



## LEGAL EXAMINATION OF THE RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT IN NIGERIA: LESSONS FROM KENYA

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### Abstract

*This paper examined the right to a clean, healthy and sustainable environment in Nigeria. It argued that although the Constitution of the Federal of Nigeria 1999 as amended, (CFRN) does not explicitly recognise the right to a clean and healthy environment, there are other provisions contained in the CFRN, case law and other statutory instruments that support this right. The article argued that the environmental right is evolving as a human right as legal instruments at both global, regional and domestic levels have begun to recognise and enforce it. The article specifically discussed the United Nations resolutions that recognise the right to a clean and healthy environment as a human right and then narrowed the discussion down to the provisions of the African Charter on Human and Peoples' Rights 1981 and its domestication in Nigeria. The authors also discussed the impediments to environmental rights in Nigeria and argued that these impediments weaken the efficacy of environmental protection in Nigeria. The paper also drew inspiration from the provisions of the Kenyan Constitution 2010 on substantive and procedural environmental rights and how these measures contribute to environmental jurisprudence in Kenya. It was concluded that the lack of explicit recognition of environmental rights in Nigeria contributes to environmental degradation in the country. It recommended the inclusion of substantive and procedural environmental rights in Chapter IV of the CFRN as well as the establishment of a specialised environmental court for quick and efficient enforcement of environmental rights in Nigeria.*

**Keywords:** *Environmental rights, environmental protection, Nigeria, Kenya*

### 1.0 Introduction

The right to a clean, healthy, and sustainable environment is recognized globally as a human right.<sup>1</sup> The United Nations General Assembly (UNGA) has declared that every individual has the inherent right to live in an environment that supports dignity, well-being, and the enjoyment of other basic rights.<sup>2</sup> This right is not only protected by international agreements but it is also enshrined in national constitutions and laws of various countries. Although the Constitution of the Federal Republic of Nigeria 1999, as amended (CFRN) does not explicitly recognise this right, the decisions of the court over time have highlighted the significance of this right and applied same within the framework of right to life and right to dignity of the human person. Despite these legal mechanisms, environmental degradation has

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<sup>1</sup> United Nations General Assembly Resolution on The Human Right to a Clean, Healthy and Sustainable Environment (A/RES/76/300).

<sup>2</sup> *Ibid.*



continued to rise in Nigeria. This demonstrates the urgent need for comprehensive legal protection of the right to a clean, healthy, and sustainable environment in Nigeria.

## 2.0 Meaning of a Clean, Healthy and Sustainable Environment

The meaning of a clean, healthy, and sustainable environment can be complex and confusing. It encompasses various aspects and dimensions that contribute to the overall well-being and quality of life for both individuals and communities. To begin with, the term 'clean' refers to an environment that is free from contamination, pollution, and harmful substances.<sup>3</sup> It implies the absence of hazardous chemicals, toxins and pollutants in the air, water bodies and soil. A clean environment ensures the preservation of natural resources, safeguarding ecosystems and minimizing any adverse impacts on human health.

The World Health Organisation (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.<sup>4</sup> Thus, a 'healthy' environment entails the conditions that enable individuals to lead a fulfilling life, free from harm or risks to their health. This includes access to clean air, safe drinking water, healthy food, sanitary living conditions and adequate healthcare facilities. A healthy environment supports the prevention of diseases, reduces health risks, and fosters overall well-being for present and future generations.

A 'sustainable' environment refers to one that can be maintained and preserved for future generations without depleting its resources or compromising the ability to meet their needs. This entails responsible resource management, conservation efforts, climate change mitigation, biodiversity protection and the promotion of renewable energy sources. A sustainable environment balances economic development, social equity and environmental protection, aiming for long-term harmony between human activities and the ecological systems on which they rely.

## 3.0 Emergence of Environmental Rights as a Human Right

The recognition of the right to a clean, healthy, and sustainable environment as a human right has gained significant momentum in recent years. This recognition has been advocated by various human rights organizations and environmental groups to safeguard the ecosystems that support human health and well-being. It acknowledges the interconnectedness between environmental protection and human rights, emphasizing that environmental harm can have a direct impact on human lives. The United Nations Human Rights Council (UNHRC), during its 48<sup>th</sup> session in 2021, adopted a resolution acknowledging the human right to a clean, healthy, and sustainable environment.<sup>5</sup> This marked the first time that the UN explicitly declared this right. In 2022, the United Nations General Assembly (UNGA) reaffirmed the UNHRC resolution through a resolution. Although these resolutions are not legally binding, they signify a significant step towards the global recognition of environmental rights.

Historically, major United Nations human rights instruments such as the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 did not explicitly

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<sup>3</sup> *Gbemre v. Shell* (2005) AHRLR 151.

<sup>4</sup> Constitution of the World Health Organisation 1948, preamble.

<sup>5</sup> HRC/RES/48/13.



recognize the right to a healthy environment. However, treaties such as the African Charter on Human and Peoples' Rights 1981<sup>6</sup> have clearly included the right to a healthy and satisfactory environment. The UNHRC and UNGA resolutions recognising this right also represent the view of the United Nations regarding the right to a clean, healthy and sustainable environment as a human right.

This growing recognition reflects a global understanding of the importance of environmental protection for the well-being and rights of individuals. It is also significant in creating legal precedents for environmental issues, including climate change litigation. It places an obligation on states to regulate and enforce environmental laws, control pollution, and provide justice and protection for communities impacted by environmental problems.<sup>7</sup> The right to a healthy environment is closely connected with other health-related human rights issues such as the right to water, right to food and right to health.

#### 4.0 The Legal Recognition of Environmental Rights in Nigeria

There is no consensus among other authors on the legal recognition of environmental rights in Nigeria. The debate in the legal community revolves around whether there is a recognized right to a safe and healthy environment within the human rights system in Nigeria.<sup>8</sup> The controversy stems from the absence of explicit provisions in Chapter IV of the CFRN that explicitly declare an individual's right to a clean environment.<sup>9</sup> According to Yerima and Okpanachi, the omission of the right to a safe and healthy environment in Chapter IV has necessitated reliance on section 33(1) of the CFRN to justify the enforceability of environmental rights in the country.

The legal recognition of environmental rights in Nigeria can be discussed by making reference to several legal provisions. Section 20 of the CFRN provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country. Article 24 of the African Charter on Human and Peoples' Rights 1981 establishes the right of all peoples to a general satisfactory environment favourable to their development. This provision is incorporated into Nigerian law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.<sup>10</sup> The applicability of the provisions of the ACHPR has been illustrated in a plethora of cases including *Abacha v Fawehinmi*<sup>11</sup> and *Usman v COP*<sup>12</sup> where the court affirmed that the ACHPR constitutes part of the laws of Nigeria. The recognition of the ACHPR has also been reflected within the context of environmental matters.<sup>13</sup> This recognition therefore provides a foundation for the legal framework of environmental rights in Nigeria.

Also, the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules) is the subsidiary legislation that governs the enforcement of fundamental rights in Nigeria. It was made by the Chief Justice of Nigeria (CJN) pursuant to section 46(2) of the CFRN. One of the overriding objectives of the

<sup>6</sup> ACHPR, art 24.

<sup>7</sup> *The Social and Economic Rights Action Center, et al. v. Nigeria* (2001) Comm. No. 155/96.

<sup>8</sup> T F Yerima and E F Okpanachi, 'Environmental Degradation as a Human Right Violation in Nigeria: A Re-Analysis' [2016](8) *Kogi State University Law Journal*;79-112.

<sup>9</sup> *Ibid.*

<sup>10</sup> Cap A9 LFN 2004.

<sup>11</sup> (2002) 3 LRC 296.

<sup>12</sup> (2020) 10 NWLR (Pt. 1732) 262.

<sup>13</sup> *Centre for Oil Pollution Watch v NNPC*, 598, paras. B-C



FREP Rules recognises the expansive and purposeful interpretation and application of Chapter IV and the ACHPR so as to advance and realise the rights and freedoms they prescribe. The FREP Rules 2009 provide a mechanism for individuals to seek redress for contraventions of the provisions of Chapter IV of the Constitution, including environmental rights contained in article 24 of the ACHPR. Thus, any person who alleges that any of the provisions of Chapter IV or ACHPR has been, is being or likely to be contravened may apply to the court for redress.<sup>14</sup>

Interestingly, the CFRN itself guarantees several fundamental rights that have implications for environmental rights. Section 33 of the CFRN recognizes the right to life while section 34 of the CFRN protects the dignity of an individual by prohibiting torture, inhuman or degrading treatment. These rights have been interpreted to include the right to a clean, poison-free, pollution-free and healthy environment.<sup>15</sup> In the case of *Gbemre v Shell*,<sup>16</sup> the court held that the respondents' actions of gas flaring constituted a violation of the applicants' fundamental rights to life and dignity. The court further held that the failure to conduct an Environmental Impact Assessment (EIA) contributed to the violation of these rights. In other words, flaring gas or indulging in certain projects without an approved EIA report is inconsistent with the rights to life and dignity.

In *Social and Economic Rights Action Center v. Nigeria*,<sup>17</sup> the African Commission on Human and Peoples' Rights held that by failing to prevent environmental degradation in the Niger Delta region, Nigeria violated various provisions of the ACHPR including the right to health,<sup>18</sup> right to a clean environment,<sup>19</sup> right to life<sup>20</sup> and many others. The Commission also recognized the importance of a clean and safe environment for the quality of life and safety of individuals and stated that States have a duty under the ACHPR to protect the environment and the health of people. The findings of the Commission in this case further support the discussion on the legal recognition of environmental rights in Nigeria.<sup>21</sup>

Based on the foregoing provisions, it is hereby submitted that the legal recognition of environmental rights in Nigeria is firmly established. The Supreme Court affirmed this position in the case of *Centre for Oil Pollution v NNPC*.<sup>22</sup> The SC jointly read sections 20 and 33 of the CFRN, section 17(4) of the Oil Pipeline Act and article 24 of the ACHPR to mean that the CFRN, the legislature and the ACHPR recognise the fundamental rights of the citizenry to a clean and healthy environment to sustain life.<sup>23</sup>

The SC per Eko (JSC) further explained that the Acha Community and all people living around and beside Ineh and Aku streams, who depend on the two rivers as their source of drinking water, fishing and other economic activities, 'have a right to a general environment favourable to their development.'

<sup>14</sup> CFRN, s 46(1); FREP Rules, preamble (3)(a).

<sup>15</sup> *Gbemre v Shell* (2005) AHRLR 151.

<sup>16</sup> *Ibid.*

<sup>17</sup> (2001) Comm. No. 155/96.

<sup>18</sup> ACHPR, art 16.

<sup>19</sup> *Ibid.*, art 24.

<sup>20</sup> *Ibid.*, art 4.

<sup>21</sup> See also *SERAP v. Federal Republic of Nigeria* ECW/CCJ/JUD/18/12.

<sup>22</sup> (2019) 5 NWLR (Pt. 1666) 518.

<sup>23</sup> *Ibid.*



They, each, have the right to life guaranteed by the CFRN. The State, including NNPC, owes the community a duty to protect them against noxious and toxicant pollutants and to improve and safeguard the water they drink, the air they breathe, the land and forest, including wildlife in and around the two rivers, they depend on for their existence, living and economic activities. This approach of the SC solidified the decision of the FHC in *Gbemre's case* and by virtue of section 235 of the CFRN, this decision of the SC remains final and binding on all persons and authorities until repealed by the SC.

### 5.0 The Justiciability of Environmental Rights in Nigeria

When a right is justiciable, it simply means that it can be enforced in a court of competent jurisdiction is breached or being breached. When it becomes non-justiciable, it simply means that it is merely 'directive' and cannot be enforced in court. In Nigeria's constitutional jurisprudence, it is generally believed that only the rights contained in Chapter IV of the CFRN are justiciable. It therefore implies that the constitutional provision on environmental protection under section 20 is not justiciable.<sup>24</sup> This is because section 20 of the CFRN is included in Chapter II of the CFRN which merely declares the fundamental objectives and directive principles of state policy whose provisions are not justiciable until the National Assembly acts on them pursuant to sections 4 and 13 of the CFRN and item 60(a) of the Exclusive Legislative List to the CFRN. However, there is another perspective on the justiciability of environmental rights in Nigeria.

Section 6 of the CFRN grants judicial powers to the courts and specifies the enumerated powers in section 6(5). However, section 6(6)(c) states that judicial powers shall not extend to determining whether any law or judicial decision conforms to Chapter II of the CFRN unless otherwise provided by the CFRN. The Supreme Court has stated that the non-justiciability of section 20 of the CFRN is not absolute as the CFRN itself allows for exceptions through the phrase 'except as otherwise provided by this Constitution.'<sup>25</sup> This means that if there are other provisions in the CFRN that make specific sections of Chapter II justiciable, the courts will interpret them accordingly.<sup>26</sup> Thus, despite the narrow reading of section 6(6)(c) that may suggest non-justiciability of the entire Chapter II, it is not necessarily the case.<sup>27</sup>

According to the SC, a proper approach to interpreting Chapter II of the CFRN involves combining or merging other provisions of the CFRN with the provisions of Chapter II.<sup>28</sup> This is necessary because if the CFRN includes provisions in other sections that make certain sections of Chapter II justiciable, the courts will interpret them accordingly. In essence, the interpretation of Chapter Two should consider the interplay between its provisions and other relevant sections of the CFRN.

### 6.0 Impediments to Environmental Rights in Nigeria

There are several impediments to the recognition and implementation of environmental rights in Nigeria. First, the lack of specific provisions in the CFRN declaring the right to a clean and healthy

<sup>24</sup> *Okogie v. Attorney General of Lagos State* (1981)2NCLR 337 at 350.

<sup>25</sup> *Centre for Oil Pollution Watch v. NNPC* (2019) 5 NWLR (Pt. 1666) 518.

<sup>26</sup> *Ibid.*

<sup>27</sup> *AG., Lagos State v. AG. Federation* (2003) 12 NWLR (Pt. 833) 1; *FRN v. Anache* (2004) 14 WRN 1.

<sup>28</sup> *Centre for Oil Pollution Watch v. NNPC* (2019) 5 NWLR (Pt. 1666) 518, 569, paras. D-E.



environment is a big obstacle.<sup>29</sup> The omission of this right from Chapter IV of the CFRN creates uncertainty and ambiguity regarding its enforceability. This absence has led to debates and controversies regarding the justiciability and scope of environmental rights in the country. The provision of section 6(6)(c) of the CFRN also constitutes an impediment to the enforcement of environmental rights against the government or any of its organs for failing to comply with its duty of protecting the environment. Although the SC has empowered victims and NGOs to enforce environmental provisions against the government and statutory corporations, it did not explicitly expunge section 6(6)(c) from the CFRN. Thus, it will continue to encourage the trial courts to decline jurisdiction and discourage victims from enforcing their environmental rights.

Another impediment is the inadequate implementation and enforcement mechanisms of environmental standards and regulations in the country. This poses challenges to the realization of environmental rights. Despite Nigeria's membership in international treaties and agreements related to environmental protection and domestication of the ACHPR, there is a gap in translating these commitments into effective domestic policies and adequate actions. This gap is reflected in the poor monitoring, enforcement, and regulation of environmental activities.

The issue of delay in justice delivery also poses a serious threat to the realization of the right to a clean, healthy, and sustainable environment in Nigeria. A prime example is the case of *Centre for Oil Pollution Watch v NNPC*, which commenced in 2005 and was only finally determined in 2019, a staggering 14-year timeframe. This is common among cases in Nigeria. The prolonged legal proceedings not only hinder timely redress for affected communities but also perpetuate environmental harm, as justice delayed is essentially justice denied.

The issue of illiteracy and lack of awareness regarding environmental rights serves as an impediment to the realization of the right to a clean, healthy, and sustainable environment in Nigeria. Given the lack of explicit codification of this right, many individuals, particularly those in marginalized communities, may be unaware of their rights or lack the educational capacity to assert and advocate for these rights effectively. This lack of awareness undermines the ability to hold public and private entities accountable for environmental negligence or pollution.

Finally, poverty oftentimes limits individuals' access to basic amenities such as clean water, sanitation facilities, and adequate housing, which directly impact their environmental well-being. Poverty also hinders individuals from seeking legal redress or engaging in environmental advocacy due to financial constraints and lack of resources. It is in recognition of this impediment that the Supreme Court liberalised *locus standi* and welcomed public interest litigation in environmental matters to encourage non-governmental organisations, human rights activists and other concerned individuals to assist victims of pollution to seek justice without being directly impacted by the act or omission being complained of.

## 7.0 Right to a Clean and Healthy Environment in Kenya

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<sup>29</sup> C T Emejuru, 'Human Rights and Environment: Whither Nigeria' [2015](35) *Journal of Law, Policy and Globalisation*;108-113.



Kenya is one of the few countries that have comprehensive constitutional provisions recognising both substantive and procedural environmental rights.<sup>30</sup> Under the repealed Constitution in Kenya, fundamental rights and freedoms were limited to traditional civil and political rights without mentioning the right to a clean environment. However, the new Constitution 2010 explicitly recognizes the right to a clean and healthy environment, encompassing both the protection of the environment for present and future generations and the fulfilment of environmental obligations.<sup>31</sup> Article 70 of the Kenyan Constitution further broadens this right by making provisions for its enforcement of environmental rights.

Article 70(1) of the Kenyan Constitution clearly provides that if a person alleges that a right to a clean and healthy environment recognised and protected under article 42 of the Constitution has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the matter. Under the Kenyan Constitution, the court has the authority to issue appropriate orders or directions to prevent or stop any harmful acts or omissions to the environment.<sup>32</sup> It can also compel public officials to take measures to prevent or stop such acts or omissions, and provide compensation to victims of violations of the right to a clean and healthy environment.<sup>33</sup> In bringing such action, article 70(3) of the Kenyan Constitution states that an applicant does not have to demonstrate that any person has incurred loss or suffered injury. This means that the rule of *locus standi* does not apply to environmental right actions in Kenya, which fosters access to justice.

To further demonstrate its commitment to environmental protection, article 162(2)(b) of the Kenyan Constitution gave the Parliament the power to establish a specialised environment with jurisdiction over environmental matters. It is pursuant to this power that the Parliament enacted the Environment and Land Court. The court has original and appellate jurisdiction over disputes related to a clean and healthy environment as enshrined in the Constitution. The court can also review decisions made by other tribunals and can employ alternative dispute resolution mechanisms when appropriate.

The case of Omido and the Owino Uhuru slum in Kenya highlights the importance of the right to a clean and healthy environment. After years of legal battles, the court held in favour of the slum's residents.<sup>34</sup> The court awarded them \$12 million in compensation for the lead poisoning they suffered due to the operations of Metal Refinery EPZ company. The court emphasised the government's failure to enforce environmental regulations and held the company accountable.<sup>35</sup>

## 8.0 Lessons for Nigeria

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<sup>30</sup> Constitution of Kenya 2010, arts 42 and 70.

<sup>31</sup> *Ibid.*, art 42.

<sup>32</sup> *Ibid.*, art 70(2).

<sup>33</sup> Constitution of Kenya 2010, art 70(2).

<sup>34</sup> C Ligami, 'Kenyan coastal community defeats lead polluter in court'

<<https://www.un.org/africarenewal/magazine/january-2021/kenyan-coastal-community-beats-lead-polluter-court>> accessed 10 October 2023.

<sup>35</sup> *Ibid.*



It is indeed regrettable that Nigeria, the giant of Africa, has not yet codified the right to a clean, healthy, and sustainable environment since the Koko dump incident of 1988. The reliance on case law and fragmented statutory provisions to construe the legal recognition of environmental rights in the country creates uncertainties and confusion in the enforcement of this right. Modern constitutions, like that of Kenya, have updated their civil and political rights to include the right to a clean, healthy and sustainable environment. Nigeria has to join this trend by including both substantive and procedural environmental rights in Chapter IV of the CFRN as demonstrated in articles 42 and 70 of the Kenyan Constitution 2010. Also, Nigeria can learn from Kenya's approach of establishing a specialized environment court with jurisdiction over environmental matters. Such a specialized court can effectively address environmental disputes and ensure expertise and efficiency in adjudicating environmental cases.

## 9.0 Conclusion

The right to a clean, healthy, and sustainable environment is of paramount importance in Nigeria. While the country has made progress in recognizing environmental rights, challenges persist in their effective implementation. Although the right to life includes the right to a clean and healthy environment, they are not one and the same fundamental right. Like Kenya's Constitution, the CFRN needs to incorporate both substantive and procedural environmental rights as standalone fundamental rights to aid victims in enforcing the right without legal impediments or uncertainties. Also, despite the decision of the Supreme Court in *Centre for Oil Pollution Watch v NNPC*, the issue of non-justiciability under section 6(6)(c) of the CFRN has continued to raise a serious setback to the realisation of this right. There is therefore the need to codify the right to a clean and healthy environment in the CFRN and establish specialized environmental courts. This will further cement environmental rights in Nigeria and give it an explicit constitutional flavour. It will also afford victims of pollution the right to seek redress in court without waiting for years for the final determination.

## 10. Recommendations

Based on the conclusion, the paper hereby makes the following recommendations:

- i. The CFRN should be amended to include provisions prescribing the substantive right to a clean, healthy and sustainable environment under Chapter IV of the CFRN. It should also provide the procedural measures and mechanisms for the enforcement of environmental rights in the court.
- ii. The CFRN should also be amended to include a provision establishing a specialised environmental court. The qualification of judges for this court should include special knowledge, expertise and experience in environmental law and human rights law.
- iii. Like election tribunals, this specialised environmental court should have a specific timeframe for the conclusion of matters. This will keep parties on their toes and prevent frivolous motions for injunctions and unnecessary applications for adjournment as delay tactics.
- iv. The CFRN should be amended deleting the provision of section 6(6)(c) on the non-justiciability of Chapter II. This deletion can encourage the various organs of the government to sit up to their economic, social, environmental and political obligations contained in the said chapter.