ECOLOGICAL PROBLEMS IN NIGERIA AS A THREAT TO HUMAN HEALTH: THE PLACE OF A NATIONAL ENVIRONMENTAL COURT*

Abstract

The COVID-19 pandemic draws attention to the profound disconnect that exists in modern societies between humans and their environment. It has long been established that human health is inextricably linked with that of animals and the environment, but this phenomenon has been exacerbated by increased rates of environmental degradation combined with high levels of urbanisation. The COVID-19 pandemic has its origins in the inability of humans to protect forests, its wildlife and govern land use, which have led to the disappearance of the traditional buffer zones that used to separate humans from animals and their pathogens. Nigeria is widely considered as one state harbouring the richest biodiversity of all the states in the African continent. However, for the past few decades, the state has witnessed increase in ecological threats and crisis from diverse sources, leading to a gradual decline of its biodiversity. Constrained by traditional legal structures, Nigeria has been unable to fully adopt an ecosystemic approach that appreciates the interconnections between the health of our planet, biodiversity, and humans. To many, it is quite evident that existing national and African regional legal and governance mechanisms are not potent enough to adequately address this decline. There is general agreement that there is need for a paradigm shift in this regard – but in what direction? Is it possible that in light of the transboundary nature of many of the existing environmental threats and degradation as well as their sources and the responsible entities, a centrally focused legal approach that includes the creation of an institution as national environmental courts may just be a pragmatic means to an effective governance regime? If indeed the idea that a focused legal approach may include the creation of institutional framework as a national environmental court with the mandate of contributing to enhancement of environmental protection in Nigeria irrespective of conflicting economic and political interests can play a major role in redeeming and protecting the country's environment, what is the place of such court in the entire debate? This move partly draws inspiration from proposals for an International Environmental Court (IEC) to ensure better global environmental protection first made at the UN Conference on Environment and Development held at Rio de Janeiro in 1992. However, since the establishment of an IEC requires the agreement of many nations (which is relatively difficult to secure) and may not reflect sufficiently the uniqueness of the African continent and its ecological situation, the idea of having a national environmental court (NEC) in African countries is generating some interest across the continent. This paper thoughtfully lends a voice in support of the establishment of a national environmental court in Nigeria. It critically assesses the desirability and justifications for such court, as it suggests that any focused legal effort at tackling human health challenges particularly in light of the COVID 19 pandemic which increases extant pressure in the socio-economic situation of the state must consider the creation of a NEC.

Keywords: Environment, NEC, Covid-19, Ecology, Environmental Court

1. Introduction

The COVID-19 pandemic draws attention to the profound disconnect that exists in modern societies between humans and their environment. As a zoonotic disease, COVID-19 is the latest newcomer in a long list of what Jared Diamond described as the 'deadly gifts from our animal friends'.[1] It is trite that human health is inextricably linked with that of animals and the environment, but this phenomenon has been exacerbated by increased rates of environmental degradation. The current COVID-19 pandemic has its origins in the inability of states in the global community to protect the forests, its wildlife and govern land use, which have led to the disappearance of the traditional buffer zones that used to separate humans from animals and their pathogens.[2] Constrained by traditional legal structures, environmental law has been unable to fully adopt an ecosystemic approach that appreciates the interconnections between the health of the earth, biodiversity, and humans. More specifically, if the hypothesis that the virus originated in a live animal market in Wuhan were confirmed, it would be a painful demonstration of the failure of existing legal regimes to protect the wildlife.[3] The possibility that the pangolin might have been an intermediary host turns the spotlight on the challenges facing the implementation and enforcement of

* **By Chidinma Therese ODAGHARA, PhD,** Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Abuja, Abuja, Nigeria. Contact details – chidinma.odaghara@uniabuja.edu.ng;

* **Henry Chukwudi OKEKE, LLM,** Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria - eattorneys2012@gmail.com.

[1] J Diamond, '*Guns, Germs, and Steel: The Fates of Human Societies'* [1997] <https://wwnorton.com/books/ 9780393 609 295> accessed 23 March 2020.

[2]UNEP Report [2016]<https://environmentlive.unep.org/media/docs/assessments/ UNEP_Frontiers_2016_ report_emerging_issues_of_environmental_concern.pdf> accessed 20 May 2020.

[3]L Duvic-Paolie, COVID-19 Symposium: The COVID-19 Pandemic and the Limits of International Environmental Law<http://opiniojuris.org/2020/03/30/covid-19-symposium-the-covid-19-pandemic-and-the-limits-of- international-environmental-law/> accessed 20 May 2020.

environmental laws at both local and international level. For instance, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), transferred all eight pangolin species to its Appendix I, prohibiting their international commercial trade, in 2016, yet pangolins remained the world's most trafficked mammal.[4]

This paper attempts to lend a positive and thoughtful voice in support of the establishment of a NEC that will broadly aim to protect the nation's environment – the physical basis of life and all development on earth. It critically assesses the desirability and justifications for having a NEC. It goes on to try at defining suitable structure and procedures for the court that could make it an effective one with respect to ensuring quality environmental protection and dispute resolution across the continent. Thereafter, it engages considerably with the question of environmental literacy in Nigeria as a fundamental challenge to the use of legal institutional frameworks to address environmental problems.

2. The Suitability of a National Environmental Court

Addressing from relevant perspective the issue of the desirability or necessity, or not, of a NEC is paramount to achieving the aim of this work. Do relevant existing judicial mechanisms within and without the continent of Africa meet the task of a regional AEC, or do we truly need a NEC to fill a critical gap in the framework for environmental protection in Nigeria? It is trite that environmental problems are mostly polycentric in nature. Environmental experts continue to stress the point that 'in nature, all ecosystems are inextricably intertwined'.[5] In fact, the principal law of ecology is that 'everything is connected to everything else'.[6] While an environmental problem may have its source in a particular place, its effect is quite commonly felt at national and supranational levels. For example, the negative effects of gas flaring in Nigeria are not only confined to local communities, but are also contributing to global greenhouse gas emissions with its attendant adverse effects on the world.[7]What this means in general terms is that the solution to environmental problems and the framework for addressing disputes arising therefrom, have to be holistic in nature if they will be effective. Already, and in support of the above line of thought, Principle 10 of 1992 Rio Declaration on Environment and Development (Rio Declaration),[8] which is widely acclaimed and accepted,[9] has made clear that the provision of effective access to judicial proceedings 'at the relevant level' is vital for properly addressing environmental issues.[10] More so, improving access to justice and environmental dispute resolution is obviously critical for realising the UN's 2030 Agenda for Sustainable Development[11] and the Sustainable Development Goals (SDGs),[12] particularly SDG Goal 16 – 'to provide access to justice for all and build effective, accountable and inclusive institutions *at all levels*.'[13] Given this fact and popular practice, as it relates to African countries and those elsewhere, the relevant levels for effective environmental protection and dispute resolution broadly speaking, is arguably tripartite in nature – the national, regional and international levels. Yet, despite the (potential) opportunities for environmental dispute resolution at the regional and international levels as they apply to African countries, why is the establishment of a NEC still relevant?

In an environmental context, national courts are primarily designed to address national environmental disputes and implement national environmental laws. More critical than the issues raised with respect to national courts, is the near-complete void of an appropriate and adequate African regional judicial forum capable of effectively

---

[4]Wildlife Justice Commission, <https://wildlifejustice.org/new-report-analyses-unprecedented-levels-of-pangolintrafficking-urging-stakeholders-to-tackle-it-as-transnational-crime/> accessed 20 May 2020.

[5] AE Dehan, 'An International Environmental Court: Should there be one?' [1992] (3) *Touro Journal of Transnational Law* 31.

[6] B Commoner, *The Closing Circle: Confronting the Environmental Crisis* (Jonathan Cape Ltd, 1972) 33.

[7] H Baumüller and others, '*The Effects of Oil Companies' Activities on the Environment, Health and Development in Sub-Saharan Africa'* (European Parliament, 2011) 23.

[8] Adopted by the UN Conference on Environment and Development (UNCED), 3-14 June 1992, (1992) 31 ILM 874.

[9] See G Händl, 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View', in C Trindade (ed), *Human Rights, Sustainable Development and the Environment* (IIDH/BID, 1992) 117, 139-140; and G Händl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (UN Audiovisual Library of International Law 2012), 6 <http://untreaty.un.org/cod/avl/pdf/ ha/dunche/ dunchee.pdf> accessed 20 July, 2019.

[10] The Influential Agenda 21(14 June 1992, (1992) 31 ILM 874) in Paragraph 39.10 has also called on states 'to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement', including through judicial means.

[11] <http://www.un.org/sustainabledevelopment/development-agenda/>accessed 20 February, 2020.

[12] <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 20 February, 2020.

[13] Emphasis added.

resolving environmental disputes in the continent. The only functional continent-wide tribunal is the African Commission on Human and Peoples' Rights (ACHPR)[14] that is responsible for the oversight and interpretation of the 1981 African Charter on Human and People's Rights[15] (African Charter). To be sure, the ACHPR has some potential for settling environmental disputes within the continent, especially when one considers its decision in the case of *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (*Ogoniland case*)[16] (in which it derived some environmental rights from established human rights provisions in the African Charter) and the fact that even non-state actors can approach it. Yet, the commission possesses certain fundamental limitations that prevent it from being a proper substitute for a NEC or being an adequate and effective environmental disputes resolution platform in Nigeria. First, being a human rights forum, it is anthropocentric in its approach, in that, it will be protective of the environment *only* when to do otherwise will directly harm humans; hence, if no human interest is directly at risk, it cannot provide protection for an engendered environment. Also, its decision is only recommendatory and not legally binding (and African countries generally have no good record of abiding by such decisions),[17] apart from the fact that its jurisdiction is generally limited to matters concerning the African Charter and does not extend to core national environmental regimes and agreements.

Furthermore, while current international dispute resolution regimes have an important role to play in addressing environmental disputes with transnational effects, they do not negate the need for an effective NEC considering their instrumental and procedural shortcomings. On the instrumental level, critics have argued that existing international institutions like the International Court of Justice (ICJ) and the World Trade Organisation (WTO) fail to give adequate regard and consideration to environmental issues, being mostly generalist in nature.[18] In fact, on an assessment of environmental litigation before international tribunals, Sands concluded that 'international courts are anthropocentric',[19] hence not very environmentally protective. This point is made obvious in the Joint Dissenting Opinion of Judges Al-Khasawneh and Simma in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*[20]where they both criticised the ICJ for neglecting to adopt a sufficiently preventive approach to the environmental problem that was the subject of litigation.[21] Also, while the ICJ has severally stressed the need for a healthy environment, it has clearly held that such concern is not sufficiently to ban the use of nuclear weapons.[22]

Given this situation, in relation to major environmental disputes relating to Nigeria, it is argued that the establishment of a specialised court with a dedicated environmental jurisdiction in the style of a NEC will ultimately raise the profile of environmental protection and dispute resolution within Nigeria.[23]

Ascribing low priority to environmental cases is common with national courts in Africa, but the rise of specialised environmental courts at that level have seen the tides turn in terms of the environment being given the much needed special attention it deserves.[24] Recent advancement recorded at national level can be traced to the emergence of a few specialised environmental courts that have sprung up in some African countries – e.g. the Kenya Environmental and Land Court, and the Hermanus Environmental Court in South Africa. An important criticism of the above position is the argument that national environmental courts overlook the difficulty of clearly distinguishing between the 'environmental' and 'non-environmental' aspects of a dispute.[25] It is argued that there

---

[14]G Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?* (South African Institute of International Affairs (SAIIA) Occasional Paper 209, 2015) 5-7.

[15] 27 June 1981, 1520 UNTS 217.

[16] (2001) AHRLR 60.

[17] African Charter, art 45.

[18] P Sands, 'International Environmental Litigation and its Future' [1999] (32) *U Rich L Rev* 1619, 1633.

[19] See P Sands, 'Water and International Law: Science and Evidence in International Litigation' [2010] (22) *ELM* 151, 161.

[20] ICJ Judgment of 20 April 2010.

[21]*Ibid,* 25.

[22] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* opinion of 8 July 1996 (ICJ Reports 1996, 226) and *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)* decision of 25 September 1997 (ICJ Reports 1997, 7).

[23]Based on the idea espoused in: J Gillroy, 'Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of ''Environmental Sustainability'' in International Jurisprudence' (2006) 42 *Stanford Journal of International Law* 1, 23 - 31.

[24] For instance, see the South African example: Stop Illegal Fishing, 'Environmental Courts Prove to be Effective' (Case Study Series 2).

[25]P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn: OUP 2009) 250.

is hardly a dispute that is exclusively 'environmental' in nature without some connections to trade, human rights, investment or general public law and the likes.[26] In such a situation, critics of specialist environmental courts have taken the view that generalist courts are more suited than specialist courts, given that a more multidisciplinary approach would be required.[27] While there is some merit to this argument, it arguably neither outweighs the need for a NEC, nor significantly impedes the potential for its success.

Indeed, the presence of other non-environmental aspects in a dispute would not necessarily prevent an environmental court from hearing and deciding on the environmental element in the case especially where it is a major aspect of the dispute. This point is well supported by the 'explosion' of environmental courts at the national level since the year 2000 – 1,200 of such in 44 countries at the state/provincial level and still growing– considering the relative success of the specialised approach at that level which may well be transposed to the regional level.[28] Moreover, this criticism has hardly constituted a major hurdle for specialised regional human rights courts that for long have handled cases from which issues from various fields of the law may be raised. These courts are still able to, successfully in general, distil and decide on the human rights aspect of the dispute, and even demonstrate the human rights implications of issues that traditionally fall under other fields of law, where they exist in the dispute.[29] There is hardly a strong reason why the same would not be the reality of a future NEC. Determining environmental matters in a non-specialist court still has some fundamental drawbacks that make a NEC relevant. Building the opportunity for wide public access into the framework of a new NEC is a more feasible option and will be most useful in resolving environmental disputes within a country whose citizens and non-state actors frequently suffer environmental harm.

Given the import of the internationally recognised principle of *subsidiarity* in an environmental context, environmental issues should be addressed at the most immediate or local level that can ensure their effective and speedy resolution. Essentially, subsidiarity refers to 'the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country',[30] or at the continental regional level rather than the international level. The principle bears close relations with the concept of 'shared responsibility', such that it is 'not so much of a choice of action at one level to the exclusion of others but, rather, a mixing of actor and instruments at the appropriate levels'[31] in order to holistically guarantee a protected environment. In other words, there are environmental disputes emanating in Nigeria that will be best and more effectively handled at the national rather than the regional or international levels of governance.

3. Place of NEC in the Debate on Ecological Problems as a Threat to Human Health

Basically, the proposal to establish a NEC reflects a logical desire to enhance environmental governance in Nigeria through an institutional framework that will assume adjudicatory responsibility over environmental matters at the national level in such a way that the governance regime will be broadly perceived as coherent and decisive. However**,** the call for a NEC whittles down in the face of perennial problems associated with access to public health which has become exacerbated as a result of the current COVID-19 pandemic in Nigeria. Poor management of public health and increase in poverty rate are major twin factors that are likely to limit access to justice and public participation in the process leading to effective environmental governance through a NEC. Although twenty-first century Nigeria has witnessed sustained demand for its natural resources, the country continues to lack effective capacity to link the environment (nature), economic growth and effective public health delivery as essential elements in poverty reduction strategies. If the issues related to impact of environmental degradation on public health are not thoroughly addressed through policy making and implementation in Nigeria, then the potential benefits of having a NEC which is part of the institutional framework to boost environmental governance in the country may be far-fetched. Procedural requirements for the implementation of policies that seek to address the challenges of environmental degradation on human health has to be clear, robust, streamlined and easily understandable.

[26]P Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (OECD Global Forum on International Investment, 2008).

[27] R Jennings, 'Need for an Environmental Court?' [1992] (20) in *Environmental Policy and Law* 312, 313.

[28] GR Pring and CK Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP, 2016) iv.

[29] See generally, OW Petersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?* [2008] (21) (1) in *Georgetown International Environmental Law Review* 73.

[30]<http://dictionary.cambridge.org/dictionary/english/subsidiarity> accessed 20 February, 2020.

[31]Fifth Environmental Programme of Action (OJ 1993 C138/1) Chapter 8.

The creation of a NEC without a decisive and positive attempt at improving the State's response to public health challenges posed by environmental degradation may result in the emergence of phenomenon that includes the following:

a. As an important element of national development, public health not only functions to provide adequate and timely medical care but also track, monitor, and control disease outbreak.[32] The Nigerian health care system is poorly developed and has suffered several challenges which may make resort to the use of an institutional framework as a specialised court to address ecological problems as a threat to human health an attempt at putting the cart before the horse. So far, there has been a lack of adequate and functional surveillance systems for establishing the nexus between environmental harm and damage to human health. In order words, the absence of a tracking system to monitor the outbreak of communicable diseases, bioterrorism, chemical poisoning, etc and establish adequate connection with environmental degradation creates a huge gap in the use of a specialised court to boost environmental protection.

b. If eventually established, a NEC that is overwhelmed by multiple environmental disputes emanating from all parts of the country, and resulting in lengthy delays and ultimately, denial of justice.
c. A situation where access to justice is limited for environmental victims because potential litigants are restrained by the high costs for litigants in court fees negates the underlying principles behind the establishment of the court in the first place. Poverty is rife in Nigeria; therefore, sundry expenses such as legal fees, expert witness fees, and security bonds is likely to be above the means of most private litigants, and as such environmental victims seeking redress in the NEC might lack unfettered access to justice in the absence of *pro bono* services.

4. Conclusion and Recommendations

In conclusion, establishing a NEC may not necessarily be the only means to boost environmental governance in Nigeria, but it is our submission that the court's presence may actually pave way for an improvement in public awareness on environmental issues in Nigeria, especially, where the government takes proactive steps to promote environmental literacy as a means of improving public participation in environmental decision making at all levels of government across Nigeria. The import of the internationally recognised principle of *subsidiarity* cannot be jettisoned in the current context. The principle warrants that environmental issues should be addressed at the most immediate or local level that can ensure their effective and speedy resolution. Essentially, subsidiarity refers to 'the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a large area,[33] or at the continental regional level rather than the international level. The principle bears close relations with the concept of 'shared responsibility', such that it is 'not so much of a choice of action at one level to the exclusion of others but, rather, a mixing of actor and instruments at the appropriate levels'[34] in order to holistically guarantee a protected environment.

To address potential challenges to the successful application of an institutional framework as a NEC to address the current environmental and public health realities in Nigeria, it is suggested that there is nothing wrong with creating a court with jurisdiction over environmental issues that are peculiar to Nigeria. Nonetheless, in the long term, the future of the proposed NEC is dependent on the will of all stakeholders, to commit towards the improvement of environmental literacy in the country by massive provision of environmental education. In order to address the challenge posed by massive environmental illiteracy in the country, the proposed court may consider adopting a user orientated approach from inception. The user-oriented approach entails the elimination of high court costs which makes litigation in environmental matters expensive, and consequently limits access to justice by environmental victims. Though adequate funding is essential in order to maintain a functional court for the environment; for the sake of promoting its key mandate which is to advance the ideals of environmental justice in Nigeria, the proposed NEC should consider adopting a judicial approach that responds to the needs and expectations of potential litigants without imposing huge financial responsibilities. Generally, the approach entails a simplified court system that avoids technicalities and high cost as it seeks to provide legal services to meet the need of users. With respect to the question of a user-friendly approach by the proposed court, it is worthy to note however that generally, court fees are just a figment of the entire litigation cost. Legal fees and expert witness fees, are the other part of litigation cost which is borne by litigants. These fees are usually determined by custom and practice in the industry, and not the court. Accordingly, the question of reducing cost for litigants may not be adequately addressed by the proposed court alone. However, as legal fees and experts' fees are significant

[32] Menizibeya Osain Welcome, The Nigerian health care system: Need for integrating adequate medical intelligence and surveillance systems, J Pharm Bioallied Sci. 2011 Oct-Dec; 3(4): 470–478 < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3249694/> last accessed 20th May, 2020.
[33] <http://dictionary.cambridge.org/dictionary/english/subsidiarity> last accessed 20.12.2019.
[34] Fifth Environmental Programme of Action (OJ 1993 C138/1) Chapter 8.

to litigation cost, this paper suggests that the court practice and procedure are key to determining the cost of litigation. Therefore, in order to effect change in the nature of litigation costs, the practice rules and procedures for the court should be made with the intention of reducing the overall cost of litigation for potential users. Bearing in mind the fact that the proposed NEC is a national institution however, it is possible to argue that such court will by nature of its status, become an expensive court. Irrespective of how much the proposed court may seek to control litigation costs; there are necessary expenses which flow from logistics and the issue of reducing litigation cost may be difficult to address totally. The massive gap in environmental literacy in Nigeria is a potential challenge to the creation of an institution such as the NEC. For the NEC to attain a significant position in the environmental governance regime of Nigeria, a major section of the population across the country must be knowledgeable of the existence of environmental pollution challenges due to human activities, the role of citizens in efforts to tackle environmental challenges, significance of an institution as the proposed NEC, and procedures of such institution. Through addressing the environmental literacy challenge, citizens can become aware and effectively participate in the process for accessing the right to environmental justice which the proposed NEC seeks to provide. Environmental literacy is also key to the successful implementation of the law on environment in Nigeria.