

**THE RIGHT TO A HEALTHY ENVIRONMENT AND ITS ENFORCEMENT: COMPARING THE CASES OF NIGERIA AND INDIA\***

**Abstract**

The right to a healthy environment is one of the emerging rights in the international human rights law. This work analyses the judiciary's roles in advancing the right to a healthy environment in Nigeria and India. These two countries have similarities and yet there exists a remarkable difference between the levels of recognition of the right to environment in both countries. Thus, the right to a healthy environment is linked with the environment, human rights and sustainable development. Notably, Nigerian is known for its rich mineral oil which has become the economy's main stay. However, the impact of the mineral oil in Nigeria especially the Niger Delta Region has deteriorated the environment which has impacted negatively on the health of the citizens living in such abode. The provision of a healthy environment remains non-justiciable in both constitutions but India has adopted a more pragmatic approach in the interpretation of the right to a healthy environment as envisaged by the provisions of the law. Though Nigeria has ratified the African Charter on the Human and Peoples Rights, it is yet to come to terms with the purport of such ratification, This article examines how Nigeria can make the right to a healthy environment attainable by its citizens by holistically adopting the procedures that are reached in India towards actualizing the right to a healthy environment. It is therefore recommended that an expansive and derivative interpretation of both the African Charter on Human and People's rights and the provisions of Fundamental Human Rights in the Nigerian Constitution can go a long way in the realization of a right to a healthy environment in Nigeria. Thus, these provisions may be utilized both defensively and restrictively to protect against actions that violate citizen's rights.

**Keywords:** Human Rights, Healthy Environment, Judiciary, African Charter, Niger Delta, Constitution.

**1. Introduction**

Environmental rights are one of the emerging rights in the international human rights law. It is composed of the substantive right to a clean environment and procedural rights to act to protect the environment. According to the Ksentini report, it suggests that the possible components of substantive human rights can be seen in one source which list out fifteen rights relative to environmental quality.<sup>1</sup> These include freedom from pollution, environmental degradation and activities that adversely affect the environment or threaten life, health, livelihood, well-being or sustainable development, protection and preservation of the air, soil, water, sea ice, flora and fauna, the highest attainable standards of health; safe and healthy food, water and working environment; adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters<sup>2</sup> views environmental rights as strengthening the role of members of the public and environmental organisations in protecting and improving the environment for the benefit of future generations. Recently<sup>3</sup>, the people of Ohaji/Egbema Community in Imo State have beckoned on the government to come to their aid in cleaning up the oil spills in their environment. This has made them to suffer great psychological, health and other socio-economic impacts. Arguably, the right to a healthy environment is a basic right which need not be written in the constitution for they are assumed to exist from the inception of human kind. This was the position of the Philippines Supreme Court in the case of *Juan Antonio Oposa v. The Honorable Fulgencio S. Factoran, Jr.*,<sup>4</sup> where the court stated that the right to a balanced and healthful ecology need not even be written in the constitution, for, it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. The Supreme Court also held *ipsisima verba* in *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bays*.<sup>5</sup>

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<sup>1</sup> Human Rights and the Environment: Final Report of 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) (Ksentini Report) 74.

<sup>2</sup> More popularly referred to as the Aarhus Convention after the Danish city where it was adopted in June 1998.

<sup>3</sup> African Independent Television News: Farmers of Obio-Akpor Community in Ohajiin Egbema seek government intervention on oil spillage. Retrieved on the 13/6/2021 AIT News at 8.30pm.

<sup>4</sup> G.R. No. 101083, 224 S.C.R.A. 792 (Supreme Court of Philippines, July 30, 1993) reprinted in 33 ILM 173, 187 (1994).

<sup>5</sup> G.R. Nos.171947 – 48 (Supreme Court of Philippines, December 19, 2008).

## **2. The Environmental Impact of the Oil Industry in Nigeria**

In 1958 Oil was discovered in commercial quantities which have become the main stay of the Nigerian economy. Oil exports contributes at least 95 percent of Nigeria's total exports<sup>6</sup> and revenues derived from the resource such as the federal government's participation interests, sale of oil blocs, concession rents, royalties and profit taxes amongst others contribute about 85 per cent of government revenues.<sup>7</sup> Most of Nigeria's onshore oil activities take place in the Niger Delta region.<sup>8</sup> The resource is exploited by oil-multinationals in partnership with the Federal Government of Nigeria through the national oil company, the Nigeria National Petroleum Corporation (NNPC). This has led to oil production which is characterized by oil spills and gas flaring. Data released by the Nigerian National Petroleum Corporation (NNPC), based on the quantities reported by the operating companies suggests that approximately 2,300 cubic metres of oil are spilled in 300 separate incidents annually, while the figures released by the Department of Petroleum Resources<sup>9</sup> and oil industry sources<sup>10</sup> differ.<sup>11</sup> The adverse effects of oil spills on the environment includes contamination of water sources and arable land as well as the destruction of economic produce including fish ponds, crops and trees. In *Shell v. Tiebo VII*<sup>12</sup>, the plaintiffs sued Shell on behalf of the Peremabiri community for damage from an oil spill. The spill reportedly covered much of the River Nun, a tributary of the Niger, which flows through the plaintiff's community and provides a source of drinking water. As a result, drinking water was contaminated, raffia palms were destroyed and fishing activities were damaged. In all, the exploration and exploitation of oil resources in the Niger Delta especially the Ogoni area has deleterious impacts on its rich and bio-diverse environment.

## **3. The Constitutional Provision on the Right to a Healthy Environment in Nigeria**

The Nigerian Constitution defined environment thus: The State shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria<sup>13</sup>. This provision falls under chapter two on Fundamental Objectives and Directive Principle of State Policy.<sup>14</sup> The main aim of section 20 is to ensure a healthy environment for Nigerian citizens.<sup>15</sup> The protection of the environment is essential for the realization of human rights because human rights can only be enjoyed in an environment that is devoid of pollutants.<sup>16</sup> Thus, safeguarding the air, water, land and wild life as stated in section 20 would enhance a pollution free environment. In spite of the laudable provision of section 20 in the constitution, the question is whether an individual or aggrieved person has a right or the locus to approach the court to enforce the provision of section 20. To answer this question, it is pertinent to examine the provision of section 6(6)(c) of the Constitution which provides thus:

The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this constitution extend to any issue or question as to whether any act or omission by any act or omission by any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in Chapter II of this constitution.

This provision of section 6(6)(c) has been interpreted as denying the court the power to adjudicate on any issue having to do with the enforcement of the provision of section 20 of the Constitution.<sup>17</sup> That is, protection of the environment. This is because section 20 falls under the provisions of fundamental objectives and directive principles of state policy set out in chapter two of the Constitution which by section 6 (6) (c) are generally not enforceable. It therefore follows that the Environment includes water, air, land, and all plants and human beings

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<sup>6</sup> M. Ross, Nigeria's Oil Sector and the poor, retrieved from <http://www.sscnet.ucla.edu/polisci/faculty/ross/NigeriaOil.pdf> on 21/06/2021.

<sup>7</sup> J Onoh, *The Nigerian Oil Economy* 1983 pp33-37.

<sup>8</sup> These include Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States. Also see the Niger Delta Development Commission (NDDC) Act, 2004, Cap N68.

<sup>9</sup> The DPR estimates that between 1976 and 1996 a total of 4,835 incidents resulted in the spillage of at least 2,446,322 barrels of which an estimated 1,896,930 barrels (about 77 percent) were lost to the environment. See Environmental Resources Managers Ltd., Niger Delta Environmental Survey Final Report 249.

<sup>10</sup> This source claims that 1.07 million barrels (45 million U.S gallons) of oil were spilled in Nigeria from 1960 to 1997. This figure is unsurprisingly lower than that calculated by the DPR. See Oil Spill Intelligence Report (Arlington, Massachusetts), 1 White Paper Series November 1997.

<sup>11</sup> P. Nwilo & T. Badejo, Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas, retrieved from [http://www.fig.net/pub/figpub/pub36/chapter\\_8.pdf](http://www.fig.net/pub/figpub/pub36/chapter_8.pdf) on

<sup>12</sup> (1996) 4 NWLR (Pt. 445) 657.

<sup>13</sup> S.20 Constitution of the Federal Republic of Nigeria, 1999 (as amended)

<sup>14</sup> See the provisions of the Chapter 11 of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).

<sup>15</sup> Gozie Ogbodo, 'Environmental Protection in Nigeria: Two Decades after Koko Incidence' (2010) (15)(1) *Annual Survey of International and Comparative Law* 1, 18.

<sup>16</sup> A. B. Abdulkadir and A. O. Sambo, 'Human Rights and Environmental Protection: The Nigerian Constitution Examined' (2009) *Journal of Food, Drug and Health Law* 61, 73.

<sup>17</sup> Mathew Adefi Olong, 'Human Rights, the Environment and Sustainable Development: Nigerian Women's Experiences' (2012) 5(1) *Journal of Politics and Law* 100, 108.

and the inter-relationship that exist among them<sup>18</sup>. Notably, the Environmental Impact Assessment Act<sup>19</sup>, defines ‘environment’ to mean the components of the Earth, and includes-

- (a) Land, water and air, including all layers of the atmosphere,
- (b) All organic and inorganic matter and living organisms, and
- (c) The interacting natural systems that include components referred to in paragraphs (a) and (b).

Environmental law prescribes the body of rules, both from the national and international perspectives, for the sustainable utilization of resources for the social and economic development of the society<sup>20</sup>. It specifies the legal platform upon which the environment could be protected and natural resources conserved through the sustainable use of natural resources, pollution control measures and the integration of environment considerations into developmental process.<sup>21</sup> All the significant environmental laws in our statute books are federal laws and regulations, pointing to the fact that the Constitution creates exclusive powers for the Federal government in certain specific areas within the Exclusive Legislative List. The Federal government has the exclusive powers to mines and minerals, including oil fields, oil mining, geological surveys and natural gas.<sup>22</sup> It also has powers over customs and excise duties<sup>23</sup> and taxation.<sup>24</sup> The provision for the protection of the environment is contained in chapter 11 of the Constitution titled ‘Fundamental Objectives and Directive Principles of State Policy which is to be read in conjunction with section 6(6)(c) of the Constitution to the effect that the provisions of the said chapter is non-justiciable against the State<sup>25</sup>. Nigeria has imbibed the substantive right to a healthy environment as provided in the African Charter on Human and People’s Rights<sup>26</sup> by the adoption of same. Nigerian Courts are enjoined to have regard to the country’s international obligations which it has undertaken to honour. Some Courts have invoked the principle of presumption in favour of international law and international obligations. In *Attorney-General v. British Broadcasting Corporation*<sup>27</sup>, Lord Scarman stated that there is a presumption albeit rebuttable, that our municipal law will be consistent with our international obligations.<sup>28</sup> The status of the African Charter was considered in *Fawehinmi v. Abacha*<sup>29</sup> where it was held that the individual rights contained in the African Charter on Human and people’s rights are justiciable in Nigerian courts. Where an international convention by virtue of the municipal process of law-making becomes a law of the state, national courts will have no problem in invoking the convention in municipal litigation. This was the situation in *Ogugu v. State*<sup>30</sup>, where the Supreme Court held that although the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act has not made a special provision like section 42 of the 1979 Constitution, the Human and Peoples Rights in the Charter are enforceable by the several High Courts in the country depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.

In the Supreme Court’s opinion, the Charter gives to citizens of member states of the Organisation of African Unity (now the African Union) rights and obligations which rights and obligations are to be enforced by our Courts for it to have meaning. In other words, if the substantive right to a healthy environment is to have any meaning, it must be judicially enforceable. African regional court systems including the African Commission on Human and People’s Rights and the Community Court of Justice of the Economic Community of West African States (ECOWAS), have also decided cases based on the status, enforceability and impact of the provisions of the African Charter on Human and People’s Rights. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v. Nigeria*<sup>31</sup>, heard by the African Commission, the question of Ogoni people’s rights to enjoy a healthy environment were in issue. The plaintiff alleged on behalf of the Ogoni’s that the Federal Government of Nigeria and its partner oil multinationals operating in the Niger Delta region had infringed on the above rights in the process of oil exploration and production activities. The Commission took cognizance of the fact that the Federal Republic of Nigeria had incorporated the African Charter into its domestic law with the result that all the rights contained therein can be invoked in Nigerian Courts including those violations alleged by the plaintiff. The Commission held that the State is obliged to protect right holders against other

<sup>18</sup> NESREA ACT 2007 s.37

<sup>19</sup> S. 63(1) EIA Act, Cap E 12, LFN 2004

<sup>20</sup> A G Oludayo, *Environmental Law and Practice in Nigeria* (Nigeria: Lagos University Press) 3

<sup>21</sup> *ibid*

<sup>22</sup> Item 39 on the Exclusive Legislative List of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>23</sup> *Ibid* Item 16

<sup>24</sup> *Ibid* Item 59

<sup>25</sup> *ibid* ss.17 and 6(6) (c)

<sup>26</sup> Art.24 African Charter on Human and People’s Rights (Ratification and Enforcement) Act, Cap. A9 2004, All peoples shall have the right to a general satisfactory environment favourable to their development.

<sup>27</sup> (1981) AC 303 at 354

<sup>28</sup> See also *Post-Office v. Estuary Radio Ltd* (1968) 2 QB 740 at 757; *Schering Chemicals Ltd v. Falkman Ltd.* (1981) 2 All ER 321.

<sup>29</sup> (2006) 6 NWLR (pt.660)228

<sup>30</sup> (1994) 9 NWLR (PT.366)1

<sup>31</sup> Communication No. 155/96

subjects by legislation and provision of effective remedies and by taking measures to ensure that there is an effective interplay of laws.

In the 1990's, the courts were called upon in certain cases to decide environmental questions in various oil litigation.<sup>32</sup> One of such case is the *Kenule Benson Saro-Wiwa, President of the Movement for the Survival of the Ogoni People (MOSOP) and Eight Others (unreported, 1995)*<sup>33</sup>, where the Ogoni people claimed that excessive oil exploration activities had destroyed agricultural land and oil spillage had destroyed a lot of flora and fauna in Ogoni land. It had also polluted many rivers in Ogoni land thereby causing death of many aquatic animals. The air and water pollution arising from gas flaring and oil spillage has always been making the area very hazardous for habitation. The environmental degradation resulting from despoliation is equally a factor which has adversely affected the economic potentials and manpower resources of Ogoni land.

Despite regional progress in the recognition of Nigerians right to enjoy a healthy environment, it appears that the country's judiciary is still circumspect with regard to the interpretation of extant legal provisions. The Chief Justice of Nigeria referred to as the 'judicial posture' of Nigerian judges in environmental cases<sup>34</sup> especially when it is oil related. In *Allan Irou v. Shell B.P.*<sup>35</sup>, the judge refused to grant an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the activities of the defendant because in his opinion, nothing should be done to disturb the operation of mineral oil which is the main source of Nigeria's economy. Sadly, some judges have followed unwritten rule that economic considerations should be prioritized over environmental concerns.<sup>36</sup> Even though some recent decisions have deviated from this sort of restricted reasoning, there still remains uncertainty in the judicial system in relation to oil related environmental litigation.<sup>37</sup> Frynas opines that the recent decisions in *Shell development Company Ltd. Councillor F. Farah and 7 others*,<sup>38</sup> *Edise & Others v. William International Limited*,<sup>39</sup> *Elf (Nigeria) Limited v. Sillo*,<sup>40</sup> and *Shell Petroleum Development Company Ltd. v. Tiebo*<sup>41</sup> shows that the judicial posture of the Nigerian judges has changed.<sup>42</sup> In *Chief Oshevire v. British Caledonian Airways Ltd.*,<sup>43</sup> the Court of Appeal held that an international agreement embodied in convention or treaty is autonomous, as the high contracting States have submitted themselves to be bound by its provisions which are therefore above domestic legislation. Thus, any domestic legislation in conflict with the convention is void. The court held that the Warsaw Convention, as amended by the Hague Protocol, which has been ratified by Nigeria prevail over the rules of domestic law when they are incompatible with the latter.<sup>44</sup> Similarly, the above position of law was also held in the case of *Ndigwe v. Ibekendu*.<sup>45</sup> In the case of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. The Federal Republic of Nigeria*<sup>46</sup> which raise the issue of the right to a healthy environment.<sup>47</sup> The communication alleges that the oil consortium has exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. In *SERAP v. Federal Republic of Nigeria*<sup>48</sup>, the plaintiff the Socio-Economic Rights and

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<sup>32</sup> J. G Frynas, Legal Change in Africa: Evidence from Oil Related Litigation in Nigeria (1999) *Journal of African Law*, Vol.43, 121-150.

<sup>33</sup> All nine activists of MOSOP were executed in 1995 on the decision of the court. A. A. Idowu, 'Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoni land Episode' (1999) *Netherlands Quarterly of Human Rights*, Vol. 17/2, pp161-184.

<sup>34</sup> M. Uwais, Recent Development in Nigerian Strengthening Legal and Institutional Framework for Promoting Environmental Management in Global Judges Symposium on Sustainable Development and the Role of the Law 2002.

<sup>35</sup> Suit No. W/89/91 – HC/26/11/73 (unreported)

<sup>36</sup> A. Ekp, Environmental Impact of Oil on Water: A Comparative overview of Law and Policy in the United States and Nigeria (1995) 4 *Denver Journal of International Law* 214

<sup>37</sup> K. Ebeku, Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria, *RECIEL* 12 (2) 2003 199-208. See also A. Adedeji & R. Ako, Hindrances to Effective Legal Response to the Problem of Oil Pollution in the Niger Delta, 5 *UNIZIK Law Journal* 2005 pp.420-422

<sup>38</sup> (1995) 3 NWLR (pt.382) p.148

<sup>39</sup> (1986) 11 CA 187

<sup>40</sup> (1994) 6 NWLR (pt. 350)

<sup>41</sup> (1996) 4 NWLR (pt. 445) 657

<sup>42</sup> J. Frynas, Legal Change in Africa: Evidence from Oil related Litigation in Nigeria, (1999) 43 *Journal of African Law* 2, 121-150

<sup>43</sup> (1990) 7 NWLR (pt.163) 507

<sup>44</sup> See also The Registered Trustees of the Constitutional Rights Project (CRP), Suit No. M/102/93; *Nigerian National Petroleum Corporation v. Chief Fawehinmi and Others* (1998) 7 NWLR (PT. 559) 598.

<sup>45</sup> (1998) 7 NWLR (PT. 558) 486.

<sup>46</sup> Communication 155/96 October 27, 2001.

<sup>47</sup> The communication alleges violations of Articles 2,4,14,16, 18(1), 21 and 24 of the African Charter on Human and People's Rights.

<sup>48</sup> General List No. ECW/CCJ/APP/08/09, Judgment No. ECW/CCJ/JUD/18/12 Holden at Ibadan in Nigeria 14<sup>th</sup> December, 2012.

Accountability Project, (SERAP), filed a suit against the Federal Republic of Nigeria in the Court of Justice of Ecowas contending that Niger Delta's land, water, forest and fauna has been subjected to extreme degradation due to oil prospecting resulting in destruction of crops and damage to the quality and productivity of soil that communities use for farming and contaminates water that people use for fishing, drinking and other domestic and economic purposes. That the devastating activities of the oil industries in the Niger Delta continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life like adequate access to clean water, education, healthcare, food and a clean and healthy environment. The Plaintiff prayed for certain declarations and restraining orders against the Federal Republic of Nigeria. The Court adjudged that it has jurisdiction to adjudicate on the matter; that SERAP has locus standi in the instant case, and that the Federal Republic of Nigeria has violated Articles 1 and 24 of the African Charter on Human and People's Rights. Consequently, the Court ordered the Federal Republic of Nigeria to take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta; take all measures that are necessary to prevent the occurrence of damage to the environment and take all measures to hold the perpetrators of the environmental damage accountable. This is a milestone judgment by the ECOWAS Court which ordered the Federal Government to punish the oil companies.<sup>49</sup> In *Gbenre v. Shell Petroleum Development Company of Nigeria Ltd & Ors*,<sup>50</sup> the plaintiff requested the Federal High Court Benin Division to declare that gas flaring is illegal, harmful to their health and environment and therefore constitutes a violation of their right to life as guaranteed by the constitution of the Federal Republic of Nigeria and reinforced by the African Charter on Human and Peoples' Rights. Judgment was delivered on the 14<sup>th</sup> day of November, 2005 by Justice V. C. Nwokorie granting the reliefs sought for by the Iwherekkan community that the constitutional guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A9, Vol.1, Laws of the Federation of Nigeria 2004 inevitably includes the right to clean, poison free, pollution free and healthy environment. Though on appeal, the government is yet to comply with any of the orders made by the Federal High Court in Jonah Gbemre's case. Gas flaring has continued in the Niger Delta. However, since it is still on appeal, one may not rely on it as being the law<sup>51</sup>. In *Ijawa Aborigines of Bayelsa State v. Shell*<sup>52</sup>, the Federal High Court awarded US\$1.5 billion against Shell as damages for environmental pollution.<sup>53</sup>

#### 4. Environmental Rights in India

India is notably one of the most progressive countries in terms of judicial awareness and application of contemporary concepts including environmental rights and notions of sustainable development.<sup>54</sup> The process of accessibility of citizens to courts to enforce their constitutional rights further strengthens the judiciary, empowers civil society and fosters an atmosphere of environmental stewardship.<sup>55</sup> The constitution contains arrays of provisions that can be utilized to create and enforce legal rights.<sup>56</sup> Ironically, India's constitutional provisions on the environment and human rights are similar to Nigeria. Article 48A<sup>57</sup> which contains environmental protection provisions and Article 51A<sup>58</sup> on the fundamental duties of the State are both principles of state policy.<sup>59</sup> However, Indian courts have breathed life into the above provisions by linking and enforcing these (and related) issues to the constitutionally guaranteed right to life contained in Article 21.<sup>60</sup> Moreover, since the 1990s, the Supreme Court has stated that "issues of environment must and shall receive the highest attention from this Court".<sup>61</sup> A few

<sup>49</sup> The oil companies involved in the case are Shell Petroleum Development Company (SPDC); Nigerian National Petroleum Corporation (NNPC); ELF Petroleum Nigeria Ltd; Chevron Oil Nigeria Plc; Agip Nigeria Plc; Total Nigeria Plc, and ExxonMobil Corporation.

<sup>50</sup> Suit No. FHC/CS/B/153/2005

<sup>51</sup> Kaniye S.A. Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited', 16 *Review of European Community and International Environmental Law (RECIEL)* 3,319, (2008).

<sup>52</sup> Unreported Case, Federal High Court Judgment on February 24, 2006, delivered by Justice Okechukwu Okeke. The case is still going through appeal.

<sup>53</sup> See Theodore Okonkwo, 'The Constitutional Propriety of the US\$1.5 Billion Compensation Award Against SPDC', (2005) 1 *EPLR* 2 p.48

<sup>54</sup> M. Anderson, Environmental Protection in India, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION*, 199 (1996).

<sup>55</sup> Pushpinder Kaur, 'Environmental Protection in India: Judicial Activism and Beyond' (2013) <http://www.airwebworld.com/articles/index.php?article=1421> accessed on 11/06/2021.

<sup>56</sup> C.M. Jariwala, 'A Judicial Approach in the Fire Works Noise Pollution: A Critical Overview (1999) *All Indian Reporter Journal Section* 72, 74

<sup>57</sup> This Article provides that the State shall endeavor to protect the environment and to safeguard the forest and wildlife.

<sup>58</sup> It states that it will be the duty of every citizen to protect and improve the natural environment of the country and to have compassion for living creatures.

<sup>59</sup> *Supra* note 85, 213-214.

<sup>60</sup> *Francis Coralie Mullin v Union Territory of Delhi*, AIR 1981 SC 746.

<sup>61</sup> *Tarun Bharat Sangh, Alwar v. Union of India*, 1992 Supp (2) SCC 448.

cases are discussed to highlight how the courts have given effect to these principles that would otherwise have been deemed unenforceable because they are principles of state policy. Thus, in India, the right to life as provided in the constitution has been interpreted to include the right to clean water, right protection from pollution and any activities likely to endanger life<sup>62</sup> *In Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*,<sup>63</sup> one of the earliest cases where the Supreme Court dealt with the issues relating to environment and ecological balance, the petitioner alleged that unauthorized mining in the Dehra Dun area adversely affected the ecology and environment. The Supreme Court upholding the right to live in a healthy environment issued an order to cease mining operations despite the amount of money and time the company had invested. Similar decisions were reached in *Subhash Kumar v. State of Bihar*,<sup>64</sup> where the Court observed that “right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life” and in *Mathur V. Union of India*,<sup>65</sup> where the Supreme Court, once again, used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution.

With regards to the duties of the State regarding the environment, the case of *Kinkri Devi and Another v. State of Himachal Pradesh and Others*,<sup>66</sup> is illustrative. The petitioners sought an order to have a mining lease cancelled, to restrain the respondents from operating the mines covered by the lease in such a manner as to pose a danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, environment and the inhabitants of the area, and for compensation for the damage caused by the uncontrolled quarrying of the limestone. The Court held that operations from the mines should stop pending the government’s proper determination of the balance between development and environment from mining operations and submission of the report to the Court. It also held that no lease for mining of limestone was to be granted, neither renewed nor temporary permits issued till the report of the committee is received and further orders were made by the court. The Court reasoned that article 48A and 51A (g) placed a constitutional duty on the State and citizens to protect and improve the environment and that it was left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions in furtherance of this. The Supreme Court had to consider the development/environment dilemma in *Rural Litigation and Entitlement Kendra v. Union of India (Doon Valley limestone Quarrying Case –II)*.<sup>67</sup> Following a public interest petition addressed to the Supreme Court by the Rural Litigation and Entitlement Kendra of Dehra Dun in the State of Uttar Pradesh, the Court directed that all fresh quarrying in the Himalayan region of the Dehra Dun District be stopped. Subsequently, the mines were ordered to be closed based on reports on the Bandyopadhyay Committee and a three-man expert committee, both of which were appointed by the Court. The lessees of the mines thereafter submitted a scheme for limestone quarrying to Bandyopadhyay Committee that was rejected. The lessees challenged the decision of the committee in the Supreme Court. The real issue before the Court was to determine the conflict between the environmental consequence of the commercial exploitation and the economic benefits of the activity. The Court was of the opinion that the environmental considerations outweighed the economic benefits of the projects and this approved the decision of the Bandyopadhyay Committee. It also held that workmen affected by the closure of the mines should, as far as possible and in the shortest time, be employed in the reforestation and soil conservation programmes to be undertaken in the area. Similarly, in *M.C. Mehta v. Union of India*,<sup>68</sup> a public interest case was brought against government administrators as well as the tanneries whose effluents polluted the River Ganga. The petitioner claimed in his petition, *inter alia*, for the issue of a writ/order/direction in the nature of mandamus to the respondents restraining them from letting out the trade effluents into the River Ganga until they put necessary treatment plants for treating the effluents in order to arrest the pollution of the river. While the pollution of the river by the effluents was not contested, the companies argued in defence that they lacked the physical facilities, technical competence and funds to install adequate treatment facilities. While some of the tanneries pleaded for time to install pre-treatment plants, all of them claimed that they could not install secondary systems for treating waste water due to costs. The Court held that it was the fundamental duty of every citizen to protect and improve the natural environment just as it was a duty of the State to protect and improve the quality of the environment. The Court held *inter alia* that a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence particularly as the possible impacts of continued effluent discharge into the River Ganga would outweigh the inconveniences caused to the management and labour employed by it on account of the closure of the tanneries.

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<sup>62</sup>NukherYilma, ‘The European Court of Human Rights and the Right to Environment’ (2007) 4(1) *Ankara Law Review* 1, 24; M.R. Anderson and Ahmed A., ‘Assessing Environmental Damage under Indian Law’ (1996) 5(4) *RECIEL* 335, 341.

<sup>63</sup> *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652.

<sup>64</sup> *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

<sup>65</sup> *Mathur v. Union of India*, (1996) 1 SCC 119.

<sup>66</sup> *Kinkri Devi and Another v State of Himachal Pradesh and Others*, AIR 1988 HP 4.

<sup>67</sup> *Rural Litigation and Entitlement Kendra v. Union of India (Doon Valley limestone Quarrying Case –II)*, AIR 1985 SC 652.

<sup>68</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 351.

In summary, the Indian Court has thrived well to ensure that the right to a healthy environment is guaranteed and protected at all cost. The cases of *Subash Kumar v. State of Bihar*<sup>69</sup> and *State of Punjab v. Ram Lubhaya Bagga*<sup>70</sup> buttress this point.

### 5. Comparing India and Nigeria Scenarios

India therefore, provides the most practical example of how the judiciary can promote sustainable development through a broad interpretation of existing human right norms guaranteed under the Constitution as seen in a litany of cases. In *Deo Singh Tomer v State of Bihar*<sup>71</sup> the Supreme Court of India held that the right to life includes the right to live in dignity. Indian courts have also adopted the approach of applying the principles of environmental law to promote sustainable development. In *Vellore Citizens Welfare Forum v Union of India*<sup>72</sup> the Supreme Court of India in granting a restraining order against a leather factory that was polluting the environment of several communities in the State of Tamil Nadu noted that although the industry generates foreign exchange and provides employment it had no right to degrade the environment and pose a health hazard. However, the most significant difference between the countries appears to be the role of the State in economic activities. In Nigeria, the federal government through the national oil company (NNPC) is the major shareholder in joint-venture agreements with foreign oil-multinationals that operate the oil industry. Consequently, State economic interests are in direct conflict with public interests including environmental protection in the course of oil exploration and exploitation. The courts when faced with cases of environmental issues give judgment in the favour of the oil companies. Thus, Nigerian courts have considered the State's economic sustenance which relies majorly on oil revenues a priority over environmental protection, especially in the Niger Delta region.<sup>73</sup> In the Indian cases cited which deal with the economic/environment argument, the State's interest is limited to its regulatory responsibility. This situation frees the courts from the burden of executive pressure on their decisions which is faced by Nigerian courts as evidenced by the aftermath of *Gbenre* case.<sup>74</sup> Also, the decision-making process and enforcement of judicial decisions differ significantly in both countries. In Nigeria, it appears the jurisprudence on the recognition of the right to environment is thin. For instance, in *Gbenre* case, the judge failed to use the opportunity to explore the growing jurisprudence on the right to environment internationally and use this as a basis for his judgment.<sup>75</sup> As *Eboku* observed, despite the judgment being a landmark one as it 'marks a sharp departure from the well-known rigid attitude of Nigerian judges and is in accord with established principles in other jurisdictions – it has a lot of weaknesses...'<sup>76</sup>

The Indian cases, on the other hand, often times contain rich references to the international precepts upon which the right to a healthy environment are founded and refer to the growing jurisprudence on these issues in the decisions. The Indian courts do not do away with consulting relevant authorities and consider practical consequences of its decisions. Furtherance to this, the Supreme Court has the veto power to and does refer scientific and technical aspects for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act 1997 and the power to direct the Central Government to determine and recover the cost of remedial measures from the polluter<sup>77</sup> under section 3 of the Environment Protection Act 1986.<sup>78</sup> Also, the Indian judiciary is known to enforce judgment on polluters.<sup>79</sup> Again, in *Costa Rica*, the court in *Presidente de la sociedad Marlene S.A v. Municipalidad de Tibas, sala Constitucional de la corte* Supreme de justiciar stated that the rights to health and to the environment are essential to guarantee that the right to life is fully enjoyed.<sup>80</sup> The court further held that it is a right that all citizens live in an environment free from contamination. In *Pakistan*, no person shall be deprived of life or liberty, save in accordance with the law.<sup>81</sup> The Supreme Court in *Shehla Zia's* case<sup>82</sup> held that article 9 includes all amenities and facilities which a person

<sup>69</sup> (1991) AIR SC 420; (1991) 1 SCC 598

<sup>70</sup> (1998) 4 SCC 117

<sup>71</sup> (1988) AIR SC 1782

<sup>72</sup> (1996) SC 2175

<sup>73</sup> *Allan Irou v. Shell BP*, Suit No. W/89/91 Warri HC/26/11/73 (unreported).

<sup>74</sup> *supra*

<sup>75</sup> R. T Ako, *The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India*, 3 *NUJS L. Rev.* 423 (2010) p.444

<sup>76</sup> *ibid* pp.415-439.

<sup>77</sup> Section 3, of the Indian Environment Protection Act 1986

<sup>78</sup> R. Sharma, *Green Courts in India: Strengthening Environmental Governance?* (2008) 4 *Law, Environment and Development Journal* 1 pp293-321. (An in-depth discussion was given on the processes the court goes through in order to reach a good decision especially in the two cases of *M.C Mehta v. Union of India (Delhi Vehicular Pollution Case)* Writ Petition Number 13029 of 1985, *Almitrapatel v. Union of India (Municipal Solid Waste Management Case)* Writ Petition Number 888 of 1996).

<sup>79</sup> A. Jasrotia, *Environmental Odyssey in India: People's Response and Judicial Vigilance – An Estimate*, (2002) 44 *Punjab University Law Review* 132.

<sup>80</sup> Decision No.6918/94 of 25 November 1994.

<sup>81</sup> Article 9 Pakistan Constitution

<sup>82</sup> (PLD 1994) SC 693

born in a free country is entitled to enjoy with dignity, legally and constitutionally. In that case, the court further held that the fundamental right to preserve and protect the dignity of man and the right to life cannot be guaranteed without access to food, clothing, shelter, education, healthcare, clean atmosphere and unpolluted environment. Article 9 was further elucidated in the case of *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. The director, Industries and Mineral Development*.<sup>83</sup> In this case, the petitioner sought to enforce the right of the inhabitants to have clear and unpolluted water. They argued that if the mines were permitted to continue their operations, the water course would get polluted. The court held in favour of the petitioner that if the water becomes contaminated, it would result into serious threat to human existence and the right to life of the general public would be under serious threat. These cases show that the courts have been able to read into the right to life, the right to enjoy an environment free of pollution. Therefore, since the Nigerian Constitution contains express provision on the right to life, citizens can assert same in the pursuit of environmental justice and protection.

## **6. Conclusion and Recommendations**

The right to a healthy and clean environment is not only a national issue but global in nature. The global trends have shown that some of these rights are momentous in the protection of the right to a healthy environment.<sup>84</sup> Over the years, courts from various jurisdictions have relied on these rights to ensure and protect a healthy environment and avert activities likely to threaten life.<sup>85</sup> Courts from various jurisdictions have relied on these rights to ensure and protect a healthy environment and avert activities. This right is categorized as a third generation right. Nevertheless, with increasing environmental awareness in the last decades, the environment has become a higher political priority and many constitutions now expressly guaranteed a right to a healthy environment as well as procedural rights necessary to implement and enforce the substantive rights granted.<sup>86</sup> This increase in awareness has led to courts around the world to interpret increasingly the provision of these fundamental rights such as the right to life to include the right to a healthy environment in which to live that life.<sup>87</sup> Although chapter IV of the Constitution on fundamental rights does not provide for the right to the environment, however, section 20 of the Constitution provides that the State shall protect and safeguard the forest and wildlife of Nigeria. As the said provision is contained in chapter II on fundamental objectives and directive Principles of State Policy which is non-justiciable<sup>88</sup> However, there is hope for the future that the destructive, polluting ways of the past can be replaced by cleaner, greener societies in the near future.<sup>89</sup> Nigeria must come with terms to this fact and adopt a more qualitative approach like Indian in giving more meaning to the right to a healthy environment. In other words, there is need for a paradigm shift to meet the demands of a healthy environment in Nigeria by adopting a radical approach in pronouncement of good judgments by the courts when saddled with any case of such nature. For instance, in Bangladesh, the High Court in *Dr. M. Farooque v. Bangladesh*<sup>90</sup> expanded the right to life to include anything that affects life, public health and safety and the enjoyment of polluted free water and air and a sustaining condition consistent with human dignity. These cases show that the courts have been able to read into the right to life, the right to enjoy an environment free of pollution. Therefore, since the Nigerian Constitution contains express provision on the right to life, citizens can assert same in the pursuit of environmental justice and protection. That way, there will be a paradigm shift from the usual way of adjudicating on environmental rights that deals with the right to a healthy and a clean environment as envisaged in local and international treaties which Nigeria is a signatory. Judges should adopt a more pragmatic approach in adjudicating on right to a clean environment in Nigeria like that of India which has a similar provision on the right to a clean and healthy environment. There is the need to recognise and provide for the participatory and procedural rights of citizens by which environmental rights can be achieved. There is also the need to amend the Constitution and other major environmental legislations to give effect to citizens' right to a healthy environment. Urgent need is also for civic education of the right to a healthy environment as it impedes on sustainable health development. Nigerian government should start seeing and prioritising environmental rights over her revenue

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<sup>83</sup> (1994) SCMR 2061

<sup>84</sup>A. B. Abdulkadir, 'The right to a Healthy Environment and Environmental Justice in Nigeria AfeBabalola University: *Journal of Sustainable Development Law and Policy* (2014) 3:1 p.128

<sup>85</sup> Michael J. Kane, 'Promoting Political Rights to protect the Environment' (2006) 18(1) *The Yale Journal of International Law* 389,390; see also the case of *Charan Lal Sabu v. Union of India* (1990) AIR SC 1480.

<sup>86</sup>JonaRazzaque, 'Human Rights and the Environment: The National Experience in South Asia and Africa (2013) <http://www2.ohchr.org/english/issues/environ/bp.4htm> accessed 11 June 2021.

<sup>87</sup>W.A. Shutkin, 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment' (1991) 31 (3) *Virginia Journal of International Law* 479, 511, 504.

<sup>88</sup> See section 6 (6) (c)

<sup>89</sup> D. R. Boyd, *The Constitutional Right to a Healthy Environment*, *Environment (Science and policy for Sustainable Development)* 2012.

<sup>90</sup> (1997) 49 Dhaka Law Reports (AD) p.1