

Realizing and Enforcing the Constitutional Right to a Healthy Environment in the Niger-Delta: Lessons from India

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Abstract

The right to a healthy environment is a fundamental right that is yet to be realized in the Nigerian legal system. This is because the constitution has not accorded it a full justifiable right status it has accorded other rights. One of the effects of this is that the Niger Delta environment, biodiversity and ecosystem has been degraded and destroyed with no hopes of redress. This is accompanied by the inevitable loss of life and reduction in the quality of lives of the indigenous people of the Niger Delta. The environmental degradation of the Niger Delta area has severely impacted on the fundamental rights of the people. The lives of the people in the region are gravely threatened by the environmental conditions in which they live. Besides the imminent threat to the life itself, conditions of living have derogated from the right to life. The pollution to the atmosphere and resultant diseases, the destruction of the means of livelihood, the depletion of biodiversity, the devastation of ecosystems that support life etc., all derogate from the right to life. Using the Comparative Methodology, this study compares the Nigerian situation with the Indian situation, which has similar constitutional provisions on the environment. The Paper reveals that the Indian environmental legal system has been able to overcome the constitutional constraint through creative “harmonious construction” by the courts of the right to a healthy environment, alongside the constitutionally guaranteed, and enforceable fundamental rights provisions in the Indian Constitution. The paper, therefore, advocates for creative recognition and enforcement of the right to a healthy environment by Nigerian Courts using the Indian template, by creatively interpreting it into, or as auxiliary to other rights and by public interest litigations to challenge the government and oil companies for their actions and policies that have negative environmental impacts. This way, an environmental law regime will be developed that recognizes and enforces the right to a healthy environment and strengthens the chances of the Niger Delta environment and ecosystem, and the constitution may even be subsequently modeled after the system as developed.

1. Environmental Issues in the Niger Delta

The Niger Delta (ND) region of Nigeria is the huge 25, 640 square kilometres floodplain into which the Niger and Benue rivers drains and it is home to about 7 million people.¹ It is the oil rich area of Nigeria, made up of 9 States,² and accounts for 97% of the country’s foreign exchange earnings,³ with oil and gas reserves at 36.2 billion barrels and 184 trillion cubic feet respectively, making Nigeria the world’s 7th largest gas reserve haven.⁴ Owing to this, the area plays host to oil and gas companies (currently, oil provides 80 per cent of budget revenues and 95 per cent of foreign exchange earnings)⁵ and their activities have contributed to environmental degradation. As at 2005, about 95% of gas was flared in the course of crude oil extraction,⁶ ranking Nigeria as number one on the gas flaring index.⁷

¹ Ike Okonta & Oronto Douglas, *Where Vultures Feast*, (London: Verso, 2003). at 5

² Section 2(b) of the N .D. D. C. Act, 2000, L.F.N, 2004. The States are: Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.

³ Kiikpoye K. Aaron and Dawari George, eds. *Placebo as Medicine The Poverty of Development Intervention and Conflict Resolutions Strategies in the Niger Delta Region of Nigeria*, (Port Harcourt: Kemuela Publications, 2010). at 1

⁴ *Ibid.* at 3

⁵ Environmental Assessment of Ogoniland 2011 (Nairobi: United Nations Environment Programme, 2011). [UNEP]

⁶ Margaret T. Okorodudu-Fubara, “Climate Change: An Interrelated Struggle”, (paper) delivered at the seminar organised by The Environmental Right Action/Friends of the Earth in Nigeria (Sept. 20, 2005). at 5

⁷ Margaret T. Okorodudu-Fubara. “Option CC/G – 77 and China” (Inventing a South –South Techno-fiscal Policy to Douse Global Warming) presented at the 8th Global Conference in Environmental Taxation, Munich, Germany (Oct. 20, 2010) at 5

Unfortunately despite its best effort to curb this, Nigeria in 2013 still flared 17.2 billion m³ of natural gas - exactly one quarter of Africa's power consumption.⁸ Nigeria thus sits atop the greenhouse gases emitter chart in Africa and also holds the unenviable record of one of the world's highest emitters of CO₂⁹ and consequently, albeit not inevitably, the world's 28th on the carbon emission list with a 0.8% contribution to the global total.¹⁰ This has significant impact on the ND soil, water, vegetation, aquatic and terrestrial life, people and their health. This situation results in polluted water sources and infertility of cultivatable lands destroying the people's two main sources of livelihood- fishing and farming. Besides these, the area's biodiversity has been and is increasingly being eroded, the ecosystem is in shambles, and the people are living with some environment-related ailments- respiratory diseases, heart diseases, skin diseases and ailments connected with the quality of lives. The people's health and quality of lives are low and deteriorating, and it will take about 3 centuries to begin to even make any impact even if the clean-up and restoration of the area were to start today,¹¹ which doesn't seem likely. Fresh water supplies disrupted by engineering works lead to cholera outbreaks, total petroleum hydrocarbon (TPH), a carcinogenic substance, contents in drinking water range from 250 to 37, 500 times the legislated level of 0.01ppm for untreated drinking water in the ND.¹² Desertification and erosion further reduce available land for farming putting even more pressure on the already strained resources. According to Fleshman, "Oil spills have poisoned community water supplies and fishing ponds, and are steadily killing the raffia palms that are the community's economic mainstay. Lacking any alternative the people of the village have been forced to drink polluted water...many people had become ill in recent months and some had died...A thick brownish film of crude oil stained the entire area, collecting in clumps along the shoreline and covering the surface of the still water, The humid air was thick with oil fumes"¹³ The physical, chemical, and biological properties of the waters are changing leading to migration of fish and other marine organisms even as they move to cooler waters and away from the traditional habitats where they hitherto have been harvested for food and other industrial and health uses with implications for food security. Significantly reduced surface water and groundwater resources reduces the availability and quality of water for agriculture and other industries and affecting water, energy, and food security. The results also include migration and potential extinction of species, flooding, erosion, and saltwater intrusion, air pollution. The environmental rights of the ND people are breached by gas flaring and "oils pills, the protracted and substandard quality of cleanup operations and the lack of adequate compensation". This is replicated across communities in the ND¹⁴

2. Complicit Legal System

The chief reason why this is going on and may go on unabated for a while is the flawed legal system that obtains in Nigeria, particularly, the permissive nature of the legal system towards environmentally degrading activity. The law even expressly permits gas flaring for a fee.¹⁵ Chief among this is the implicating silence of the constitution, the grundnorm in addressing this issue, particularly in the refusal to recognize and make enforceable as a constitutionally guaranteed fundamental human right, the right to a healthy environment. The only mention made of the environment in the constitution is in the fundamental objectives and directive principles of state policy, guiding principles by which government and other actors have to abide, where the constitution provides that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria"¹⁶ But whatever teeth the constitution gives to environmental justice is immediately defanged by section 6 (c) which provides that the judicial powers vested in the courts by the constitution "shall not except.

⁸ Anslem O. Ajugwo, "Negative Effects of Gas Flaring: The Nigerian Experience" (2013) 1(1) Journal of Environment Pollution and Human Health 6 at 6 online: available at <http://pubs.sciepub.com/jephh/1/1/2/jephh-1-1-2.pdf> (last accessed October 30, 2016)

⁹ E.C. Ubani and I.M. Onyejekwe, "Environmental impact analyses of gas flaring in the Niger delta region of Nigeria" (2013) 4(2) American Journal of Scientific and Industrial Research 246 at 246 online: available at <http://www.scihub.org/AJSIR/PDF/2013/2/AJSIR-4-2-246-252.pdf> (last accessed October 30, 2016).

¹⁰ CO₂ Time Series 1990-2014 Per Capita for World Countries". By the Netherlands Environmental Assessment Agency. Online: <http://edgar.jrc.ec.europa.eu/overview.php?v=CO2ts_pc1990-2014>

¹¹ UNEP, *Supra* note 5

¹² David Hunter, James Salzman & Durwood Zaelke. *International Environmental law and Policy* 2nd ed. (New York: Foundation Press, 2002). [Hunter]

¹³ Michael Fleshman, *Report from Nigeria 2*, (New York: the Africa Fund, 1999). at 12

¹⁴ [Okonta & Douglas]. *Supra* note 1. At 95

¹⁵ The Associated Gas Re-injection (Continued Flaring of Gas) Regulations S.I. 43 of 1984, ch. A25 Laws of the Federation of Nigeria [2004].

¹⁶ Cap II, section 20, Constitution of the Federal republic of Nigeria, 1999 [Nigerian Constitution]

As otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution”, and the constitution did not otherwise provide. In the light of that, not only is there not a right to a healthy environment for citizens to rely on, so that even if an act or process complies with other legal requirements but still affect the environment negatively, the affected parties would still have a right to question it, but worse, there is no remedy at all for environmental damage. This means the ND environment can continue to be pummeled for the next centuries, perhaps till everything has died and the land becomes desolate and there is nothing anyone can do about it...legally-which explains the other ways aggrieved persons have sought redress- self-help and militancy. The damages cannot be redressed, perpetrators regularly and consistently are not held accountable, and there is nothing to deter potential violators.

3. Human Rights

Human rights sometimes referred to as basic and inalienable rights, are those rights that are ascribed by refined society to every human being by the reason of their humanity and believed to be derived from the inherent dignity of the human person.¹⁷ Human rights are offshoots of natural rights, themselves offshoots of natural law- that “standard of higher-order morality against which all other laws are adjudged”¹⁸ “Whereas natural law provided a basis for curbing excessive state power over society, natural rights gave individuals the ability to press claims against the government”¹⁹ The idea of human rights stemmed from the need to protect persons from government that was more powerful than the individual and from even more powerful individuals and came to be known as an attribute of human beings, just like ears, eyes and is traceable to the Enlightenment – a political philosophy and movement to establish limited forms of representative government that would respect the freedom of individual citizens.²⁰ Thus the founding fathers of the United States of America in the Declaration of Independence (1776) stated that “we hold these truths to be self-evident, that all men are ... endowed by their Creator with certain unalienable Rights” A right is “a justifiable claim, on legal or moral grounds, to have or obtain something, or act in a certain way”; a human right is a “right which is universal and held by all persons”²¹ According to the United Nations Office of the High Commissioner for Human Rights, human rights are “rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination”.²² The major feature of human rights is universality, human rights are inalienable and fundamental rights to which every human being is inherently entitled simply by virtue of their humanness.²³ A human right by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.²⁴ It is possessed by all human beings and is assert-able “against the whole world.”²⁵

4. Environmental Rights

According to Atsegbua, “a healthy and balanced environment has always been recognized as a prerequisite to the implementation of other fundamental human rights”.²⁶ In this context, the World Health Organization (WHO) has recognized that “[t]he right to health and indeed to life cannot be achieved without basic rights to a safe and

¹⁷ The United Nations Office of the High Commissioner for Human Rights, What are Human Rights. Online: <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>

¹⁸ Jack Donnelly, The Relative Universality of Human Rights Online: <<https://www.scribd.com/doc/19044017/Jack-Donnelly-THE-RELATIVE-UNIVERSALITY-OF-HUMAN-RIGHTS>>

¹⁹ Alison Dundes Renteln, *The Concept of Human Rights*. (Freiburg, Switzerland: Paulsdruckerei, 1988).

²⁰ Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction*, (Enugu: CIDJAP Publishers, 1999).

²¹ Ibid

²² What are human Rights Online: <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>

²³ Magdalena Sepúlveda et al, *Human Rights Reference Handbook 3rd ed.* (Ciudad Colon, Costa Rica: University of Peace, 2004)

²⁴ Maurice Cranston, *What are Human Rights* (New York: Taplinger, 1973). at 36

²⁵ Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues” (Copeland Colloquium Series on Morality and the Professions at the Amherst College 1974) Online: <http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session1_lawyers_as_professionals_s_ome_moral_questions.authcheckdam.pdf>, page 50

²⁶ Atsegbua, L. et al. 2004. *Environmental Law in Nigeria: Theory and Practice*, (Lagos: Ababa Press Ltd, 2004). at 131.

healthy environment including water, air, and land and to life supporting systems that sustain life on earth for future generations”.²⁷ Environmental rights, considered third-generation, “collective-developmental” rights, constitute a broad class of rights that have gained recognition in international agreements²⁸ and have been expressed largely in documents advancing aspirational “soft law,” such as the 1992 Rio Declaration on Environment and Development. Rene Cassin, Nobel Laureate advocated in 1974 the extension of existing notions of human rights to include the right to a healthy environment, free from pollution.²⁹ According to Knox, “Environmental protection protects human rights... Thus, domestic environmental laws and MEAs can both be strengthened through the incorporation of human rights principles, even as they contribute to the ongoing realization of human rights”.³⁰

Although the notion that the environment was a part of human existence was acknowledged very early, the recognition of its central role in all human activities and its fragility would only come much later. With this recognition came a more global and specific awareness of the ways that humans interact with the environment and the need to protect the environment as an integral part of all the things we do. The right to a healthy environment was first formally recognized in the Stockholm declaration which states that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”³¹ Principle 1 of the Rio Declaration states that human beings “are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature” Subsequently, the Rio declaration acknowledged that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”. The Rio Declaration also recognized the critical role of environmental rights in sustainable development - public participation, access to information and judicial remedies, which are all established procedural environmental rights. Principle 10 emphasized this in providing that “Environmental issues are best handled with 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”. Chapter 23 of Agenda 21 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, as well as information on environmental protection matters.

Section III of Agenda 21 identifies major groups whose participation is needed to include indigenous and local populations. The African charter provides that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their Development”.³² National governments have also recognized and protected this right in their constitutions. Article 66 of the Portuguese constitution on Environment and Quality of Life provides that “Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it”, and that It is the duty of the State to: a) ‘Prevent and control pollution and its effects...; Order and promote regional planning ... resulting in biologically balanced landscapes;... ensure the conservation of nature and Promote the rational use of natural resources, safeguarding . Their capacity for renewal and ecological stability”.

²⁷ Fabara, A. 2002. “The Intersection of Human Rights and Environmental Issues: A Review of Institutional Developments at the International Level”. Background Paper No. 3, Joint UNEP–OHCHR Expert Seminar on Human Rights and the Environment, 14–16 January 2002, Geneva, Online: <<http://www2.ohchr.org/english/issues/environment/envir/bp3.htm>>

²⁸ Sumner B. Twiss, “History, Human Rights, and Globalization”(2004) *Journal of Religious Ethics* 32:1. 39–70. Online: <[doi:10.1111/j.0384-9694.2004.00154.x](https://doi.org/10.1111/j.0384-9694.2004.00154.x)>

²⁹ Romina Picolotti and Jorge Daniel Taillant, *Linking Human Rights and Environment* (Arizona: University of Arizona Press, 2003)

³⁰ John H. Knox, *Human Rights and the Environment: Carrying the Conversation Forward*, ASEM Seminar on Human Rights on October 21, 2013. <http://www.asef.org/images/docs/Keynote%20speech-John%20Knox_Human%20Rights%20and%20the%20Environment.pdf>;

³¹ Art 1

³² Article 24

The Spanish constitution provides that “Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it”, and imposes on government the duty to ‘watch over rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment; further, and breach of these rights and duties attract criminal and administrative sanctions and the defaulters ‘shall be obliged to repair the damage caused’.³³ Article 225 of the Constitution of Federal Republic of Brazil, 1988 provides that “everyone is entitled to an ecologically balanced environment “Now over 170 nations have enshrined the right in some form in their constitutions and other governing laws and there are over 130 regional and sub-regional agreements on the right to healthy environment.³⁴

The right to a healthy environment encompasses, among others:

- safe and healthy environment;
- the highest attainable standard of health;
- ecologically sustainable development;
- adequate standard of living, including access to safe food and water;
- The right of the child to live in an environment appropriate for physical and mental development;
- full and equal participation for all persons in environmental decision-making and development planning, and in shaping decisions and policies affecting one’s community, at the local, national and international levels;
- education and information, including information relating to links between health and the environment;
- The right to share in the benefits of scientific progress;³⁵
- Procedural obligation on the state to assess environmental impact and make environmental information public, facilitate public participation in environmental decision making, including the protection of expression and association, and provide access to remedies for harm;³⁶ and
- Substantive obligation of states to create legal systems and frameworks that protect against environmental harm.³⁷

The link between environmental degradation and human rights violation has been explored by Hunter who opines that human rights abuse severity is directly proportional to the level of environmental devastation from development projects, an aspect of which is the targeting of environment and human rights activists, sometimes directly by government, sometimes with the government’s tacit approval. A well-known example, he says in Ken Saro-Wiwa of ND of Nigeria who was hung along with other activists for “raising environmental concerns about oil development by Royal Dutch Petroleum in their native Ogoni Land”³⁸ Again he notes that when outside interests, generally multinational corporations are exploiting oil or other natural resources in developing countries, there is a “recurring pattern of environmental abuse that sparks human rights abuse”, as “repression of local communities...appears to be the most convenient way to pursue development in frontier lands”³⁹ This is a testimonial of the ND and the environmental troubles trailing it.

5. The Courts Attitudinal Orientation

The enforcement and enjoyment of fundamental rights is significantly influenced by judicial attitude to constitutional interpretation. A judiciary could be liberal, activist, strict, or passive. The strict passive court declares what the law is and does not make it, in accordance with strict separation of powers. The passive court relies on just the words used because the legislature says what it means, and means what it says; this court limits and confines itself to interpreting and applying rules already laid down, leaving development and modification of the law to the political process “to which it rightly belongs”. This court, overly concerned with the rule book, is diametrical to doctrinal innovation.⁴⁰

³³ Section 45

³⁴ David R. Boyd, *The Constitutional Right to a Healthy Environment*

2013 Online: < <http://www.lawnow.org/author/davidrboyd/>>

³⁵ <http://www.pdhre.org/rights/environment.html>

³⁶ United Nations Environment Programme, *Climate Change and Human Rights*(Nairobi: UNEP, 2015). at 16

³⁷ *Ibid.* p 19

³⁸ Hunter, *Supra* note 12. at 1281

³⁹ *Ibid.* 1283

⁴⁰ Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction*, (Enugu: CIDJAP Publishers, 1999). at 279

The liberal, activist court on the other hand assumes that every law has a purpose and that the constitution is “a social charter of a dynamic society based on certain presumptions”, that there are assumptions behind the words of the constitution, and in interpreting the constitution, the court should seek to ascertain the underlying principles and give effect to them. The judicial activist is more interested in the law, not as restraints, but as a means to an end- doing justice in each individual case.⁴¹

The Nigerian court is of the passive, strict disposition.

In *Okpala & Others v. Shell Petroleum Development Company (SPDC) & Others*, the Applicant and others representing themselves and their Communities instituted an action seeking declaration that the fundamental rights to life and dignity constitutionally guaranteed under sections 33 and 34 of the Nigerian Constitution included a right to a clean and healthy environment and urged the Court to declare that the action of the Defendants in continuing to flare gas in the course of their oil exploration and production activities in the Applicants’ Communities amounted to a violation of their human rights; the Defendants argued that “what is permitted by law cannot amount to an infringement of a citizen’s constitutional right”, and that gas flaring could not constitute a human rights violation since it was permitted under Nigerian law.

The court held, agreeing with the Defendants, that the rights to life and dignity guaranteed under sections 33 and 34 of the Constitution cannot be claimed by a community but by each person in the community who feels that his individual right has been infringed. It also held that the Applicants could not maintain action in a representative suit as there was no common grievance or common benefit. According to the Court, “the rights and causes averred in the Verifying Affidavit in respect of the applicants of the community they represented are not common. [it] states ‘that so many natives of our communities have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring in our communities by the defendants’...it is obvious that applicants represent some natives of their community who have died, some others suffering from various sicknesses. This averment reflects that there is no common benefit therefore the procedure is clearly incompetent on ground of non-joinder of parties. The right must be common and relief sought must be of common benefit”⁴²The case is a clear demonstration of the obstacles that hinder the judicial enforcement of environmental rights in Nigeria. The Court refused to allow for the use of representative actions to enforce the right to a healthy environment and instead, insisted that aggrieved individuals must personally and individually sue to enforce their individual human rights. Thus, where individuals in a community are generally disturbed by environmental pollution and subsequently seek to enforce their rights to a clean environment, they can only do so individually. Not only is this position undesirable as it will only result in the multiplication of individual suits on a particular matter, but also, such an approach is unrealistic and cannot be used to effectively enforce environmental rights mainly because the “vast majority of people affected by severe environmental pollution are usually too poor to meet the financial requirements of individually litigating their environmental rights and therefore, in most cases, will be unable to seek judicial recourse against the perpetrators of environmental pollution who are usually rich multinational oil corporations”⁴³ Also, the court’s decision that the applicants could not maintain action in a representative suit as there was no common grievance or common benefit was an apparent adherence to rigid legal technicalities.

This emphasizes the need for Nigerian courts to adopt a liberal approach to use of representative actions in the enforcement of environmental rights. Such a liberal approach will enhance timely and easy litigant access to the judicial enforcement of the right to a clean and healthy environment. Balakrishnan identifies three approaches of judicial attitude to environmental rights in India which can be classified into “the ‘pro-project’ approach wherein judges tend to emphasize the potential benefits of a particular project or commercial activity, the ‘judicial restraint’⁴⁴ wherein judges defer to the determinations made by executive agencies and experts with regard to the environmental feasibility of a project and rigorous ‘judicial review’⁴⁵

⁴¹ Ibid 280-281

⁴² Ibid

⁴³ Uchenna Jerome Orji, ‘Right to a Clean Environment– Some Reflections’ (2012) *Environmental Policy and Law* 42: 4–5. 285

⁴⁴ *Silent Valley case* (1980)

⁴⁵ *Calcutta Taj Hotel Case* (1987) AIR 1987 SC 1109 where the Court inquired extensively into the government permission granted for the construction of a medium-rise hotel against objections that the building would interfere with the flight path of migratory birds; and *Tehri Bandh Virodhi Sangharsh Samiti v. State of Uttar Pradesh*, (1992) Supp 1 SCR 44; *Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Company*, (1991) 2 SCC 539

Wherein judges tend to scrutinize the environmental impact of particular activities... the general approach of the higher judiciary in environmental litigation can be described as ‘activist’ in nature. A prominent example of such activism in evaluating the environmental impact of commercial activities justified in the name of development is the decision given in the Dehradun Valley case, where the court itself appointed a committee to look into the adverse effects of illegal and indiscriminate mining activities and asked the respondent government to show the national importance of the lime-stone procured from those quarries so as to determine whether the demand could be satisfied by mining in other areas, and in *Tarun Bharat Sangh, Alwar v. Union of India* where the court adopted a firm stand against the owners of mines that were being operated inside the reserve forest areas. In both cases above, the court appointed independent committees of experts to ascertain the environmental impact of the commercial activities that were being undertaken⁴⁶The Indian constitution has similar provisions to the Nigerian constitution on the environment. Like its Nigerian counterpart, environmental protection is part of the directive principles of state policy, policies to guide governmental action; and like its Nigerian counterpart, the constitution declares that the section on directive principles are not justiciable- whether or not the government or any of its agencies is acting in accordance with the directive principles cannot be the subject of any litigation in the courts. The section on Directive Principles of State Policy (DPSP) declares that “the State shall end favor to protect and improve the environment and to safeguard the forests and wildlife of the country”.⁴⁷Every citizen also has a Fundamental Duty “to protect and improve the natural environment including forest, lakes, rivers and wildlife, and to have compassion for living creatures”.⁴⁸ But that section - Part IV opens by declaring itself unenforceable by court. It states in section 37 thus, “the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”.

6. Enforcing Non-Justifiable Constitutional Principles by Indian Courts

The courts have however, been creative in their interpretation of the constitution, what Khan refers to as the ‘sub-silent approach’,⁴⁹ and Boyd terms ‘harmonious construction’,⁵⁰ an approach that seeks to establish a harmony between the other sections of the constitution, particularly the section on fundamental rights with the provisions of fundamental objectives and directives of state policy. In *C.B. Boarding and Loading v. State of Mysore*,⁵¹ the court observed that the provisions contained in Part III and Part IV, “are complementary and supplementary to other” In *Kesavananda Bharati v. Union of India*,⁵² it was observed that Fundamental Rights themselves have no cast-iron items, and that the approach of the Court should be to expand the scope of the Fundamental Rights. And in *Minerva Mills Ltd. v. Union of India*,⁵³ it was held that harmony and balance are essential features of the basic structure of the Constitution. This judicial approach has informed the commencement of the enforcement of DPSP, otherwise unenforceable were actually enforced albeit indirectly. Later, the Supreme Court declared that both the DPSP and Fundamental Rights are complimentary to each other and are equally essential to governance, that different Articles in the chapter on Fundamental Rights and the DPSP in Part IV of the Constitution must be read as an integral whole⁵⁴ and, thus, the judiciary while interpreting Part III, established the practice of reading part IV into Part III. In *Ashok Kumar Thakur v. Union of India*,⁵⁵ the supreme court of India observed that the DPSP in Part IV of the Constitution shall be treated as the Book of Interpretation for the fundamental rights in Chapter III. In *Mehta V Union of India*,⁵⁶ the Supreme Court held that “Article 39 (e), 47 and 48A by themselves and collectively cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment. ... Lack of concern or effort on the part of various governmental agencies had resulted in spiraling pollution levels.

⁴⁶K.G. Balakrishnan, ‘The role of the Judiciary in Environmental Protection’ (D.P. Shrivastava Memorial Lecture delivered at the High Court of Chattisgarh, Bilaspur. 20 March, 2010).[unpublished]

⁴⁷ Art 48a

⁴⁸ Art. 51(A) (g)

⁴⁹Md Faiyaz Khan, “Environmental Pollution and Indian Constitution: A New Trend” (2009) Online:<<http://twocircles.net/users/admin2>>

⁵⁰David R. Boyd, “The Implicit Constitutional Right to Live in a Healthy Environment”(2011)RECIEL 20:2, 171- 179. at 173

⁵¹ (18 AIR 1970 SC 2042.)

⁵²(1973) 4 SCC 225.

⁵³ AIR 1980 SC 1789.

⁵⁴*Delhi Transport Corporation v. DTC Mazdoor Congress*, AIR 1991 SC 101

⁵⁵ (2008) 6 SCC 1; *Paramati Educational and Cultural Trust & Others v. Union of India & Others* (2014) 8 SCC 1.

⁵⁶ 2002 (2) SCR 963,

The quality of air was steadily decreasing and no effective steps were being taken by the administration in this behalf. It was by reason of the failure to discharge its constitutional obligations, and with a view to protect the health of the present and future generations, that this Court, for the first time, on 23rd September, 1986, directed the Delhi Administration to file an affidavit specifying steps taken by it for controlling pollution emission of smoke, noise, etc. from vehicles plying in Delhi". And in *Ratlam vs Shri Vardhichand & Ors.*,⁵⁷ the court held that "where Directive Principles have found statutory expression in Do's and Don'ts the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice". What Nigeria can learn from this is the harmonious interpretation approach. Rather than the courts to fold their arms and feign helplessness. They can, when they are not enforcing the directive principles directly, treat the constitution as one whole and the principle of non-enforceability should not stop the court from consulting the chapter 2 in the interpretation, application and enforcement of other sections. Perhaps, in these times when the Nigerian judiciary is gradually departing from its traditional, conservative, no ripples role of just interpreting the law into creative and innovative applications of legal principles, the issue of environmental rights could benefit from the emerging judicial innovativeness. This is in line with the activist construction, finding the reasons and underlying assumptions behind the words of the constitution, and giving effect to them.

7.Integration of Environmental rights into other, More-Readily Recognized Fundamental Rights

Besides the harmonious approach to interpretation, the courts if they seek to avoid controversy and cause no ripples could adopt the sub-silencio approach and pronounce the rights as offshoots of other rights- the rights to life, dignity of the human person, property- all expressly guaranteed under the constitution. Thus the Judge who is unwilling to step too close to the border between law making and interpretation, could adopt the approach of interpreting the right as inherent in other, more specifically recognized rights. The Indian judiciary has also employed this approach of attaching environmental rights as inherent components of other rights. Firstly, the right to life has been expanded to include the right to a clean environment. For instance, in *Damodhar Rao v. Municipal Corporation, Hyderabad*,⁵⁸ the high court held that "there can be no reason why practice of violent extinguishments of life alone would be regarded as violative of Art.21 of Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art.21 of the Constitution."

In *LK Koolwal v State of Rajasthan and Ors.*,⁵⁹ the petitioner asked the court to issue directions to the state to perform its obligatory duties invoking Fundamental Rights and the DPSP in respect of the acute sanitation problem in Jaipur which was alleged to be hazardous to the life of the citizens. The Court observed that maintenance of health, preservation of sanitation and environment falls within the purview of Article 21 of the Constitution as it adversely affect the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created if left unchecked, thus "rendering the citizens the fundamental right to ask for affirmative action." The Court held that the Municipality had a statutory duty to remove the dirt and filth and clear the city it ordered the municipality to do so within a stipulated time and constituted a committee to inspect the implementation of the judgment. In *Attakoya Thangal v. Union of India*,⁶⁰ it was held that "the right to sweet water, and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself" The High Courts also held in *V. Lakshmi Prasad v. State of Karnataka*⁶¹ that "Entitlement to clean environment is one of the recognized basic human rights...The right to life inherent in Art.21 of the Constitution of India does not fall short of the required quality of life which is possible only in an environment of quality...Where on account of human agencies, the quality of air and quality of environment are threatened or affected, the Court would not hesitate to use its innovative power...to enforce and safeguard the right to life to promote public interest" Even the Supreme Court has held in *Chetria Pardushan Mukti Sangarsh Samiti v. State of UP*⁶² that "Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India.

⁵⁷1980 AIR 1622, 1981 SCR (1) 97,

⁵⁸(AIR 1987 AP 170)

⁵⁹AIR 1988 Raj.2

⁶⁰(1990 KLT 580)

⁶¹(AIR 1992 Kant 57)

⁶²(AIR 1990 SC 2060)

Anything, which endangers or impairs that quality of life, is entitled to take recourse to Article 32 of the Constitution of India,” and in *Subhash Kumar v. State of Bihar*⁶³ that “the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, an affected person or a person genuinely interested in the protection of society has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life”.

In *Virender Gaur v. State of Haryana*,⁶⁴ the Supreme Court held that the “Enjoyment of the life and its attainment including their right to life with human dignity encompasses. Within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed. Any contract or action which would cause environmental pollution . . . should be regarded as amounting to violation of Article 21 . . . Therefore, there is a constitutional imperative on the state government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect, and improve both the manmade and the natural environment”. In *Ratlam vs Shri Vardhichand & Ors.*,⁶⁵ the court held that “the state should realize that Art. 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties. The municipality also will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health”, and that “Where Directive Principles have found statutory expression in Do's and Don'ts the court will not sit idly by and allow municipal government to become statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice”.

The procedural right of information and participation in decision making was upheld by the Gujarat High Court in *Centre For Social Justice v Union Of India And Ors.*,⁶⁶ where the petitioner challenged the manner in which notifications were issued by the Government in the matter of granting of environmental clearances. The petitioner also asked that certain orders be made to the respondent authorities about the manner in which the public hearing should be conducted so that the public hearing should be effective and meaningful. The Court laid down the following guidelines to be followed in the Public hearing procedure of the Environment Impact Assessment:

1. The venue of the public hearing has to be as near as possible to the site of the proposed project and the period of public notice regarding public hearing should be at least three months.
2. The state pollution control board should publish notice of the public hearing in at least two newspaper widely circulated in the region, one of which should be in the vernacular language;
3. The first public hearing should be held at least 30 days after the newspaper notice;
4. There should be a summary of the EIA Report in the local language and the EIA report be made available to the concerned citizen;
5. The quorum of the committee conducting the public hearing would be half its membership and the representatives of the Pollution Control Board, state department of environment and one of the three senior citizens nominated by the Collector, would have to be present for a valid public hearing (at least one of the three senior citizens nominated should have some credentials on the issues of environmental concerns);
6. The minutes of the public hearing have to be supplied to citizens on demand;
7. The gist of the environmental clearance has to be published in the newspaper in which notice of the public hearing is given. In this manner, if the persons who have participated at the public hearing or other persons who are aggrieved by action of any other authorities of the Central Government are desirous of filing an appeal, they would be in a position to file such appeal, as the authorities make them aware that a particular unit is granted the environmental clearance certificate. Other rights that may be implicative of a right to environment include the right to property,⁶⁷ the right to private and family life⁶⁸ and the right to dignity of the human person.⁶⁹ Orji opines that “an individual may not satisfactorily enjoy the right to a private and family life if his home is subjected to uncomfortable noise or toxic emissions from a nearby factory.

⁶³(AIR 1991 SC 420)

⁶⁴, (1995) 2 SCC 577

⁶⁵1980 AIR 1622, 1981 SCR (1) 97

⁶⁶AIR 2001 Guj 71, (2000) 3 GLR 1997

⁶⁷ S44

⁶⁸ S 17(3)(h) and 37

⁶⁹ S 34

This state of affairs can constitute a form of intolerable interference that will amount to a denial of the right to a private and family life ... as argued in *Lopez-Ostra v. Spain*.⁷⁰ The existence of environmental hazards in a place where a property is located is generally considered as a factor that is capable of causing substantial depreciation to the value of the property or even a total loss of the property. For example, a farmer whose land has been degraded by environmental pollution to the extent that the land can no longer be used for agricultural purposes can be said to have lost the value of the land for agriculture. A total loss of the property will occur where for example such land can no longer be used for any other purpose. The linkage between the human right to property and the wellbeing of the environment has been illustrated in ... *Maya Indigenous Community of the Toledo District v. Belize*,⁷¹ where the Inter American Commission on Human Rights (IACHR) accepted that logging concessions threatened long-term and irreversible damage to the natural environment on which the petitioners' system of subsistence agriculture depended. Thus, the human right to property can only be satisfactorily enjoyed in a balanced environment that is devoid of severe environmental pollution. Consequently, it follows that the right to a healthy environment is derivable from the right to property under the Nigerian Constitution as an unhealthy environment cannot satisfactorily support the exercise of the human right to property. One of the implications of the right to dignity is that subjecting a human being to inhuman or degrading treatment amounts to a breach of his or her right to dignity. "Inhuman or degrading treatment" is not only limited to torture but includes any "barbarous, uncouth and cruel treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty".⁷² Accordingly, conditions of severe environmental pollution which may cause serious physical illness, impairment and suffering on the part of the local population have been held to be inconsistent with the right to be respected as a human being.³¹⁷³ Thus, the creation of unsustainable environmental conditions that diminish the quality of human life or prevent the dignified enjoyment of life amounts to a violation of the human right to dignity under the Constitution".⁷⁴

8. Exploring Public Interest Litigation, Relaxation of Locus Standi And Procedural Rules

The issue of locus standi has trailed any efforts by public groups seeking redress for environmental degradation. This is the principle that a person complaining of harm must establish how he is affected by the harm, and if the harm is to the public, how the harm affects him more than other individuals of the society. Locus Standi is a Latin phrase which means a place of standing; standing in court; a right of appearance in a court of justice or before a legislative body on a given question.⁷⁵ The concept of locus standi connotes the capacity of a person to institute legal proceedings in a court of law or other competent tribunal. In *Owodunmi v. Registered Trustees of Celestial Church & Ors.*,⁷⁶ the Nigerian Supreme Court held that "the term locus standi (or standing) denotes the legal capacity to institute proceedings in a Court of law. Standing to sue is not dependent on the success or merits of a case; it is a condition precedent to a determination on the merits. Therefore, if the plaintiff has no locus standi or standing to sue, it is not necessary to consider whether there is a genuine case on the merits; his case must be thrown out as being incompetent".

In *Adesanya v President of the Republic of Nigeria & Anor.*,⁷⁷ it was held that the term "locus standi" denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like "standing" or "title to sue". In the Nigerian case of *Chief Gafaru Arowolo v Chief Sunday Olowookere*,⁷⁸ it was held that "the concept of the Latin Maxim locus standi, means a place of standing. Its legal application connotes that legal right which a person has to bring or file an action or be heard in a Court of law. Certainly, the law is sacrosanct that a party will have locus standi in a matter only if he has special legal right, or, alternatively, if he can show that he has sufficient or special interest in the performance of a duty sought to be enforced, or where his interest is adversely.

⁷⁰ [1994] 20 EHRR 277.

⁷¹ See *Maya Indigenous Community of the Toledo District v. Belize* [2004] Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc.5 rev. 1, 727.

⁷² See *Uzoukwu v. Ezeonu* (1991) 6 NWLR (pt 200) 708 [14].

⁷³ See Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96.doc.10 rev. 1 (1997) 92, 93.

⁷⁴ Uchenna Jerome Orji, 'Right to a Clean Environment— Some Reflections' (2012) *Environmental Policy and Law* 42: 4–5. 2

⁷⁵ *Blacks Law Dictionary*, 6th ed., sub verbo "locus standi"; *Omega Bank Plc. v Govt. Ekiti State* (2007) 16 NWLR (Pt. 1061) p. 445." Per OMOLEYE, J.C.A. (p.51, Paras.B-C).

⁷⁶ (2000) 10 NWLR (pt 675) 315.

⁷⁷ (1981) 2 NCLR 358. Per Fatayi-Williams, J.S.C. (P. 22, paras. D-E).

⁷⁸ (2011) LPELR- SC 200/2003 Online:

<http://www.lawpavilionpersonal.com/newfulllawreport.jsp?suite=olabisi@9thfloor&pk=SC.200/2003&apk=17888#17888>.

Affected. It is thus, the legal duty of the plaintiff to show to the Court, through his pleadings and evidence, that he has the standing (*locus standi*) to institute the action either for himself or as a representative of his family, whose civil rights and obligations have been, or are in danger of being violated or infringed. He also has to show that he or the family he represents have a justifiable dispute with the defendant. Olufunola Oyelola Adekeye, J.S.C held that “Strictly speaking the term “*locus standi*” denotes the legal capacity to institute...a status which a plaintiff must have before being heard in Court. It is a condition precedent to the determination of a suit on its merits”.⁷⁹

From the foregoing, it is clear that a person who has no *locus standi* will not be granted audience. This in essence means that when oil has spilled and made whole village farmlands uncultivable, each individual farmer must prove how his farm is less cultivable than the other village parcels, or how the lack of cultivability of his farm affects him more than his neighbor who has suffered the same fate.

Alternatively, they can apply to the Attorney General who alone has the *locus standi* to sue for public damages, and because of the economic bent of government and the very heavy likelihood that the Attorney General will be on the side of his appointor, the Governor/President, who in all likelihood too is unwilling to cause any ripples in the smoothly and rapidly flowing cash stream that oil and oil resources are, the possibility of environmental harm being challenged and redressed through this channel becomes even slimmer. The dilution of the strict application of the doctrine of *locus standi* has enabled public interest litigation in the Indian legal system. Not only does the Indian court accept litigation instituted by public spirited individuals and organizations, it also pronounced that public interest litigation can be explored as an avenue of enforcing environmental rights when it held in that “An important ingredient of environmental litigation is the element of procedural convenience. On the procedural side, *locus standi* requirements have been diluted in environmental actions and courts allow citizens to file Public Interest Litigation (hereafter ‘PIL’) for addressing violations of statutory mandates by the executive and private parties or situations where legal lacunae still persist. PILs have emerged as the most potent tool in the hands of Indian judiciary”.⁸⁰

According to Balakrishnan, “in order to improve access to justice for poor and disadvantaged sections, the traditional rules of ‘*locus standi*’ were diluted and a practice was initiated whereby public-spirited individuals could approach the court on behalf of such sections... I must highlight the procedural flexibility and innovative remedies that have come to be associated with this form of litigation. Instead of an adversarial setting where the judge relies on the counsels to produce evidence and argue their cases, the PIL cases are characterized by a collaborative problem-solving approach. Acting either at the instance of petitioners or on their own, the Supreme Court has granted interim remedies such as stay orders and injunctions to restrain harmful activities in many cases. Reliance has also been placed on the power to do complete justice ... to issue detailed guidelines to executive agencies and private parties for ensuring the implementation judicial directions, beginning with the Ratlam Municipality case⁸¹ where the Supreme Court directed a local body to make proper drainage provisions. The tool of a ‘*continuing mandamus*’ has been used to monitor the implementation of orders by seeking frequent reports from governmental agencies on the progress made [in that context]”⁸²

The Indian judiciary has adopted the public interest litigation doctrine for many cases of environmental protection, “shading the inhibitions against refusing strangers to present the petitions on behalf of poor and ignorant individuals. The basic ideology behind adopting PIL is that access to justice ought not to be denied to the needy for the lack of knowledge or finances. In PIL a public spirited individual or organization can maintain petition on behalf of poor & ignorant individuals”,⁸³ and PIL has proved to be an effective tool in this regard.

⁷⁹ Ibid

⁸⁰ Environmental Legislation & Its Legal Aspect. Online: <<http://www.legalservicesindia.com/article/article/environmental-legislation-&-its-legal-aspect-162-1.html>>

⁸¹ Municipal Council Ratlam v. Vardichan, (1980) 4 SCC 162

⁸² K.G. Balakrishnan, ‘The role of the Judiciary in Environmental Protection’ (D.P. Shrivastava Memorial Lecture delivered at the High Court of Chattisgarh, Bilaspur. 20 March, 2010).[unpublished]

⁸³ Vijay Oak, “Role of PIL in Environmental Protection In India” Online: <http://www.legalserviceindia.com/articles/peiln.htm>; see also Mukesh Garg, “Role of PIL in the Development and Implementation of Environment Laws in India” (2012) International Journal of Research in Social Sciences 2:3. 322-337. Online: <http://www.ijmra.us/project%20doc/IJRSS_AUGUST2012/IJMRA-RSS1692.pdf>

In Vellore, An NGO (Vellore Citizens Welfare Forum) filed a Public Interest Litigation (PIL) against the pollution which was caused by discharge of enormous amounts of untreated effluents by tanneries and other industries into rivers and people's water source, which led to the pollution of the main source of potable water for consumption and irrigation and consequently, the non-availability of clean water, thus jeopardizing people's health. The Supreme Court allowed standing to a public spirited social organization for protecting the health of residents of Vellore to sue the tanneries. In *Rural Litigation and Entitlement Kendra vs. State of U.P.*,⁸⁴ the Supreme Court prohibited continuance of mining as it adversely affected the environment and was a violation of the right to life.

In *Indian Council for Enviro-Legal Action vs. Union of India*,⁸⁵ the Supreme Court cautioned the industries discharging dangerous Oleum and H acid and held that such pollution is a breach of the right to wholesome environment and ultimately the right to life. In *M.C. Mehta vs. Union of India*,⁸⁶ the Supreme Court held that air pollution in Delhi caused by vehicular emissions violates right to life under Art. 21 and directed all commercial vehicles operating in Delhi to switch to CNG fuel mode for safeguarding health of the people. In *Church of God (Full Gospel) in India vs. KKR Majestic Colony Welfare Association*,⁸⁷ the Supreme Court observed that noise pollution amounts to violation of Art.21 of the Constitution. In all the above cited cases, the courts relaxed the strict rules of locus standi and allowed, even encouraged public spirited groups to bring an action on behalf of indigent victims. In this manner, the Indian judiciary has used the tool of PIL effectively for environmental protection. The judiciary has not done this in disregard of the law, in *Subhash Kumar vs. State of Bihar*,⁸⁸ the Supreme Court refused to entertain a false petition seeking to advance private interests through PIL. The petitioner had filed a public interest petition pleading infringement of the right to life arising from the pollution of the Bokaro river by the sludge/slurry discharged from the industries of the Tata Iron and Steel Company Ltd. [TISCO) making its water unfit for drinking or irrigation. The respondents established that TISCO and the State Pollution Control Board had complied with statutory requirement and that the petitioner was motivated by self-interest. The Court observed that Public interest litigation envisages legal proceedings for the enforcement of fundamental rights of a group of persons or community, who are unable to do so on their own because of their incapacity, poverty or ignorance of the law. However public interest litigation cannot be exploited to satisfy personal grudges and personal interest cannot be enforced through the process of court under Article 32, in the garb of public interest litigation. Since in the opinion of the court, the instant case was motivated by self-interest, it was accordingly dismissed with a warning to all such people who would approach the court for fulfilling personal goals. In Nigerian cases of alleged environmental damage the courts usually insist on the proof of 'causal connection'⁸⁹ (causality) – the failure of which had resulted in the failure of several cases.⁹⁰ Contrast with the Indian judicial attitude where an actor is required to prove that his actions and the consequences thereof are environmentally benign.⁹¹

It must be noted that nowhere does the court constitute itself into a law maker as alleged by Dam and Tewari.⁹² What the court has done, at most could be described as a creative interpretation of already existing laws. In any case, the role of a judge has evolved beyond being an interpreter of the language of the law. He is called upon increasingly to attempt an exploration into the mind of the lawmaker, to discover his intent, to manage the law in such away as ensures that as much as he can, the law is actually employed towards the curing of existing ills in the society. According to Denning, "the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all that he legitimately can to avoid that rule or even to change it so as to do justice in the instant case before him.

⁸⁴ (AIR 1985 SC 652)

⁸⁵ (AIR 1996 SC 1446),

⁸⁶ (AIR 2001 SC 1948)

⁸⁷ (AIR 2000 SC 2773)

⁸⁸ (AIR 1991 SC 420),

⁸⁹ *Alan Irou v. Shell-BP Development (Nig.) Ltd.; Chinda v. Shell-BP*, [1974] 2 RSLR 1; *Ogiale v. Shell*, [1997] 1 NWLR (Pt. 480) 148

⁹⁰ See Kaniye S.A. Ebeku, 'Legal Remedies for Victims of Environmental Pollution in Nigeria' (1998) *Nigerian Law and Practice Journal* 2, 2

⁹¹ Vellore

⁹² Shubhankar Dam and Vivek Tewary, "Polluting Environment, Polluting Constitution: is a 'Polluted' Constitution Worse than a Polluted Environment?" (2005) *Journal of Environmental Law* 17: 3, 383–393. at 386-388

This is more so where the freedom of the individual or any other of his fundamental liberties are in conflict with other interests, then [he] must hold the balance between the competing interests. In holding the balance, [he] must put freedom first. He must give priority to the freedom of the individual”.⁹³

9. Ensuring the Performance of Obligations Under International Treaties

Nigeria is a signatory to many international treaties recognising the right to environment, but the domestication of these treaties remains a problem. The constitution provides that for international agreements to have effect in Nigeria, such treaties must be ratified by the national assembly. The constitution provides that “no treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly”.⁹⁴ However, despite many environmental treaties entered into by Nigeria, and even those expressly talking about the right to a healthy environment, the national legislature is yet to ratify them, which makes all the efforts at the international level to seem futile. But India has found a way around this. In *Vellore Citizens*, the Indian supreme court held that the traditional notion that development and ecological health are mutually exclusive was no longer accepted⁹⁵ and referred to *Gramophone Company of India Lt v Birendra Bahadur Pandey and Others*⁹⁶ and *Jolly George Varghese and Another v Bank of Cochin*⁹⁷ to conclude that “the rules and requirements of international law may be accommodated into municipal law even without express legislative consent”.⁹⁸ If the Nigerian judiciary is willing to take this track, then it may recognise and enforce environmental rights that have been enshrined in international agreements and treaties to which Nigeria is a signatory notwithstanding that the national assembly is yet to enact the international treaty into local legislation or that the rights therein granted and/or recognised are not expressed as rights in the conventional rights recognised and guaranteed by the constitution. Even when the constitution has not expressly mentioned the right to environment, court have said it was implicit in the right to life health or government duty to protect the environment.⁹⁹

10. Economic Concerns V Environmental Concerns

In the seemingly constant struggle between the environment and the economy the Nigerian government as an umpire seems biased in favour of the latter, and that is a comprehensible, albeit unjustifiable position. Nigeria’s mono-cultural economy is largely dependent on the oil and gas sector, whose activities are inherently detrimental to the environment. What is even more indefensible is the constantly keeping an eye on the balance sheets, seeking always the cheapest ways to make the most profits, actors compromising on standards (where there exist any at all) and the legislature and executive are interested only in how much is made or lost, but only in monetary terms. In counting the cost and benefit analysis, the only factor considered in making the analysis is in monetary terms, and the judiciary, the third arm of government seems inclined to tilt with her fellows in the direction of economics. Whenever the conflict happens in the judicial arena, the decision is always in favor of economics against the environment. According to Ebeku, “Nigerian judges usually privileged the economic benefits of the country over environmental protection, particularly in relation to oil operations, notwithstanding the existence of the legal right to a healthy environment under the African Charter on Human and Peoples’ Rights, the ‘right to environment’ under Section 20 of the 1999 Constitution of Nigeria, as well as the constitutional provisions on human rights.”¹⁰⁰ The pro-economic attitude of the judges led to the failure of many cases relating to environmental damage, particularly those arising from oil operations – oil is the main source of government revenue”.¹⁰¹ According to Ijaiya, “cases have tended to follow the unwritten rule that economic considerations should be prioritized over environmental concerns and judges have often exhibited their reluctance to grant injunctions against oil-companies even where oil operations have been discovered to have adversely affected host communities and their environment...in spite of the provisions of the Constitution ...

⁹³ Alred Thompson Denning, *The Family Story*, (London: Butterworths, 1981) at 184

⁹⁴ Part II, Section 12(1)

⁹⁵ *Vellore Tanneries Case*, AIR 1996 SC 2715

⁹⁶ *Gramophone Company of India Lt v Birendra Bahadur Pandey and Others*, 1984, AIR (SC) 667

⁹⁷ *Jolly George Varghese and Another v Bank of Cochin*, 1980 AIR (SC) 470

⁹⁸ *Gramophone Company Case*, 1984, AIR (SC) 667

⁹⁹ David R. Boyd, “The Implicit Constitutional Right to Live in a Healthy Environment” (2011) *RECIEL* 20:2, 171- 179. at 174

Kaniye S.A. Ebeku, ‘Locus standi in Environmental Nuisance Actions: A Perspective from the Commonwealth’ (2005) *ELM* 17:1. 14.

¹⁰¹ Kaniye S.A. Ebeku, ‘Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria’ (2003) *RECIEL* 12:2. 199; see also Kaniye S.A. Ebeku, *Oil and the Niger Delta People in International Law* (Rüdiger Köppe: Verlag Publishers, 2006), at 158–170.

Other procedural rules on environmental rights in Nigeria, the judges placed economic considerations over environmental concerns".¹⁰²In *Allan Irou v. Shell BP*,¹⁰³ the court refused to grant an injunction in favor of the plaintiff whose land. Fish pond and creek had been polluted by the activities of the defendant. India has shown a more willing disposition towards considering environmental concerns and the courts have not been guided only by financial concerns and the Indian judiciary strives to strike a balance in the seemingly constant struggle between environmental and economic concerns. Balakrishnan, India's Chief Justice in 2010 acknowledged the need to draw a "balance between environmental concerns and competing developmental needs such as those of generating employment and wealth". In *Ratlamvs Shri Vardhichand & Ors.*, the court held that "The municipality will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health", and that "the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice".¹⁰⁴ Also, in *Dr. B.L. Wadehra v. Union of India and others*,¹⁰⁵ the courts refused to allow economic considerations as a reason why government should not maintain and ensure a healthy environment and held that the authorities entrusted with the work of pollution control cannot absolve themselves of their duties on the pretext of financial and other limitations like inefficiency of staff etc. This sentiment was echoed by D E R Kirpal, J. in *Almitra H. Patel and Anor. V. Union Of India And Ors*,¹⁰⁶ and in *M. C Mehta v State of Orissa*,¹⁰⁷ a writ petition was filed to protect the health of people who were suffering from pollution from sewage being caused by the Municipal Committee and the SCB Medical College Hospital, Cuttack. The petitioners contended that the dumping of untreated waste water in the Taladanda canal was creating health problems in the city. The Court ordered the respondents to take steps to prevent and control water pollution and to maintain wholesomeness of water and held that the provision of proper drainage system in working conditions and the preservation of public health, which is the precise purpose for constituting a municipal council, cannot be avoided by pleading financial inability.

In the *Vellore Tanneries* case, The court addressed the seemingly constant conflict between environmental safety and economic development, the incorporation of a Right to Wholesome Environment into Article 21 of the constitution, the liability of the industrialists-polluter to the environment and the people affected by pollution and The inclusion of Environmental principles such as 'polluter pays', 'precautionary principle' and Sustainable Development in the Indian legal system, and held that the onus was on the actor to prove that his actions were environmentally benign. The court ordered the Government to set up an authority to deal with the situation created by the tanneries and other polluting outlets, implement the 'precautionary principle' and the 'polluter pays principle', identify the loss to the environment and to the individuals/families who suffered from the pollution and to assess the amount of compensation to be recovered from the polluters both for reversing the ecology and for payment to individuals. It directed the closure of all tanneries which failed to comply with Effluent Treatment requirements and prohibited further setting up of highly polluting industries within the area.¹⁰⁸ In *Bombay Cotton Mills Case*,¹⁰⁹ the court relied on the principle of sustainable development and held that a balance should be struck between the ecology and development, in view of public interest. In most of the cases reported here, the court has had to deal with industries that are either the mainstay of the complaining communities or that were touted to be potential for significant economic improvement for the central government, state governments and the communities, and the courts have consistently held that even though the industries and proposed projects are of serious economic significance, such should not be at the expense of a healthy and decent environment. The court has ordered tanneries to either adopt environmental friendly practices, relocate or shut down; this is in contrast to the Nigerian stance where because oil is the main stay, every other consideration is subsumed under the economic concerns.

¹⁰²Hakeem Ijaiya, 'Environmental Rights in Nigeria and India' (2012) IJED 9:2. 153-160

¹⁰³ *Allan Irou v. Shell B.P* Suit No. W/89/91 Warri HC/26/11/73 (unreported).

¹⁰⁴ 1980 AIR 1622, 1981 SCR (1) 97

¹⁰⁵ AIR1996SC2969, 2001(5)SCALE304, (1996)2SCC594, [1996]3SCR80,

¹⁰⁶ 1998) 2 SCC 416.

¹⁰⁷ AIR 1992 Ori 225

¹⁰⁸ *Vellore Tanneries Case*, AIR 1996 SC 2715; *Company Case*, 1984, AIR (SC) 667 (Supreme Court)

¹⁰⁹ *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors.* AIR 2006 SC 1489

The multinationals have achieved an almost untouchable status even as they commit all kinds of atrocities against the environment and the people.¹¹⁰ However, a balance could be struck as India has shown; it is possible that economic considerations will not supersede and consume environmental concerns. In *Samatha vs State Of A.P. And Ors*, the Court opined that “since the Executive is enjoined to protect social, economic and educational interests of the tribals. When the state leases out the lands in the scheduled areas to the non tribal’s or industries for exploitation of mineral resource, it transmits the above correlative constitutional duties and obligation to those who undertake to exploit the natural resources. The Court directed, that at least 20% of the net profits should be set apart as a permanent fund as part of industrial/business activity for establishment and maintenance of water resources, schools, hospitals, sanitation and transport facilities by laying roads, etc. This 20% allocation would not include the expenditure for reforestation and maintenance of the ecology”.¹¹¹

Contrary to what Khan alludes,¹¹² the courts have not subsumed every other consideration for environmental concerns. The court is not always blinded by the mere mention of environmental concerns. It has demonstrated a willingness to strike a balance and not just hand over judgment to every trivial claim that makes the merest mention of environment. For instance, in *Tehri Bandh Virodhi Sangharsh Samiti and State of UP and ors.*,¹¹³ the petitioners sought to restrain a large corporation and its government backers from constructing and implementing a Hydro Power project, chiefly because the plan for the project had not considered the safety aspect of the dam as it posed a serious threat being that the area is prone to earthquakes and the site of the dam was prone to seismic activity hence posing grave danger to the people residing in that area. The Court looked to whether or not the Government had taken all relevant consideration, while clearing the project, concluded that the facilitators had considered the safety of the project in details with the benefit of expert analyses on various aspects and held that the project facilitators had considered the relevant aspects of safety of the dam. And in *Goa Foundation v Konkan Railways Corporation*,¹¹⁴ the Goa community asked the Court to compel the Railway Corporation to procure environmental clearance from the Ministry of Environment and Forest for the part of alignment passing through Goa, claiming that the proposed alignment is destructive of the environment and the ecosystem and violates Art. 21 of the Constitution and that the proposed alignment was planned and undertaken without an adequate Environment Impact Assessment and Environment Management Plan. The petitioner also claimed that the Corporation had violated the notification requirements. The Court after review the argument and the facts presented before it, refused to make the order over a matter of national importance and significance. That the extent of damage was negligible and public project of this kind will fulfill the long standing aspirations of the people on the west coast, the court held. That the project is an important development for the economic and social structure of the western people. In *Narmada Bachao Andolan v. Union of India and Ors.*,¹¹⁵ it was held that the construction of a dam on the Narmada River would not have dire environmental consequences, and hence the ‘precautionary principle’ in this case would not apply.

11. The Potential Gains of a Human Rights Approach to Environmental Concerns

According to Boyd, the Indian Supreme Court has “opened the door wide to judicial remedies by treating the right to a healthy environment as a fundamental right capable of being protected by citizens and NGOs by means of writ petitions. ...The constitutional right to a healthy environment has also contributed to improvements in the recognition of procedural rights including access to information and participation in decision making”.¹¹⁶ The advantage of a human right approach is that the human rights approach is a “strong claim, a claim to an absolute entitlement...immune to the lobbying and trade-offs that characterize bureaucratic decision making. Its power lies in its ability to trump individual greed and short term thinking. A second advantage is that the procedural dimensions of an environmental right can provide access to justice in a way that bureaucratic regulation, or tort law, simply cannot. A robust environmental right regime can mobilise redress where other remedies have failed. Thirdly, human rights approach may stimulate concomitant political [and legal] activism in environmental issues.

¹¹⁰ Okonta & Douglas, *Supra* note 1.

¹¹¹ AIR 1997 SC 3297, JT 1997 (6) SC 449, 1997 (4)

¹¹² Md Faiyaz Khan, “Environmental Pollution and Indian Constitution: A New Trend” (2009)
Online: <<http://twocircles.net/users/admin2>>

¹¹³ 1990 (2) SCALE 1003,

¹¹⁴ AIR 1992 Bom. 471

¹¹⁵ *Narmada Bachao Andolan v. Union of India and ors.*, AIR 2000 SC 3751

¹¹⁶ David R. Boyd, “The Implicit Constitutional Right to Live in a Healthy Environment” (2011)
RECIEL 20:2, 171- 179. at 174

Concerned citizens and NGO are more likely to rally around a general statement of right than a highly technical, bureaucratic regulation expressed in legalese... a no-discriminatory human rights standard could facilitate comparison and foster political mobilization linking local concerns with more global issues".¹¹⁷ Improve public access to information, particularly on-classified information regarding the oil industry, such as EIAs, monitoring reports, spill reports and remediation closure reports¹¹⁸ According to boyd, "evidence from across the globe demonstrates that constitutional environmental rights and responsibilities are a catalyst for stronger environmental laws, better enforcement of those laws, and enhanced public participation in environmental governance. Most importantly, there is a strong positive correlation between superior environmental performance and constitutional provisions requiring environmental protection. For example, nations with green constitutions have smaller ecological footprints and have reduced some types of air pollution up to ten times faster than nations without environmental provisions in their constitutions. Ultimately this means people are breathing cleaner air, drinking safer water, and living in healthier environments. For example, citizens living in what was once one of the most polluted watersheds in Argentina used their constitutional right to a healthy environment to compel federal, provincial, and municipal governments to undertake an unprecedented cleanup and restoration effort".¹¹⁹ The human rights mechanism has specialised courts, institutions and procedures where environmental human right issues can be raised with a greater likelihood of obtaining relief In Nigeria, a specialised expedited procedure designed to side step the lengthy trial time and often onerous technical, filing, trial and proof requirements of other non-human rights litigation(the Fundamental Rights Enforcement Procedure Rules), would greatly aid environmental right litigation in terms of reduced costs for indigent victims and the time implications especially if it means halting an activity that will damage or is already damaging the environment and perpetuation has even worse consequences. Expanded jurisdiction for fundamental right enforcement litigation and the resultant options presented to victims make redress for environmental damages very likely as it makes for easier access for victims who can ask that their rights be enforced in any courts. The relaxed rule of technicality is another advantage that human rights litigation has over, say, ordinary tort litigation. According to Knox, "a human rights perspective demonstrates the fundamental importance of environmental protection to the dignity, equality, and freedom of human beings...a human rights framework provides minimum substantive standards that environmental policies must strive to meet...and sets out procedural tools that are necessary for environmental policies to be fair and effective".¹²⁰"In sum, human rights principles establish procedural obligations whose implementation makes environmental decision-making more transparent, better informed, more responsive to the public, and, as a result, more effective."¹²¹

12. Conclusion

An important aspect of these cases is the realization that environmental rights and their enforcement are heavily dependent on the judiciary and on the initiative of citizens who approach the judiciary, given the presence of an apathetic administration.¹²²Environmental and human rights are merging, and the many linkages between their institutions and systems demonstrate their oneness. Anderson identifies four interrelated regimes of corporate responsibility from the human rights field - Market based regime-where firms compete for consumers and investors by demonstrating compliance with human rights standards.

¹¹⁷Michael R. Anderson and Alan E. Boyle, eds. *Human Rights Approaches to Environmental Protection* (Gloucestershire: Clarendon Press, 1996) at 1-4, 21-23

¹¹⁸UNEP, Supra note 6

¹¹⁹David R. Boyd, *The Constitutional Right to a Healthy Environment*

2013 Online: < <http://www.lawnow.org/author/davidrboyd/>>

¹²⁰ John H. Knox, *Human Rights and the Environment: Carrying the Conversation Forward*, ASEM Seminar on Human Rights on October 21, 2013. <http://www.asef.org/images/docs/Keynote%20speechJohn%20Knox_Human%20Rights%20and%20the%20Environment.pdf>; see also John H. Knox, *Human Rights Obligations to Protect the Environment*, Independent Expert on human rights and the environment Statement to the 25th Session of the Human Rights Council, 11 March 2014; and John H. Knox, *The Development of Environmental Human Rights*, UN Independent Expert on Human Rights and the Environment On the Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean Santiago, Chile, 6 November 2014. <http://www.cepal.org/sites/default/files/events/files/knox_-_6_nov_2014_-_final.pdf>

¹²¹John H. Knox, *Human Rights, Environmental Protection, and the Sustainable Development Goals* (September 1, 2015). 24 *Washington International Law Journal* 517 (2015). Online: <<https://ssrn.com/abstract=2660392>>

¹²²<http://www.nlsenlaw.org/waste-management-law/domestic-legal-framework/supreme-court-cases/almitra-h-patel-v-union-of-india-1998-2-scc-416/>

Domestic and international regulation regime, and the regime of civil liability enforced through lawsuits in domestic courts, overarching and propelling the other regimes.¹²³ A significant obstacle, however, in exporting the Indian judicial attitude to the Nigerian judiciary may be the absence in the Nigerian Constitution of a provision similar to Article 51A of the Indian Constitution which gives private persons the right to institute legal action in order to protect and preserve the environment. Thus, it will be difficult to extend the constitutional duty of protecting the environment directly to private individuals. Despite this, the Indian judicial decisions constitute persuasive precedents for Nigerian courts.¹²⁴

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¹²³Ralph G. Steinhardt. Litigating Corporate Responsibility. (New York: United Nations, 2001). at 1-12, Online: <<http://www.globaldimensions.net/articles/cr/steinhardt.html>>

¹²⁴E.P. Amechi, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation'(2012) LEAD 6:3. Online: <http://www.lead_journal.org/content/10320pdf>

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