and destruction of marine life:** In Chile, in the case of *Pedro Flores Y Otros v. Corporacion delcobre* [<sup>25</sup>], (*CODELCO*), the Supreme Court of Chile applied Articles 19 (Right to Live in Unpolluted Environment) of the Constitution to restrain a mining company from further deposition of copper wastes into Chilean beaches, thereby destroying all traces of marine life in the area.

Also, in *Fundacion Fauna Marina v. Ministerio de la production de la Proncia de la Bueno Aires* [<sup>26</sup>] a Federal Argentinian judge invoked constitutional rights to a clean environment.

- vi. **Hewing of timber:** In *Juan Antonio Oposa v. The Honorable Fulgencio S. Factorum* [<sup>27</sup>], the Supreme Court of the Phillipines gave full effect to Article 16, Art 11, 1987 of their constitution providing for a right to a healthy and balanced ecology in accordance with the rhythm and harmony of nature. Licence for timber was reviewed and withdrawn in the overriding public interest.
- vii. **Manufacturing:** In Uganda, the High Court in the case of *Greenwatch v. Attorney General and Anor* [<sup>28</sup>] granted leave to an NGO registered and incorporated in Uganda to institute an action on behalf of citizens whose rights to a clean and healthy environment were being violated by the manufacture, distribution, sale and disposal of plastic bags, containers and food wrappers.
- viii. **Dumping of Toxic waste:** In the case of *Indian Council for Environment-(legal Action) v. Union of India* [<sup>29</sup>], the Supreme court of India held that the dumping of toxic and dangerous substances was a threat to the right to life. The Courts specifically acclaimed its power to protect the constitutionally guaranteed right to life by ordering the closure of the plants and directing the government to determine and recover the cost of remedial measures from the owners of the plant.
- ix. **Vehicle emission of hazardous smoke:** In the case of *Foroogue v. Government of Bangladesh* [<sup>30</sup>], the Supreme Court of Bangladesh confirmed the right to life to include the right to enjoy life. The case concerned pollution by vehicles emission of hazardous smoke and emission of toxic air of Dhakar city.
- x. **Disposal of Toxic waste:** In *Gani Fawehinmi v. Sani Abacha* [<sup>31</sup>], the Supreme Court of Nigeria affirmed the rights of Ogoni people to environmental integrity. The court specifically observed that Nigeria had domesticated *The African Charter on Human and Peoples' Rights* (Ratification and Enforcement) Act. Article 24, thereof, provides that: "All peoples shall have the right to a general satisfactory environment favourable to their development"

In the *I.G Farben Trial – The United States of America v. Carl Kraush* [<sup>32</sup>] & 22 Ors i.e Nuremberg trial, the tribunal found the accused persons liable for spoilation and plunder in occupied territories

<sup>20</sup> (1991) 9NWLR 155

<sup>21</sup> (1977) 6 SC (pt 109)

<sup>22</sup> (1986) LR 3HL 300

<sup>23</sup> Suit No. FHC/B/CS/53/05

<sup>24</sup> These rights are guaranteed by sections 44(1) and 34(1) of the 1999 CFRN, and reinforced by Acts. 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement Act, Cap A9, Vol. 1, Laws of the Federation of Nigeria, (2004)

<sup>25</sup> 81, (1988) 12. 753. FS 641 (Chile)

<sup>26</sup> Commercial Court No. 11 (March, 2006)

<sup>27</sup> G.R No. 101083, Supreme Court Phil. (July 10, 1993)

<sup>28</sup> (2003) EALR IEA 83 (CAK)

<sup>29</sup> (1996) AIR 1446

<sup>30</sup> (1997) 50 DLR (HCD) (1998) 84

<sup>31</sup> 2001 51 WRN 29 S Ct. (June 2015)

<sup>32</sup> US Military Trial (1947)

Also, on the issue of exploiting natural resources, the case of Charles Taylor succinctly demonstrates the criminal aspect of the breach of international humanitarian law. The trial highlighted the manner in which insurgents worked with immoral capitalists, to pillage natural resources. One of the main targets of the RUF [<sup>33</sup>] was the diamonds deposited in Sierra Leone.

## CONCLUSIONS

- Environmental breaches directly affect life, flora and fauna. The right to life is entrenched in all constitutions of the world as a fundamental right.
- All Corporate Boards must maintain and to ensure environmental protection for sustainable development. To this effect, the Board must have a strategy for building requisite local technical expertise for responsible management of the environment particularly in the oil industry.
- This will make it easier to combat incidents of negative effects on the environment.
- Boards of oil and other commercial enterprises must mitigate and remediate the damages to the environment due to exploration, production and distribution activities for long and short term common good and social responsibility.

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<sup>33</sup> RUF was a rebel army that fought a failed 10 years' war in Sierra Leone starting in 1991.