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A CRITICAL APPRAISAL OF THE RIGHT TO CLEAN ENVIRONMENT IN THE NIGER DELTA AREA OF NIGERIA

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Abstract

To many people, the term environment conjures up idea of global warning, the greenhouse effect and the vulnerability of certain species of animals or even the planet earth itself, it is any proclamation of a human rights to environmental conditions of specified quality of human rights and the environment. Chapter 11 of the constitution of the Federal republic of Nigeria 1999 in it fundamental objectives and directive principle of the state policy direct the state to protect and improve the environment and safeguard the water, land, air, forest and wildlife of Nigeria. The right to clean or healthy environment is one of the most controversial emerging rights since the agitation for the recognition of the link between human rights and the environment that started obtaining recognition at international law. Basically, the constitution of the federal republic of Nigeria 1999 as amended in its section 44(3) and item 39 schedule of the exclusive legislative list vests the control and management of the natural resources and hydrocarbon operations on the federal government for the common good and benefits of the citizens. This paper examines the Nigeria experience in the advancement of the right to clean environment.

Key words: Recognition, Enforcement, Right to clean environment.

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INTRODUCTION

The need for modern governments to diversify, industrialise, promote and sustain a sound economy, create jobs, provide housing, meet its human and capital needs, admittedly, is imperative1 and properly placed, however the same has thrown nature ‘out of balance’2 and man has begun to grapple with a

catalogue of environmented challenges whether in development or developed countries. As a fellow up, many countries, including Nigeria3 have had to adopt several approached-legislatives4.

1. The necessity for development appears antithetical to the demand for a clean environment. As it is observed, "environmental concerns an negatively affect the short term needs and objectives of human beings. States and individuals could be in a situation of disadvantage, if they neglect their economic development in favour of environment protection. Especially in developing considered as more important than environment." (Unpublished Essay) submitted to the faculty of Law and social sciences (London: School of Oriental and African Studies, 2004) pp. 3-4, available at www. subin. De/environment. Pdf accessed 16 – DEC – 2021.

2. See E. Daly, 'Constitutional Protection for environmental Rights: The benefits of Environmental process' (2012) 17 International Journal of peace studies, 76 citing Justice Feliciano in the Philippine case of Minors Oposa v. Factoran Jr., G.R. No. 10183, 224 S.C.R.A. 792 (July 30, 1993).

3. In Nigeria, environmental consciousness did not begin much early, as at 1990 there were still complaints about the pace of the awareness of environmental problems in Nigeria. See, J.A. Omotola, (ed). Environmental laws in Nigeria including Compensation (Lagos: Faculty of Law, University of Lagos, 1990) 201. Unit 1988 when the Federal Environmental Protection Agency Decree was promulgated, there was no distinct environmental regulatory regime in Nigeria. In fact, it was the national environmental emergency situation i.e. the discharged of imported containers of toxic waste product in Koko in 1988 that led to the promulgation of the Federal Environmental Protection Act. See Martin – Joe, Ezeudu "Revisting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the potential Role of the International Criminal Court"" (2011) 11 African Human Rights Law Journal, 36. Apart from scanty legislative instruments, legal discourse on the Nigerian environment too was rare until 1988 when the Faculty of Law of the University of Ibadan organized a conference on Environmental Law as part of the activities marking the 40th anniversary celebration of the University. Most of the papers presented at that conference were edited by Folarin Shyllon into a book and formed one of the earliest works on environmental law in Nigeria. See the Introduction by Shyllon, F. to The Law and the Environment in Nigeria (Ibadan: Faculty of Law, University of Ibadan, 1989). Ministerial 5, political even judicial to address the evolving environment concerns. Unfortunately, most of the remedial efforts are targeted only at the preservation of the environment and

not necessarily the people living in the environment. Thus, human rights advocates6 have found the need to extend the frontiers of

4. Several environmental legislations exist in Nigeria, some of them enacted in the hope of curtailing the rising temple of environmental degradation. Examples are the Environmental Impact Assessment Act Cap. E. 12 Laws of the Federation of Nigeria (LFN), 2004, Federal Environmental Protection Agency Act Cap F. 10 LFN, 2004, Hramful Wastes (Special Criminal Provisions, etc) Act, 1988, and National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.

5. There is in Nigerian, both at the Federal and State levels, ministers of environment as well as departments, boards, agencies, commissions, etc specially established to monitor the environment.

6 In facts, according to Boyle, a chief proponent of environmental rights, the human rights law." See Boyle, Alan "Human Rights or Environmental Rights? Download/publications/0-221-humanjusticeorenvironmental rights reassess.pdf. accessed 2/5/2015. See also, the Ksentini Report (Sub Commission of the United Nations Commission on Human Rights) UN. Doc. E/CN.4/sub.2/1989/C23 (1989).

According to Ako "The Ksentini Report offers what may be the broadest definition, or better still, components, of environmental rights. It suggests that the possible components of substantive human rights or perhaps several environmental rights can be seen in one source which sets out no less than fifteen rights relative to environmental quality". See Rhuks Ako "The Judicial Recognition and Enforcement of the Right to Environmental: Differing Perspectives from Nigeria and India" (2010) 3 NUJS Law Review 426. These include (a) Freedom from pollution, environmental degradation and activities that adversely affect the environment or threaten life, health, livelihood, well-being or sustainable development; (b) protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; (c) the highest attainable standards of health; (d) safe and healthy food, water and working environment; (e) adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; (f) ecologically sound access to nature and the conservation and the use of nature and natural resources; (g) preservation of unique sites, and (h) enjoyment of traditional life and subsistence for indigenous peoples. Thus, para. 2 of the Draft Principles On Human Rights and the Environment/CN.4/Sub. 2/1994/9, human right campaign by seeking for the recognition and enforcement of an emerging right referred to as environmental right, particularly to provide a quality,

adequate and satisfactory[7] environment safe for human living. Laudable as this project is, it is not absolved of controversies, challenges or even confusion both real and imagined in the attempt to insist on a right to clean environment.

THEORETICAL ASPECT OF THE RIGHT TO CLEAN ENVIRONMENT

UNDERSTANDING THE TERM ENVIRONMENT

Part of the challenges which face the recognition and the enforcement of the right to clean environment anywhere stems from the intricate nature of the term "environment" itself. Thus, as a corollary to the discussion on the concept of the right to clean environment, it is imperative to start with what the term encompass everything, and almost everything that happens in society can implicate the environment.'8 As simple as the term seems, the conceptual under planning are not devoid of divergence. This is because the term 'environment' is inherently broad and neutral9 with diverse synonyms such as

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Annex 1 (1994), which provides that "All persons have the right to a secure, healthy and ecologically sound environment" and that "this right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible" was a follow up of the Ksentini Report.

Article 24 of the African Chapter of human and people's Rights OAU doc. CAB/LEG/67/3 rev. I.L.M. 58 (1982) provides that "all peoples shall have the right to a generally satisfactory environment favourable to their development". See generally K.S.A Ebeku, "The Right to a Satifactory Environment and the African Commission' (2003) 3 African Human Rights Law Journal 149166. Daly (n 2) 73. P.E Taylor, "From Environmental to Ecological Human Right: A New Dynamic in International Law? (1998) 10 Georgetown International Environment Law Review, 309, 360. nature, earth, ecology,10 ecosystem11 biosphere, 12 biodiversity, 13 etc. The meaning of the term is also coloured by some social, economic or political considerations in certain circumstances. The term therefore does not lend itself to the exclusive preserved of any particular field of learning in underscoring an acceptable meaning. Environmental scientists, environmental lawyers, analyst and commentators all have equal challenge in the theoretical voyage into the ambit of the term "environment". According to Dupuy and Vinualce 14 A first question that arises when we attempt to understand the object of international environmental right law is where the term "environment" refers or

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Encyclopedia of Earth states that ecology technically "an academic discipline as mathematics or physics, although in public or media use, it is often used to connote some sort of normative or evaluative issues ….. more properly ecology is used only in the sense that it is an academic discipline, no more evaluative than mathematics or physics. When a normative or evaluative term is needed then it is more proper to use the term "environment", i.e. "environmental quality,' or environmentally degrading". See the Encyclopedia of Earth available at www.eoearth.org/view/article/151932/accessed 23/8/2015.

The Convention on Biological Divesity defines "ecology" to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit". See article 2 of the Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

This has been defined as the biological component of earth systems which also includes the lithosphere, hydrosphere, atmosphere and other "spheres" (e.g cryosphere, and anthrosphere, etc). The biosphere includes all living organism on earth, together with dead organic matter produced by them". See the Encyclopedia of Earth available at www.eoearth.org/view/article/150667/accessed 23/8/2015.

The word "biodiversity" is a contracted version of "biological diversity". The Convention on Biological Diversity defines it as "the variability among living organisms from all sources including inter-alia, terestial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part…" see article 2. The Convention on Biological Diversity, supra note 11.

Pierre-Maric Dupuy and Jorge E. Vinuales, International Environmental Law: A modern Introduction (Cambridge: Cambridge University Press, 2015) 24.

DLR Environmental Law Edition. Vol. 3 No 1 2016 can be pinned down to a single concept or meaning, The term "environment" pervades scientific, political and media discourse and, yet, its meaning remains unclear. As with the concept of "time" of which Augustine said that we know what it means so long as we are not asked for a definition, the term as it is difficult to circumscribe precisely.

The uncertainty surrounding the meaning of the term "environment" has been cited as one of the major challenges facing the judicial enforcement of the right to clean environment and the constitutionalization of the right. According to Daly.

Most discussion on the relationship between human rights and the environment, several terminologies and adjectives have been employed to denote the meaning of the concept. Some of these terms are "environmental rights, 24 " fundamental environmental rights. 25 'right to healthy 26 or clean 27 or quality28 or adequate "human rights law seeks to ensure that environmental conditions do not deteriorate to the point where the substantive right to health, the right to a family, right to life, to culture, and other human right are seriously unpaired". D. Shelton, 'Human Right and Environment: What Specific Environmental Rights have been Recognized? (2008) 35/1 Denver Journal of International law and policy 129.

Shelton uses the term "environmental rights' to refer to" any proclamation of a human right to environmental conditions of a specified quality." See D. Shelton, Developing Substantive Environmental rights' (2010) 1/1 Journal of Human Rights and the Environment, 89.

J.R. May and E. Daly 'Vindicating Fundamental Environmental Right Worldwide' (2009) Oregon Review of International Law, 364 – 440. Shelton has always referred to these rights simply as "environmental rights.' See generally, Shelton (n24) 89 – 120.

Principle 10 of the Rio Declaration on Environment and Development, UN Doc. A/CONF 151/26 (Aug. 12, 1992), United Nations Conference on Environment and Development, June 3 – 14, 1992, Rio de Janciro, Brazil, (hereafter referred to as Rio Declaration) which states that human beings are "entitled to a healthy and productive life in harmony with nature. " See also Art. 11 of the Addition Protocol to the American Convention on Human Right in the Area of Economic, Social and Cultural Right, Nov. 14, 28 ILM 156 which guarantees the right to a healthy environment.

DEFINING THE RIGHT TO CLEAN ENVIRONMENT

Admittedly, defining a term has been one of the most Herculean tasks in the field of law. But where definition becomes inevitable; it is irrelevant how much ink is spilled in attempting to proffer one. 61 it has been identified that the meaning of a wood is its use in "See the Philippines case of Minors Oposa Factoran Jr., G.R. No. 10183m 224 S.C.R.A. 792 (July 30, 1993) cited in Daly, (n2)73.

Arnold, has said that law for instance can never be defined with equal obviousness, however it should be said that adherence of legal instrument must never give up the struggle to define. See Arnold T. the symbol of language. It may be true too that the meaning of a word is just more words that stand in for them. 63 However, it is not out of place if one considers the meaning of the term environmental rights (as if this subsumes other related terms) with the hope of arriving at a near universally acceptable definition, even though the term may be coloured, some of the time, by its contextual appearance. Trying to develop a general platform to cover the terms is to improvise a frame work to ensure that each term does not have to depend on the context in which it in used at all times but on the general notion of what it is accepted to mean.

The term "environmental rights" has raised a lot of dust and it is still generating more issues, moral, social, legal and so forth, some of these issues having to do with the ambit of the entire idea of the linkage between human rights and the environment. It is therefore a complex term. Some authors rather than embark on the difficult task of proffering a definition have decided to draw inspiration from available relevant legal instruments as aid in elucidating the import of the term. Wet and Plessis state that, 64

Government, 1935 p.36 cited in M.I. Jegede, 'What's wrong with the Law?" (1993) N.I.A.L.S. Annual Lecture Series 12 at 2. See L. Wittgenstein, Philosphical Investigation (2002) 18 cited in J. Nester, 'word meaning and the Contest Principle in the Investigation's p. 245 available at wttgensteinrepository.org/agoraalws/article/view/2725/3174 accessed 27/1/201.5 Erik de Wet and Anel

du Plessis "The Meaning of Certain Substantive Obligations Distilled from International Environmental Rights in South African (2010) 10 Africa Human Rights Law Journal, 346. (Footnote omitted) They lament that the South African Constitutional Court has not yet had African Constitution. Section 24 of the South African Constitution, 1996 provides: "Everyone has the right (:) a. to an environment that is not harmful to their health or well-being and b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – i. prevent pollution and ecological degradation; ii. Promote conservation; and iii. Secure ecologically sustainable development

Environmental rights contained in domestic bills of rights and international human rights instruments often consist of a complex combination of legal obligations. Their interpretation tends to be a particularly challenging task. Arguably, this also holds true for the environmental right in section 24 of the Constitution of the Republic of South Africa Act, 1996 (Constitution). Fortunately, however, there is a growing body of public international law, as well as foreign domestic law, on which one may draw to render the abstract language of section 24 (of the South Africa Constitution) more concrete for Judicial application.

Why Wet and Plessis feel that public international laws and domestic laws may be helpful in clarifying the language of the South Africa Constitution relating to environmental rights provisions. It may even be more confusing in some other jurisdictions. This is because according to May and Daly "the almost complete lack of evidence of framers' intent about environmental provisions reinforces the sense of randomness." 65 It is thought therefore that it will rather be more rewarding if legislatures and drafters of Constitutions have a near-generally acceptable scholarly idea of what is environmental rights to aid n formulating environmental right provisions than to look forward to discordant legislative provisions, whether domestic or otherwise, for guidance.

According to Boyle, "Environmental rights, give environmental quality comparable status to the other economic and social rights…(and) would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfillment of other human rights."70

It is imperative to note at this point that the terms "the right to clean environment," environmental human rights" and "environmental rights" or even the right to healthy environment may not mean exactly one and the same thing even though it is obvious that all terms relate to the relationship between the environment and human being. For instance, if attention must be environment and human

being. For instance, if attention must be given to the definition of the wood "health" by the World Health Organization (WHO)71 then not every clean environment in the Strict sense of the word "clean'72 denotes a healthy environment, WHO defines "health" as "a complete of physical, mental and social well-being, and not merely the absence of disease or infirmity."73. Several other generally accepted definitions of the word "health" exist. Bircher74 defines health as "a dynamic state of well-being characterized by a physical and mental potential, which satisfies the demands of life commensurate with age, culture, and personal responsibility." Saracci75 defines it as "a condition of well being, free of diseases or infirmity, and a basic and universal human right." The Australian Aboriginal people generally have this to say about health: "… Health does not just mean the physical well-being of the individual but refers to the social, emotional, spiritual and cultural well-being of the whole community." 76 Health can be "a whole of

The Nigerian Experience

The issue of the right to clean environment has not been robustly articulated in Nigerian courts. In fact the first and only authority at the moment on the issue is the notorious Federal High Court case of Mr. Jonah Gbemre and Shell Petroleum Development Company Nigeria Ltd and 2 Other. 80 This authority though very weak, given that it is a lonely High Court decision which is yet to be decided on appeal, has heightened the campaign for the recognition of the right to clean environment in Nigeria. Since then there has never been any scholarly discussion on the right to clean environment or on Chapter 2 of the Constitution, or on social, economic and cultural rights in Nigeria without some pontifications on Gbemre v SPDC81 In this case, the Applicants alleged, inter alia, that the operation of the Respondents in continuing to flare gas in their community contaminated and polluted their environment and exposed them to several disease including respiratory illnesses, asthma, cancer, increased premature deaths and also reduced crop yield on the land. As a result, the Applicants urged the Court to declare their right to pollution free environment entrenched under the Constitution and the African Charter. The substance of the claim of the Applicants that the Constitutionally guaranteed fundamental rights to life and dignity of the human person provided in the Constitution and reinforced by the African Charter on Human and peoples' Right (Ratification and Enforcement) Act inevitably includes the right to clean poison-free, pollution-free and healthy environment.82 All the reliefs of the applicants were granted.

The case has been highly commended for giving a purposeful interpretation to the fundamental rights contained in the Constitution and the African Charter. Other scholars feel that even though the Supreme Court is yet to pronounce o the case, Gbemre v SPDC gives the sign that the African Charter can

ground a valid application for the enforcement of socio-economic and cultural rights in the Nigerian Court. 83 According to Professor Ladan, "(t) this is a landmark judgment in the sense of application of fundamental human rights to an environmental case for the first time in Nigeria, consistent with the trend in other jurisdictions.

"84 Apparently, there are pockets of skepticisms shrouding *Gbemre's* case, particularly, having regard to the provisions of section 6 (6) (c) and 20 of the Nigerian Constitution. The Court in *Gbemre* was rather more comfortable with given a broader interpretation to the provisions of the Constitution (which guarantee the right to life and the dignity of the human person) to include the right to live in a clean and healthy environment. However, a writer observed that "broadly interpreting the right to life to include the protection of environmental rights is not yet an established legal principal in Nigeria."[85]

This leads us to why Gbemre's case has not opened up from the uneasiness which trailed the political environment after the judgment, some constitutional lawyers feel that only the Constitution should protect the caliber of right envisaged in Article 24 of the African Charter and that section 6 (6) (c) of the Nigerian Constitution having made mockery of section 20 of the same Constitution, there exists no further basis for upholding environmental rights in Nigeria.[86] Others wonder why the Court.

CONCLUSION

In the history of the struggle towards the recognition of the right to a clean and healthy environment all over the world, many governments have begun to give a thought to the recognition of environmental rights particularly through constitutional provisions. [87] Conversely, the Nigerian government is yet to reason in this direction in spite of the fact that the Nigerian environment is one of the most traumatized in the world.

Be that as it may, though conceptual challenges exist and are associated with the import of the right, this should be for academic purpose only especially where environmental right is explicitly

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action by any originating process acceptable to the Court. (see order 2 rules 2 of the FR Rules 2009)

Boyd states that "Today (environmental right)….. is widely recognized in international law and endorsed by an overwhelming proportion of countries. Even more importantly, despite their recent vintage, environmental rights are included in more than 90 national constitutions. These provisions are having a remarkable impact, ranging from stronger environmental laws and landmark court decisions

to the cleanup of pollution hot spots and the provision of safe drinking water". See D.R. Boyd, "The Constitutional Right to a Healthy Environment' (2012) 54/4 Science and Policy for Sustainable Development, 3.

provided for.[88] Taking lead from the Montana's Case, [89] it does appear that there is a general understanding of the import of the right to clean and healthy environment. Even if all a statue says is that citizens shall have right to the environment it should be interpreted to mean a right to an environment fit for human living, the courts [90] being sufficiently able to draw the line between what environment is fit and what is not for human habitation.

Some constitutions, such as South Africa explicitly provide for the progressive realization of some environmental rights. See generally Wet and Plessis (n 64) 345-376. Supra note 37. For instance, in South Africa, the Constitutional Court had interpreted section 24 of the South Africa Constitution to the effect that the section implies that environmental rights should be accorded recognition and respect even in administrative processes. See the case of The Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others (1999) 2 SA 709 (SCA) referred to in the Report on Human Rights and the Environment: Regional Consultation on the Relationship between Human Rights Obligations and Environmental Protection, 23-24 January 2014, Johnnesburg. South Africa, available at http://ieenvironment.org/wp-content/uploads/2014/11/Johannesburg-consultation-report-final.pdf, accessed 2/2/2022.

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