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ENVIRONMENTAL CONSTITUTIONALISM IN NIGERIA: ARE WE THERE YET?*

Abstract

Environmental constitutionalism, sometimes termed 'green constitutionalism', refers to the environmental governance and the legal framework with which to protect environmental conditions and natural resources. The constitution is the organic and fundamental law of a nation or state. It is a fact that Nigeria's environmental regime is ineffective because the anthropogenic factors that cause environmental degradation remain unaddressed, and the government remains unconcerned to enforce binding environmental obligations. This article examines the question of the nature and extent of constitutional protection for the environment in Nigeria – practical approaches to better realize or constitutionalize environmental rights guaranteed under international, regional and Nigerian laws. It probes how we can utilize existing constitutional and international human rights treaties to advance environmental goals and how the existing constitutional rights can be invoked to protect the environment.

Keywords: Environmental constitutionalism; constitutional rights; constitution; environment; environmental protection; environmental rights

1. Introduction

The term *environmental constitutionalism* has been variously defined¹, and used in very different contexts². For the focus of this article, environmental constitutionalism means examining the

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¹ Blake Hudson, 'Structural Environmental Constitutionalism', *Widener Law Review*, (2015), Vol. 21: XXX.

² Brian J. Gareu, 'Foreword: Global Environmental Constitutionalism' 40 B.C. *ENVTL. AFF. L. REV.* 403, 403-404 (2013); Louis J. Kotze, 'Arguing Global Environmental Constitutionalism', 1 *TRANSNAT'L ENVTL. L.* 199, 203-204 (2012); Douglas A. Kysar, 'Global Environmental Constitutionalism: Getting There from Here' 1 *TRANSNAT'L ENVTL. L.* 83, 90 (2012).

question of domestic and international environmental concerns and measures taken to constitutionalize them³. It has been argued that environmental rights are basic rights which need not even 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.*,⁴ 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 goals of this article are to determine the extent to which environmental protection, and in particular, the right to a clean and healthy environment is now included not only in Nigeria's Constitution but also in regional and international Charters and treaties; whether these environmental provisions are enforceable and the extent to which these constitutional provisions have influenced environmental laws, court decisions and environmental governance. This article examines the practical approaches to realize or constitutionalize environmental rights guaranteed under international, regional and domestic laws and how we can utilize existing constitutional and international human rights treaties to advance environmental goals. Importantly, how do we employ the existing constitutional rights to protect the environment?

This article argues that environmental constitutionalism involves not only the letters of the constitution protecting the environment, but also ensuring access to environmental justice by citizens. This brings into focus substantive and procedural issues pertaining to the judicial recognition and enforcement of the citizen rights to 'a quality environment.'⁵

³ Kotze, *ibid.*

⁴ G.R. No. 101083, 224 S.C.R.A. 792 (Supreme Court of Philippines, July 30, 1993) reprinted in 33 ILM 173, 187 (1994). See also, *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. Nos. 171947 – 48 (Supreme Court of Philippines, December 19, 2008).

⁵ Rhuks Temitope Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India', 3, *N.U.J.S.L.REV.* 423 (2010).

Environmental constitutionalism, also involves the individual's constitutional right to a healthy environment⁶, which may create new constitutional rights as does the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides that: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria."⁷

This section 20 is a laudable provision on environmental objectives – protection of the nation's environment. Thus, it is very clear that citizens have a right to clean air, pure water and to the preservation of the natural, scenic, historic and aesthetic values of the environment⁸. However, constitutional provisions do not matter if there are no procedures in place to allow citizens to enforce them. In Nigeria, it is standing that gets in the way.

Nigeria's Constitution contains provisions which include – legislative powers: exclusive, concurrent and residual powers⁹, right to private property and payment of compensation; judicial powers; requirements of standing to sue and other jurisdictional requirements, which places serious limitations on the 'ability to address the environmental needs of present and future citizens'.¹⁰

Though the Constitution contains environmental objectives expressed in section 20 of the amended 1999 Constitution, its inclusion under Chapter II – 'Fundamental Objectives and Directive Principles of State Policy' whittled down the efficacy of such environmental objectives. First, the quality of the environmental objectives contained in section 20 of the 1999 Constitution is destroyed, and the content of the environmental objectives are reduced to worthless platitudes by section 13 of the 1999 Constitution which prohibits justiciability of the provisions

⁶ David R. Boyd, 'The Constitutional Right to a Healthy Environment', *ENV'T, (Science and Policy for Sustainable Development)*, July-August, 2012.

⁷ Section 20, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁸ *Robinson Township v. Pennsylvania*, 83 A. 3d901 (pa. 2013), in Blake Hudson, 'Structural Environmental Constitutionalism', *ibid.*

⁹ The Constitution of the Federal Republic of Nigeria 1999 (as amended) Legislative Powers, Part 1 Exclusive Legislative List (ELL); Concurrent Legislative List.

¹⁰ Douglas A. Kysar, "Global Environmental Constitutionalism: Getting There From Here", 1 *TRANSNAT'L ENVTL. L.* 83, 90 (2012).

contained in Chapter II on 'Fundamental Objectives and Directive Principles of State Policy'. Section 6(6)(c) of the 1999 Constitution excludes the jurisdiction of the courts on matters relating to the provisions (section 20) in Chapter II – that is on 'Fundamental Objectives and Directive Principles of State Policy'.

On the whole, therefore, attempt to constitutionalize the environment suffers gravely and is in need of reform. This article seeks to appraise the question of environmental constitutionalism against the above backdrop.

Part II focuses on the nature and extent of constitutional protection for the environment in Nigeria. Part III discusses the practical approaches to constitutionalize environmental rights and proposes the need to entrench fundamental environmental rights in the constitution. Part IV probes how utilizing existing constitutional and international human rights treaties can advance environmental goals in Nigeria, while Part V examines the judicial intervention in environmental constitutionalism in Nigeria. Part VI details how environmental constitutionalism can be moved forward in Nigeria. Part VII briefly concludes.

2. The Nature and Extent of Constitutional Protection for the Environment in Nigeria

Section 20 of the 1999 Constitution of the Federal Republic of Nigeria outlines provision for the State to protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria. An environmental right has been defined as 'the right of individuals and peoples to an ecologically sound environment and sustainable management of natural resources conducive to sustainable development.' Being part of State policy, this section is not justiciable. Section 33(1) states that 'every person has a right to life and no one shall be deprived intentionally of his life.' This right seems to protect the right of citizens against environmental degradation. Many argue that this right to life along with section 20 confirm a right to a healthy environment.

In *Gani Fawehinmi v. Abacha*¹¹, the Court of Appeal held that the human rights in the African Charter on Human and Peoples' Rights

¹¹ (1996) 9NWLR, Part 475, p 710.

having been enacted into Nigerian national law, was superior to a Decree. The African Charter 1981, Article 24 proclaimed that the right to a satisfactory environment for development is a human right. A citizen can therefore rely on Article 24 of the Charter to enforce his environmental right instead of relying on section 20 of the 1999 Constitution which is not justiciable¹². The court has also recognised that environmental degradation can give rise to a violation of human rights.¹³

Okonmah has stated that cases related to human rights and environmental degradation are quite common in Nigeria, particularly in the area of oil exploration¹⁴. This Article argues that this is a sweeping statement as the courts in Nigeria, except in the case of *Gbemre* are yet to pronounce directly on 'human rights and environmental degradation'. The plethora of available cases is mainly founded on common law principles of nuisance, trespass or negligence. The provision in the Constitution presupposes that the Government of Nigeria should always take necessary precautions to protect the rights of the people in all policies formulated to exploit natural and human resources of the state. Several environmental legislation in the 1980's and 1990's deal with oil pollution, spillage and discharges¹⁵. Moreover, the Niger Delta Development Commission (NDDC), a government body, has been established to compensate communities that have suffered ecological damage from mineral exploitation. There is also the National Environmental Standards and Regulations Enforcement Agency (NESREA) to monitor and evaluate overall environmental protection programme and provide solutions to ecological problems of exploration of oil and other minerals.

During the 1990's, the courts were called upon in certain cases to decide environmental questions in various oil litigation¹⁶. One such case is the *Kenule Benson Saro-Wiwa, President of the Movement for*

¹² L. Atsegbua, 'Environmental Rights, Pipeline Vandalisation and Conflict Resolution in Nigeria' (2001) *IELTR* 89-92.

¹³ *Kokoro-Owo v. Lagos State Government* (1995) 6 NWLR 760 at 765.

¹⁴ P. O. Okonmah, 'Right to a Clean Environment: the Case for the People of Oil Producing Communities in Niger Delta' (1997) *Journal of African Law*, Vol. 41, 43-67.

¹⁵ For example: Environmental Impact Assessment Act, L.F.N. 2010.

¹⁶ For case examples: J. G. Frynas, 'Legal Change in Africa: Evidence from Oil Related Litigation in Nigeria.' (1999) *Journal of African Law*, Vol. 43, 121-150.

Environmental Constitutionalism in Nigeria ~ T. Okonkwo

*the Survival of the Ogoni People (MOSOP) and Eight Others (unreported, 1995)*¹⁷, 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 Ogoniland. It had also polluted many rivers in Ogoniland 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 Ogoniland.

Though Nigeria's 1999 Constitution (as amended), contains environmental constitutional provision, the government need to strengthen the environmental constitutionalism through constitutional amendment to achieve more effective or balanced environmental governance.¹⁸

Since there is no specific reference in the Constitution to the power of the Federal government to exclusively make laws with respect to the environment, the States possess primary constitutional powers in this area, provided it legislates within its competency. So far as environmental protection in Nigeria is concerned, the constitution contains formidable list of federal powers, a list which generally confers superior legislative authority with respect to environmental regulations and management.

All the significant environmental laws in our statute books are federal laws and regulations, thus 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.¹⁹ It also has powers over customs and excise duties²⁰ and taxation²¹.

¹⁷ 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 Ogoniland Episode' (1999) *Netherlands Quarterly of Human Rights*, Vol. 17/2, 161-184.

¹⁸ Blake Hudson, *ibid*, p. 4.

¹⁹ Item 39 on the Exclusive Legislative List of 1999 Constitution. See *S.P.D.C v. Isaiah*, *Ibid*.

²⁰ Item 16 *ibid*.

The Federal regulations relevant to the environment in Nigeria dates back to 1914 with the passing of Mineral Oils Ordinance of 1914. Then followed the Harmful Waste (Special Criminal Provisions, etc) Act, Cap H1 L.F.N. 2004; the NESREA Act 2010; Chapter 23 of the Criminal Code, Cap C. 38, LFN 2004; the Endangered Species (Control of International Trade and Traffic) Act, Cap. E9 LFN 2004; the Land Use Act 1978 (now Cap. L5 L.F.N. 2004); the Tobacco Smoking Control Act Cap. T6 LFN 2004; the 2011 National Environmental Regulations in various specified areas; the Factories Act, Cap. F1, LFN 2004, concerning environmental health and safety; legislation on oil pollution and the National Environmental Policy 1999.²²

From these legislation, the Federal government can regulate environmental impacts of hazardous wastes, and upon natural resources, wildlife reserves; public health hazards, river basin development, conservation of wildlife and protection of endangered species; land use and planning²³, tobacco smoking; industrial pollution, environmental health and safety and oil pollution. Clearly, it can also regulate, conserve and manage the living and non-living resources relating to the 68 items on the Exclusive List and 38 items on the Concurrent List of 1999 constitution .

The NESREA Act²⁴ contains items²⁵ of which the Agency is required to keep and maintain National Environmental Standards²⁶. In a way, those items are exclusive as they contain elements of exclusiveness and at the same time concurrent jurisdiction within itself for the State as well as the Federal government. For example, the Federal government through NESREA is entrusted with water quality standard as well as establishing effluent limitation; air quality and atmospheric protection; noise control and hazardous

²¹ Item 59 Ibid.

²² Apart from the National Environmental Policy 1999, all the legislations mentioned are now codified in the Laws of the Federation of Nigeria 2010.

²³ It appears doubtful whether the Federal Government can exclusively or concurrently regulate land use and planning in Nigeria. On this point see the case of *A.-G., Lagos State v. A.-G., Federation* (2003) 35 WRN 1 – 226.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

substances control. But NESREA Act empowers the authorities to encourage states and local councils to set up their environmental protection bodies for the purpose of maintaining good environmental quality in the areas of related pollutant under their control subject to the provisions of the Act.

It is therefore, clear that the State and local governments derive their powers to make environmental laws or byelaws from the Constitution. Both make laws, but the law made by the National Assembly shall prevail and the State laws, to the extent of its inconsistency shall be void.

In Nigeria, virtually most of the important matters of government including ones on Environmental Policy have been placed within the Exclusive List. Thus, on matters of environmental protection, policy and laws, the States are vested with either concurrent or residual legislative power on the matters not included in the Exclusive List or in the areas of related pollutant under their control.

This residual legislative power vested in the States is capable of being interpreted by a State so as to legislate and exercise its executive power (in the case of a State) in respect of waste management and urban and town planning because these subject matters are not included in the Exclusive List nor in the Concurrent List.

Chapter II of the Constitution²⁷ makes provision for what the 1999 Constitution described as “*Fundamental Objectives and Directive Principles of State Policy*”. Fundamental Objectives refer to the identification of the ultimate objectives of the nation whilst Directive Principles of State Policy indicate the paths, which lead to those objectives.²⁸ The proposal to include environmental objectives in section 20 of the 1999 constitution is a radical and enlightened innovation. But the provision which is in the following terms: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”

First, the quality of the environmental objectives contained in section 20 of the 1999 Constitution is destroyed, and the content of

²⁷ Same as 1979 Constitution.

²⁸ See Volume 1 p. V of the *Report of the Constitution Drafting Committee* on the 1979 constitution.

the environmental objectives are reduced to worthless platitudes, by section 13 of the 1999 constitution. The whole of section 13 provides as follows:

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.

Section 13 of the 1999 Constitution appears to have whittled down other provisions of the Constitution. Section 6(6)(c) excludes the jurisdiction of the courts on matters relating to the contravention of the provisions (section 20) in Chapter II - that is on Fundamental Objectives and Directive Principles of State Policy. Section 6 (6)(c) provides:

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 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.

It is, therefore, clear that unless the environmental objectives are clearly defined, and constitutional provisions made for their legal enforcement if the need arises, protection of the nation's environment will drift and suffer unsustainability and degradation. If section 20 on environmental objectives is allowed to remain in Chapter II of the Constitution, then, the whole environmental objectives are reduced to "empty platitudes and hollow admonitions which should have no place in a Constitution which is, first and last, a legal document whose provisions must *ipso facto* be justiciable and legally enforceable"²⁹.

The Drafters of the Constitution are correct in holding that constitutional obligations as between the people on the one hand and the State on the other must be mutual. But, they are wrong, at the same time, for providing for the justiciability of the duties laid on

²⁹ Chief Obafemi Awolowo, *Daily Times*, December 9, 1976: "My Thoughts", reported in *The Great Debate - Nigerian Viewpoints on the 1976/77 Draft Constitution*- A publication of *Daily Times*, p. 44.

the people towards the State, and for the non-justiciability of the obligations which the State owes to the people.³⁰ However, in the words of late Chief Obafemi Awolowo:

It may be argued with some cogency that some of the sections in Chapter II are not drafted in a language that would lend them to court actions. If this is then (sic) such sections should be re-drafted. But I don't think that this is so... I have read Chapter II again and again and I am of the considered opinion that a breach of any of the sections in the Chapter can be tenably challenged in our Courts of Law.³¹

One would easily agree with Chief Obafemi Awolowo that “a breach of any of the sections in the chapter can be tenably challenged in our courts of law”. The position of the law is quite settled as regards the cannon of interpretation or construction of the Constitution, which is not merely a statute but the organic and supreme law of the land. The courts should always lean towards the wider and broader interpretation of the Constitution, unless there is something in the constitution that indicates to the contrary.

With the above guiding principle in mind, if the government fails to fulfill the objectives provided for in section 20, it should be open to any citizen to go to court to obtain an order to the effect that the Government shall discharge the obligations laid on it by this section, and this the citizen can do under the relevant provisions of the African Charter on Human and Peoples' Rights, 1981 to which Nigeria is a party.

The environmental objectives contained in section 20 of the Constitution carries with it the correlative duty to refrain from impairing the environment. The environmental objectives, thus implies the right among other things, the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

The provision in section 20 stresses “the necessity of maintaining a sound ecological balance and protecting and enhancing the quality

³⁰ Ibid.

³¹ Ibid at p. 44.

of the environment”.³² It may, however, be recalled that even before the arrival of the 1999 Constitution, specific statutes already paid special attention to the “environmental right” and objectives of the present and future generations. In 1988 the Harmful Waste (Special Criminal Provisions, Etc) Act³³ and the NESREA Act³⁴ were enacted. The former prohibited all activities relating to harmful waste³⁵, and the latter Act, on the other hand, gave flesh to the former by declaring a continuing policy of the State to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other, to fulfill the environmental objectives and other requirements of present and future generations of Nigerians, and to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being.³⁶

On the 13th day of June 2003, the Supreme Court of Nigeria in the case of *A. -G., Lagos State v. A. – G., Federation & Ors.*³⁷, pronounced on the purport of section 20 of the 1999 Constitution of the Federal Republic of Nigeria which in Chapter II of the Constitution is described as “*Fundamental Objectives and Directive Principles of State Policy*”.

The plaintiff instituted the action against the 1st defendant complaining that the 1st defendant has been interfering with and has made incursions into the arrangements of the Lagos State Governments in town and country planning matters. The plaintiff contended that this was done in reliance on Urban and Regional Planning Act (Decree No. 88. of the 1992) whereas the State has its own Town and Country Planning Laws as (1) Building Lines Regulation Law of 1936 now Cap. 16. Laws of Lagos State, 1994; (2) Land Development (Provision for Roads) Law. Cap. 110; (3) Town and Country Planning Law No. 1 of 1986. Cap 199. The Plaintiff then sought for restraining orders against the defendant.

There was a majority opinion of 4 to 3 (Uwaifo, JSC, supported by Onu, Kalgo and Ejiwunmi JJSC) granting the plaintiff's relief in part.

³² Ibid.

³³ Cap. H1, LFN 2004.

³⁴ Ibid.

³⁵ Section 1 (1) of Cap H1, LFN 2004.

³⁶ See section 1 of the *Philippine Environmental Policy*, issued on 6 June 1977.

³⁷ (2003) 35 WRN 1 – 226.

There was also a minority opinion delivered by Uwais CJN supported by Tobi and Ayoola JJSC. The matter before the Supreme Court concerned the constitutionality or otherwise of the Urban and Regional Planning Act 1992. In the course of the judgment, several notable pronouncements were made by the Supreme Court on the purport of section 20 of the 1999 Constitution, which they agreed is for the protection and improvement of the environment in Nigeria and safeguarding the water, air and land, forest and wildlife in Nigeria.

3. Practical Approaches to Constitutionalize Environmental Rights

This article argues that the only way to attain efficient and effective constitutional environmentalism is to amend the constitution, though this appears a herculean task as previous attempts to undertake constitutional amendment have been severally thwarted due to political interests. Only a handful of amendments have passed.

Recently there has been an outburst of literature on environmental constitutionalism. Existing literature suggests a degree of harmonious development among the world's national constitutions aimed at environmental constitutionalism³⁸. Boyd reports that, as of 2012, 147 of the world's 193 United Nations

³⁸ See generally, Klaus Bosselmann, 'Global Environmental Constitutionalism: Mapping the Terrain', *Widener Law Review* (2015) Vol. 21:171; Damilola S. Olawuyi, 'Constitutionalizing Environmental Rights in Nigeria: Reflections on the Question of Approach' (2015) *National Human Rights Commission Journal*; 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)*; Philip Allot, *The Emerging Universal Legal System*, in NEW PERSPECTIVE ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 63-83, (Janne Nijman & Andre Nollkaemper eds. 2007); Jeffrey L. Dunnoff & Joel P Trachtman, *A Functional Approach to Global Constitutionalism*, in RULING THE WORLD? 3-36 (Jeffrey L. Dunnoff & Joel P. Trachtman eds. 2009); Blake Hudson, 'Structural Environmental Constitutionalism: *Widener Law Review*, (2015), Vol. 21: XXX; Brian J. Gareu, 'Global Environmental Constitutionalism' 40 *B.C ENVTL. AFF. L. REV.* (2013); Louis J. Kotze, 'Arguing Global Environmental Constitutionalism, 1 *TRANSNAT'L ENVTL. L.* (2012); Douglas A. Kysar, 'Global Environmental Constitutionalism: Getting There from Here 1 *TRANSNAT'L ENVTL. L.* (2012); David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, (University of British Columbia Press, 2012); James R. May and Erin Daly, *Global Environmental Constitutionalism*, (Cambridge University Press, 2014).

members contain constitutions that address environmental matters in some form. The Constitutions from about 76 nations specifically recognize some kind of right to a quality environment.

Several dozens impose corresponding duties on individuals or the State to protect the environment. Several others specifically recognize environmental protection as a matter of national policy. Others recognize specific rights concerning issues like climate change and sustainability and rights to water. Lastly, according to Boyd, about three dozen countries have special procedural rights in environmental matters.³⁹

Environmental constitutionalism is however not a complete solution to environmental protection law governance, but can help to bridge the gaps left by other legal regimes. According to Douglas A. Kysar,⁴⁰ constitutionalism is:

a work in progress, asymptotically striving towards an unattainable but undeniable goal of universal recognition and respect.

This being the case, 'the exact theoretical content and extent of environmental constitutionalism remains insufficiently determined'⁴¹. Notwithstanding, practical approaches to better realize or constitutionalize environmental rights include:

- (i) entrenching environmental rights in the Constitution under Chapter IV as justiciable fundamental rights, thus, of a substantive and/or procedural nature⁴²;
- (ii) providing in the Constitution the sustainable development principles;
- (iii) explicit provisions in the Constitution with respect to state and non-state functions and duties.⁴³

Louis J. Kotze⁴⁴, outlined these duties to include: ensuring intra – and intergenerational equity; conserving resources, and ensuring

³⁹ Ibid.

⁴⁰ Douglas A. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity*, (Yale University Press, 2010), p. 245.

⁴¹ Louis J. Kotze, above note 2, p. 208.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

equitable access to and use of resources; avoiding adverse environmental impacts; preventing environmental disasters; minimizing damage and providing emergency assistance to compensate for environmental harm and to ensure environmental justice, access to justice and sufficient civil society representation and participation. There is also need to establish environmental rights tribunals to entertain claims of violations resulting from environmental degradation.

International and national environmental standards must be complied with by the governments⁴⁵. As stated above, environmental rights should be enshrined in the Constitution just as the human rights, being a human right to environmental conditions of a specified quality⁴⁶. On the international and regional scenes, certain treaties have since recognized environmental rights in their texts. The African Charter on Human and Peoples' Rights provides that: '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.'⁴⁷ There is also the Additional Protocol to the American Convention on Human Rights which provides that: 'everyone shall have the right to live in a healthy environment and to have access to basic public services.'⁴⁸ Various environmental instruments, numerous national constitutions and international declarations have also proclaimed environmental rights.⁴⁹

In constitutionalizing environmental rights, effect should be given to procedural and substantive environmental rights. It is however, evident that procedural environmental rights is preferred to substantive environmental rights for the very reason that attempts to enforce substantive environmental rights are likely to be

⁴⁵ Dinah L. Shelton, 'Developing Substantive Environmental Rights', *1 J. Hum, Rts. & Env't*. 89 (2010).

⁴⁶ Ibid.

⁴⁷ African Charter on Human and Peoples' Rights (27 June 1981), (1982) 21 ILM 58 (African Charter) Article 24.

⁴⁸ Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (17 November, 1988) OAS Treaty Series No. 69 28 ILM 161 (ESC Protocol) Art 11.

⁴⁹ Dinah L. Shelton, Ibid, p. 89.

resisted. It has in fact been shown that the claim of a human right to environmental quality has been rejected by those who argue that the concept is not justiciable due to the fact that no ascertainable 'standards can be developed to enforce the right, because of the inherent variability of environmental conditions'.⁵⁰ Constitutions and laws should provide a framework to incorporate rights and obligations to be performed by the citizens and the government and its institutions to uphold environmental constitutionalism. Standards must be set and enforced to ensure good environmental governance.

To constitutionalize or realize environmental rights, the role of the courts is indispensable. The courts by their interpretation and adjudication of environmental disputes give teeth to environmental constitutionalism.⁵¹ In this manner, the courts carry out judicial enforcement of environmental obligations which the citizens and governments are bound to keep; they resolve disputes and provide access to environmental justice.

To realize environmental constitutionalism, therefore, the following elements and characteristics must exist;⁵² environmental rights; environmental justice; intra-and inter-generational equity; ecological integrity; sustainability and its associated principles; an extended vision of the environmental obligations of the state and the private sector; judicial control of executive and legislative environmental governance functions; and an expansive notion of private and public accountability.⁵³

This article hereby proposes the need to entrench fundamental environmental rights in the Constitution.

4. Utilizing Existing Constitutional and International Human Rights Treaties to Advance Environmental Goals in Nigeria

The question at the heart of this section is how can we utilize the existing constitutional provisions and international multilateral

⁵⁰ Ibid, p. 91.

⁵¹ Louis J. Kotze; A. R. Paterson (eds.) *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International, 2009).

⁵² Louis J. Kotze, Ibid, p. 209.

⁵³ Ibid.

human rights treaties to advance environmental goals at national level?

There are several international multilateral human rights and environmental treaties in existence that protect the environment.

Principle 1 of the *Stockholm Declaration* established a foundation for linking human rights and environmental protection, declaring that man has a fundamental right to freedom, equality and adequate conditions of life, in environment of a quality that permits a life of dignity and well being. It also announced the responsibility of each person to protect and improve the environment for present and future generations. Almost twenty years later, in Resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well being. The Resolution called for enhanced efforts towards ensuring a better and healthier environment.

In contrast to the earlier documents, the 1992 Conference of Rio de Janeiro on Environment and Development formulated the link between human rights and environmental protection largely in procedural terms. Principle 10 of the *Rio Declaration on Environment and Development* proclaims as follows:

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

Rights to information, participation and remedies in respect to environmental conditions thus formed the focus of the Rio Declaration. In addition to Principle 10, the Declaration includes provisions on the participation of different components of the population: women (Principle 20), youth (Principle 21), and indigenous peoples and local communities (Principle 22). Public participation also is emphasized in Agenda 21. The Preamble to Chapter 23 states:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.

Chapter 23 proclaims that individuals, groups and organizations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection matters. Agenda 21 also calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy for actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organizations with a recognized legal interest. Section III of Chapter 23 identifies major groups whose participation is needed: women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers. Agenda 21 also calls for public participation in environmental impact assessment procedures and in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. It also encourages governments to create policies that facilitate a direct exchange of information between the government and the public in environmental issues, suggesting the Environmental Impact Assessment (EIA) process as a potential mechanism for participation.

In the decade since preparations began for the Rio Conference, global and regional treaties adopted in the fields of human rights and environmental protection have included provisions specific to the

rights contained in Principle 10. The language used by different instruments is far from being homogeneous. Sometimes public participation is used in a broad sense to designate the recommended openness of authorities towards individuals and groups of individuals and includes the right to information rather than separately guaranteeing it. Some treaties also contain substantive rights to a particular environmental quality while others, such as the Lugano Convention, focus on remedies for environmental harm. Generally, global and regional environmental treaties since 1991 contain at least some reference to public information, access or remedies, although this practice is not usually followed in the case with watercourse agreements. Such agreements tend to focus on interstate management and utilization of freshwaters without reference to public information and participation.

Human rights treaties of the past decade are fewer in number than the total of environmental agreements adopted during the same period and most of those that have been concluded have been at the regional level. In general, global treaties have not included specific reference to the environment or to environmental rights. In contrast, even prior to the Rio Conference, regional instruments contained provisions on environmental rights, although they pre-date the conference.

Also pertinent is the *African Charter on Human and Peoples' Rights*, (Banjul June 26, 1981) which contains several provisions related to environmental rights. Article 21 provides that 'All peoples shall freely dispose of their wealth and natural resource' and adds that this right shall be exercised in the exclusive interest of the people. Article 24, which could be seen to complement or perhaps conflict with Article 21, states that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' Article 7 provides that 'every individual shall have the right to have his cause heard.'

Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) establishes that international treaties (including environmental treaties) ratified by the National Assembly should be implemented as law in Nigeria. Furthermore, sections 33 and 34 of the Constitution which guarantee fundamental human rights to life and human dignity respectively, have also being argued

to be linked to the need for a healthy and safe environment to give these rights effect.

Nigeria is a member of the comity of nations, the United Nations and has ratified several environmental treaties, conventions and protocols and is therefore, bound subject to the provisions of section 12 of the Constitution to enforce such international laws to ensure citizens' right to a healthy environment.

Do these international human rights treaties and constitutional rights advance environmental goals in Nigeria? As David R. Boyd stated:

Proponents of constitutional rights argue that laws will become stronger, institutions and norms will evolve, and courts will defend the rights of citizens. There is implicit faith, that constitutions in tandem with *international* legal systems, will ensure the protection and fulfillment of rights.⁵⁴

This 'faith' does not however justify what is 'on-the-ground,' as what is evident shows the failure of constitutional rights to live up to their promises.⁵⁵ According to Ignatieff:⁵⁶

... the acid test of the worth of constitutional and international human rights is whether they improve peoples' lives... otherwise, rights may be mere paper tigers and their constitutional recognition nothing more than "cheap talk".

The above statement fitly describes section 20 of the 1999 Constitution as amended, which provides for environmental objectives, which cannot be questioned nor judicially enforced.⁵⁷

Environmental constitutionalism through international human rights treaties could also advance environmental goals by facilitating the creation of good environmental regulations, standards, rights, duties, and other substantive and procedural elements, such as

⁵⁴ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (University of British Columbia Press, 2012).

⁵⁵ *Ibid*, p. 14.

⁵⁶ Quoted in David R. Boyd, *ibid*, pp. 14-15.

⁵⁷ Rhuks Temitope Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India,' 3 *N.U.J.S. Law Review*, 423 (2010), p. 433.

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'access to information; participative and representative environmental governance; access to justice; and ways to better enforce environmental laws'. Environmental constitutionalism has been criticized as being of little value, merely symbolic and a paper tiger. Douglas A. Kysar has described the situation thus:

On the whole ... efforts to constitutionalize environmental law remain largely symbolic exercises even under the socially and environmentally progressive constitutions that have been adopted during the past half century. The situation is comparably dim at the supranational level.⁵⁸

Boyd has also described environmental constitutionalism as being vague, absolute, redundant, ineffective and merely an exercise in window dressing that generates false hopes.⁵⁹ However, Kotze, has outlined the various benefits of environmental constitutionalism which could by extension advance environmental goals in Nigeria, to include the fact that it:

- provides the opportunity, and to some extent the means, by which to reform governance, the state, laws and society with respect to the environment;
- prioritizes environmental care by equating it at the higher constitutional level to fundamental rights, ethics and universal moral values (or constitutional principles);
- boosts procedural aspects of environmental governance and therefore also private actors participation and state accountability;
- provides a legitimate foundation and means for creating and enforcing environmental rights, values and other sources of ecological obligation upon private and public actors;
- provides checks and balances for the creation of legislation and the exercise of executive environmental governance functions;
- provides the means to dictate the content of laws; and
- establishes moral and ethical obligations with respect to the environment and a concomitant public and private, intra-and

⁵⁸ Douglas A. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity*, (Yale University Press, 2010), p. 231.

⁵⁹ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, (University of British Columbia Press, 2012), pp. 33-43.

interstate justificatory basis for, and authority to require proper performance of these duties.⁶⁰

Despite its criticisms, environmental constitutionalism is important in that it advances environmental goals as a 'means to defend (environmental) rights and interests, to restrict authority and private encroachment on these rights and interests, and to compel the state and non-state actors to affirmatively and collectively respect, protect, promote and fulfill⁶¹ the citizens' right to a clean and healthy environment.

5. Judicial Intervention in Environmental Constitutionalism in Nigeria

Environmental constitutionalism is not commonly embodied explicitly in the Constitution except in the cases of countries like South Africa,⁶² and Kenya⁶³ where environmental constitutionalism 'has an especially firm foothold.'

In Nigeria, the starting point is the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which does not make explicit provisions on the right to a healthy environment. Instead, in

⁶⁰ Ibid, pp. 210-211.

⁶¹ Bruch C., Coker W., and Van Arsdale, C., 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa', (World Resources Institute: *Working Paper Series, WPN*, 2, April, 2001).

⁶² Section 24 of the South African Constitution provides:

"Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Section 38 of the South African Constitution grants affected persons wide *locus standi* to vindicate their claims under section 24.

⁶³ Environmental provisions are included in Chapter Four, of the Kenya Constitution, 2010, under 'Rights and Fundamental Freedoms'; Chapter Five, under 'Environment and Natural Resources'; and Chapter Ten, under 'Judicial Authority and Legal system.' The Fourth Schedule also includes environmental provisions under 'Distribution of functions, between National and County Governments' and the Fifth Schedule titled 'Legislation to be enacted by Parliament.'

what it terms 'environmental objectives' in its section 20, captured in Chapter II of the Constitution titled 'Fundamental Objectives and Directive Principles of State Policy,' it declares that the State should 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.' Section 20 when read against the provisions of section 6(6)(c) of the Constitution clearly shows non-justiciability of the contents of section 20. It cannot be enforced in the Courts. The import of the provisions of section 6(6)(c) is that the section 20 'environmental objectives' cannot be enforced in the law courts.

However, Nigeria is a member of the comity of nations and in that capacity ratified the African Charter on Human and Peoples' Rights which contains in its Article 24 the substantive right to a healthy environment.⁶⁴ Following the provisions of section 12 of the Constitution on domestication of international treaties, Nigeria enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁶⁵ which provides in its section 1 as follows:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

By this provision, therefore, the Nigerian courts are enjoined to have regard to the country's international obligations which it has undertaken to honour. We can take some decisions of the courts to appreciate the position taken by the Judiciary. Some courts have invoked the principle of presumption in favour of international law and international obligations. In *Attorney-General v. British Broadcasting Corporation*,⁶⁶ Lord Scarman stated that:

There is presumption albeit rebuttable, that our municipal law will

⁶⁴ Ibid.

⁶⁵ Cap. A9, Laws of the Federation of Nigeria, 2010.

⁶⁶ (1981) AC. 303 at 354.

be consistent with our international obligations.⁶⁷

Where an international convention, by virtue of the municipal process law-making becomes a law of the state, national courts will have no difficulty in invoking the convention in municipal litigation. That was the situation in *Ogugu v. The State*,⁶⁸ 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 *General Sani Abacha and Others v. Chief Gani Fawehinmi*,⁶⁹ the Supreme Court held as follows:

- (1) An international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by National Assembly, it has no such force of law as to make its provision justiciable in our courts.
- (2) By virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, (now Cap A9, Laws of the Federation of Nigeria, 2010), the African Charter is now part of the Laws of Nigeria and like all other laws, the courts must uphold it.
- (3) The individual rights contained in the Articles of the African Charter on Human and Peoples Rights are justiciable in Nigerian Courts.
- (4) The validity of any other domestic statute cannot be affected by the mere fact that it violates the African Charter or any other treaty.

The court defined a treaty in a broad sense as similar to an agreement under civil law. Therefore it covers international

⁶⁷ See also *Post Office v. Estuary Radio Ltd.* (1968) 2 QB. 740 at 757; *Norris v. Ireland* 142 Eur. H.R. (Ser. A) (1988); *Schering Chemicals Ltd v. Falkman Ltd.* (1981) 2 All ER 321.

⁶⁸ (1994) 9 NWLR (Pt. 366) 1.

⁶⁹ (2000) 6 NWLR (Pt. 660) 228.

agreements in the context of this discussion. And it should be so.

In *Chief Oshevire v. British Caledonian Airways Ltd.*,⁷⁰ 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.⁷¹

This article argues that flowing from above, is the question of substantive right to a clean and healthy environment which the courts are obligated to protect and enforce. The right to a clean and healthy environment arose for determination within 'the status, enforceability and impact of the provisions of the African Charter on Human and Peoples' Rights.'⁷²

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*,⁷³ which turned on amongst other issues, the right to a healthy environment.⁷⁴ The communication alleges that the Federal Government of Nigeria aided by the oil production company, the Nigerian National Petroleum Company (NNPC) and the Shell Petroleum Development Corporation (SPDC) have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. 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

⁷⁰ (1990) 7 NWLR (Pt. 163) 507.

⁷¹ See also *The Registered Trustees of the Constitutional Rights Project (CRP)*, Suit No. M/102/93; *Akinnola v. General Babangida and Others*, Suit NO. M/462/93; *Nigeria National Petroleum Corporation v. Chief Fawehinmi and Others* (1998) 7 NWLR (Pt. 559) 598; *Ndigwe v. Ibekendu and Others* (1998) 7 NWLR (Pt. 558) 486.

⁷² Rhuks Temitope Ako, above note 5, p. 434.

⁷³ Communication 155/96, October 27, 2001.

⁷⁴ The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.

environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air had had serious short and long term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. The communication finally alleges that the Federal Government has destroyed and threatened Ogoni food resources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

The African Commission took cognizance of the fact that the Federal Republic of Nigeria has incorporated the African Charter into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including the violations alleged by the Complainants. The Commission noted that the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies and that this obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. This protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.⁷⁵

The African Commission stated that under Article 24 of the African Charter, the Federal Government of Nigeria is under obligation to provide satisfactory environment – the right to a healthy environment for its citizens. This requires the state to take reasonable, and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.⁷⁶

⁷⁵ Ibid, paragraph 46.

⁷⁶ Ibid, paragraph 52.

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The Commission stated that collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.⁷⁷ In its holding, the Commission found the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, and appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by amongst other things, ensuring adequate compensation to victims of the human rights violations and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations.

This case is significant, for the Commission reaffirmed the obligations imposed on the States by Articles 16, 21 and 24 of the African Charter. The Commission made it clear that governments have the bounden duty to protect their citizens by protecting them from damaging acts that are likely to be perpetrated by private parties and in this, it called for positive action on the part of governments. This case has 'laid the groundwork' for future cases on environmental rights of citizens to a clean and healthy environment as a constitutional right. The case has no doubt mapped out government's human rights obligations relating to the citizens constitutional right to the enjoyment of a safe, clean, healthy and sustainable environment.

In the case of *SERAP v. Federal Republic of Nigeria*,⁷⁸ the plaintiff, the Socio-Economic Rights and 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 – adequate access to clean water, education,

⁷⁷ Ibid, paragraph 68.

⁷⁸ General List No. ECW/CCJ/APP/08/09, Judgment No. ECW/CCJ/JUD/18/12. Holden at Ibadan, in Nigeria, 14th December, 2012.

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 Peoples' 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 ground-breaking judgment by ECOWAS Court, which ordered the Federal Government to punish the oil companies.⁷⁹ The Court unanimously found the Nigerian government responsible for abuses by oil companies and made it clear that the government must hold the companies and other perpetrators to account. The Court noted that the government violated Articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples' Rights by failing to protect the Niger Delta and its people from the operations of oil companies that have for many years devastated the region. The Court noted that government's failure to enact effective laws and establish effective institutions to regulate the activities of the companies coupled with its failure to bring perpetrators of pollutions "to book" is a breach of Nigeria's international human rights obligations and commitments. According to the Court, "the quality of life of people is determined by the quality of the environment. But the government has failed in its duty to maintain a general satisfactory environment conducive to the development of the Niger Delta region."

This article argues that this judgment vindicates the concept of

⁷⁹ 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.

environmental constitutionalism as a tool for constitutionalizing environmental rights and advancing environmental goals in Nigeria. Article 15(4) of the ECOWAS Treaty makes the Judgment of the Court binding on member States, including Nigeria. By Article 19(2) of the 1991 Protocol, the decisions of the Court shall be final and immediately enforceable. Non-compliance with judgment of the Court can be sanctioned under Article 24 of the Supplementary Protocol of the ECOWAS Court of Justice, and Article 77 of the ECOWAS Treaty.

Presently, notwithstanding the decisions of the African Commission and ECOWAS Court on the constitutional right of Nigerians to a clean and healthy environment, the judiciary has remained dormant and apathetic with regard to interpreting extant constitutional provisions to ensure environmental protection. Apart from the case of *Jonah Gbemre*⁸⁰, there is no other known national decision of the courts acknowledging the citizens constitutional right to a clean and healthy environment.

In *Jonah Gbemre (For himself and as representing Iwherekan Community in Delta State Nigeria) v. Shell Petroleum Development Company of Nigeria Ltd & Ors.*,⁸¹ 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 14th day of November, 2005 by JUSTICE V.C. NWOKORIE granting the reliefs sought for by the Iwherekan Community. Among the reliefs granted by the court are:

1. A declaration 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 Peoples' Rights (Ratification and Enforcement) Act, Cap, A9, Vol, 1, Laws of the Federation of

⁸⁰ The case is on Appeal.

⁸¹ Suit No. FHC/CS/B/153/2005

- Nigeria, 2004 inevitably includes the right to clean, poison free, pollution-free and healthy environment.
2. A declaration that the actions of SHELL and NNPC in continuing to flare gas in the course of their oil exploration and production activities in Iwherekan community is a violation of their fundamental right to life (including healthy environment) and dignity of human person guaranteed by 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 Peoples' Rights (Ratification and Enforcement) Act, Cap, A9, Vol. 1, Laws of the Federation of Nigeria, 2004.
 3. A declaration that the failure of SHELL and NNPC to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, Cap, E12, Vol.6, Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person.
 4. A declaration that the provisions of section 3(2) (a) (b) of the Associated Gas Re-Injection Act, Cap. A25, Vol. 1 Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S. 1. 43 of 1984 under which continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap, A9, Vol. 1, Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1 (3) of the same Constitution.
 5. AN ORDER of perpetual injunction restraining SHELL and NNPC by themselves or by agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in Iwherekan community.
 6. AN ORDER directing the ATTORNEY GENERAL OF THE FEDERATION to immediately put in motion in conjunction with the FEDERAL EXECUTIVE COUNCIL a BILL before the National Assembly to amend the Associated Gas Re-injection Act to bring it in conformity with the constitutional provisions.

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 this case was determined by the court of first instance, the outcome of the appeal may be indeterminate. Therefore, one may not rely on it as being the law.⁸²

*In Ijaw Aborigines of Bayelsa State v. Shell I*⁸³, the Federal High Court awarded US\$1.5 billion against Shell as damages for environmental pollution⁸⁴.

The Nigerian judiciary appears not to properly appreciate the issues involved when adjudicating environmental matters. The judges appear overwhelmed and do not understand how economic considerations could be sacrificed on the altar of environmental protection. They therefore, are not prepared to restrain polluting activities of the oil companies, even in the face of provable adverse environmental concerns. The law has always been tilted on their side. *In Allan Irou v. Shell B.P.*⁸⁵—despite provable facts, the judge refused to grant restraining orders against the polluting activities. However, there are cases where the courts have performed creditably, though the cause of actions were based on the common law principles of nuisance, the rule in *Rylands v. Fletcher*, negligence and trespass⁸⁶.

This article argues that there is the likelihood of judicial compromise on the part of the courts due to interference from powerful authorities within and outside governmental institutions. Rhuk has in fact argued along this line⁸⁷, and he cited several instances including the poor judicial handling of the case of *Oronto*

⁸² 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).

⁸³ Unreported case, Federal High Court judgment on February 24, 2006, by Justice Okechukwu Okeke. The case is still going through appeal.

⁸⁴ See Theodore Okonkwo, 'The Constitutional Propriety of the US\$1.5Billion Compensation Award Against SPDC', [2005] 1 *EPLR* (2), p.48.

⁸⁵ Suit No. W/89/91 – HC/26/11/73 (unreported).

⁸⁶ *Shell v. Farah* (1995) 3 *NWLR* (Pt. 382), 148; *Edise v. William* (1986) 11 *C.A* 187; *Elf v. Sillo* (1994) 6 *NWLR* (Pt. 350); *S.P.D.C v. Tiebo* (1996) 4 *NWLR* (Pt 445) 657.

⁸⁷ Rhuks Temitope Ako, above note 5, pp. 438-439.

*Douglas v. Shell Petroleum Development Company Ltd.*⁸⁸

*Oronto Douglas v. Shell Petroleum Company Limited*⁸⁹, arose at the Federal High Court Lagos, Nigeria. The plaintiff, Oronto Douglas sought three main reliefs:

- a) A declaration that the 1st to 4th Defendants cannot lawfully commission, carry out and operate their Liquefied Natural Gas (LNG) Projects without first complying strictly with the Environmental Impact Assessment Act, 1992.
- b) A declaration that the 5th Defendant is bound to require the 1st to 3rd Defendants, (namely, SHELL, NNPC and NLNG) to adequately publicize any proposed Environmental Impact Assessment report to all interested Non-Governmental Organizations and the Communities likely to be affected by the operation of the Liquefied Natural Gas Project in accordance with the provisions of Section 7 of the Environmental Impact Assessment Act, 1992.
- c) An injunction restraining the 4th Defendant from commencing or commissioning its Liquefied Natural Gas Project or carrying on any activity thereon and in respect therewith pending a proper Environmental Impact Assessment of the project fully certified by the 5th Defendant in accordance with the Environmental Impact Assessment Act, 1992.

In his Ruling, Belgore, C.J. (as he then was) said:

This is, apart from the fact that the claim is baseless, the plaintiff has shown no prima facie evidence that his right was affected nor any direct injury caused to him. Furthermore, since there was no personal right of the plaintiff infringed, nor has he shown any suffered, if he suffered anything at all more than the generality of the people.

What the learned Chief Judge of the Federal High Court did was with due respect, to dismiss the suit on the grounds that there was no cause of action as the plaintiff has not alleged a specific legal right violated by the defendants, and the issue of sufficient interest. This paper argues that procedural irregularities apart, the learned Chief

⁸⁸ Suit No. FHC/2CS/573 (unreported).

⁸⁹ *Ibid.*

Judge ought to have considered the fact that the complaint of *Oronto Douglas* was of common and general interest not just to several, but to all citizens of the Federal Republic of Nigeria. Consequently, *Oronto Douglas* ought to have been held by the court to be representative enough to ensure the full protection of all concerned interests. The plaintiff's personality to sue could only be based on the responsibility of every individual to safeguard and protect the environment. The complaint focused on constitutional right to a clean and safe environment, which is contained in the African Charter on Human and Peoples' Rights. The said right implies, among many other things, the judicious management and conservation of the country's forests and the mandate of the State, through the courts to provide sanctions against all forms of pollution and ecological damage to the environment.

Apart from the concerns raised by Rhuk,⁹⁰ there is the problem of fact-finding and lack of expertise, which this article argues remain a hurdle for the judicial officers 'to giving substantive content to environmental rights'. Such lack of expertise might have been one of the problems faced by the judge in the case of *Oronto Douglas*. The judge could not understand how and why a multi-billion Naira project could be stalled as a result of non-compliance with environmental regulations. Further, the court lacked the wherewithal to carry out fact-finding on the issues raised by the plaintiff in that case. It is therefore time to question whether legally trained, nontechnical judges are the appropriate arbiters of environmental constitutionalism cases, when it is apparent that they are not trained to face the highly technical matters usually associated with environmental litigation. This article also proposes the establishment of Environmental Constitutional Tribunals or Courts manned by highly professional trained environmental personnel as judges to handle environmental cases and to give substance to environmental rights without overstepping the judicial function.⁹¹

Right to clean environment is not only a national issue but also

⁹⁰ Rhuks Temitope Ako, above note 5.

⁹¹ Dinah L. Shelton, 'Developing Substantive Environmental Rights', *1 J. Hum. Rts. & Env't.* 89 (2010).

global matter, which has so much to do with international humanitarian law. The right could be lazily categorized as a third generation right.⁹² Although Chapter IV of the Constitution on Fundamental Rights does not provide for the right to the environment, section 20 of the Constitution provides that the State shall protect and safeguard the forest and wildlife of Nigeria. As the provision is contained in Chapter II on Fundamental Objectives and Directive Principles of State Policy, it is not justiciable.⁹³ However, the provision could be invoked if an international agreement or treaty on the environment comes within the provision of section 12 of the Constitution and the case law examined above.

Because of the importance of the environment to mankind, government has a duty to protect it from abuse and degradation. In the same way, government has a duty to ensure that in the management and control of the environment, the nation is not delinquent in the enforcement of international agreements to which Nigeria is a party. One way to make this work is the education of the different agencies and bodies charged with or involved in the protection of the environment, not only in national environmental legislation but also in international agreements to which Nigeria is a party. There is an urgent need for civic education in the whole area of environmental law.

6. Moving Environmental Constitutionalism Forward in Nigeria

Environmental constitutionalism in Nigeria is a recent development. The jurisprudence is therefore not yet well developed as is the case in other jurisdictions with strong and explicit constitutional provisions protecting the environment. The earliest proposal of a human right to a clean and healthy environment was muted in 1962 by Rachael Carson when he stated⁹⁴:

⁹² The point should be made that the so called division of rights into first, second and third generation rights do not fall into water tight compartments as if each follow or flow through particular water course or marine navigational lines in exclusive riverets, to the extent that the waters do not meet. That is not the position. On the contrary, the rights meet at convenient points in their practical application to the needs of society, particularly in the maintenance of stability and the social equilibrium.

⁹³ See section 6(6)(c) of the Constitution.

⁹⁴ Rachael Carson, *Silent Spring*, (Boston: Houghton Mifflin, 1962), pp. 12-13. Carson testified before President Kennedy's Scientific Advisory Committee, where he submitted that there is need for the right of the Citizen to be secure in his own home against the intrusion of poisons applied by other persons, and that this ought to be one of the basic human rights.

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If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.

The debate for the recognition of environmental constitutionalism was put on the international agenda in 1972 during the United Nations Conference on the Human Environment held in Stockholm, Sweden from June 5 to June 16 in 1972. Principle 1 of the Declaration of the United Nations Conference on the Human Environment states the conviction that:

Man has the fundamental right to freedom, equality and adequate conditions to life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations...⁹⁵

Since 1972, several countries, regions and international bodies have explicit provisions in their constitutions, charters and treaties on the constitutional right to a clean and healthy environment. For Nigeria, environmental constitutionalism came in the wake of the 1999 Constitution which in section 20 made it an environmental objective of the Nigerian State to improve and protect the air, land, water, forest and wildlife of Nigeria⁹⁶. Sections 33 and 34 of same Constitution guarantees fundamental human rights to life and human dignity respectively, which have been argued to include the need for a clean and healthy environment to give these rights effect.

Prior to the enactment of section 20 of the 1999 Constitution (as amended), there were pockets of legislation both at the Federal and State levels concerning environmental protection, planning, pollution, prevention and control. The Constitution however remains the grundnorm of all the laws.

However, notwithstanding attempts at consolidating the environmental constitutionalism principles, many scholars have

⁹⁵ Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment), 1972, UN Doc. A/Conf. 48/14/Rev.1.

⁹⁶ Section 12 of the 1999 Constitution provides for domestication of international treaties (including environmental treaties).

found recent efforts to achieve a more robust legal framework with which to protect global environmental conditions and resources to be rather disappointing⁹⁷. There is skepticism borne out of certain limitations, practical barriers and challenges that must be overcome in order to enthrone reforms that could move forward the issue of environmental constitutionalism in Nigeria.

The first limitation and practical barrier is the apparent lack of leadership which over the years has failed to make strong commitments to the question of environmental constitutionalism. Citizens are disenchanted by the continual failures of environmental governance in Nigeria. The very actors and decision-makers do not take environmental issues seriously the way and manner they take other national issues forgetting that environmental disasters do not respect authorities, political and geographical boundaries. The other limitation cum practical barrier lies in the apathetic nature of the drivers of our economic and financial markets, mainstream electronic and print media, that fail to incorporate environmental governance into their decision-making process.

The present environmental constitutionalism regime must be improved and strengthened, redesigned and rediscovered. To achieve this, a constitutional amendment is required to provide for a detailed procedural and substantive right to the environment. This would help control environmental harm that knows no State boundaries. A constitutional amendment would give the National Assembly and the courts the clear authority to take strong action to protect the environment.

Recognizing a clean and healthy environment as a constitutional right will also help the economy by creating more business opportunities, which will increase the number of jobs. There are critics who believe that recognizing a clean and healthy environment as a constitutional right will hurt the economy by increasing the cost of doing business and will result in the loss of jobs and a rise in consumer prices. This argument fails to appreciate the increasing

⁹⁷ Brian J. Gareau, 'Global Environmental Constitutionalism Panel', (B.C. CLOUGHCTR. FOR THE STUDY OF CONST. DEMOCRACY), *Boston College Environmental Affairs Law Review* (2013), Volume 40, Issue 2, Article 3 pp. 403-404.

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recognition that the environment is a subject for protection in constitutional courts. The economy no doubt is bound to collapse when there is no healthy environment, same with jobs. Unfettered economic growth, blanket acceptance of industrial-led growth, and the increasing use of human-made chemicals could only produce catastrophic environmental backlash.

Achieving a more productive environmental constitutionalism requires that Federal and State institutions continue to work together in synergy. Kotze argues that environmental constitutionalism could be used to formulate thresholds and criteria to which environmental laws must adhere, in other words, it could facilitate the creation of good environmental laws⁹⁸. Therefore, environmental constitutionalism could advance environmental goals cum constitutional environmental rights in that it provides stronger environmental laws and policies; improved implementation and enforcement; increased accountability; reduction in environmental injustices; a level playing field with social and economic rights and better environmental performance.⁹⁹

Conversely, critics argue that environmental constitutionalism nay constitutional environmental rights are too vague to be useful, redundant because of existing human rights and environmental laws; a threat to democracy because they shift power from elected legislators to judges; not enforceable; likely to cause a flood of litigation and likely to be ineffective.¹⁰⁰ This article argues that no matter on which side an individual may pitch camp, the fears expressed by the critics are not materializing.¹⁰¹

Environmental constitutionalism remains strong and has two proven legal outcomes going for it: stronger environmental laws and court decisions defending the right from violations.¹⁰²

There are however, some challenges. First, the criticism of failure of environmental constitutionalism in some countries is a valid one.

⁹⁸ Kotze, above note 5, p. 209.

⁹⁹ Boyd, 'The Constitutional Right to a Healthy Environment', *Environment (Science and Policy for Sustainable Development)*, July – August 2012..

¹⁰⁰ *ibid.*

¹⁰¹ *Ibid.*

¹⁰² *SERAP* cases.

In such places, there is the problem of the absence of the rule of law resulting in weak legal institutions and independent judiciary. There are problems of widespread poverty, corruption, civil wars and authoritarian governments which poses daunting obstacles to the advancement of environmental constitutionalism.

Second, the issue of excessive judicial activism can deprive the legislative arm of government their constitutional duties.

The challenge posed by the inclusion of section 20 of the 1999 Constitution in Chapter II- Fundamental Objectives and Directive Principles of State Policy has been discussed in this article. It must however, be noted that such defect appears to have been cured by the relevant environmental rights provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.¹⁰³

Despite these innovations in environmental constitutionalism, only few judicial decisions have been interpreted by the courts, thus, failing to fulfill its potential as judicial decisions on environmental protection remain elusive. This is surprising though, in a country that grapples with environmental challenges of monumental proportions including desertification, erosion, oil pollution, noise pollution, severe water scarcity, deforestation, climate change impacts due to government and oil companies activities, ravages of mining and crude oil extraction, poorly managed public and private lands, dumping of toxic and chemical wastes, wetland depletion due to construction and developmental activities. These challenges must be addressed through specialized research. In our clime, experience has shown that constitutional litigation can be protracted, time consuming and expensive. Ten years after the Federal High Court judgment in the case of *Gbemre v. Shell*¹⁰⁴, the Court of Appeal is yet to determine the appeal filed by Shell S.P.D.C. Ltd. Nine years also since the Federal High Court Judgment in the case of *Ijaw Aborigines of Bayelsa State v. Shell 1*, the appellate Court has not determined the matter. The case of *Oronto Douglas v. Shell S.P.D.C*¹⁰⁵, suffered judicial frustration and was struck out. Beneath all these cases, is the problem of constitutionally embedded provisions which has become

¹⁰³ Cap. A9, Laws of the Federation of Nigeria, 2004.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

challenging both to the lawyer, the litigants and the Courts. Judgments and Orders of courts are most times difficult to enforce, as case files often get missing from the Registries. All these constitute challenges and a cog in the wheel of environmental constitutionalism. This article argues that though most environmental cases always involve very powerful and wealthy actors and major economic consequences, the courts in appropriate cases should take bold decisions based on constitutional environmental provisions.

7. Conclusion

Environmental constitutionalism continues to raise more questions than answers, and this Article has examined many issues, most of which for a very long time to come shall remain topical. But one thing definitely remain certain- the conception of environmental constitutionalism is a brilliant idea that addresses the question of how constitutional provisions impact environmental quality and the environmental right of citizens.¹⁰⁶ It compels us to carefully examine and revisit national and international environmental law and governance, and focus on how to advance fundamental environmental constitutional provisions protecting fundamental substantive or procedural rights of citizens to a quality environment. Scores of countries have affirmed that their citizens are entitled to healthy air, water and land, and their constitutions have guaranteed a measure of these environmental rights.¹⁰⁷

In spite of the criticisms leveled against environmental constitutionalism, the concept has definitely come to stay and this article has argued that constitutional environmental provisions have substantially increased the citizens' role and participation in environmental governance. It has continued to gain national and global recognition, despite perceived challenges and constraints. Clearly, this article has proposed justifications that provide support for the cause of the environmental constitutionalism. The right of citizens to live in a clean and healthy environment continues to gain

¹⁰⁶ Blake Hudson, 'Structural Environmental Constitutionalism', *Widener Law Review* Vol. 21: xxx (2015).

¹⁰⁷ James R. May and Erin Daly, *Global Environmental Constitutionalism*, (New York: Cambridge University Press, November 17, 2014).

constitutional recognition. A new human right appears to be 'blossoming from the seeds planted decades ago'.¹⁰⁸

There is a great future for environmental constitutionalism in our legal jurisprudence – a future that embodies hope 'that the destructive, polluting ways of the past can be replaced by cleaner, greener societies in the future'.¹⁰⁹

Central to this great future is the inclusion of environmental objectives in the Constitution of the Federal Republic of Nigeria 1999 (as amended). This inclusion in section 20 of the Constitution declared Nigeria's goal of securing the quality of the nation's environment for health and well-being of citizens, conserving and using the environment and natural resources for the benefit of present and future generations as well as restoring, maintaining and enhancing the ecosystem and ecological processes.

There are also activities of the federal government through the ministries, departments and agencies with functional responsibility for protecting the environment. These activities are legislative and some are administrative. Environmental legislations, regulations, standards and notices are now regularly issued by these authorities. In 2011 the National Environmental Standards and Regulations Enforcement Agency (NESREA) revised all the National Environmental Regulations to bring them in line with the current events and development on the environment. Nigeria is also active in participating in national and international events and activities on the environment, including the recently concluded COP21 – CMP11 on Climate Change held in Paris, 2015.

These environmental legislation deal with a variety of environmental pollutants, such as toxic chemicals, noise, control of particular activities such as mining, power generation as well as general guidelines for protecting basic natural resources such as air, land and water. The citizens are equally getting more and more

¹⁰⁸ David R. Boyd, 'The Constitutional Right to a Healthy Environment', *Environment (Science and Policy for Sustainable Development)*, July – August 2012.

¹⁰⁹ Ibid, See, David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: University of British Columbia Press, 2012).

involved in environmental matters at local, state and national levels. There is ongoing debate on enactment of a Climate Change Bill by the National Assembly. The House of Representative, the Senate, the State House of Assemblies and the local government legislative councils, all have committees on the environment. These are good signs that there is a great future for environmental constitutionalism in Nigeria. These legislative bodies also carry out oversight functions on the environment through their respective environment committees.

Efforts are also being made by some citizens and the courts to legally define enforceable environmental rights, though judicial intervention in this area still remain unsatisfactory, with the exception of few cases discussed in this article.

However, there remains the issue of having a robust and legally enforceable environmental rights regime in Nigeria. To achieve this, we need to recognize and provide for the participatory and procedural rights of citizens through which environmental rights norms could be constitutionalized.¹¹⁰ This definitely means amending or altering the Constitution, the National Environmental Standards and Regulations Enforcement Agency Act and the Environmental Impact Assessment Act and other major environmental legislations on the environment to include the three pillars of access to information, public participation and access to justice. A straight forward right-based approach should be adopted and based on human rights context.

In the context of procedural law, procedural rights to information, rights to justice and rights to participation must be reflected within the key environmental legislation referred to above, and also in the Constitution. Citizens must have access to information, public participation in decision making and access to justice in environmental matters. Environmental legislation should also de-emphasize substantive and reactive procedures as procedural rights are preferred over substantive rights in environmental issues. In general, procedural human rights linked to environmental

¹¹⁰ Damilola S. Olawuyi, 'Constitutionalizing Environmental Rights in Nigeria: Reflections, on the Question of Approach' (2015) *National Human Rights Commission Journal*.

protection receive more attention than do substantive rights. The National Assembly should therefore, increase their oversight legislative functions on environmental matters.

It is not enough however, to have a textual environmental constitutionalism. This throws up the question: are we there yet? The important issue is the extent to which the textual environmental provisions are respected and implemented by the citizens, governments and the courts. On the part of citizens, poverty remain a problem as a person who cannot afford to eat would be least minded to discuss or albeit tackle environmental issues. For the governments, there is the question of good governance. The trouble with Nigeria is the failure of leadership and this failure has caused pervasive corruption, political wrangling, economic mismanagement, civil and insurgent activities and environmental neglect. Enforcement is weak due to legislative and judicial limitations.

On the issue of the courts, claiming the right to the environment in courts in Nigeria has met with certain barriers as discussed in this paper. The legality of administrative decisions on environmental matters can generally be questioned within the judicial review process before the national courts. Environmental case-law, however, is not generally appreciated properly and is relatively little known and used. This was the situation in the case of *Oronto Douglas v. Shell*,¹¹¹ where the presiding Federal High Court Judge did not appreciate properly the issues involved and subsequently struck out the case. The court commented on the right of the plaintiff to institute the action and held that he had no *locus standi*. The existing case law, except a few, sees the courts always raising the question of standing of the individual to sue on the right to environment in its entirety, both in substantive and procedural terms. With this limitation, which is a very serious one, this article argues that we are not yet close to having a robust and legally enforceable environmental rights in Nigeria. Therefore, to get there, there is need to amend the Constitution and other major environmental legislations to give standing not only to individuals but to ecological NGOs in certain administrative proceedings which may affect the

¹¹¹ Ibid.

interest of the environment. Our Constitution must contain legal provision establishing a public interest complaint (*action popularis*). This will empower individuals to challenge and assert an infringement of a public interest on the environment without the need to challenge infringement of their own rights.

In conclusion, the connection between environmental protection and human rights has been discussed and the links between the two fields have served as a basis for establishment of rights-based approach to environmental protection. All the approaches, such as the interpretation of the traditional human rights, procedural aspects of environmental protection and substantive human right to a healthy environment are aimed at increasing the effectiveness of environmental protection and improving the quality of the human environment. Surely, environmental constitutionalism based approach is an efficient means of fulfilling this goal, however, there is still room for positive development, the right to a healthy environment still cannot be seen as having a stable position in Nigeria's constitutionally guaranteed human rights catalogue. The focal point of legal regulation of environmental protection still remains in the public regulatory approach. Nigeria's constitution leaves the environmental objectives and the right to a healthy environment to be activated by further legislation. The existing judicial interpretation of the right to the environment is narrow, always based on the interpretation of standing to claim this right. Unfortunately, apart from *Jonah Gbemre* and the *SERAP* cases, the African Charter on Human and People's Rights provisions has not had much impact on our national courts so far. This article therefore, concludes that based on the above arguments, it seems that the human rights based approach for enforcing environmental rights is still searching for its place in Nigeria.