

# ENVIRONMENTAL DEGRADATION AS A HUMAN RIGHT VIOLATION IN NIGERIA: A RE-ANALYSIS

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## Abstract

The crux of this article is to re-analyze environmental rights in Nigeria from the perspective of the question whether or not environmental degradation is a violation of human rights in Nigeria. In tackling this vexed question, the article first considers and analyzes the legal framework for the protection of environmental rights from the perspective of International Bill of Rights in the universal system, provisions of the African Charter on Human and Peoples' Rights and its domesticated version and provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)(1999 Constitution) as they relate to environmental protection and fundamental human rights along with views of scholars on the subject matter. The article also considers Case Law in other jurisdictions with a view to buttressing the fact that environmental rights actually exist in Nigeria either as a fusion of rights or separate rights; the consequence of which environmental degradation constitutes violation of human right; and therefore, enforceable. The article recommends constitutional amendment to cater for express reflection of environmental rights in Chapter IV of the 1999 Constitution so as to resolve the constitutional dilemma on the subject matter. Beyond constitutional amendments, the article advocates for an active and purposeful, as opposed to conservative, interpretation of the first generation rights to include right to safe and healthy environment, learning lessons from other jurisdictions, most especially the Indian scenario.

## 1.0 Introduction

The nexus existing between environmental damage and human rights appears to be self-evident, in that, when air is polluted by toxic fumes, people who breathe the fumes are injured—perhaps even killed. Also, when water becomes contaminated, people who drink such water may become sick and pregnant women who drink it may pass the contaminants on to their unborn babies.<sup>1</sup> This also extends to the contamination of food or its sources. In essence, the link between environmental harm and human rights violations (for instance, the right to life), is as visible as

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<sup>1</sup> Cassel, J. Enforcing Environmental Human Rights: Selected Strategies of US NGOs. *Northwestern Journal of International Human Rights* Vol. 6, Issue 1 (Fall), 2007, Pp. 104 — 1271104.

the clouds in the sky, for the further reason that leaving in an unhealthy environment is capable of derailing citizens' right to life among others.

Environmental rights, therefore, may be broadly categorized into two: substantive and procedural rights.<sup>2</sup> Of the substantive rights, the right to a clean and safe environment is the most basic one and other related rights include the rights to safe drinking water, clean air, and safe food. The procedural aspect refers to the processes by which citizens may act to protect the environment. This includes the rights to environmental information, rights to participation in environmental decision-making and rights to access to justice.<sup>3</sup> The Constitution of the Federal Republic of Nigeria, 1999 (as amended),<sup>4</sup> does not have substantive provisions that recognizes the right to a healthy environment rather; the African Charter on Human and Peoples' Rights<sup>5</sup> which expressly recognizes the substantive rights has been domesticated in Nigeria as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 2004,<sup>6</sup> and is legally binding on all authorities in Nigeria.<sup>7</sup>

On the procedural rights aspect, the Nigerian Constitution provides procedural rights that can also be mobilized for environmental rights protection. These include the rights to fair hearing, freedom of expression and the press, right to peaceful assembly and freedom of association.<sup>8</sup> Constitutional procedural rights when mobilized for environmental protection are enabling rights as they make it possible for people to contribute actively to the protection of their environmental rights<sup>9</sup> in the argument of Atapattu:

The importance of these rights is that they contribute to the development of a decision-making process which is transparent and participatory and which holds the government entity in question accountable for its actions. Applied in relations to environmental issues these include: the right to have access to

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<sup>2</sup> Ijaiya, H.O. Environmental Rights in Nigeria and India. *International Journal of Environmental and Development (IJED)*, Vol.9 (2), 2012, pp.153-160:153.

<sup>3</sup> Human Rights and the Environment: Final Report of Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Ministries, UN Doc. E/CN.4/Sub.2/ 1994/9, (1994). See also Ijaiya, *supra*, note 2; Rhuks, T., "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India," *National University of Juridical Sciences (NUJS) Law Review*, Vol. 3, 2010, pp423-445:2423. Electronic copy available at <http://ssrn.com/abstract=1796824> retrieved on 3/9/2014.

<sup>4</sup> Hereafter referred as 1999 Constitution or Nigerian Constitution, 1999.

<sup>5</sup> The African Charter on Human and Peoples' JUNE 27, 1981, OAU CAB/LEG/67/3/Rev. 5 (1981) reprinted in I.L.M 59 (1982) (hereinafter Africa Charter or the Charter). The African Charter is also called the "Banjul Charter", because it was adopted in 1981 by the 19<sup>th</sup> Assembly of Heads of the State and Government of Organization of African Unity (hereinafter O.A.U), the official body of African States in Banjul, the Capital of the Gambia.

<sup>6</sup> Cap A9, Laws of the Federation (LFN), 2004

<sup>77</sup> *Ibid*, S. 1.

<sup>8</sup> 1999 Constitution, SS. 36, 39 & 40.

<sup>9</sup> Amechi, P.E. "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental RIGHTS (Enforcement Procedure) Rules 2009, in Ensuring Access of Justice for Victims of Environmental Degradation," *Law, Environment and Development Journal*, <http://www.lead-journal.org/content/10320.pdf>

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information affecting one's environment, the right to participate in decisions affecting the environment, and the right to seek redress in the event one's environment is impaired.<sup>10</sup>

While it may be argued that the procedural rights espoused in the foregoing paragraph or that the powers conferred on the Chief Justice of Nigeria by section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999, to make rules of procedure for the enforcement of the rights contained in Chapter IV of the 1999 Constitution, rules made pursuant thereto<sup>11</sup> do not apply to environmental rights (same not contained in Chapter IV of the Constitution), it may still be extended to the enforcement of environmental rights. This argument is hinged on the fact that Nigerian Courts as well as Courts in other jurisdictions have variously held that the right to life includes right to a healthy environment.<sup>12</sup>

The article is divided into four segments. Having dealt with the introduction in the first part, the second part delves into the legal framework for the protection of the environment. The third part of the article draws examples of case law from other jurisdiction; with special attention from India. In the last segment the article proffers suggestions for a way forward.

## **2.0 Legal Framework for Environmental Rights Protection in Nigeria**

The Laws on environmental rights could be grouped into domestic, regional and universal human rights instruments. To be specific, at the universal system, the International Bill of Rights- the Universal Declaration of Human Rights, 1948,<sup>13</sup> the International Covenant on Economic, Social and Cultural Rights, 1966<sup>14</sup> and the International Covenant on Civil and Political Rights, 1966<sup>15</sup> are worth mentioning. At the African regional human rights system, the African Charter<sup>16</sup> is very significant; and at the domestic forum, the 1999 Constitution and the domesticated African Charter refers in this article as the Ratification and Enforcement Act 2004<sup>17</sup> play pivotal role. These laws are by no means exhaustive; there are other instruments, though not mentioned in the foregoing paragraph, that are significant to the determination of the enforcement of environmental rights emanating from environmental degradation. This segment considers these instruments in turn.

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<sup>10</sup> Atapattu, S. "The Right to a Healthy Life or the Right to DIE Polluted?: The EMERGENCY OF A Human Right to a Healthy Environment Under International Law", 16 *Tulane Environmental Law Journal* 2002, pp. 65-126:111

<sup>11</sup> 1999 Constitution, S. 46(3)

<sup>12</sup> For Instance, in *Ransome Kuti v. A.G. Fed* (2001) FWLR (pt 80) 1637, it was held that allowing a person to live in an unprotected or downgraded environment could put his life at great risk.

<sup>13</sup> The Universal Declaration of Human Rights, UN G.A. Res. 217A (III) of 10 Dec., 1948 (hereafter the UDHR or Declaration). International Covenant UN G.A, Res 2200 A (XXI) of Dec. 1866 and

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights 1966, adopted by the UN General Assembly of the UN in Res. 2200 A (XXXI) of 16 Dec. 1966 at New York; opened for signature, ratification and accession on 19 Dec. 1966 and entered into force on 23 March 1976 (hereafter ICESCR or covenant)

<sup>15</sup> International Covenant on Civil and Political Rights, 1966, adopted by the UN General Assembly of the UN in Res. 2200 A (XXI) of 16 Dec. 1966 and entered into on 23 March 1976 (hereafter ICCPR or covenant).

<sup>16</sup> African Charter, *supra* note 5

<sup>17</sup> See note 6, *supra*,

## **2.1 The International Bill of Rights**

Determined to secure human rights universally, the United Nations, by virtue of article 68 of its Charter, established the UN Commission of Human Rights in 1946 and a Committee of this Commission was appointed to draft an International Bill of Rights. The first in mind, which served as a foundation and today being regarded as “the cornerstone of contemporary human rights law”<sup>18</sup> is the UDHR, which recalled that “. . . the peoples of the United Nations re-affirmed their faith in fundamental human rights in the dignity and Worth of the human person and in the equal rights of men and Women and have determined to promote social progress and better standards of life in larger freedom.”<sup>19</sup> Articles 3-21 set forth the First Generation of rights- the “civil and political rights.”<sup>20</sup> But of particular significance is Article 3, which deals with the rights to life, liberty and security of person and article 8, which deals with effective remedy in law.

It is not in dispute that the UDHR in its second part- the “economic, social and cultural rights,”<sup>21</sup> does not explicitly provide for environmental rights, article 25, dealing with right to “an adequate standard of living and health” provides that “everyone has the right to a standard of living adequate for the health and Well-being of himself and of his family....” The UDHR makes special provision on “no abuse of rights.” It declares that nothing contained in the Declaration may be construed “as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms” enumerated in the Declaration.<sup>22</sup>

The question whether or not the UDHR is a binding instrument today has been answered in the affirmative to the conclusion that though the UDHR was not an immediately enforceable legal text; nor was it intended to be so,<sup>23</sup> today, its provisions, especially the civil and political

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<sup>18</sup> M.N. Shaw, *International Law*, 6<sup>th</sup> edn., Cambridge: Cambridge University Press, 2008, at. 278. It has also been established that the UDHR “has served as the inspiration for some 80 Conventions and Declarations that have been concluded within the United Nations on a wide range of issues.....” See *Basic Facts About the United Nations*, New York: United Nations, 2004, at 230.

<sup>19</sup> UDHR, *supra*, note 13, Para. 5 of the Preamble.

<sup>20</sup> “The first generation rights consist of those civil and political rights that derive from the natural rights philosophy of Locke, Rousseau and others....” See D.J. Harris, *Cases and Materials on International LAW*, 6<sup>th</sup> edn., Sweet and Maxwell, 2004, 654

<sup>21</sup> See UDHR, Arts, 22-28- ‘The second generation rights,’ “are those economic, social and cultural rights that attained recognition in the twentieth century with the advent of socialism”. *Id.* For detailed discussion on economic, social and cultural rights, see M.T. Ladan (ed.), *Law, Human Rights and the Administration of Justice*, *supra*, note 51, Pp. 66-96; Ngozi Udomana, “The Role of Court in Making Economic, Social and Cultural Rights Justiciable in Nigeria” *Fountain Quarterly Law Journal*, Vol. 1, No. 1, Aug. 2004, at 160-174; Olubayo Oluduro, “The Right to Health in Nigeria: How Justiciable?” in A. Ibidapo-Obo and T.F. Yerima Esq (eds.), *International Law, Human Rights and Development*, Ado-ekiti, PETOA, Feb. 2004, at 184-201.

<sup>22</sup> UDHR, Art. 30.

<sup>23</sup> At the time of its adoption, Mrs. Roosevelt informed the General Assembly that the UDHR was intended as “a declaration of the basic principles to serve as a common standard for all nations” R.M. Wallace, *Public International Law* 5<sup>th</sup> edn. London: Sweet & Maxwell, 2005, at 126. This point is reiterated in the preamble, where the Declaration is described “as a common standard of achievement for all peoples and all nations....” A Belgium Court

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rights, are considered to have the Weight of customary international law because they are so widely accepted and used to measure the conduct of states.<sup>24</sup> This assertion was affirmed by Vice-President Ammoun in the Namibia (South-West Africa) case,<sup>25</sup> Where His Lordship declared:

Although, the affirmations of the Declaration are not binding, qua international Convention they can bind states on the basis of custom whether because they constituted a codification of customary law or because they have acquired the force of custom through a general practice accepted as law.

To achieve the legal force of the UDHR, the general Assembly of the UN in 1966 adopted the ICCPR and the ICESCR. The ICCPR provides for the inherent right to life of every human being. Of more significance to the subject matter of this research is the provisions of article 12 of the ICESCR, which specifically recognizes the right to health, which state parties to the Covenant do not only recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” but also the steps, which they (States parties) should take to achieve the full realization of the right, including “b) the improvement of all aspects of environmental and industrial hygiene.” Like the UDHR, the ICESCR also provides for “no abuse of rights” recognized by the Covenant. Consequently, the Covenant does give room for interpretation of any provision of the Covenant “as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized therein. . .”

From the foregoing, it is convincing to agree with the view that “there is a mélange of ideas associated traditionally with the concept of environmental right. The proponents of this right have expanded and re-attempted the civil and social rights in the UDHR, ICESCR and other human rights instruments to suggest that the right to a clean environment is the integral part of the fundamental right of every citizen.”<sup>26</sup>

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has also reaffirmed this point in *M. v United Nations and Belgium* (1966) 45 ILR 446. Where Court declared that “the Universal declaration does not have the force of law. Its sole aim is to express the common ideal to be attained by people and all nations, in order that by instruction and education respect for these rights and freedoms may be developed and that measures may be taken progressively to ensure that they are recognized and universally and effectively applied in the future...” Similarly, in the Proclamation of Teheran, 1968<sup>23</sup> it was made explicit that “the Universal declaration of human rights states a common understanding of the peoples of the world concerning inalienable and inviolable rights of all members of the human family and constitutes an obligation for the member of the international community:. The Vienna Declaration of Programme of Action, 1993, the results of the 1993 Second World Conference on Human Rights, stated simply that the UDHR “constitutes a common standard of achievement for all peoples and all nations”. Adopted by the 171 countries participating in the World Conference on Human Rights, held in Vienna from 14 June until 25 June 1993. See eight paragraph to the preamble of the Declaration.

<sup>24</sup> . *Basic Facts About the About the United Nations*, *supra*, note 18, p.228

<sup>25</sup> (1971) ICJ Reports, p. 55, per vice President Ammoun.

<sup>26</sup> A.G. Oludayo, *Environmental Law and Practice in Nigeria*, Lagos: UniLag. Press, 2004, at 590.

## 2.2 African Charter on Human and Peoples' Rights, 1981

The adoption of the Charter in 1981 suggested a formal commitment of African States to conform their national laws and practices to international standards.<sup>27</sup> The African Charter was intended to “take into account African philosophy of law and to meet the needs of Africa.”<sup>28</sup> This is evidence from the point that the Charter takes into consideration and recognizes historical traditions and values of African civilization, which inspires and characterizes the concept of human and peoples' rights;<sup>29</sup> complying with the preamble of the Charter: “Taking into consideration the virtues of their historic tradition and the values of African civilization, which should inspire and characterize their reflection on the concept of human and peoples' rights.”<sup>30</sup>

In view of the instruction given to the drafters that they should be guided by the African conception of human rights, but yet not to deviate from international norms solemnly adopted in various universal instruments by different member states of OAU,<sup>31</sup> African Charter recognizes the theoretical trends in the development of human rights regime.”<sup>32</sup> It reflects the three generations of rights, which human rights has undergone; picturing it as an amalgam of both traditional and contemporary formulations on human rights.

African Charter protects not only civil and political rights but also economic and social rights. The Charter includes the socio-economic rights at the same level as the civil and political rights. The preamble of the Charter is explicit that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as Well as universality. To reiterate, the

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<sup>27</sup> Carlson Anyangwe, Carlson Anyangwe, “Obligations of States Parties to the African Charter on Human and Peoples' Rights.” *10 RADIC*, 1998, at 625.

<sup>28</sup> N.J. Ndombana, *Human Rights and Contemporary Issues in Africa*, Mathouse, 2003, at 121.

<sup>29</sup> T.O. Elias, *New Horizons in International Law*, Second Revised edn. Martinus NijHoff Publishers, 1992, at 110; see also U.O. Umzurike, “Autochthonhy in the African Charter on Human and Peoples' Rights” *Calabar Law Journal*, 1990, at 111.

<sup>30</sup> African Charter, *supra*, note 5, Para. 5 of the preamble.

<sup>31</sup> O.C. Eze, “African Concept of Human Rights”, in A.U. Kalu and Yemi Osinbanjo (eds.), *Perspective on Human Rights*, Fed. Min. of Justice Law Review Series, Vol. 12, 1992, at 19. These universal instruments are: the UDHR, ICCPR, ICESCR, Convention on the Prevention and Punishment of the Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, adopted y the UN General Assembly, Res. 260 (III), Dec. 9, 1948 (entered into force on Jah. 1951, in accordance with art. 13), et cetera),.

<sup>32</sup> Onje Gye-wado, “Human Rights and Reconstruction in Africa”, in A.U. Kalu and Yemi Osinbanjo (eds.) *Law, Justice and the Nigerian Society*, Nigerian Institute of advanced Legal Studies (NIALS). T.O. Elias, new Horizons in INTERNATINAL lsw, Second revised edn. Martinus nijHoff Publishers, 1992, at 110; See also U. O. Umzurike, “Autochthony in the African Charter on Human and Peoples' Rights” *Calabar law. Journal*, 1990, at 111)

<sup>32</sup>O.C. Eze, “African Concept of Human Rights”, in A.U. Kalu and Yemi Osibanjo (eds.) *Perspective on Human Rights*, Fed. Min. of Justice Law Review Series, Vo. 12, 1992, at 19. These universal instruments are: the UDHR, ICCPR, ICESCR, Convention on the Elimination of all forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide adopted by the UN General Assembly, Res, 260 (III), Dec. 1948 (entered into force on Jan. 1951, in accordance with art. 13), *et cetera.*), 1995, at. 175; Philip Amoah, “The AFRICAN Charter on Human and Peoples Rights-An Effective Weapon for Human Rights”, 4 *RADIC*, 1992, at 226, where he said “...the provisions of the Charter reflect not only the African view of the human rights situation in Africa of the 1970s, but also the provision of existing internationals human rights instruments and principles of international laws”

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Charter noted that the satisfaction of economic, social and cultural rights is guaranteed for the enjoyment of civil and political rights.<sup>33</sup> Thus, apart from the traditional civil and political rights such as rights to life and integrity of the person and other civil and political rights,<sup>34</sup> etc., the Charter also guarantees the rights to the best attainable state of physical and mental health and other socio-economic rights.<sup>35</sup> Unlike the ICESCR, which provides that these rights may be progressively achieved,<sup>36</sup> the African Charter requires their immediate implementation.<sup>37</sup>

Also, African Charter aims at protecting not simply “individuals”, but also “peoples.”<sup>38</sup> The peoples’ rights under the Charter are protected in respect of “collective” (group) rights called “third generation rights” including the right to a general and satisfactory environment favourable to development,<sup>39</sup> Proponents of the enforceability of socio-economic and group rights have relied strongly on the indivisibility character of the African Charter to argue that environmental degradation is a justiciable right. This argument was given strength by the African Commission on Human and Peoples’ Rights,<sup>40</sup> in exercise of its interpretational mandate under the African Charter. This was in the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights Action (SERAC) v. Nigeria*,<sup>41</sup> Where the Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce Laws and Regulations to protect the environment and prevent pollution. The plaintiff, a socioeconomic rights’ Non- Governmental Organization (NGO) alleged on behalf of the people of the Niger Delta that the Federal Government of Nigeria and its oil multinational partners operating in the region had infringed on the above rights in the process of oil exploration and production activities. The Commission took cognizance of the fact that 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 noted further that the State is obliged to protect right holders against other subjects by legislation and provision of effective remedies and by taking measures

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<sup>33</sup> African Charter, *supra*, note 5, Para. 8 of the preamble.

<sup>34</sup> Including rights to liberty and security of his person; fair trial, freedom of religion; freedom of assembly, freedom of movement and residence, *et cetera*. See African Charter, *supra* note 5, ARTS. 3-13.

<sup>35</sup> Including rights to property, right to work, right to education, right to take part in the cultural life of the community. See African Charter, *supra* note 5, Arts. 14-19.

<sup>36</sup> ICESCR, *supra*, note 14, art. 2(1)

<sup>37</sup> African Charter, *supra*, note 5, ART. 1.

<sup>38</sup> For detailed discussion on “Peoples’ Rights”, see J. Machowske, “Peoples’ Rights as a New Form of Human Rights”, in E.G. Bello and B.A. Ajibola (eds.), *Contemporary International Law and Human Right*, Vol. 1, 1991, at 345-360.

<sup>39</sup> See Chris Maina Peter, “Taking Environment Seriously: The African Charter on Human and People’s Rights and the Environment”, 3 *Revue Africaine des Droits de l’Homme*, 1993, at 40; see D.A. Dakas and I.H. Chroma, “Rights to development: Has it a significance of its own?” 4 *Reveu Africain des Droits de l’Homme*, 1994, at. 68-79; Isaac Nguema, “Africa, Human Rights and Development” 7 *Revue Africaine des Droits de l’Homme* (1998), at 91-113.

<sup>40</sup> African Commission on Human and Peoples’ Rights was established under PART II of the African Charter- “MEASURES OF SAFEGUARD”. With three mandate-Protection protective and interpretational mandate. See African Charter, *supra*, note 5, arts, 30&45

<sup>41</sup> General List N<sup>o</sup>ECW/CCJ/APP/08/09, judgment No. ECW/CCJ/JUD/18/12:

to ensure that there is an effective interplay of laws and regulations that enable individuals to realize their rights and freedoms. It noted further that even though Nigeria had the right to develop natural resources in the oil-rich region, Article 24 imposes clear obligations upon a government to respect, to protect and to fulfill the rights and freedoms enshrined in the Charter.

The Commission endorsed the notion to respect the enjoyment of economic, social and cultural rights, stating that “the obligation to respect entails that the state should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With particular reference to socio-economic rights, the Commission noted explicitly: “This means that the state is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs; and with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy needs.”<sup>42</sup>

It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources. To that extent, the Commission had no hesitation in declaring that the government of Nigeria breached its duties to respect the rights to health and to a healthy environment, by directly “attacking, burning and destroying several Ogoni villages and homes.”<sup>43</sup>

With respect to the duty of state to protect, the African Commission in SERAC’s case, having discovered that the Government of Nigeria failed to regulate and prevent the conduct of a private oil company, which polluted natural resources and destroyed the traditional means of livelihood of the Ogoni People, declared that the Government had failed in its duties to protect the rights to health, to a clean environment, and to protect against the degradation of the peoples’ Wealth and natural resources.<sup>44</sup>

It is important to note that the African Commission equally noted that collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa.<sup>45</sup>

The practice of the ECOWAS Court of Justice tows the line of the African Commission. The Court has also grasped the opportunities of considering and interpreting the socio-economic rights under the ICESCR and the African Charter, including “the right to a general satisfactory environment favourable to their development.”<sup>46</sup> According to the Court, “. . .the duty assigned

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<sup>42</sup>*Ibid*

<sup>43</sup>*Ibid*

<sup>44</sup> *Ibid*, paras, 46, 61 and 65.

<sup>45</sup> *Ibid*

<sup>46</sup> See 1 No. EW/CCJ/JUD/1812, at 24.

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by Article 24 to each State party to the (African) Charter is both an obligation of attitude and an obligation of result. . .<sup>47</sup>

It also established that provided the right violated or alleged to be violated is enshrined in an international instrument that binds a Member State, the domestic legislation of that State cannot prevail on the international treaty, even if it is the Constitution of the State concerned.<sup>48</sup> The Court considered the invocation of lack of justifiability of socio-economic rights to justify non-accountability as “completely baseless.”<sup>49</sup> It also noted that “... in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing.”<sup>50</sup>

### 2.3 Domestic Human Rights

#### 2.3.1 *The Constitution of the Federal Republic of Nigeria, 1999 (As Amended)*

The debate seems unending as to whether there is such right to safe and healthy environment in the Nigerian human rights system. An author observes that “the right to a safe and healthy environment is as controversial as other debates concerning new or emerging rights such as right to development and indigenous right in Nigeria; adding that the controversy arose out of absence of clear provisions in Chapter IV of the 1999 Constitution proclaiming individual’s right to clean environment.”<sup>51</sup> As a matter of fact, Chapter IV of the Nigerian Constitution providing for enforceable fundamental rights conspicuously omits the right to safe and healthy environment;<sup>52</sup> the only section often relied upon to justify the enforceability of environmental rights, is section 33(1) of the 1999 Constitution, which can only be implied by extension to cover the right to safe and healthy environment.

However, Section 20 of the Nigerian Constitution mandates the state to “protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.” This section falls under the infamous Chapter II—Fundamental Objectives and Directive Principles of State Policy (FODPSP). This provision in the Constitution presupposes that the Government of Nigeria should always take necessary precautions to protect the rights of the

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<sup>47</sup> *Ibid*, at 25.

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid*

<sup>50</sup> *Ibid*

<sup>51</sup> R.A Mmadu, “The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How KIOEL Added salt to Injury” *Afe Babalola University: Journal of sustainable Development Law and Policy*. Vol. 1, 2013, at 73-85:80

<sup>52</sup> Chapter IV of the Nigerian Constitution provides for: right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; and right to acquire and own immovable property anywhere in Nigeria. See sections 33-43 of the Constitution respectively.

people in all policies formulated to exploit natural and human resources of the states<sup>53</sup> But being part of state policy, it has always been argued that section 20 is not justiciable and cannot be made a basis for a justiciable right to clean environment,<sup>54</sup> in view of the provisions of section 6(6)(c) of the same constitution.<sup>55</sup> It is, therefore, obvious from the outset that a justiciable right to quality environment was lacking due to the constitutional lacuna created by the non-justiciability of the provisions of section 20 of the 1999 Constitution. This is so withstanding the provisions of section 33 of the constitution, which guarantees the right to life.

The constitutional clog to the justiciability of the environmental rights is compounded by the restrictive interpretation of socio-economic rights “as non-justiciable rights- mere directives and lofty objectives of the states that cannot be elevated to the status of substantive right except through legislative intervention,”<sup>56</sup> as held in *Archbishop Olubnmi Okogie v. Attorney General of Lagos State*,<sup>57</sup> and a number of cases<sup>58</sup>; meaning that the provisions of Chapter II of the Nigerian Constitution, 1999, are mere declarations or ‘cosmetic constitutional provisions’<sup>59</sup> while their constitutional weight lies at the moral level.<sup>60</sup> This has been reaffirmed by the Nigerian Supreme Court in *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria*<sup>61</sup>.

However, the reinterpretation of existing rights is dependent on a progressive and activist judiciary as the court is required to make a connection between the alleged human rights violation and the environmental problem in question<sup>62</sup>. This qualification cannot be ascribed to

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<sup>53</sup> Similarly, under the heading “Directive Principles of State Policy,” Article 48A of the Indian constitution provides only that “The state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country” This article obviously creates no enforceable rights but, it has encouraged Indian Courts to give other human rights, including the right to life, a very vigorous environmental interpretation. See A. Otubu, “Environmental and Human Rights: An Overview of current Trends in Nigeria,” Retrieved on 3/9/2014 from <http://www.unilag.edu.ng/opedoc.php?sno=19981&doctype=doc&Docname=ENVIRONMENTAL%20AND%20HUMAN%20RIGHTS:%20OVERVIEW%20F%20XYEEWR%20TRE NDS520IN%29NIGERI>.

<sup>54</sup> See Section 6(6)(c) of the Constitution. According to Olong, 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 enforceability of the provision of section 20 of the Constitution. See M.A. Olong, “Human Rights, the Environment and Sustainable Development: Nigerian Women’s Experiences, *Journal of Politics and Law*, Vol.5(1), 2012, at 100-:1-8.”

<sup>55</sup> S.6(6)(c) of the Nigerian Constitutions, 1999, excludes the power of Courts to delve into the “issue or question as to whether any Law or any judicial decision is in conformity with fundamental objectives and directive principles of state policy set out in Chapter II of the Constitutions”.

<sup>56</sup> See Oludayo, *supra*, note 26.

<sup>57</sup> (1981)2NCLR 337 at 350

<sup>58</sup> *Adewole v Jakande* (1981) 1 N.C.L.R. 152

<sup>59</sup> D. Olowu, “Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees,” 69 *Saskatchewan Law Review* 2006, p56 in Amechi, ed., *supra*, note 9 at 325.

<sup>60</sup> P. Oluyede, *Constitutional Law in Nigeria* 1<sup>st</sup> edn., Ibadan: Evans Brothers: 1992, at 174.

<sup>61</sup> (2002) 9 NWLR (pt772); (2002) 6 S.C (pt1) 1; (2002) 27 WRN 1.

<sup>62</sup> Douglas-Scott, S. ‘Environmental Rights in the European Union-Participatory Democracy or Democratic Deficit’, in Boyle and Anderson eds., 1996, AT, AT 111-112.

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many judicial systems in developing countries especially African countries like Nigeria.<sup>63</sup> An example of what is capable of tampering with posture of a judge in Nigeria is the visible Government influence in oil- related environmental cases. In the *Gbemre* case for instance, certain occurrences after the Federal High Court delivered its decision ostensibly orchestrated to frustrate the plaintiffs can only be adduced to state interference. First, after the expiration of the ‘stay of execution’ ordered by Justice Nwokire of the Federal High Court, the plaintiffs appeared in Court but none of the defendants or their representative showed up. It was discovered then that the judge had been removed from the case having been transferred to another Court in Katsina State and that the Court file was not available.<sup>64</sup>

Similarly, at the Court of Appeal’s hearing on Shell and NNPC’s jurisdiction appeal, it was discovered that the case had been wrongly adjourned by the Court staff without any notice to the applicant or his lawyers. Even when the presiding Justice promised to investigate the matter and that the person responsible would be disciplined,<sup>65</sup> nothing on the matter was heard publicly. Reacting to the foregoing incidences, Roderick, Co-Chairman of the Climate Justice Programme that is taking an active role in pursuing the case said:

The fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in purported democracy acting under the rule of law.<sup>66</sup>

As it were, it still behooves the same judiciary to, in view “of the inexplicable reluctance of the State to comply with the provisions of Chapter II of the Constitution”,<sup>67</sup> engage in judicial activism in order to give teeth to constitutional provisions to bite where violated by any party. Without other consideration, therefore, the right to safe and healthy environment under the Nigerian Constitution is a function of the extent the Courts may be willing to expand the definition of other established human rights enshrined therein. It is safe to conclude here that environmental rights under the Nigerian Constitution may exist as a right within rights.

It seems Nigerian Courts have been relying on old case Law in other jurisdictions to justify the non-justiciability of socio-economic rights in general and environmental rights in particular. In *Okogie v. Lagos State Government (Supra)*, the Court of Appeal of Nigeria, relied

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<sup>63</sup> See for instance, *Oronto-Douglas v. Shell Petroleum Development Company and 5 others*, Unreported Suit No. FHC/CS/573/93, Delivered on 17 February 1997, where the plaintiff’s application to compel the defendants to observe provisions of the EIA Act before the Nigerian Federal High Court, failed for lack of *locus standi*.

<sup>64</sup> Friends of the Earth International Press Briefing, Shell fails to obey gas flaring court order, May 2, retrieved on 6/9/2014 from <http://www.foe.co.uk/resource/press-releases/she-fails-to-obey-gas-fl-02052007.html>

<sup>65</sup> G.Enogholase, “Benin Court Registrar Under Investigation,” Vanguard Newspapers, Lagos, September 27, 2006 in Rhuks, *supra*, note 3, at 428.

<sup>66</sup> Friends of the Earth International Press Briefing, *supra*, note 64

<sup>67</sup> F. Falana, *Fundamental Rights Enforcement in Nigeria*, 2<sup>nd</sup> edn., Lagos: Legal Text Publishing Co. Ltd. 2010, at 14.

on the Indian case of State of *Mandras v. Champakan*,<sup>68</sup> to declare the non-justiciability of the fundamental objectives in Chapter II of the 1979 (now 1999, as amended) Constitution. As it will be shown later in this article, India, and other countries have taken new steps in the enforcement of environmental rights.

Another reason proffered to justify the non-justiciability of environmental rights cropped from the fact that “enforcement of procedures Rules 1979 does not admit any of the rights not enshrined in Chapter IV” of the 1999 Constitution, relying on the case of *Uzochukwu and Others v. Ezeonu II*.<sup>69</sup> While this argument is strong under the Fundamental Rights (Enforcement Procedure) Rules, 1979,<sup>70</sup> it is no longer tenable under Fundamental Rights (Enforcement procedure) Rules, 2009.<sup>71</sup> The 2009 Enforcement Rules recognize that the provisions of African Charter as domesticated can be enforced by invoking the Rules. In fact, under the overriding objectives of the Rules, in order to realize the objectives of the Rules and advise and realize the fundamental rights guaranteed under Chapter IV of the 1999 constitution and the African Charter, Courts are enjoined to give a holistic and purposeful interpretation and application of the Constitution and the African Charter; and to respect all human rights instruments-domestic, regional and international referred to before them.<sup>72</sup> Courts with jurisdiction to entertain cases of violation of human rights under Chapter IV and the African Charter, have discretionary power to “make consequential orders as may be just and expedient-”<sup>73</sup> a provision that is regarded as a reiteration of the provisions of section 46(2) of the 1999 Constitution.<sup>74</sup>

Again, the requirement of *locus standi*, which was regarded as a clog to the enforcement of environmental rights cases has now been settled by the new Procedure Rules. The new Rules has expressly abolished the common law doctrine of *locus standi*; replacing it with public interest litigation. The Rules declare in explicit terms that “no human rights case may be dismissed or struck out for want of *locus standi*.”<sup>75</sup> To give the public interest litigation provisions teeth to bite, the new Rules provide to the effect that an applicant for the purpose of the Rules is any party who files an application in his own interest or any one acting on behalf of another person; any party acting as member in the interest of Nigeria society or any segment of it in promoting human rights and advancing human rights law.<sup>76</sup>

In a bid to justify the reasoning that Chapter II be non- justiciable, Wonike posits and Olong puts it in the following words: -

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<sup>68</sup> (1951) SCR 252.

<sup>69</sup> (1991)6 NWLR (Pt. 200), 708.

<sup>70</sup> See Supplementary to Official Gazette, NO. 64, Vol. 66 of Dec, 1979.

<sup>71</sup> Herein after 2009 Enforcement Rules or the new Rules

<sup>72</sup> *Ibid* Para. 3.(a)(b).

<sup>73</sup> *Ibid.* Para 3(c)&Order XI

<sup>74</sup> T.F. Yerima, “From Obstacle to Miracle: The New Fundamental Rights Enforcement Procedure Rules of Nigeria- Prospects for Human Rights Advocates,” *University of Ado-Ekiti Law Journal*, Vol. 3, 2009, at 275.

<sup>75</sup> 2009 Enforcement Rules, Para. 3(e) to the Preamble.

<sup>76</sup> *Ibid*, Order 1 Rule 2.

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Section 20 of the 1999 Constitution of the Federal Republic of Nigeria states that, states shall protect and improve the environment and safeguard the water, air, forest and wild life of Nigeria even at that it is important to note that, this provision is non-justiciable as it forms part of the Fundamental Objectives and Directive Principle of State Policy in Chapter II of the Constitution the implication of which.... no Nigerian citizen can go to Court to enforce his/her rights in respect of a violation or threatened violation of such provision. The fear of enshrining human and environmental rights in Nigeria is in the possibility of multiplicity of suits against the Federal Government.<sup>77</sup>

The foregoing reasoning concerning multiplicity of action according to Abdulkadri, “is with respect untenable. The right of the public cannot be sacrificed in fear of multiplicity of action.”<sup>78</sup> It should be reasoned instead that the Nigerian courts should own up to its responsibilities and be bold in interpreting human rights provisions to include right to safe and healthy environment which will ensure sustainable development thereby protecting the future generations of Nigeria.<sup>79</sup> This article submits further that if the government had put in place functional rules on best international environmental standard, including the most conducive political atmosphere for its workability, there may not be any need for an action in the first place, let alone a multiplicity of actions. It is contended further that the non-justiciability provision is “undemocratic and open to abuse”; it implies that “the quality of the social objectives is destroyed, and that the provisions under Chapter II for these objectives are reduced to worthless platitudes.”<sup>80</sup>

Even though the rights in Chapter II are not justiciable, they contain guidelines as to what the Courts should do when confronted with the problem of interpretation of the Constitution.<sup>81</sup> Fundamental objectives are the “directive principles” laid down by the policies which are expected to be pursued in the efforts of the nation to realize the national ideals.<sup>82</sup> This also applies in international law where principles, though not binding, “assist courts and tribunals in

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<sup>77</sup> Cited in M.A. Olong, 2012, *supra* note 54, at 106

<sup>78</sup> A.B. Abdulkadir, “The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria” *Afe Babalola University: Journal of Sustainable Development Law and Policy*, Vol. 3. Issue 1, 2014 at 118-131:124.”

<sup>79</sup> See also Olong, *supra*, note 54, at 106.

<sup>80</sup> Abdulkadir, *supra*, note 78, at 124-125

<sup>81</sup> *Damisha v Speaker House of Assembly, Benue State* (1983) 4 NCLR 625.

<sup>82</sup> See report of the Constitution Drafting Committee in connection with the 1979 Constitution, Vol. 1, p.v. cited in J.O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria, 1999*, Lagos: MIJ Professional Publishers Ltd.: 2000, at 52.

the process of interpreting international rules and obligations as well as helping in clarifying certain misconceptions, filling legal gaps and acting as aids to interpretation.”<sup>83</sup>

Furthermore, principles “lay down parameters which affect the way Courts decide cases or the way an international institution exercises discretionary powers. They set limits or provide guidance, or determine how conflicts between other rules or principles will be resolved.”<sup>84</sup> In essence, Nigerian Judiciary can at any rate, allow itself to be persuaded and/or guided by the tenets of the Chapter II of the Constitution in the determination of environmental violation cases.

Section 13 provides that “it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this constitution.” While section 6(6)(c) is to the effect that judicial powers “shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”

Alero Akeredolu opines that since section 6(6)(c) ousts the jurisdiction of Court on matters related to the whole of Chapter II, section 13, being part of Chapter II, cannot be used to cure the deficiency of the Chapter.<sup>85</sup> In other words, that Chapter II cannot be used to cure its own deficiency. It is contended in this article that there is no better place in the Constitution to correct the anomaly created by section 6(6)(c) than in Chapter II itself. Section 13, being a latter provision should be treated as prevailing over section 6(6)(c), an earlier provision of the same Constitution.<sup>86</sup>

Notwithstanding this obvious lacuna, scholars and Courts across the world have maintained severally that the rights contained in Chapter IV can be given an expansive interpretation to include a right to a safe and healthy environment; learning lessons from other jurisdictions.

That even Nigerian Courts had seen the justiciability of environmental rights was witnessed in some cases. In *Ransome Kuti v. A.G. Federation (supra)*, the Supreme Court held

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<sup>83</sup> M.Y. Yusuf, “The Application of Pollution from Offshore Petroleum Activities, *Nigerian Bar Journal*, Vol. 8, No. 1, Aug., 2012, at 93-122”<sup>94</sup>.

<sup>84</sup> A. Boyle, “Some Reflections on the Relationship of Treaties and Soft Law,” *International & Comparative Law Quarterly*, Vol. 48, 1999, at 091-913:907.

<sup>85</sup> Lecturer, Department of Public & international Law, Faculty of Law, University of Ibadan, in an interactive session with this writer sometimes in September, 2014

<sup>86</sup> See P. St. Langan, *Maxwell on the Interpretation of Statutes*, 12<sup>th</sup> edn., India: LexisNexis: 2006, at 187.

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that allowing a person to live in an unprotected or downgraded environment could amount to a deprivation of the person's right to life since the environment can put his life at great risk.<sup>87</sup>

Similarly, in *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria and 2 Others*,<sup>88</sup> the Federal High Court held that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> 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 their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person.

It is noteworthy from the foregoing cases that the enforceable right to life in section 33 of the Nigerian Constitution, 1999, has been given an expansive interpretation to cover environmental rights, particularly the right to healthy environment. The need for the Nigerian Apex Court to progressively move away from the traditional or conservative interpretation of the right to life as imposing only a negative duty on the State not to arbitrarily deprive a citizen of his/her life cannot be overemphasized<sup>89</sup> Holding firm to such viewpoint "is in contradistinction to an inclusive application of the right to life, which combines the traditional view with the enforcement of the right in terms of the imposition of a positive duty on the government to take all reasonable steps to protect life."<sup>90</sup> Failure to move from the *status quo* in the interpretation of the right to life (in its traditionally restrictive form) can be viewed as a deliberate refusal to move with the tide of positive international developmental standard. Enabulele maintained and this article concurs as follows:

A major problem with the traditional approach is that it has the effect of excluding such other components (such as the right to health, food, healthy environment, etc.) contained in the bundle conveniently wrapped up as the right to life. This has the effect of restricting the enforcement of the right to the occurrence of death

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<sup>87</sup> For detailed analysis, see also J. Razzaque, "Human Rights and the Environments Development at the National Level, South Asia and Africa, Background Paper No. 4, Joint UNEP-OHCHR Expert Seminar on *Human Rights and the Environment*, 14-16 January 2002, Geneva, available at <http://www2.ohchr.org/english/issues/environment/envIRON/bp4.htm>. M.R. Anderson, "Individual Rights to Environmental Protection in India," in A.E. Boyle, *Environmental Protection*, Oxford: Clarendon Press: 1996. at 210.

<sup>88</sup> Unreported Suit No. FHC/B/SC/52/05, Delivered on 14 November 2005, paras 3-4.

<sup>89</sup> This was the case as exemplified in *Nasiru Bello v. AG Oyo State* (1986)5 NWLR (pt.45) 828, where a convicted felon was executed by the respondent while his appeal to a higher court was pending. At the suit of the deceased family, the Supreme Court of Nigeria held that the respondent violated the deceased right to life and ordered compensation to his family. See also the finding of the African commission for Human and Peoples' Rights in *Organization Mondiale Contre La Torture and Association Internationale des juristes Democraties) Commission Internationale des Juriestes (C.I.J.) Union Interaticaine des Droits de l'Homme/Rwanda, Communication 27/89, 49/91.99/93*, where the commission found that the massacre of a large number of Rwandan villagers y the Rwandan Armed Forces and the many reported extra judicial executions for reasons of their membership of a particular ethnic group were series of violations of the right to life in article 4 of the African Charter on Human and Peoples' Rights.

<sup>90</sup> A.O. Enabulele, "The Right to Life or the right to compensation Upon Death: Perspectives on an Inclusive Understanding of the Constitutional Right to Life in Nigeria" *Afe Babalola University: Journal of Sustainable Development Law and Policy*, Vol.3, Issue 1, 2014, at 99-117: 102-3

and thus confining the right to the realm of a broken promise, for which compensation is a just and adequate remedy only when the government directly authorised the death. The right would mean nothing more than the right to compensation for unlawful death rather than a right that protects life from unlawful deprivation.<sup>91</sup>

Even though the foregoing observation *strictu sensu*, does not appear to be in relation to environmental right in toto, it is the view of this writer that it is well suited. A deliberate progressive shift to an all-inclusive interpretation of the right to life in Nigeria is accordingly advocated. Lessons from other jurisdictions in this regard become very imperative. This article resubmits the suggestion of Falana that the Nigerian Courts can borrow leaf from India where an activist judiciary has compelled the Government to enforce certain aspects of the Directive Principles of State Policy.<sup>92</sup>

### 2.3.2 *The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 2004*

As a regional treaty, the Nigerian Constitution requires domestication before the African Charter, becomes binding.<sup>93</sup> Pursuant to Section 12 of the Constitution, the Ratification and Enforcement Act<sup>94</sup> domesticated the provisions of the African Charter. Thus, all provisions of the Charter are now part of Nigerian Legislation and are applicable as well enforceable in the country.<sup>95</sup> This Act now forms part of existing Nigerian legislation recognized under the Constitution and has such effect until modified by the appropriate authority by way of repeal or amendment.

The long title of the Act reads: “An Act to enable effect to be given to the African Charter.... made in Banjul on the 19<sup>th</sup> day of January, 1981 and for purposes connected therewith.” Although, the Act itself has only two sections, section 1 incorporates the text of the African Charter into the body of Nigerian Laws as Schedule to the Act. By virtue of this, it is submitted that even though the Nigerian Constitution has no provision for a substantive right to safe and healthy environment, the African Charter in its Article 24 enacted that “all peoples shall have the right to a general satisfactory environment favourable to their development.”

Regardless of the fact that the Directive Principles of State Policy are not justiciable, it is reminded that the domesticated version of the African Charter reiterated verbatim in its preamble that “civil and political rights cannot be dissociated from economic, social and cultural rights in

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<sup>91</sup> *Ibid*, p. 103.

<sup>92</sup> *Ibid*.

<sup>93</sup> Section 12(1) & (2) of the Nigerian Constitution: No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a Treaty.

<sup>94</sup> *Supra*, note 6.

<sup>95</sup> See *Odafe & Ors. V. A.G. Federation* (2004) AHRLR 205 at 211; *Ubani v. Director SSS* (1999) 11 NWLR (pt 129).

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their conception as Well as universality and that the satisfaction of economic, social and cultural rights is guaranteed for the enjoyment of civil and cultural rights.”<sup>96</sup> This indeed strengthens the universality and indivisibility of the environmental rights and the civil and political rights in the Act. It is accordingly opined:

The right to environment completes the other rights guaranteed to each human being. The requirement of a healthy and balanced environment and of the environmentally sound management of natural resources is a condition for the implementation of other fundamental rights... if enacted, environmental right would grant the public a right to healthy environment and introduce a series of reforms to increase the powers of the private citizens to protect themselves and their environment from the effects of pollution. Also such right would increase powers to sue in civil courts for damages caused by pollution and to initiate private suits or claims for pollution where government has refused to act. It would also grant increased access to information on pollution and rights to participate on standard settings and other processes.<sup>97</sup>

The domestication of the African Charter in Nigeria extends the corresponding obligations not only to the State (Government), but also to private individuals in Nigeria.<sup>98</sup> By implication, any person who feels that any of the rights provided by the Act, including the right to a healthy environment, in relation to him is infringed or threatened by conducts of the State or private individuals can bring an action in any of the Nigerian High Courts depending on the circumstances of the case for appropriate relief.<sup>99</sup> Under the Act, the claimant only needs to establish that the degradation resulted or will result in the creation of environment that is not favourable to his health and well-being or socio-economic development.<sup>100</sup> Article 24 of the African Charter, which proclaims the right to a satisfactory environment for development as a human right is still retained under the domesticated Charter.<sup>101</sup> In *Gani Fawehinmi v. Abacha*<sup>102</sup> the Court held that human rights in the African Charter, having been enacted into Nigerian National Law, are superior to a Decree. On the status of the African Charter, the Supreme Court in that case, held that the African Charter is part of the Laws of Nigeria and like all other Laws, Courts must uphold it. In the Apex Court’s opinion, the Charter gives to citizens of Member States of the now African Union rights and obligations, which rights and obligations are to be

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<sup>96</sup> African Charter, *supra*, note 5, Para. 8 of the Preamble.

<sup>97</sup> L. Atsegbua, et al. *Environmental Law in Nigeria: Theory and Practice*, New edn., Lagos: Ababa Press Ltd.: 2004, at 131.

<sup>98</sup> Amechi, *supra*, note 9, at. 327.

<sup>99</sup> *Ogugu v. The State* (1994) 9 NWLR (Pt 366)1.

<sup>100</sup> Amechi, *Supra*, note 9, at 327 see also Atapattu, S. 2002. P. 99

<sup>101</sup> See *Kokoro-Owo v. Lagos State Government* (1995) 6 NWLR 760 at 765.

<sup>102</sup> (1969) 9 NWLR pt. 475 p. 710.

enforced by our Courts, if they must have any meaning. In other words, if the substantive right to a healthy environment is to have any meaning, it must be judicially enforceable.<sup>103</sup>

Article 24 and other provisions of the Act are subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it.<sup>104</sup> The effect of this is that, in the event of any conflict between the provisions of the Act and that of the Nigerian Constitution particularly its fundamental human rights provisions, the latter prevail<sup>105</sup> Though, one may safely argue that the provisions of both the Act and Chapter IV of the Nigerian Constitution are complementary to each other, the possibility of conflict arising between them cannot be obviated. Of particular interest in this regard is the provision of article 24 of the Act providing for the right to a healthy environment, and that of sections 43 and 44 of the Nigerian Constitution providing for the right to property. Thus, in the event of such conflict ever arising, the provision of the sections of the constitution prevails.

It is submitted that this conservative approach by the Supreme Court to interpretation will serve as a clog to the justiciability of environmental rights, for the very simple reason that unlike the African Charter and the domesticated version that place socio-economic rights on the same status with civil and political rights, the Constitution of Nigeria, 1999, places the civil and political rights over and above socio-economic rights. The only way out, therefore, is for superior Courts of Nigeria to give active and purposeful interpretation of the civil and political rights to cover socio-economic rights. This is the kind of interpretation which the 2009 Enforcement Rules contemplates, where the Rules enjoined Courts to give a holistic and purposeful interpretation and application of the constitution and the African Charter.

### **3.0 Revisiting the Categorization of Environmental Rights in Nigeria**

The question whether environmental rights in Nigeria are distinct or an amalgam of the first and second generations of rights has to be tackled from the perspective of definitions of the key terms, including rights, environment, human rights and environmental rights on the one hand and the brief categorization of the classes of rights under the Constitution of Nigeria, 1999 on the other hand.

It has been opined that “the term ‘right’ has two special moral importance: it may refer to something that is normally correct or demanded by the fact that it is a right. This means that right refers to moral standards, righteousness and moral rectitude. Second, it may refer to the entitlement of a person; the special title, one has to a good or opportunity.”<sup>106</sup> It is predicated on this idea that scholars proffered their respective definitions of right(s). Accordingly, right could

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<sup>103</sup> See also Rhuks, T. 2010. *Op cit.* p 434.

<sup>104</sup> *Abacha v Fawehinmi* (2000) FWLR 595G-P; 586A-C; & 653G.

<sup>105</sup> See S. 1(3) of the Nigerian Constitution. See also *Ransome-Kuti v Attorney-General, Federation* (2001) FWLR 586A-C; & 653G.

<sup>106</sup> Atsegbua, L. et. al., *supra*, note 97, at 129,

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mean justice, moral, what the law supports or approves;<sup>107</sup> it connotes “right” “a just claim.” That is why when someone is regarded as having a right he is also known to be entitled to something to which he has a just claim under the law. Consequently, by virtue of his creation, man has certain rights which are common to all men”<sup>108</sup>. Yet, right is described as an instrument used for protection and advantage of an individual or group. It is seen as the power of possessing something, the disturbance or infringement for which there is a legal sanction.<sup>109</sup> Larger definitions of human rights are incorporated in the Black’s Law Dictionary,<sup>110</sup> as follows”:

That which is proper under the Law, morality, or ethics...2. Something that is due to a person by just claim, legal guarantee, or moral principle...the right of liberty... 4. A legally enforceable claim that another will do or will do a given act; a recognized and protected interest the violation of which is a wrong-a breach of duty that infringes one’s rights.

From the foregoing definitions human rights are defined as

“...the right one holds by virtue solely of being human person. ...Rights naturally inhering in the human being.<sup>111</sup> This definition had earlier been given by Jack Donnelly that “human rights are the rights one has simply because one is a human being;<sup>112</sup> stating further that “... to have human rights, one does not have to be anything other than a human being; neither must one do anything other than be born a human being.<sup>113</sup> Therefore, Black’s Law Dictionary summarized the definition of human rights as “the freedoms, immunities, and benefits that according to modern values... all human beings should be able to claim as a matter of right in the society in which they live.” No Wonder, it is described by Cranston as “something of which no one may be deprived without a great affront to justice...”<sup>114</sup> Deducible from the foregoing definitions of human rights is that the common feature of them all is that the concept of human rights is employed to indicate that all individuals, simply by being human, have moral rights, which no state or society should

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<sup>107</sup> M. Ikahariale, “The Jurisprudence of human Rights,” *Journal of Human Rights Law and Practice*, Vol. 5, No. 1, Jan. 1995, at 51.

<sup>108</sup> J.O. Akande, “Securing Individual Rights under Federalism”, Proceedings of the Conference on *Constitutions and Federalism*, held at the Unilag. Nig., 23 – 25 April, 1996, at 87.

<sup>109</sup> Mike Ikahariale, *supra* note, 107.

<sup>110</sup> B.A. Garner (ed.), *Black’s Law Dictionary*, 9<sup>th</sup> edn., United States of America: West, A Thomson Reuters Business, 2004, 1436.

<sup>111</sup> Ben Nwabueze, *Constitutional Democracy in Africa* vol. 2, Spectrum Book Ltd, 2003, at 3, where he stated that “the peculiar difficulty about the concept of human rights springs from their very nature”.

<sup>112</sup> Jack Donnelly, “Human rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights,” 76 the American Political Science Review (1982), at 305.

<sup>113</sup> *Ibid.*

<sup>114</sup> M. Craston, “Human Rights and Supposed”, in Raphael, (ed.), *Political Theory and the Rights of Man*, Bloomington, Indiana University Press, 1967, at 52.

deny. These are “rights and freedoms, which every person is entitled to enjoy possibly deriving from natural law.”<sup>115</sup>

Scholars have identified the term “environment” as one which is an object of debate; noting that various objects are most frequently used, including the Words: “‘secure’, ‘safe’, ‘satisfactory’, ‘healthy’, ‘healthful’, ‘decent’, ‘adequate’, ‘clean’, ‘pure’, ‘natural’, ‘viable’, ‘ecologically-sound’ and ‘ecologically balanced’.”<sup>116</sup> Other words used to qualify the word “environment” are: “‘setting’, ‘surrounding’ and ‘background’.”<sup>117</sup> Notwithstanding the controversies in the concept of environment, attempted definitions have been proffered. In Black’s Law Dictionary, the Word “environment” is defined as “the totality of physical, economic, aesthetic and social circumstances and factors which surround and affect the desirability and value of property or which also affects the quality of people’s lives.”<sup>118</sup> Environment is also defined as “the conditions that affect the behaviour and development of sb/sth (somebody and something respectively); the physical conditions that sb/sth exists in: a pleasant working/learning environment. . . .2. The environment. ...the natural World in which people ....live. . . .”<sup>119</sup> This definition indicates the need to protect human health, safety and interest. It requires the maintenance of certain level of environment because of human use and enjoyment of nature. It is on this note that healthy and clean environment becomes human rights<sup>120</sup> or better describe as environmental rights; which refer “to the right(s) of the citizen to have a clean, safe and decent environment and to enforce it in case of violation by the Government or private citizens.”<sup>121</sup> Therefore, an “artificial disturbance of the physical, chemical, or biological components that make up the environment constitute a violation of environmental right(s).

Taking into consideration the totality of the human rights provisions under the Nigerian Constitution, 1999, the African Charter/its domesticated version and the international Bill of Rights as they relate either directly or indirectly to environmental rights, it will not be out of place to examine the nature of environmental rights in Nigeria. Under the Constitution, it appears glaringly easy to identify that environmental rights are an amalgam of other established human rights. They do not fall under Chapter II nor Chapter IV, but situate between the two categories. They are, however, by holistic interpretation of the first generation of rights under Chapter IV of the Constitution form part of that category of rights. This is not far-fetched as even the Supreme Court has pronounced that allowing a person to live in an unprotected or downgraded

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<sup>115</sup> L. Rutherford and S. Bone (eds.), *Osborn’s concise Law Dictionary*, 8<sup>th</sup> edn., Sweet and Maxwell, 1993, at 293.L.

<sup>116</sup> Oludayo, *supra*, note 26, at 589.

<sup>117</sup> A.S. Hornby, *Oxford Advanced Learner’s Dictionary of Current English*, Oxford: Oxford University Press, 2010, at 491.

<sup>118</sup> Black’s Law Dictionary, cited in Atsegbua, et al, *Environmental Law in Nigeria: Theory and Practice*, 2<sup>nd</sup> edn. Lagos: Ambik Press, 2010, at 3.

<sup>119</sup> Horny, *supra*, note 117, at 490-491.

<sup>120</sup> Atsegua, L., et al., *supra*, note 97, at. 131.

<sup>121</sup> Oludayo, *supra*, note

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environment could amount to a deprivation of the person's right to life since the environment can put his life at great risk.<sup>122</sup> It is contended, and rightly so that "right to life is not just a bare negative duty on the State not to arbitrarily take life; it emphasizes that the right to life, has at its core, the positive duty on the State to create the essentials that would allow for a dignified life. The government would be in breach of the right to life, therefore, if it does not channel the commonwealth towards the common good by pursuing policies and programs towards a society that guarantees the basic necessities of life to the people."<sup>123</sup>

To be convinced of this contention, it is gratifyingly important to examine some decisions of Courts in other jurisdictions. The Indian scenario is the first that comes to mind and worth emulating because the economic, social and cultural rights are to be found under the Directive Principles of State Policy, contained in Part IV of the Indian Constitution, which, according to section 37 of the Constitution, "shall not be enforceable by the Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." Importantly and more worth knowing is that judicial activism or radicalism have transformed socio-economic rights, including environmental rights in India from non-justiciable rights to justiciable rights. In *M. C. Mehta v. Union of India*,<sup>124</sup> based on public interest litigation, the Supreme Court of India granted *locus standi* to the petitioner to enforce the rights of the people who suffered damage as a result of leakages of hazardous gas. In another environmental law case of *Minors Opasa v. Secretary of the Department of Environment and Natural Resources*<sup>125</sup> the same Court declared: "While the right to a balanced and healthful ecology is to be found under the declaration of principles and State policies and not the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter." In all these cases the Indian Supreme Court reviewed its earlier decision in *Mandras v. Champakam Dorairajan*<sup>126</sup> where the Court held that "the directive principles have to conform to, and run subsidiary to the chapter on fundamental rights."

Yet in another jurisdiction in the Pakistani case of *Zia v. Water & Development Authority (WAPDA)*<sup>127</sup> the Supreme Court held that a right to life included a right to live in a hazard free environment and that economic policies should be informed by sustainable development.

The pivotal role of the Inter American Court of Human Rights in holistic and purposeful interpretation of the right to life cannot sink into oblivion. in *Juvenile Re education Institute case*<sup>128</sup>, the Inter-American Court of Human Rights declared that "the right to life and the right to

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<sup>122</sup> See *Ransome Kuti v. A.G. Federation (supra)*

<sup>123</sup> Enabulele, A.O., *supra*, note 90, at 104

<sup>124</sup> (1987) AIR, 965

<sup>125</sup> (1994) 33 I.L.M. 173

<sup>126</sup> (1951) SCR 525.

<sup>127</sup> (1994) SCA 16.

<sup>128</sup> Judgement of September 2, 2004. Series C. No. 112, para 158.

humane treatment require not only that the State respect them (negative obligation) but also that the State adopts all appropriate measures to protect and preserve them (positive obligation)”.

Also, in the *Street Children case*,<sup>129</sup> the court, held, inter alia:

The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning... In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur.

According to Keener and Vasquez, in reaction to the foregoing decision, “the Court took the idea that the right to life must be a right to a dignified life and began to enforce many elements of the right to health, finding violations even when the victims did not die and requiring government provision of food, Water sanitation, medicine and adequate medical care.”<sup>130</sup> Similarly, in the *Indigenous Community of Sawhoyamaya v. Paraguay*<sup>131</sup> the Court reiterated its stance in the following pronouncements:

States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals; and to protect the right of not being prevented from access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right.

It is argued, and this article agrees that the decisions of the Courts in the foregoing cases were largely anchored on the fact that socio-economic and environmental rights do not only ensure the attainment of an adequate standard of living for the people, but also help guarantee certain conditions that are fundamental to human existence, without which “fundamental rights” will have no meaning. It, therefore, follows that the intricate relationship between the right to a

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<sup>129</sup>*Villagran-Morales et al v. Guatemala*, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63, 144 (Nov. 19, 1999).

<sup>130</sup> Kener, S.R. & Vasquez, J. A, “Life worth Living: Enforcement of the Right to Health Through the Right to life in the Inter-American Court of Human Rights”, (2008-2009) 40 *Columbia Human Review*, 595, 597, quoted in Enabulele, *supra*, note 90, footnote 9.

<sup>131</sup> Series C No. 146 (2006) IACHR 2, para 153

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healthy environment and the right to life cannot be obliterated by reducing the right to a healthy environment to the level of non-justiciability.<sup>132</sup>

The whole essence of an all-inclusive interpretation of the right to life is as lucidly espoused in the case of *Indigenous Community of Yakye Axa v. Paraguay*,<sup>133</sup> as follows:

Essentially, this right (to life) includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated. One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

From this reasoning of the Court, it could be gleaned that the causes that are enforceable as components of the rights to life are broader in relation to persons who are vulnerable and at higher risk than people who do not fall into this category<sup>134</sup> The people of the Niger Delta and other environmental degradation prone areas are indeed vulnerable as they are at the mercy of the authority to put in place and implement policies and laws that will protect them from environmental harm an extension of which could be the violation of their right to life. This is the most reason why an expansive and purposive interpretation can be given to the right to life, right to dignity of human person, right to private and family life, and the right to acquire and own immovable property anywhere in Nigeria enshrined in Chapter IV of the Nigerian Constitution, to include the right to a safe, healthy and general satisfactory environment favourable to the development of the human person. This will place Nigeria at par with the developmental and people oriented extension of the right to life as same cannot be achieved Without a suitable environment in place; and places human rights development in Nigeria at par with international standards- in specific, the universality and indivisibility of human rights to Which article 6(2)(3) of the United Nations Declaration of Right to Development, 1986<sup>135</sup> is instructive. It stipulates:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation,

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<sup>132</sup> Enabulele, *supra*, note 90, at 107

<sup>133</sup> Series C No. 125, (2005) IACHR 6.

<sup>134</sup> Enabulele, *supra*, note 90, at 108

<sup>135</sup> UN GA RES. 41/128 of 4<sup>th</sup> Dec., 1986

promotion and protection of civil, political, economic, social and cultural rights.  
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights.

On the other side of the argument, the domesticated version of the African Charter and its express substantive provisions for the right to a general satisfactory environment renders environmental rights distinct rights in Nigeria. To further give life to this line of argument, it is reminded crucially that the 2009 Enforcement Rules made pursuant to section 46(3) of the Nigerian Constitution promulgated the enforcement of all the rights enshrined in the African Charter including the right to a safe and healthy environment.<sup>136</sup> The Rules further defines ‘fundamental right’ to mean “any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act” and that ‘human rights’ “includes fundamental rights”.<sup>137</sup> Simply put, in Nigeria, environmental rights have dual ‘personality’; they are both distinct rights as well as an amalgam of rights. Either way, the right to safe and healthy environment satisfactory to the wellbeing and development of man is legally recognised within the entity called Nigeria.

From the perspective of international law, it is germane to agree with professor Atsegbua, *er al*, that “international recognition of the environment entails both a right for everyone to benefit from environment as well as obligation for all to manage it sustainably and enforce its sustainability.”<sup>138</sup>

#### **4.0 Concluding Comments**

Amendment of the 1999 Constitution to guarantee environmental rights as fundamental rights is suggested. In other words, to achieve sustainable development, there is imperative need to make socio-economic rights, including environmental rights, enforceable. This will in tum curtail the excesses of nonchalant government. But the immediate approach is the pivotal role of Judges in making active and purposeful interpretation of the fundamental rights provisions under the 1999 Constitution and other international and regional human rights instruments, which Nigeria is signatory, as well as customary international laws.

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<sup>136</sup> See Preamble to the Rules.

<sup>137</sup> 2009 Enforcement Procedure Rules, Order I, Rule 2.

<sup>138</sup> Atsegbua, *el al*, *supra*, note 118, at 172.