



HUMAN RIGHTS REVIEW

An International Human Rights Journal

**An annual publication of the Department of Public Law,
Ahmadu Bello University, Zaria, Nigeria and The National
Human Rights Commission of Nigeria**



Vol. 2, No. 2, July, 2011

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Nigeria

and

The National Human Rights Commission of Nigeria

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SSN: 978-31030-2-4

Printed in 2011

by

Faith Printers International

Block 6, Flat 36 Rimi Tsiwa Estate

Kongo Zaria, Kaduna State, Nigeria.

08022067248,08062241889,08097253144

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ENVIRONMENTAL RIGHT AND HUMAN RIGHTS ENFORCEMENT IN NIGERIA: VISITING THE NEXUS AND A CALL FOR REFORM

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ABSTRACT

This article examines the right to a healthy environment and human rights generally. It argues that a healthy environment is necessary for the enjoyment of other rights. It concludes and recommends that for enhanced enforcement of environmental right under Nigerian Law; it should be included in chapter IV of the 1999 Constitution.

1.0 Introduction¹

The environment was taken for granted until industrialization started in England. This was because, until the advent of industrialization, the economic activities of man were basically agrarian and had no serious adverse effect on the environment. With industrialization and the quest for development came genuine and obvious concern for environmental health and safety. This concern especially at the global level, has led to the holding of many international conferences and conventions on environmental health and safety, the first notable one being the

¹ Key words: Environmental rights, Human rights, Enforcement and Reform.

1972 United Nation's (Stockholm) Conference on Human Environment.² The World Commission on Environment and Development (WCED) in its report³ drew the world's attention to the devastating impact of man's activities on the environment thus:

From space, we see a small and fragile ball dominated not by human activities and edifice but by a pattern of clouds, oceans, greenery and soils. Humanity's pattern is changing planetary systems, fundamentally. Many such changes are accomplished by life-threatening hazards. This new reality, from which there is no escape, must be recognized and managed.⁴

Serious cases of environmental pollution like the pouring of 120,000 tons of heavy crude into a hundred miles of British and French coastlines by the grounded Liberian Super-tanker Torrey Canyon in 1967,⁵ the numerous cases of oil spill in Nigeria, especially in the Niger Delta region⁶ and most recently, the Gulf of Mexico oil well blow-out⁷ tend to have shaken the apparently complacent world to the realization that environmental issues are not abstractions but daily realities affecting and impacting human lives. Thus the need for protection for man from the adverse effects of environmental pollution by conferring the rights on man both as a group or collective right (environmental rights which embrace both substantive and procedural rights)

2 Thornton, J.M.A. and Beckwith, S. (1997) *Environmental Law*. London. Sweet & Maxwell. 31.

3 The Brundtland Report of 1987.

4 World Commission on Environment and Development. 1987. *Our Common Future*. New York: Oxford University Press. 1.

5 M'Gonigle, R.M. and Zacher, M.W. 1979. *Pollution, Politics and International Law*. Berkeley: University of California Press Ltd. 5

6 Ezigbo, O. "Niger Delta: Shell to Clean Up 268 Oil Spill Sites." *This Day*, Monday June 14, 2010. pp. 1 and 6.

7 The magnitude of the spill shocked the world.

and as an individual right (the right to environment) deserves attention. The emphasis in this paper is on the right to environment, (by which individuals and groups can enforce their rights to a healthy environment) while references are made to environmental rights where appropriate. The relationship between human rights and the right to environment is of paramount importance to this paper. *"The linkage between environmental and human rights has been envisaged mostly in terms of the protection or conservation of a clean or healthy environment for the benefit of individuals whose conditions of life are threatened"*.⁸ The link between the environment and human rights has its evidence in the increasing international interest in the concept of human right to a healthy environment.

The paper examines the import of non inclusion of the right to environment in the fundamental rights section of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, and if found to have a negative effect, advocates its inclusion. To achieve this goal, the paper has six sections including this introduction. Section two examines human rights, right to environment and the linkage(s) between the two, while the third is on the important position of man in human rights and in the right to environment. The fourth section examines the legal framework within which human rights and the right to environment operate, followed by the different enforcement mechanisms, which have been resorted to in the absence of a constitutional right to environment in the fifth section. Section six is the recommendations and conclusions that end the paper.

⁸ Philippe Cullet, op.cit., (note 13 above) p.2. Also available on 19 November 2010 at <http://www.ielrc.org/content/a9502.pdf>

2.0 Human Rights, the Right to Environment and the Linkages

Human rights are universal rights attaching to the human being wherever he appears without regard to time, place, colour, sex, parentage or environment according to Arnold Lien.⁹ Ogbu has noted that human rights remain so, whether they occur in the international plane or within municipal confines, and whether they are called "human rights" or "fundamental rights", or "fundamental human rights".¹⁰ It is notable that the international bill of rights, namely, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, use the expression "fundamental human rights", and so does the United Nations (UN) Charter.¹¹ This position allows the use of fundamental rights or human rights for the same concept. In Nigeria, however, the courts have drawn a distinction between human rights and fundamental rights. In *Uzoukwu & Ors. v. Ezeonu II & Ors.*,¹² the Court of Appeal (per Nasir J.C.A) said:

Due to the development of Constitutional Law in this field, distinct difference has emerged between "Fundamental Rights" and "Human Rights." It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights, which every civilized society must accept as belonging to each person as a human being.

⁹ Referred to in Dakas C.J. Dakas, *The Implementation of the African Charter on Human and Peoples' Right in Nigeria (1998 -1990)* *University of Jos L.J.* Vol. 3, p.39 and cited in Lawrence Atsegbua, Vincent Akpotaire and Folarin Dimowo, (2003), *Environmental Law in Nigeria Theory and Practice*, Ababa Press Ltd., p.129.

¹⁰ Ogbu O.N. 1999. *Human Rights Law and Practice in Nigeria: An Introduction*. ENUGU: CIDJAP Press, 31.

¹¹ Cap. A9, *Laws of the Federation of Nigeria (LFN)*, 2004.

¹² (1991) 6 NWLR (pt. 200) 708 at 761.

These were termed human rights. When the United Nations made its declaration it was in respect of "Human Rights" as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, and religion and so on. This has now formed part of International Law. Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution.¹³

By this distinction, the Nigerian Court has introduced other important factors that will affect enforceability of a provision. The mode and level of enforcement may depend on whether a provision is contained in an international or a national instrument, against the background of the sovereignty of individual states. In this paper, "human rights", "fundamental rights" and "fundamental human rights" are used interchangeably.

In terms of classifications, human rights are now discussed in terms of "Generations".¹⁴ The first generation consists of civil and political rights; the second consists of economic, social and cultural rights. The two generations differ in the sense that while the first relate to the sanctity of the individual and his rights in the socio political milieu and is described as libertarian in character, the second are positive rights in the sense that they require the affirmative action of governments for

13 (2000) FWLR (PE. 4) 557.

14 See Karl Vasak, 1997. A 30 years Struggle, 11 UNESCO Courier 29.

their implementation.¹⁵ The third generation of rights encompasses the "solidarity rights"¹⁶ These are the most recently recognized rights and they are distinguished from the other categories of rights because their realization do not depend upon both affirmative and negative duties of the state alone, but also upon the behaviour of each individual.¹⁷ Rights in this category are right to development, right to peace and right to a healthy environment.¹⁸ Vasak has also stated that the right to environment is a solidarity right. He adds that other rights in this category include right to development and right to peace, right to ownership of a common heritage of mankind, and the right to communication.¹⁹ When the first generation rights were formulated, the need for environmental protection had not become a serious concern.²⁰ This apparently accounts for the non-inclusion of the right to environment in what may be called the traditional list of human rights.

It has now become apparent that the right to environment is important to ensure the realization of other human rights Philippe Cullet expressed it thus:

The inclusion of an environmental dimension in the human rights debate has become necessary in view of the recognition of the pervasive influence of local and global environmental conditions upon the realization

15 See C. Welch Jr., 1984. Human Rights as a Problem in Contemporary Africa, in *Human Rights and Development in Africa* 24 (Welch and Meltzer eds.), cited in N. J. Udombana, 2003. *Human Rights and Contemporary Issues in Africa*, Lagos, Malthouse Press Ltd, 8.

16 N. J. Udombana, (Ibid note 9).

17 Atsegbua L., et.al., op.cit. (note 7), p.130.

18 Atsegbua L., Ibid.

19 See Vasak, (op.cit. note 8 above).

20 O. Adenowo-Osho, *The Evolution of Human Rights Approaches to Environmental Protection in Nigeria*. Retrieved 21 September 2010, from http://www.iucnael.org/index.php?option=com_docman&task.

of human rights. In legal terms, the new linkages will come to enhance the protection in both fields as the protection of the environment will benefit from the established machinery whereas the human rights system will be enhanced by the inclusion of new interpretative elements until recently ignored."²¹

International environmental law and human rights law have intertwined objectives and ultimately strive to produce better conditions of life on earth.²² It is therefore desirable that the convergent points in the two be used to maximum advantage for the good of humanity. A complementary approach is certainly to be preferred to an isolation of human rights and the right to environment. Thus the right to environment has been provided for in some international and regional instruments, beginning with the African Charter. In terms of the African Charter on Human and Peoples' Rights, "*all peoples shall have the ... right to a general satisfactory environment favourable to their development.*"²³ The pervasive influence of the environment on the realization of human rights received global recognition in the first principle of the Stockholm Declaration as follows:

Man 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, and he bears a solemn responsibility to protect and improve the environment for present and future

²¹ Philippe Cullet, Definition of an Environmental Right in a Human Rights Context, *International Environmental Law Research Centre*, Geneva, Switzerland, p.1. Also available on 19 November 2010 at <http://www.ielrc.org/content/a9502.pdf>

²² Philippe Cullet, *Ibid.*

²³ African Charter on Human and Peoples Rights, 1981, Art. 24.

generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.²⁴

In terms of the character of human rights, Onyekpere has observed that as a social fact, it can be viewed as normative responses to expressions of oppression and domination.²⁵ He believes they represent the minimum living standards for civilized humanity, and says *"they are the morality of the depths rather than the morality of the heights. They are won through struggles of the oppressed against their oppressors."*²⁶ If this observation is true of human rights, then it is submitted that it is a basis for regarding environmental rights as human rights or fundamental rights in national laws because all over the world environmental rights enforcement is characterized by struggles of the people against "the oppressors".²⁷ Environmental violators oppress people by engaging in development or economic activities that are harmful to the environment and threatening to the health and life of the people. This is the situation in the Niger Delta region of Nigeria, and has led to the formation of environmental rights groups like the Environmental Rights Action (ERA), Friends of the Earth, Nigeria (FoEN), and Nigerian Environmental Study or Action Team (NEST). At the international level, the 1972 Stockholm

24 Stockholm Declaration, 1972, Principle 1. The Declaration of the 1972 United Nations Conference on Human Environment was convened by the Secretary General of the UN by UNGA Resolution 2398 (XXII) 1972.

25 E. Onyekpere, *Fundamental Rights Enforcement*. 5 JHRLP, 1 January 1991, p. 13 at 30 cited in Falana F. 2004. Lagos, Legal Text Publishing Company Limited. 2.

26 Cap. A9, *Laws of the Federation of Nigeria (LFN)*, 2004.

27 Governments and Multinational companies are chief among the violators of environmental rights.

Conference recognized the human rights character of environmental rights.²⁸

Earlier, the Universal Declaration of Human Rights (UDHR) had recognized the comprehensiveness of the right to life when it stated that every person is entitled to the right to life and to a standard of living adequate for health and well-being of individuals and their family.²⁹ It is submitted that the enjoyment of the right to life cannot be realized in isolation of a good state of health, which is only possible in the context of a healthy environment. The degradation of the environment by pollution and its health implication is therefore a derogation of the right of life. The African Charter on Human and Peoples Rights has not only recognized the centrality of environmental rights to the enjoyment of other human rights like the right to life and human dignity, but has expressly granted environmental rights to all people by providing that: "*All people shall have a right to a general satisfactory environment favourable to their development.*"³⁰ Laudable as this provision is, it for it to make the desired impact on the nation, it must be applicable and enforceable within the jurisdiction concerned, since it is a regional provision. The human right to a healthy environment will remain so only in name if not recognized by national laws. This explains why most human rights, especially those of the first generation, have been firmly entrenched in international as well as municipal laws. Happily, the African Charter on Human and Peoples' Rights has been domesticated in Nigeria by virtue of the African Charter on Human and People's Rights

28 Principle 1 of the Stockholm Declaration.

29 Articles 3 and 25, Universal Declaration of Human Rights (UDHR) 1948.

30 Article 24.

(Ratification and Enforcement) Act³¹, part of which will be examined subsequently in this paper.

Efforts at the Rio Summit on Environment and Development to advance substantive environmental human rights failed, but this failure has not stripped environmental rights of their human rights character.³² In a judicial acknowledgment of the role of law in giving meaning and effect to human rights (including environmental rights), it was held (per Ogundare JSC) in *Fawehinmi v. Abacha*³³ that:

The Charter³⁴ gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning.

In order to give a legal backing to the rights conferred on citizens by the African Charter on Human and People's Rights, the National Assembly of Nigeria has enacted the African Charter on Human and People's Rights (Ratification and Enforcement) Act.³⁵ By implication, this enactment by the National Assembly has made the right to environment a law in Nigeria, just like any other human right contained in the Charter.

Unfortunately, right to environment has not received sufficient attention in national laws of Nigeria. In recognition of this link between environmental rights and human rights, courts in

31 Cap. A9, Laws of the Federation of Nigeria (LFN), 2004.

32 Bell, S. and Anderson, M. (1996) *Human Rights Approaches to Environmental Protection*. Oxford: Clarendon Press 43.

33 (2000) FWLR (PE. 4) 557.

34 African Charter on Human and People's Rights (1981).

35 Cap. A9, Laws of the Federation of Nigeria (LFN), 2004.

different jurisdictions have expanded the scope of the fundamental right to life and human dignity to include the right to a healthy and safe environment. For example, the constitution of India provides that "the state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife in the country."³⁶ Although this provision is non-justiciable, the Supreme Court of India expanded the scope of the right to life in *Coralie v. Union Territory of New Delhi*³⁷ by holding that the right to life includes the right to live with human dignity and all that goes along with it, namely: the basic necessities of life such as adequate nutrition, clothing and shelter over the head. It is submitted that this includes the right to a healthy and safe environment, as a polluted and degraded environment impoverishes the people, leading to inadequate nutrition, diseases and want. Similarly, in *Subhash Kumar v. State of Bihar*,³⁸ the Court observed that the "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life."

The fact that right to a safe and healthy environment is not expressly provided for in the Constitution of Bangladesh notwithstanding, the right has been inferred from the constitutionally guaranteed and enforceable right to life. Thus in *Dr. Mohiuddin Farooque v. Bangladesh*³⁹ it was held as follows:

Although we do not have any provisions like Article 48A of the Indian Constitution for protection of the environment, Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its

36 Art. 48A, (52nd Amend) Act 1985. This provision is the same with that of the current Indian Constitution, 2007.

37 (1981) AIR (S.C.) 746.

38 (1991) AIR (S.C.) 420.

39 (1997) 49 Dhaka Law Reports (AD) 1.

ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be a violation of the said right to life.

In the case of *Shehla Zia v. WAPDA*,⁴⁰ the Supreme Court of Pakistan interpreted the right to life in Article 9 of the constitution of Pakistan to include the right to a healthy environment. Also in the Filipino case of *Juan Antonio Oposa and Others v. The Honourable Fulgencio S. Factoran and Another*⁴¹ the Supreme Court of Philippines held that the fact that the right to a balanced and healthful ecology incorporated in Article 16 of the 1987 Constitution was included under the Directive principles of State Policy and not under the Bill of Rights did not make it less important. Venezuela is a good example of a country where environmental rights have gained increasing importance. An entire chapter⁴² of the 1999 Constitution of the Bolivarian Republic of Venezuela is dedicated to the environment. The Constitution, which came into force on December 30, 1999, recognizes the right of citizens to a clean and safe environment. This right gained the same inalienable status in the Constitution as the right to life, health and education. The Constitution provides thus:

It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future.

40 PLD 1994 SC 693.

41 G.R. No. 101083: Supreme Court of the Philippines, cited in Ogbuigwe, A. 2002. *Offended: Legal Issues in the Niger Delta Struggle*, 2nd ed. Port-Harcourt: Anpez Center for Environment and Development. P. 26.

42 Chapter IX. Masri R. 2009. *Environmental Rights within the Venezuelan Constitution*. Retrieved Mar. 18, 2010,

Everyone has the right individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment. The state shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monument, and other areas of particular ecological importance. It is the fundamental duty of the state, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.⁴³

In Nigeria, although environmental protection is provided for in Chapter II⁴⁴ of the 1999 Constitution (under the Fundamental Objectives and Directive Principles of State Policy) and not in Chapter IV (Fundamental Rights), the Federal High Court Benin has interpreted the Constitutionally guaranteed right to life⁴⁵ to include the right to clean, poison-free, pollution-free, healthy environment. This was the decision of the Court in *Gbemre v. Shell Petroleum Development Company Nigeria Ltd. and Ors.*⁴⁶ The court further held that the action of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community was a gross violation of the fundamental right to life (including a healthy environment and dignity of human person as enshrined in the Constitution). By virtue of judicial

43 Article 127.

44 Which is non-justiciable by virtue of the provision in section 6 (6) (c) of the same constitution.

45 See Section 33 (1) of the Constitution.

46 Suit No. FHC/CS/B/153/2005. Unreported decision given on November 14, 2005.

activism, therefore, the Nigerian Court has elevated the status of the right to environment, to that of a fundamental right in this decision. However, a case with similar facts as that of Gbemre, was decided differently by another Nigerian court. In *Okpara v Shell Petroleum Development Company Nigeria Ltd & others*,⁴⁷ the court arrived at a different decision because the case turned to a bout of legal technicalities and philosophy and was struck out based on preliminary objections. In striking out the case, the court stated:

I therefore uphold the submission of the learned Counsel for the 2nd, 3rd and 4th Defendants that the present suit cannot be maintained in a representative capacity. I also uphold the objection of the Learned SAN for the 1st Defendant Counsel, the 5th and 6th Defendants on the ground that this suit is incompetent for wrong joinder of cause of action.

It is submitted with due respect that the court placed undue emphasis on technicalities and did not accord sufficient consideration to environmental impacts made on the health of the environment and people, in arriving at such a decision. These two cases represent the first attempts in Nigeria to interpret the fundamental rights provisions of the Constitution of the Federal Republic of Nigeria (CFRN) 1999,⁴⁸ to include the right to "clean, poison-free, pollution-free, and healthy

47 Suit No. FHC/PH/CS/518/2005, Unreported decision of the Federal High Court, Port Harcourt Division, on 29 September 2006.

48 Sections 33 and 34 CFRN 1999 which provide for rights to life and dignity of the human person respectively.

environment."⁴⁹ The above examples obviously demonstrate that environmental rights, human rights and legislations are functionally interconnected.

3.0 The centrality of man in human rights and the right to environment

Human beings are at the centre of the causes or activities that adversely alter the environment, although it does not appear that the effects are under man's control. The climate change phenomenon is a typical example. Accordingly, man's rights and obligations to the environment received acknowledgement in the 1972 Stockholm Declaration.⁵⁰ The declaration represented the first international effort at recognizing the right of man to a healthy and safe environment. The recognition indicates an increasing realization that human beings are at the centre of concern for sustainable development. Subsequently, the rights and duties of man in relations to the environment received attention in other media. In the 1974 Hague Academy lecture, it was advocated that existing concepts of human rights should be extended in order to include the right to a healthful and decent environment, that is, freedom from pollution and the corresponding rights to pure air and water.⁵¹ It is notably important that the effect of environmental pollution is not limited to the perpetrators of such pollutions. This makes the need for a human right to a healthy environment an imperative, to protect humanity at large and particularly, to protect innocent individual victims of pollution.

49 B.A., Olowolaran, 2009, *The Right to a Clean and Healthy Environment and the Fundamental Human Rights Provisions of the Constitution of the Federal Republic of Nigeria*, 1999. *Petroleum, Natural Resources and Environmental Law Journal*, 53-80.

50 Stockholm Declaration, 1972 op. cit. (note 23).

51 Nobel Prize Winner Rene Cassin in Okorodudu – Fubara, M.T. 1998. *Law of Environmental Protection – Materials and Text*. Ibadan: Caltop Publications (Nigeria) Limited. 73

The right to environment can safely be described as the result of the realization that environmental protection is not just about the need to protect, preserve, or maintain the aesthetic value of the physical environment and its economic potentials and benefits, but the fact that man has become an endangered species due to the threat to human health and life by pollution. The United Nations Conference on Environment and Development (UNCED), (also known as the Earth Summit),⁵² gave further expression to the concern for the need to preserve the environment.⁵³ The central focus of the summit was the question of how to relieve the global environmental system through the introduction of the paradigm of sustainable development. Other matters for concern were how to solve global problems such as poverty, war, and the growing gap between industrialized and developing countries.⁵⁴ All of these are man-centred concerns which take place in the context of the environment and also threaten human rights enjoyment. Also important is the 1992 Rio Declaration⁵⁵ which refers to the need to ensure a healthy and safe environment. The Declaration states 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.⁵⁶ This principle recognizes man's entitlement to a healthy environment. The Rio

52 The Earth Summit took place in Rio de Janeiro, Brazil, from June 2-14, 1992. Government officials from 178 countries and between 20,000 and 30,000 individuals from governments, non-governmental organizations, and the media participated in the event to discuss solutions for economic and social as well as environmental and developmental problems.

53 It was held twenty years after the United Nations Conference on the Human Environment (UNCHE) took place in Stockholm, Sweden.

54 United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil. Available at

[http://www.eoearth.org/article/United_Nations_Conference_on_Environment_and_Development_\(UNCED\),_Rio_de_Janeiro,_Brazil](http://www.eoearth.org/article/United_Nations_Conference_on_Environment_and_Development_(UNCED),_Rio_de_Janeiro,_Brazil) Accessed on 30 September 2010.

55 The Declaration of the 1992 United Nations Conference on Environment and Development (UNCED), tagged the "Earth Summit", held in Rio de Janeiro, Brazil.

56 Principle 1.

Declaration goes further to state that: *The right to development must be fulfilled to meet equitably developmental and environmental needs of present and future generations*⁵⁷, and that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.⁵⁸ Although Principle 3 appears to support the right to development which has been the desire of developing countries, the reference to meeting environmental as well as developmental needs suggests that developmental goals must sometimes be compromised for environmental needs.⁵⁹ The Declaration makes environmental protection and consideration central to the development process in order to ensure sustainable development.⁶⁰ Sustainable development may be seen as an integral part of the international law of human rights. From this perspective, the achievement of sustainable development is supported by three pillars namely, international environmental law, international human rights law, and international economic law. The principle, in this way, covers a broad range of disciplines. This multi-disciplinary approach is further illustrated by the policy of the European Bank for Reconstruction and Development, which aims to integrate environmentally sound and sustainable development with the rule of law, market economy and multi-party democracy⁶¹. Recognizing the importance of a participatory approach as a requirement to successful enforcement of standards, the Rio Declaration further states:

⁵⁷ Principle 3, emphasis added.

⁵⁸ Principle 4.

⁵⁹ Thornton, S.M.A. and Beckwith, S. Op cit. p. 41.

⁶⁰ Principle 4.

⁶¹ McGoldrick. 1996. "Sustainable Development and Human Rights: An Integrated Conception". 45 I.C.L.O. 796. See also Ksentini. 1994. "Human Rights and Environment". UN Doc. E. CN. 4/sub. 2/1994/9. July 6, 1994. (Special report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities). Cited in Thornton, J.M.A. and Beckwith, S. OP cit. P. 41.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment – that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.⁶²

Any development that fails to address the environmental needs required for the realization of man's basic rights, falls short of being a true development. The principle of participation is of particular relevance in that it is very important in providing a platform for the development of procedural rights, enabling individuals and environmental groups to take action to protect the environment. It further creates a moral obligation on participants to ensure enforcement of guidelines and standards to which they are not only parties, but determinants of.

3.0.1 Environmental Rights Enforcement

The effectiveness of rights lies in their enforceability. Rights cannot be rights properly so called if they cannot be enforced. This section discusses International, African Regional and Nigerian National legal frameworks for the enforcement of

62 Principle 10.

environmental rights, and making them more meaningful to those who are the subjects of such rights.

3.0.2 *International Legal Framework on the Enforcement of Environmental Rights.*

The United Nations (UN) initiatives on environmental rights forms the focus of discussion in this section of the paper, in view of its leading role in maintaining the global environmental health as a way of furthering the human rights provided for in its several instruments. Many international conferences and conventions on the environment deal with global concerns about the implications of environmental pollution (such as global warming, climate change and loss of biological diversity), without considering the problems of enforcement of rights of individuals or peoples to healthy and safe environment. However, the United Nations (Stockholm) Conference on Human Environment (1972)⁶³ is unique in its categorical provision for the right of man to a healthy and safe environment. It is the first and only UN Declaration with such a clear provision on environmental rights. The Stockholm Declaration is a forward-looking instrument and targets a future development of international environmental law. The conference adopted a Declaration on the human environment that consisted of 26 principles. It covered most of the major international environmental issues including sustainability, pollution of the seas, conservation of habitats and wild life, population growth nuclear weapons and toxic substances. It is notable that Principle 1 deals with man's fundamental rights to equality, liberty, and conditions of life in an environment that adequately guarantees the quality of life that man requires for his existence on earth.⁶⁴ Equality and liberty are libertarian

⁶³ Stockholm Declaration, 1972 op. cit. (note 23).

⁶⁴ Emphasis added by authors of this paper.

rights, clearly in the category of the first generation of human rights. This removes any ambiguity about the importance of the need for a supportive environment for the enjoyment of the first generation rights, which are the civil rights to life, equality and liberty.

The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro Brazil (1992) is another landmark in international environmental law. Among other provisions, it states that *"the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations"*⁶⁵ and further states that, *"in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."*⁶⁶

Of particular relevance to environmental rights enforcement, is the acknowledgement that environmental issues are better handled with the participation of all concerned citizens, at the relevant levels. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy are to be provided.⁶⁷ It is submitted that unless environmental rights are accorded the status of human rights, enforceability by individuals will be very difficult and it

65 Principle 3 of the Declaration.

66 Principle 4 of the Declaration.

67 Principle 10.

occur only exceptionally, since environmental law is in the domain of public law.

The principles provided by the international instruments have generally provided a platform for the development of procedural environmental rights, enabling individuals and environmental rights groups to take action to protect the environment. Efforts to advance substantive environmental human rights were however rejected at the Rio Summit.⁶⁸

3.0.3 *African Regional Legal Framework on the Enforcement of Environmental Rights*

Africa has made the most outstanding contribution to legal recognition and enforcement of environmental rights. This it has done through the African Charter on Human and People's Rights. The Charter,⁶⁹ provides that "all people shall have a right to a general satisfactory environment favourable to their development."⁷⁰ This is a major breakthrough in environmental rights advocacy as it links the right to a healthy environment clearly with development. It has provided a basis for national legal action within the African sub region. For instance, on the basis of this provision, it has been held in *Fawehinmi v. Abacha*⁷¹ (per Ogunbare JSC) that:

The Charter gives to citizens of member states of the Organization of African Unity⁷² rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning.

68 Boyle, A, and Anderson, M. 1996. *Human Rights Approaches to Environmental Protection*. Oxford: Clarendon Press. p.43

69 The African Charter came into force on October 21, 1986.

70 Article 24.

71 (2000) FWLR (pt.4) 557.

72 Now African Union.

This Charter has been ratified by Nigeria vide the African Charter on Human and People's Rights (Ratification and Enforcement) Act.⁷³ It is notable that the African Union has as one of its objectives, sustainable development at the economic, cultural and social levels. The Charter therefore is a useful tool in achieving the objective of enforcement of the right to a healthy environment.

3.0.4 *Nigeria National Legal Framework on the Enforcement of Environmental Rights.*

Nigeria has a plethora of laws on environmental protection, but only those that are directly relevant for environmental rights enforcement, will be highlighted here due to constraint of space. The basis for environmental rights enforcement in Nigeria is the 1999 Constitution of the Federal Republic of Nigeria. The Constitution provides that: *The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.*⁷⁴ Although this provision is non-justiciable⁷⁵ it is submitted that where a law imposes a duty there is a corresponding right enjoyable by the beneficiary of the duty, in this case citizens of Nigeria. The Supreme Court of Nigeria has held in *Attorney-General, Ondo State v. Attorney-General of the Federation*⁷⁶ that the National Assembly could legislate on any of the Fundamental Objectives and Directive Principles of State Policy to make it enforceable. Thus, the key national legislations including the Federal Environmental Protection Act (FEPA), which has been repealed and replaced by the National Environmental standards and Regulations Agency

73 Cap. A9, LFN 2004.

74 Section 20 CFRN 1999.

75 See Section 6 (6) (c).

76 (2002) 9 NWLR (pt. 772) 222,272. See also *FRN v. Anache* (2004) Vol. 14 WRN 1 (S.C).

(Establishment) Act (NESREA)⁷⁷ have found constitutional basis for their operations. Also, by the enactment of the African Charter on Human and People's Rights (Ratification and Enforcement) Act by the National Assembly, environmental rights as provided in section 20 of the CFRN 1999 have become enforceable in Nigeria.

The Constitution provides for a fundamental right to life in its Section 33(1). This constitutionally guaranteed right to life has been interpreted to include the right to clean, poison-free, pollution-free, healthy environment.⁷⁸ This is very encouraging and it is expected that the Court of Appeal and the Supreme Court will tow this line of reasoning.

It is notable that neither the National Environmental standards and Regulations Agency (Establishment) Act nor the National Oil Spill Detection and Response Agency Act⁷⁹ provides for the right of citizens to a healthy and safe environment. They however criminalize certain acts and impose penalties on offenders. While this is a welcome development, it is submitted that the Acts should take further steps to expressly provide for enforceable rights of citizens to a healthy and safe environment, thus creating room for private enforcement. Currently, there are some existing enforcement mechanisms for the realization of environmental rights and this will be the next part of the paper.

4.0 Enforcement Mechanisms

Different mechanisms may be adopted in the enforcement of environmental rights. Some of such enforcement mechanisms,

⁷⁷ 1990 and 2007 respectively.

⁷⁸ See *Gbemre v. Shell PDCN Ltd & Ors. Supra.*

⁷⁹ Cap. N 157 LFN 2004.

which are applied in different jurisdictions with different levels of effectiveness, will now be highlighted.

4.0.1 Public Interest Litigation

Where the collective environmental right of citizens is breached it is appropriate for a public-spirited individual to bring an action to enforce the right. The problem with this mechanism is the technical issue of locus standi. For a person to succeed in this form of litigation he has to show that he has suffered injury over and above other members of the public.⁸⁰ Otherwise, only the Attorney-General is entitled to institute an action. However, the Supreme Court of Nigeria has held that Section 6(6)(b) of Constitution has the effect of empowering a private person to sue in the public interest without obtaining the consent of the Attorney-General or joining him as a party.⁸¹

Another problem with this mechanism is the reluctance of Nigerian Courts to grant injunctions against companies causing pollution, considering rather the economic impact on the companies and government instead of the need for the protection of the environment, property and individual health and life.⁸² In this regard, Nigerian courts should take a cue from American courts which grant injunctions in cases deserving same. For example, in *Amoco Production Co. v. Village of Gambell, Alaska*⁸³ the Supreme Court of the United States held as follows:

Environmental injury, by its nature can seldom be adequately remedied by money damage and is often permanent or at least of long

80 See *Amos & Ors. v. Shell - BP PDCN Ltd & Anor.* (1974) 1 R.S.L.R. at PP. 23 - 24.

81 See *Adediran and Anor. v. Inter-Land Transport Limited* (1991) 9 NWLR (pt. 214) 155.

82 Ekpu A.O.O. "Environmental Impact of Oil on Water: United States and Nigeria". 4 *Denver Journal of International Law*. 214; cited in *Akpotaire, V., Atsegbua, L. and Dimowo, F.* 2004. *Environmental Law in Nigeria: Theory and Practice*. Lagos: Ababa Press Ltd. P. 185

83 480 U.S. 531 (1987).

duration, that is irreparable if such injury is sufficiently likely, therefore, the balance of harm will usually favour the issuance of an injunction to protect the environment.

4.0.2 *Fundamental Rights Enforcement Procedure*

A person whose environmental right has been breached may institute an action by way of fundamental right enforcement under the Fundamental Rights (Enforcement procedure) Rules. Environmental rights enforcement may then be achieved through this procedure by enforcing the fundamental right to life guaranteed by the Constitution. The problem with this procedure is that people may encounter technical difficulties in bringing actions in representative capacities.⁸⁴ In *Okpara and Shell PDCN*⁸⁵ the facts of which are similar to Okechukwu's case, technicalities prevailed over justice and the matter was struck out on preliminary objections, without looking into the merits of the case. The court ruled that the suit could not be maintained in a representative capacity. It also ruled that for wrong joinder of cause of action, the suit could not be maintained. This is very unfortunate and can constitute a major hurdle in the way of enforcing environmental rights vide the fundamental rights enforcement procedure. This is because environmental pollution is usually colossal and widespread in effect, affecting many people and whole communities. Actions will necessarily, and are usually, brought in representative capacities to avoid multiplicity of actions and also to minimize costs, as the victims are often poor and helpless. An environmental rights suit should therefore be seen as belonging

⁸⁴ See *Okpara v. Shell PDCN Ltd v. Ors.* Suit No. FHC/PH/CS/518/2005. Unreported decision of the Federal High Court, Port Harcourt, September 29, 2006. See also *Okechukwu v. Etukokwu* (1998) 8 NWLR (pt. 562) 511.

⁸⁵ Suit No. FHC/PH/CS/518/2005. Unreported decision of the Federal High Court, Port Harcourt, September 29, 2006. See also *Okechukwu v. Etukokwu* (1998) 8 NWLR (pt. 562) 511.

to a special class and not be defeated by unnecessary technical rules.

4.0.3 *Judicial Intervention*

The judiciary is said to be the last hope of the common person. In its role of interpreting laws and the constitution, it has often come to the aid of oppressed citizens by creative interpretation of laws. The courts in Nigeria have done creditably in this regard.

The creative interpretation of the right to life to include the right to a healthy and safe environment in the different jurisdictions already discussed is illustrative of the point being made here. The problem as it concerns Nigeria is that the authority of *Gbemre and Shell PDCN Ltd & Ors*⁸⁶ is only persuasive as the Federal High Court is a Court of coordinate jurisdiction with other High Courts of the states. Its jurisprudential value would have been a lot higher if it had been a decision of the Court of Appeal or the Supreme Court of Nigeria, in keeping with the hierarchical order and the operation of judicial precedent. Another problem is that judges are often influenced in their interpretation of laws by their backgrounds, orientations and beliefs. This informs the characterization of judges as either strict and conservative or liberal and progressive. It is submitted that if there is continuing education for judges, environmental rights should be part of such curriculum, to ensure that they appreciate the importance of environmental health and reflect same in their judgments.

⁸⁶ See *Okpara v Shell* (Unreported) Op. Cit.

4.0.4 Pressure Groups

Pressure groups like non-governmental organizations (NGOs) can and do help in the enforcement of environmental rights. This takes the form of media campaigns, publication and distribution of leaflets, magazines and books, presentation of bills on environmental rights to the legislature, and even instituting actions to enforce environmental rights. The problem with this mechanism is that pressure groups depend mainly on persuasion for success and this is not always very effective.

5.0 Need for Fundamental Right to Environment

The need for constitutional provision of a fundamental right to environment can not be overemphasized. As has been discussed above, Gbemre's case is not yet a binding authority in Nigeria and therefore cannot be relied upon. Although it may be argued that the right to environment may be enforced under the African Charter on Human and People's Rights⁸⁷ the right under the Charter does not enjoy a fundamental right status in Nigeria, since it is not provided for under Chapter IV of the 1999 Constitution. In *Chief (Mrs.) Olufunmilayo Ransome-Kuti & Ors. V. Attorney-General of the Federation*⁸⁸ the court considered the nature of fundamental rights when it said:

This is no doubt a right guaranteed to everyone including the appellant by the Constitution. But what is the nature of a Fundamental Right? It is a right, which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our

⁸⁷ As ratified by the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A 9 LFN 2004.

⁸⁸ (1985) 6 SC 245 at 276-277; (1985) 5 NWLR (Pt. 10) 211 at 299-230.

Constitution, since independence starting with the independence Constitution, that is, the Nigeria (Constitution) Order in Council 1960, up to the present Constitution, that is the Constitution of the Federal Republic of Nigeria, 1979 (the latter does not in fact apply to this case: it is the 1963 Constitution that applies) is to have these rights enshrined in constitutions so that the rights could be "immutable" to the extent of the "non-immutability" of the Constitution itself.

The effect of the Act ratifying the Charter is that it domesticates the provisions of the Charter by making the Charter part of the ordinary laws of the land creating ordinary rights. Until a constitutional provision, therefore, of a fundamental right to environment, the courts will continue to enforce the rights as ordinary rights,⁸⁹ especially as Gbemre's case is not yet a binding authority in Nigeria. The argument that the provision of a substantive right to environment in the constitution will lead to a proliferation of rights⁹⁰ can not stand as there is no evidence to substantiate this assertion. It is the argument of conservatives akin to the argument that allowing private individuals to bring action to redress public wrongs will open the floodgates of litigation to busy bodies. We know that this is not so as not everybody is public-spirited and the high cost of litigation in terms of time and finance may not permit that.

⁸⁹ Okon E. E., "The Environmental Law Perspective in the 1999 Nigerian Constitution". *Env L Rev* 5 (2003). Vathek Publishing. 271.

⁹⁰ See Wolfe K. "Greening the International human Rights Sphere? Environmental Rights and the Declaration of Principles on Human Rights and the Environment". Retrieved Oct. 25, 2010, from http://www.heinonlinebackup.com/hol-cgibin/get_pdf.cgi?

6.0 Conclusion

The courts are to be commended for being able to enforce environmental rights though not provided for in the fundamental rights chapter of the 1999 CFRN in the case of *Gbemre and Shell PDCN Ltd* (supra). The resort to interpretative innovations in the enforcement of the fundamental right to life is a way of bridging the lacuna created by the non-inclusion of the right to a healthy environment in the constitution. Applying the African Charter on Human and People's Rights (Ratification and Enforcement) Act⁹¹ court has also provided a basis for environmental rights enforcement. However, some judges still sacrifice justice for technicalities, and this is a major hurdle in environmental rights enforcement in Nigeria.

6.1 Recommendations

Given the centrality of a safe and healthy environment to the enjoyment of other human rights (and especially the right to life), the 1999 Constitution should be amended to provide for environmental rights in Chapter IV of the Constitution. This will make the rights directly enforceable by the people. Judges should de-emphasize procedural technicalities in the interest of environmental justice. The Court of Appeal and the Supreme Court should tow the line of the Federal High Court, Benin Division in giving a broad interpretation to the right to life to include a right to a healthy and safe environment.

⁹¹ Vol. 1, Cap Ag, LFN, 2004