

## **CONSTITUTIONAL RIGHT TO ENVIRONMENT IN NIGERIA: A CRITICAL APPRAISAL<sup>1</sup>**

### **Abstract**

*Environmental degradation is bound to increase as long as human population increases and new technologies are invented. In order to arrest the problems of environmental degradation, a number of approaches have been adopted. Among these approaches are the incorporation of environmental protection policies into development programs, the passage of comprehensive environmental legislation covering all aspects of the environment, and the incorporation of environmental provisions in the constitutions of most countries. Unfortunately, while some countries make environmental protections in their constitutions enforceable, others do not. In Nigeria, indirect environmental provisions were first included in the 1979 Constitution. The direct environmental provision was embedded in the 1999 Constitution. However, Chapter II of the 1999 Constitution, which contains the environmental provisions, is unenforceable. While the Nigerian courts have done nothing tangible to enforce the provisions of the constitution on environment, on the other hand, the Indian courts have taken positive steps to enforce provisions of the Indian Constitution on environment.*

**Keywords:** Human Rights, Constitution, Environment, Nigeria

### **1. Introduction**

The concernment of the environment to man cannot be over emphasized as what affects the environment either positively or negatively, ultimately affects man, animals and plants that exist therein. The prodigious growth in industrialization and human population in states worldwide including Nigeria have led to serious environmental problems as the environment on a daily basis is degraded. This account for the severe climate change in the atmosphere as well as the various hurricanes which have ravage countries like the United States of America, Nigeria has not been left out with the activities of oil companies in the Niger Delta region where oil provides nearly 80% Nigeria's national revenue with Shell Petroleum Development Company operating in the Niger Delta as the largest producer of Nigeria's oil. This accounts for more than 50 percent of the country's oil output and for more than 20 years, oil spills and gas flares have destroyed the environment and endangered the health of the indigenous people of the oil producing communities in Nigeria. The emissions and oil spillages has rendered farm lands barren, destroyed aquatic life as well as rendered the water from rivers and streams undrinkable. There arises the need to press for environmental rights which can be used as a platform to ensure that our environment is protected from wanton pollution as this has been noted thus. As the oil producing states are usually riverine, oil spills contaminate their water which is their main source of survival and makes unfertile the little land they have. Where the environment is properly managed and taken care of the value of man's life increases; however, where the environment is polluted. The side effects on man and other living creatures are often grave as can be seen in the Niger Delta region where there presently exists an unprecedented crisis in the region. As a result of the degradation in the Niger Delta region, there presently exist unrest in the region which can be attributed to the fact that there appears to be no platform where the Niger Deltans can canvass for their environmental rights which can be used to enforce the protection of the environment. This article attempt to examine the various laws that have been put in place to protect the environment from pollution and to find out if they are adequate enough to provide a solution and if not proffer, a solution for environmental rights to be recognized not only Constitutionally but also judicially which would in the long run be a medium for settling the crises currently pervading the Niger Delta region.

### **2. Definition of Key Terms**

#### **Environment**

Environment has been defined as: The totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affects the quality of people lives. Section 38 of the Federal Environmental Protection A defines environment to include: Water, air, land and all plants and human beings or animals living therein and the inter relationships which exist among these or any of them. The above definitions show a relationship among man, other living creatures and the environment as man's activities on the environment determine the quality of life man and other creature would have. There are different types of pollution which have emanated as a result of the various activities carried out by man and these pollutions have had a deleterious effect on the environment. Pollution has been defined as: The introduction by man directly or indirectly of substances or energy into the environment resulting in deleterious effects of such nature as to endanger human health, harm living resources and ecosystems and impair or interferes with amenities and other legitimates uses of the environment.

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## **Pollution**

Pollution according to Black's Law Dictionary is defined as: The contamination of the environment by a variety of sources including but not limited to hazardous substances, organic wastes and toxic chemicals.

### **Air Pollution**

This occurs where there is the introduction of foreign matter in the air which becomes detrimental to the health and welfare of the people. The source of air pollution are traced to man's activities like gas flaring emissions from oil and manufacturing industries, motor vehicles and incinerators. This often produces effects like acid rain, climate change, respiratory problems and cancer amongst other effects.

### **Water Pollution**

Pollution of water occurs harmful effluents are introduced into oceans, seas, rivers, streams, Lakes, well water and broken water pipes. These water pollutants come in various forms like deoxygenating materials e.g. sewage and other organic wastes, farm wastes, oil spillages, fertilizers etc. in Nigeria, water pollution has been identified as the second highest potential for future negative impact on the Gross Domestic Product (GDP) which puts 40 million people at risk as oil spillages has taken us toll on the riverine area of the Niger Delta region. This pollution has caused health problems to the people living around these streams as well as denying them their main source of income which is mainly fishing.

### **Land Pollution**

Man's activities on the land through the dumping of harmful waste materials which are dangerous to vegetation and animal led to pollution of land. These pollutants come in the form of chemical inputs, non-soluble and non liquid materials as well as hazardous substances and oil spillages which makes the land barren.

The effects of such pollution especially on water and land which occurs as a result of oil spillages cannot be over emphasized as it has led to vast tracts of agricultural land being laid to waste and contaminated the riverine waters making the water undrinkable as well as destroying aquatic life.

### **Noise Pollution**

This refers to noise which is capable of creating ear discomfort to people and in Nigeria can be traced to the economic growth of the people whereby the common man is exposed to different sounds coming from buses, the loudspeakers by the road side and the neighbour who loves to play his music loud. These noises are carried out on a daily basis and when exposed to such noise for a continuous period, can lead to severe health problems.

## **3. Environmental Right as Human Right**

Human Rights are defined as: Rights that are considered by most societies to belong automatically to everyone. Human rights also refer to those demands and claim the individuals or groups of people are entitled to enjoy as human beings and are usually guaranteed by the State. Human rights are classified into three categories, the first generation rights refer to civil and political rights, which include freedom of speech, press etc the second generation rights refer to right to education, work, social security etc. These two generational rights can be found in most Constitutions of many countries. This third generation rights the most recently recognized category amongst which is the right to a healthy environment, it also includes the right to development and are collective rights rather than being individual rights. Despite numerous international instruments pertaining to issues like human rights, world peace, etc there are really no binding international agreements where environmental rights are delineated and conceptualized as rights per se. As a result of this, environmental right continues to suffer neglect. It thus becomes very difficult for the aggrieved in some countries to use the platform of environmental rights to get redress, except to channel it through the human rights platform. There is a general consensus however that environment rights and human rights are interlinked because where the environment is endangered, it would have an effect on human beings which translates to a breach of right to life which is fundamental human right. The question that bothers one here is that why is it not possible for environmental rights to be used as a platform to press for the protection of the environment in Nigeria. This shall form the basis for discourse

## **4. The Nigerian Experience**

In the Niger Delta region, the environment has been subjected to prospecting and exploration for crude oil which has formed increased environmental hazards as noted by Atsegbua: Roads are constructed through farmlands, the water is polluted, gas flares cause noise, heat, destruction of farm produce and the land, severe damage is also caused to the environment by oil spill accidents, for example death of marine and terrestrial organisms, disturbance of the ecosystem resulting in socio-economic disequilibrium. The Niger Delta region has also witnessed air pollution in terms of gas flaring and acid rain which affects the soil and causes damage to human beings, plants and buildings. The land has also witnessed the dumping of harmful waste materials such as chemical input which are dangerous not only to vegetation and agricultural production but to man also. The Koko toxic waste incident of 1988 is an example of such land pollution where an Italian shipped to the port of Koko 4,000 tons of industrial and nuclear waste. The Nigerian health officials while the repatriation of the wastes was being carried out reported

incidents of serious health injuries to residents of Koko. Three workers suffered severe chemical burns while moving the wastes and nineteen residents died after eating farm products that were contaminated by the toxic chemicals. The region is also inundated with water pollution with oil pollution being the major pollution in the riverine areas of Nigeria. According to the late Professor Ambrose Alli, he stated that: As a result of oil loses, vast tracts of agricultural land have been laid waste, thus becoming unproductive, surface water and river courses are variably contaminated and polluted rendering the water undrinkable and the aquatic life is destroyed. The result is great hardship for the inhabitants who become impoverished.

The pollution caused by oil spillages not only cause health hazards to human beings but cause fire outbreaks and damage the ecosystems in the environment. Other various acts of pollution also extend to other regions in Nigeria however the impact of environmental degradation is higher in the Niger Delta Region. The effect of the degradation of the environment cannot be adequately quantified as most of the oil producing communities in Nigeria do not reflect the gold mine they have rather, their communities show miserable poverty and neglect by the Government, polluted streams and rivers where aquatic life have been destroyed as well as barren lands which are unproductive. A graphic detail can be seen from a newspaper publication on the present state of Oloibiri a small community in Bayelsa where oil was first discovered in 1956, the paper reported on the effect of the oil finds as follows: Where we got was earth tremors during the exploration stage, teenage pregnancies and broken homes. These were however immediate and short problems term. The worst oil spillage was yet to come. When we had our first oil spillage, we did not know what it was-since we did not know what happened, we kept drinking from polluted streams. Some of us even ate fishes killed by the crude oil, soon crop yield started deteriorating and some farmlands stopped supporting plant. The devastation was terrible and the death toll imaginable. In Oloibiri today, there is no cottage hospital. The publication further reported that: ‘Oloibiri represents misery, abject poverty and utter neglect and that; there is, Almost zero government presence as well as infrastructural development in such historic town’

In 1990, as a result of the degradation in Ogoni land by Shell's activities, Ken Saro-wiwa, an international poet, author and human right activist mobilized his indigenous people of Ogoni land to lead a non violent protest against Shell's activities in their land. Ken was subsequently hanged with eight other activists on trumped up charges which was upheld by the Civil Disturbances Special Tribunal in 1995 under the then General Sani Abacha. In reviewing the environmental situation in Ogoni land before his death. Ken Saro-wiwa –succinctly painted a gory picture: The environment in Ogoni land has been completely devastated by three decades of reckless oil exploitation or ecological war fare An ecological war is highly lethal, the more it is unconventional. It is homicidal in effect. Human life, flora, fauna, the air fall at its feet and finally the land itself dies. It appears to the writer that the late Ken Saro-wiwa had a foreknowledge of what the present situation in Nigeria would be. Presently, the ecological warfare has escalated with serious fighting within the Niger Delta militants and the Government and has further resulted in the various kidnappings of expatriates and Nigerians alike which have been turned into a big time business for the restive youths of the Niger Delta. From the various accounts mentioned above, it can be seen that the effects of oil pollution is devastating. There is therefore the Need to examine the existing laws to find out whether solutions can be found and if not, what has hindered the enforcement of these laws as well as the examination of the 1999 Constitution and the judicial arm of Government with a view to finding out whether a constitutionally recognized environmental right can be the way out to the protection of the environment.

## **5. Existing Legislation on the Protection of the Environment**

We have several Legislations which have been enacted with a view to regulating and protecting the environment some of which include:

### **Oil in Navigable Waters Act 1968**

The preamble to the Oil in Navigable waters Act which enacted in 1968 states as follows: An Act to implement the terms of the International convention for the prevention of pollution by the sea by oil from 1954 to 1992 and to make provision for such prevention in the navigable waters of Nigeria This Act is said to be the first attempt to deal with the prevention and control of pollution by oil in Nigeria Section 1 of the Act prohibits the discharge of certain oils into the sea areas. Section 1 (1) further states that: If any oil to which this section applies is discharged from a Nigerian ship into a part of the sea which in relation to that ship, is a prohibited sea area or if any mixture containing not less than 100 parts of oil to which this section applies is discharged from such a ship into such a part of the sea, the owner or master of the ship shall subject to the provisions of the Act be guilty of an offence under this section. Certain oils is defined by the Act to include, fuel oil, lubricating oil and heavy diesel oil Section 2 (1) provides that, areas designated by or in accordance with the Act shall be known as prohibited sea areas while schedule to the Act states that, sea areas shall include all sea areas within 50 mile from land and outside the waters of Nigeria and those outside the areas specified in the schedule. Section 2 (3) empowers the Minister if he considers it necessary to designate by order any area of the sea outside the territorial waters of Nigeria and outside the areas specified in the schedule of the Act as a prohibited sea area for the purpose of protecting the coast and territorial waters from pollution by oil. Section 3 (1) makes it an offence if any oil or mixture containing oil is discharged into water from any vessel or from any place on land or from any apparatus used for transferring oil from or to

any vessel (whether to or from a place on land or from another vessel). Section 5 provides that all Nigerian ships shall be equipped with facilities for the purposes of the prevention of oil pollution. Section 5 (5) states that a contravention of section 5 shall make the owner or master of a ship to be guilty of an offence. Penalties for the above offences in respect of sections 1, 3 and 5 are provided for in section 6 which states that, where a person has been found guilty, such a person shall be convicted by a High Court or Supreme Court and in the case of any court of inferior jurisdiction be liable to a fine which shall not exceed 2,000.00 Naira. It has been noted that the above provision is vague as the payment of a fine apart from being the only punishment prescribed is not defined by the law. It is also noted that the above fine which should not exceed N2,000.00 has also been criticized for being abysmally low as rather than act as a deterrent, it encourages an offender to violate the provisions of the Act.

Despite the provision for penalties, there is however special defences provided in the Act for an offender to be able to use as defence and these are provided for in section 4. Where an offender is charged for an offence Under Section 1 and 3 of the Act, the offender can raise a special defence by proving that oil or mixture was discharged for the purposes of securing the safety or for preventing damage or destruction of vessel or cargo or for saving life. These defences will avail anyone if any of the above factors occurred which led to oil spillage thus a ship owner or master will not be held liable in the event any of the above factors occur. Another defence is the defence of accident, an offender can escape liability if he can prove that the oil escaped accidentally and reduce as a result of damage to the vessel or leakage and that all reasonable and urgent steps were taken to curtail the discharge and reduce its impact on the environment. It is also a defence to prove that the oil was contained in an effluent container produced by operations for the refining of oil and that it was not reasonably practicable to dispose of such effluent otherwise than by discharging it into prohibited water. Another defence which can be pleaded by the polluter is where the discharge from a place on land was caused by the act of a third party without the express or implied consent of the occupier. The Oil in Navigable Waters Act has been criticized as a result of the above defences as being too many and has thus provided loop holes through which an offender may escape liability. There is therefore the need for a review of the Act in terms of clear provisions which would provide for punitive penalties which would go a long way to serve as a deterrent. Section 12 of the Act provides for the consent of the Attorney General to be obtained before a suit can be prosecuted. It is submitted that the procedure for obtaining such consent can be cumbersome due to the slow bureaucratic nature of the Federal Government Office and has been noted by Salu to waste a lot of time, energy and resources.

### **Petroleum Act**

The Petroleum Act vests in the Minister of Petroleum Resources the power to make regulations for the prevention of pollution of water courses and the atmosphere The Act imposes an obligation on a holder of an oil exploration license, oil prospecting license or oil mining lease to pay a fair and adequate compensation for the disturbance of surface or oilier rights 'to any person who owns or is in lawful occupation of the licensed or leased lands in addition to any liability for compensation to which he may subject to under any other provisions of the Act. The term fair and adequate compensation is imprecise as it tends to bring about a misunderstanding as to what the term could really mean to both parties as it does not bring about a concrete interpretation of what can be said to be a fair and adequate compensation. Critics are of the opinion that the Petroleum Act does not really focus on pollution in its provisions as an item to be controlled therefore, reliance as to pollution is mostly gotten from the Petroleum (Drilling and Production) Regulation 1969 for an effective enforcement on oil pollution,

### **Petroleum Drilling and Production Regulations**

The regulations contain provisions relating to the prevention of pollution from oil exploration activities thus the licensee or lessee by virtue of Regulation is expected to pay adequate compensation where he exercises his rights in an unreasonable manner which interferes with the exercise of any fishing rights person who is injured by the exercise of such rights. Regulation states that: The Licensee or Lessee shall adopt all practicable precautions including the provision of up to date equipment approved by the Chief Petroleum Engineer to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high sea by oil, mud or other fluids or substances which might cause harm or destruction to fresh water banks or marine life and when any such pollution occurs or has occurred, he shall take prompt steps to end it.

Regulation 36 also provides that: A licensee or lessee shall maintain all apparatus and appliances for use in his operations and all boreholes and wells capable of producing petroleum in good repair and condition and carry out all his Operations in a proper and workman-like manner in line with regulation and other relevant regulations and practices accepted by the Head of the Petroleum Inspectorate as oil field practice as well as take all steps practicable to control the flow and to prevent the escape or avoidable waste of petroleum discovered or obtained from relevant areas to prevent damage to adjoining petroleum bearing strata, to prevent the entrance of water through boreholes and wells to petroleum bearing strata, to prevent the escape of petroleum into any water, well, spring stream, river etc and to cause a little damage as possible to the surface of the relevant areas and to trees, crops, buildings structures and other property thereon. In furtherance of ensuring that the environment is drone pollution, Regulation 40 of the Act provides that: The Licensee or lessee shall drain all waste oil, brine and sludge or refuse from all storage vessels, boreholes and wells into proper receptacles constructed in compliance

with safety regulations made under the Act or any other applicable regulations and shall dispose thereof in a manner approved by the Head of the Petroleum Inspectorate or as provided by any other applicable regulations. The above provision is to further ensure that oils and wastes are not dumped discriminately. A notable author has decried the imprecise wording of so many terms such as ‘proper and workman like manner and all steps practicable as the lack of legal definition do not aid the effective implementation of this Act.

### **Oil Pipeline Act 1965**

The Act relates to pollution arising from corrosive pipelines or leakages from pipelines laid in the distribution, marketing and transportation of crude oil. A licensee is under an obligation to pay compensation to any person who suffers injurious affliction, loss or damage as a result of the exercise conferred on the license, leakage or breakage of an oil pipeline or any ancillary installation. The Act, it has been noted with respect to the term ‘injurious affliction’ does not offer much by way of interpreting what the term means and this failure has led to parties going on a voyage of discovery, each time seeking to determine what is a fair and adequate compensation for a person whose interest is injuriously affected. In furtherance of ensuring that the environment is Hum pollution, Regulation 40 of the Act provides that: The Licensee or lessee shall drain all waste oil, brine and sludge or refuse from all storage vessels, boreholes and wells into proper receptacles constructed in compliance with safety regulations made under the Act or any other applicable regulations and shall dispose thereof in a manner approved by the Head of the Petroleum Inspectorate or as provided by any other applicable regulations, The above provision is to further ensure that oils and wastes are not dumped indiscriminately, A notable author’ has decried the imprecise wording of so many terms such as ‘proper and workman like manner’ and ‘all steps practicable’ as the lack of legal definition do not aid the effective implementation of this Act. Section 6 (3) states that: The holder of a permit to survey acting under the authority of section 5 of this Act shall take reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable tress thereon, shall make compensation to the owners or occupiers for any damage done under such authority and not made good. Section 7 (4) states that no person other than the holder of a license shall construct, maintain or operate an oil pipeline. Section 1 (5) states that anyone who contravenes subsection be guilty of an offence and shall be liable on conviction for a term of thousand imprisonment not exceeding two years or to a fine not exceeding one thousand or to both such imprisonment and fine.

### **Federal Environmental Protection Agency Decree 1990**

The Koko toxic waste incident of 1988 awakened the then Federal Military Government of Nigeria to promulgate the Federal Environmental Protection Decree now Act which has been described as a great step towards improving other laws governing pollution and other forms of environmental degradation. The Am contains comprehensive provisions on criminalization based on the discharge of hazardous substances in the air, water and on land with penalty for offences ranging from a fine on N100,000.00 or ten years imprisonment with respect to an individual, and in respect of corporate bodies with a fine of N500,000.00 and an additional fine of N1,000.00 for every day the offence subsists. Section 22 provides for spillers not to be only liable to penalties which are stated in Section 21 but also be liable for the cost of removal which includes any cost which may be incurred by any Government body or agency in the restoration or replacement of natural resources and also be liable for costs of third parties in the form of repair, restoration, restitution or compensation. Section 21 (2) states that the owner or operator of a vessel or onshore facility from which there is a discharge in violation of section 21 of this Act shall to the fullest extent possible, act to mitigate the damage by: giving immediate notice of the discharge to the Agency and any other relevant agencies beginning immediate cleanup operations following the the best available clean-up practice and the removal methods as maybe prescribed by regulations made under section 23 of this Act and promptly complying with such other decisions as the Agency may from time to time, prescribe. Sections 26 and 27 provides for its enforcement powers where any authorized officer is empowered without a warrant to investigate and examine documents or any appliance, device or item used in relation to environmental pollution and also to arrest any offender. Anyone who obstructs any authorized officer in the exercise of the powers conferred on him by FEPA shall be guilty of an offence and be liable to a fine not exceeding N500,000.00 or to imprisonment for a term not exceeding ten years or both. The Federal Environmental Agency has been replaced with by Federal Ministry of Environment but is vested with all powers to execute and enforce the FEPA Act. The FEPA Act is a step in the right direction in the sense that every polluter is charged with enormous responsibilities with the aim of ensuring that the pollution does not occur again.

### **Harmful Waste (Special Criminal Provisions) Act 1988**

This Act creates the offences of carrying and dumping of harmful waste on any land., territorial waters and matters relating thereto. It is opined that oil pollutants like diesel and fuel apparently come within the definition of ‘harmful wastes’ under the Act in view of their harmful hazardous and toxic capabilities, for instance Section 6 (a) and (b) provides that any person found guilty of a crime under Sections 1-5 of the Act shall be sentenced to life imprisonment and any carrier (vessel) or land on which the harmful waste was deposited or dumped shall be forfeited. It is pertinent to note that though Nigeria has a plethora of laws as can be seen from above which

provides for the protection of the environment. It is however noted that these laws are either inadequate or ineffective to forestall the present degradation that currently occurs in the Niger-Delta. FEPA for instance has been noted not to have in its list oil as a hazardous substance. thus in an environmental claim arising from damage occasioned by the discharge of hazardous substance in water, the claimant can only succeed if the discharge of the said substance is in harmful quantities. This means that expert evidence is required to prove that a discharge caused actual harm before liability can accrue to the discharge, it is therefore doubtful if victims of oil pollution can find succour under the various Acts especially where majority of the populace live increasingly impoverished lives.

#### **Constitution of the Federal Republic of Nigeria 1999 (as amended)**

Unlike the 1979 Constitution that did not contain any provision relating to the environment the 1999 Constitution in its chapter II which relates to the Fundamental Objectives and Directive Principles of State Policy makes provision for the environment by directing the State in its section 20 to protect and improve the environment and safe guard the water, air and land, forest and wild life of Nigeria. The presupposes that the Government is expected to ensure that facilities are put in place to ensure a conducive, healthy and clean environment for its citizens to live in. The Fundamental Objectives Directive Principles of State Policy objectives are expected to be pursued by the Government to realize national ideals by prescribing the state's definite duties towards its subjects. Failure to perform these duties should entitle one to enforce this provision however this cannot be so as all the provisions contained in chapter II are neither enforceable or litigable by virtue of section 6 (6) (c) of the 1999 constitution which ousts the jurisdiction of the Court. Section 6 (6) (c) provides that: The Judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any Issue or question as to whether any act of omission by any authority or person or 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. This non justifiability does not augur well for the environment as it becomes difficult to compel the State to perform its duty.

#### **African Charter on Human and Peoples Rights**

Article 24 states that 'All people shall have the right to a general satisfactory environment favourable to their development The Charter by virtue of this provision enjoins member of States to exercise their duty in bringing about adequate development in their States thus recognizing the need for sustainable development. The enactment of the Charter into our laws by virtue of Section (1) of the 1999 Constitution via authorization has enabled the African Charter to be relied upon for the purpose of enforcement by Nigerians. However, where provisions of the African Charter are in conflict with the 1999 Constitution, especially with chapter II of the FODSPSP, the Charter cannot be said to be effective. In *Gen. Abacha v Gani Fawehinmi*<sup>2</sup> the respondent, a legal practitioner brought an application challenging his arrest and unlawful detention as he was unlawfully arrested and detained by the State Security Service without any formal charge which constituted a violation of his fundamental rights guaranteed under section 31, 32 and 33 of the 1999 Constitution and Articles 5, 6, and 12 of the African Charter on Human and Peoples Right (Authorization and Enforcement) Act. The Supreme Court in its judgment stated the status of the African charter vis a viz the Constitution of Nigeria where it held that, the African charter is not superior to and does not override the Constitution of the Federal Republic of Nigeria.

It is suggested that for enforceability under the Charter, one may have to link it with section 33 of the 1999 Constitution which refers to the right to life which has been recognized by our Courts in *Jonah Gbemire v Shell Petroleum Development Company Nigeria Limited & Ors*<sup>3</sup> where the Federal High Court upheld the applicants prayer that the Constitutionality guaranteed Fundamental rights to life and dignity of human person provided in section 33 (1) and 34 (1) of the Constitution of Federal Republic of Nigeria 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Right (Ratification and Enforcement) Act, 2004 inevitably includes: The right to clean, poison free, pollution free and healthy environment. It also has been noted that the African Charter Commission on Human Rights does not give binding decisions as its competence is confined to promotional activities and making recommendations to the Assembly of Heads of States, a body whose membership has been said to comprise the worst violators of human rights in Africa.

## **6. Challenges**

### **Poor implementation by Regulatory Bodies Enforcement of Laws to Protect the Environment**

As a result of the above analysis, one would find out that an effective implementation of statutes like the FEPA

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<sup>2</sup> (LOR/28/4/2000) SC)

<sup>3</sup> (2005)

Act and Harmful waste (Special Criminal Provision) Act is hampered by the lack of manpower, inadequate funding and corruption that has been a difficult virus to remove from the Nigerian system. This has unfortunately not helped matters in terms of pollution control. In terms of effective monitoring, implementation and enforcement, it has been noted that the Nigerian environment has suffered environmental degradation and abuse which are inflicted by many multinational company who are presently engaged in the exploitation of oil, minerals, timber and other national resources and not much is done to bring them to book. The lack of judicial activism by Nigerian Courts has also played a vital role in stagnating the enforcement of an individual's rights with respect to obligations of the Government towards its citizens in chapter II as has been seen in *Okogie v Lagos State Government*<sup>4</sup>. The Court has also refused to disregard the issue of locus standi which closes the gates to individuals looking to the Courts for redress. It is observed that economic consideration is often taken into consideration by the Judiciary. This is under the guise of providing and enabling environment for foreign investors to participate in the development of the economy. This, as a result, has exerted untold hardship on the citizens of the Niger Delta Region. It is thus suggested that a review of the 1999 Constitution should include the upgrading of the environmental objectives stated in chapter II of the FODPSP to constitutional fundamental rights in Nigeria which would aid the development of the environment by ensuring a healthy and clean environment to live in.

### **Lack of Judicial Activism**

The judiciary has also not helped matters as Nigerian Courts have by their rigid adherence to the 'self executive cannon' of interpretation refused to give full effect to the FODPSP provisions by construing them as non justifiable rights as they have been declared as mere directives and lofty objectives of the states that cannot be elevated to the status of substantive rights except through legislative intervention. In *Okogie v Lagos State Government*<sup>5</sup> an application by the plaintiff challenging a circular issued by the Lagos State Government purporting to abolish private schools in Lagos State on the ground that infringed on the Constitutional rights to receive and impact education guaranteed under Section 36 of the 1979 Constitution countered by the defendant who argued that the implementation was in conformity with the FODPSP as contained in section 18 of the 1979 Constitution. In resolving the issues raised by both parties, the Court of Appeal held that, the FODPSP of the 1979 Constitution were non-justifiable and must conform to and run subsidiary to the fundamental rights guaranteed by the constitution and as such an individual cannot rely on the FODPSP to assert any legal right. This position has been reiterated in *A.G Ondo State v A.G Federation of the Supreme*<sup>6</sup> Court held that, the provisions of chapter II of the 1999 Constitution remains non-justifiable. This decision on non justifiability is said to have its roots in the Indian Supreme Court decision in *State v Chanpakan* which held that; the Directive Principles of State policy have to conform to and run subsidiary to the fundamental rights because the fundamental rights are enforceable whereas the Directive Principles are not. Presently the stance taken by the Indian Courts have been altered due to judicial activism.

The 1999 constitution on the other hand also provides for fundamental human rights which are set out in Chapter IV, sections 33 to 46, Section 33 (1) provides for Right to life and states that: Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. The above section shows that the Constitution guarantees the right to life. This can be interpreted to mean that in terms of degradation of environment where Government fails to perform its duty in insuring that the environment is clean, this can lead to a threat to the right to life, whereby any concerned individual or group of individuals can trigger an action that the environment be protected from further degradation. However, the above position cannot be said to be workable with respect to chapter II of the FODPSP as a result of the effect of section 6 (6) (c) which makes litigation an impossible task. In *AG of Ondo State v. A.G. of the Federation & ors*<sup>7</sup>, the plaintiffs instituted this action on behalf of the Government of Ondo State against the Attorneys General of States; all the states in Nigeria, the plaintiff invoked the original jurisdiction of the Supreme Court to challenge the constitutionality of the Independent Corrupt Practices and Other Related Offences Act 2000 (ICPC). One of the issues that came up for determination was the justiciability or otherwise of chapter II of the 1999 Constitution. The Supreme court held that the provisions of chapter II cannot be enforced as section 6 (6) (c) of the Constitution render chapter II of the 1999 generally non-justiciable and that where the government is unable to perform its obligation with respect to chapter II, it would only be seen as a failure of responsibility and duty if they acted in clear disregard of them. The Supreme Court however acknowledged that some of the directive principles can be made justiciable where there is an urgent and

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<sup>4</sup> (1981) 2 NCLR

<sup>5</sup> Ibid

<sup>6</sup> (SC.22/1983)

<sup>7</sup> (SC.200/2001)

pressing need to do so. This can be done as the National Assembly can be trusted in their collective wisdom to recognize what is in the best interest of the polity by passing a law to that effect. It is my humble opinion that this can be seen as an alternative pending when the Constitution is reviewed. It is suggested that by the general spirit of the Constitution if section 33 guarantees right to life, can't chapter II, section 20 be an extension of Section 33 by ensuring that anything that can deprive that life, like environmental hazard should be seen as a violation of that right. Thus, the non justiciability of chapter II under S.6 (6) (c) should not be used to throw overboard health hazards caused by environmental degradation which can deprive the citizens their rights to life. One could bring an action on the ground that one's life is threatened using environmental pollution as facts. It is therefore the writer's opinion that the failure to upgrade Section 20 under chapter II of the 1999 Constitution with respect to protecting the environment as a right and its protection by the Government has led to the various crises in the Niger Delta area as the oil communities who produce the oil which is currently the main stay of the Nigerian Economy do not have good road network, good water supply, clinic, schools and electricity supply. The environment they live in cannot be said to be habitable as they contend with gas flaring and pollution as a result of oil spillages which have destroyed their main source of livelihood which is fishing and farming. The Government of Nigeria certainly owes these communities a duty to ensure that they become beneficiaries of the oil they produce.

### 7. Environment Rights in Some other Form-Jurisdictions

In India, the Indian courts have set a new standard in environmental litigation by disregarding the traditional concert of environmental litigation with regard to the issue of *locus standi* which does not allow individuals get redress and as a result has opened the gate to allow litigations sue for environmental right beaches. In *Rural Litigation and Entitlement Kendra v State of U. P*<sup>8</sup>, the petitioner brought an action to stop the defendant who operated heavy industrial plants without permits producing chemicals such as Oleum, single super phosphate and highly toxic acid which polluted the water and soil of the village and its environs. The court ordered that the factory be shut down and went ahead to recognize the right to environment.<sup>9</sup> An environmental lawyer M.C Mehta brought an action in Court for the closure of a chlorine plant due to leakages of hazardous gas. The Supreme Court consisting of five constitutional judges regarded the gravity of environmental and legal questions and granted *locus standi* to the petitioner to enforce the rights of the people affected by the leakages. This opinion taken by India has also been recognized in the Philippines by the Supreme Court in *Minors Oposa v Secretary of the Department of Environment and Natural*<sup>10</sup> where the Supreme Court made pronouncement concerning the right to a clean environment by stating that the right to a balanced and healthful ecology carries with the correlative duty to refrain from impairing the environment. In Pakistan, the right to a clean environment has been judicially recognized in *She/a Zia v Water and Power Development Authority*. The Supreme Court held that the right to life included a right to live in a clean environment. In Europe, the Court of Human Rights has interpreted some civil and political first-generation rights as a guard against environmental harms e.g the Court has in fairly extreme cases creatively interpreted this right to respect for home life in *Lopez Ostra v Spain*.<sup>11</sup> The court upheld a claim brought by Mrs. Lopez under Article 18 of the European Convention on Human Rights for the violation of her rights with respect to her home life in relation to exceptionally severe pollution coming from a factory twelve meters away from her home. In Spain, Article 45 paragraph 1 and 2 of the Spanish Constitution provides that everyone has right to enjoy an environment suitable for the development of the person as well as preserve it.

Coming home to the African, South African has not been left without the recognition of rights to the environment as a basic human right. Section 24 (a) provides for the right to have the environment that is not harmful to human health or well being. Section 24 (b) provides for the benefit of present and future generations.

In addition to the Constitution, the Government has promulgated other legislations relating to environmental issues among which is the National Environment Management Act which further supports the principle of the Constitution and gives detail to Environmental rights which are provided in the Constitution for example Section 28 of the National Environment Management Act states that, everyone has a right to demand that the environment be taken care of while section 32 and 33 also provides that anybody who is concerned with the protection of the environment may make a Court application or act as Criminal Prosecutor to enforce environmental rights and laws and such a person can recover the costs of the court proceedings. Section 38 states that any one has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief including a declaration of rights, Section 38 further states that persons who may approach a court shall include anyone acting in their own interest, acting on behalf of another person who cannot act in their own name, acting as a members of or in the interest of a group or class of persons, acting in public

<sup>8</sup> (1985) INSC 220

<sup>9</sup> *UN Mehta v Union of India* (AIR 1988 SC 1037; (1987) 4 SCC 463)

<sup>10</sup> Resources 33 ILM 173 (1994)

<sup>11</sup> (ECHR 1994),

interest and an association acting in the interest of its members. This means that the issue of locus standi does not apply to individuals in South Africa. These provisions place a duty on Government to ensure that the environment is preserved from wanton pollution and the failure to protect the environment would entitle an aggrieved individual to make Government provide a healthy environment. These elaborate provisions which have been made with respect to environmental rights have been recognized as distinct from human rights in South Africa and a private individual can sue based on the breach or infringement of environmental rights. This is indeed a good legal development as justiciability of this right is not linked to right to life (a human right)

### **8. Conclusion and Recommendations**

It has been seen that environmental rights defy a universal definition and this has to an extent caused some difficulty with how it should be treated. It has also been discovered that all over the world, the environment has suffered enormous degradation and the only way to protect it has been to provide elaborate environmental laws which cater for environmental rights with the sole aim of preventing further pollution and degradation of the environment. The various Constitutions that have been examined show that these Constitutions have provided for the protection of the environment and this has led to the recognition of environmental rights which enables its citizenry to sue for breaches of such rights. In Nigeria, it has been observed that the term 'environmental rights' has not been constitutionally recognized nor given a place in the 1999 Constitution just as human rights have been recognized. For section 20 of chapter II of the 1999 Constitution to play a vital role in protection of the environment, it is recommended that section 20 be upgraded to the platform of a fundamental right that will be guaranteed by the Constitution, The effect of this will help forestall the present Niger Delta crisis and facilitate the enforcement of the right in Nigerian courts as the issue of *locus standi* will no longer be used as a ground to frustrate an aggrieved person from seeking redress as well as ensuring that the Government becomes fully committed to fulfilling its obligation in terms of development and preservation of the environment from further degradation which will help in bringing about sustainable development of the region. Recently, land mark judgments have been made by the Courts on election matters with respect to the 2007 elections. The judgments show a great departure from the conservative and traditional method of adjudication. It is recommended that this remarkable judicial activism be extended by our Courts to environmental issues so as to ensure that our environment particularly the Niger Delta Region salvaged from further degradation. The creation of the Niger Delta Ministry in 2007 by President Umaru Musa Yar'Adua with the aim of fostering peace and facilitating development so as to prevent further damage to the environment. It is hoped would also go a long way in pressing for a constitutional environmental right.