JUSTICIABILITY OF ENVIRONMENTAL RIGHTS: WHITHER THE NIGERIAN LAW?

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Abstract

This paper analyses the enforceability of the right to a clean and safe environment in Nigeria. It identifies the 1999 Constitution, the African Charter on Human and People's Rights, the National Environmental Standard and Regulations Enforcement Agency (NESREA) Act 2007, and the Climate Change Act 2021 as relevant instruments and analyses them in order to establish the extent to which they support the enforcement of the right to a clean and safe environment in Nigeria. With respect to the 1999 Constitution, it argues that the non-justiciable right to a clean and safe environment has been strengthened by the pro-environmental attitude of the Nigerian Courts who have interpreted it in several instances to be ingrained in the right to life making it enforceable. However, the uncertainty of judicial precedents in Nigeria calls for constitutionalism of its enforceability to strengthen it in Nigeria. This paper interrogates the right to a clean and safe environment as provided for in the African Charter on Human and People's Rights Act. It argues that why it is clearly justiciable, that its conflict with the constitution which provides for its non-justiciability of the right introduces uncertainties as to its validity. Among other things, it is argued that the exclusion of petroleum from the orbit of the NESREA Act and, the lack of an enforcement mechanism for the Climate Change Act are limiting factors in this context. Key recommendations

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were made including constitutionalising a justiciable right to a clean and safe environment in Nigeria.

Keywords: Climate Change, Environment, Eco-Rights, Human Rights, Justiciability, Law, Pollution

1. Introduction

It is trite that the enforcement and justiciability of environmental rights in Nigeria has been a herculean task for aggrieved persons who wish to enforce their fundamental right to a fair hearing[1] and take steps to seek redress before the Court of law in actualising the equity maxim of where there is a wrong, there is a remedy.[2] However, the legal machinery for protecting a sustainable environment cannot be overlooked, as environmental abuses over the years have affected properties and citizens' rights. This excerpt succinctly describes these human rights abuses:

> Although the degree of harm is debatable, oil production has had negative consequences on the ecology in the oil-producing region. Despite decades of oil production, there are surprisingly few reliable, independent scientific studies on the overall or long-term effects of hydrocarbon pollution on the delta. Despite this, it is obvious that oil-led development has seriously harmed the environment and the way of life for many people who live in the oil-producing communities. Although Nigerian environmental rules are generally comparable to their international counterparts, they are not consistently implemented, despite claims made by the oil firms that operate there that their operations adhere to the greatest environmental standards.[3]

The absence of a fundamental constitutional right to a healthy and safe environment under Nigerian law has made it more difficult. As such,

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[1] Guaranteed in CFRN 1999 (as amended), s. 36.

[2] Olu Alowolo, 'Environmental Rights and Sustainable Development in Nigeria',<http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html> accessed 08 April, 2022.

[3] Human Rights Watch, 'The Price of Oil' (New York Human Rights Watch, 1999)

this paper aims to discover Nigerian laws that have played a role in encouraging and developing environmental rights and discern the possibility of enforcing such rights before the Court, hence, its justiciability. The effort is concerted at drawing the link between human rights and environmental rights in Nigerian laws like the Constitution of the Federal Republic of Nigeria (CFRN) 1999, the African Charter on Human and People's Rights 2004, National Environmental Standards and Regulation Enforcement Agency 2007, the Climate Change Act 2021; and determine whether environmental rights in Nigeria is a reality or a pious wish. For this purpose, the work is divided into seven. The second part is a background on environmental protection. The third part is the nexus between the Constitution and environmental rights,

2. Background on Environmental Protection

As studied, the Stockholm Declaration provided the foundation for the link between the environment and human rights; and environmental protection is a sine qua non for the enjoyment of fundamental human rights, hence, the need for environmental rights.[4] The growth of environmental rights in Nigeria mainly depends on its effort to domesticate and implement international treaties on the matter. Ever since 1972, several treaties have been implemented on environmental rights. However, Nigeria's legal regimes on environmental protection can be distilled to pre-1988 and post-1988.

Prior to 1988, there had barely been any effort concerted toward environmental protection in Nigeria. The absence of dedicated or exclusive legislation for environmental protection is one of the clear pointers. Essentially, there was a lack of public awareness of environmental issues in Nigeria neither did the governments nor authorities consider it as an impending risk.[5] In the colonial era and shortly after the post-colonial era, most environmental guidelines came from public health regulations such as waste management and

[4] *Ibid.*

[5] S Ebomhe, 'National Environmental Regulations 2009- A New Dawn for Environmental Protection in Nigeria' (2010) 1 IUCN Academy of Envtl L 1.

sanitation.[6] However, environmental challenges took a new turn when oil was discovered in 1956, which had to be addressed by implementing new guidelines and legislation.[7]

This does not connote that before 1988, no legislation addressed environmental challenges. In fact, we had laws like the Quarantine Act of 1926, the Agriculture (Control of Importation) Act of 1964, the Kainji Lake National Part Act of 1979, the Land Use Act of 1978, etc. There was no exclusive legislation for environmental protection. Fortunately, a turnaround in 1988 was marked by a colossal event that occurred in September 1987, where more than 18, 000 barrels of highly hazardous and toxic substances were dumped on an open site in Koko, Delta State in Nigeria. It was reported to have been dumped by Mr Rapheli Gianfranco, who was working for an Italian Company and successfully bribing the officials at the site.[8]

These consequences became damning for the residents of the Koko community; some of its residents were hospitalized for several ailments ranging from burns to paralysis due to the toxic dumping.[9] Consequently, this led to a wake-up call in Nigeria and Africa to the impending need for environmental protection and its legislation. This led to several pieces of legislation, such as the Harmful Waste (Special Criminal Provisions) Decree 42 of 1988,[10] which also led to the creation of the Federal Environmental Protection Agency (FEPA) through the Federal Environmental Protection Agency Act, Laws of the Federation of Nigeria 2004, c F10.[11] Currently, the principal

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[6] Damilola S. Olawuyi, *the principles of Nigerian Environmental law* (First published in 2013, Afe Babalola University Press 2015) 16

[7] L Atsegbua, V Akpotaire & F Dimowo, *Environmental Law in Nigeria Theory and Practice* (Ababa Press Ltd, 2004) at 3-6, 14.

[8] D Olawuyi, 'The Emergence of International Law and Practice 12; S Ogbodo, 'Environmental Protection in Nigeria: The Decades after the Koko Incident' (2009) 15 (1) *Annual Survey of International & Comparative Law.*

[9] C Anyinam, 'Transboundary Movements of Hazardous Wastes: The Case of Toxic Waste Dumping in Africa' (1991) 21 (4) *International Journal of Health Services* 759-77.

[10] Harmful Waste (Special Criminal Provisions) Decree 42 of 1988, LFN 2004.

[11] Now repealed.

legislation on environmental protection in Nigeria is now the National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007.[12]

3. The Constitution of the Federal Republic of Nigeria, 1999, and Environmental Rights

Like most Constitutions worldwide, Nigeria's Constitution is the grundnorm and the principal document in determining the legitimacy of any person and authority throughout the Country.[13]As a result, all laws and rights derive their legitimacy and validity from the Constitution. Any law inconsistent with its provisions will be void to the extent of its inconsistency.[14] Sections 1 (1) and 1 (3)[15] provide as follows:

> Section 1 (1) - This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 1 (3) - If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

The Supreme Court in *Abacha v Fawehinmi*[16] held inter-alia:*"It is necessary to get our bearings right. The Constitution is the supreme law of the land, it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances."*[17]

At this juncture, what is at issue is the provision of the principal legal document in Nigeria on the right of every citizen to a clean and healthy environment. It is appropriate to note that the past Constitutions did not make the arrangements for the right to a clean environment in any structure until the 1999 one. Now, in consideration

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[12] The National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007, LFN 2004, c N164.
[13] CFRN 1999 (as amended), s. 1 (1) & (3).
[14]*Ibid.*
[15] *Ibid.*
[16] (2001) SWLR (pt. 168) 909.
[17] Also, A.G. Abia State v. A.G. Federation (2003) 6 NWLR (pt. 763) 264 at 497.

of the question of the relevant provisions;Section 13 provides that all governmental bodies, agencies, and individuals exercising legislative, executive, or judicial responsibilities shall be required to comply with, observe, and apply the provisions of this chapter of this Constitution.[18] Section 17 of the 1999 constitution deals with social objectives and states that the state social order shall be founded on ideals of freedom, equality and justice. Section 17 (2) (d) provides that the "exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented… "[19] As such, in pursuance of this obligation placed on the government by the Constitution, they are to take necessary steps to protect the people and form policies that will assist in achieving the exploitation of natural and human resources for the common good and benefit of the people. Section 20 of the 1999 Constitution provides that: *"The state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria".*

These highlighted provisions of the Constitution are to create an obligation on the government of Nigeria to create policies and a framework that would achieve positive milestones in preventing life-threatening environmental disasterseven while exploiting natural resources. The acclaimed conclusion can be deduced as similar conclusions have been reached in other jurisdictions like in the case of *Urgenda Foundation& 886 Citizens v. The State of the Netherlands*[20], where a similar provision in the Dutch Constitution was deemed to be the right of Netherlands citizens to a clean environment. Uwaifo JSC said on account of *Attorney General of Lagos State v. Head Legal Officer of the Federation and Ors.*[21] that the arrangement of segment 20 shows up without precedent for Nigeria's protected history in the 1999 constitution. Nonetheless, Section 20 of the 1999 constitution is found in Chapter 2 of the Constitution, which is named "Fundamental

[18] CFRN 1999 (as amended), s. 13.
[19] CFRN 1999 (as amended), s. 17 (1) & (2).
[20] (2015) C/09/456689/ha za 13-1396.
[21] (2003) SWLR (PT. 168) 909

Objectives and Directive Principles of State Policy".[22] However, on the legal implication of the rights provided in the highlighted chapter II of the Constitution, by virtue of section 6 (6) (c) of the 1999 Constitution;

> *"The judicial powers vested in accordance with the foregoing provisions of the Section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any laws or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 2 of this Constitution"*

In other words, these fundamental principles of which the right to a clean environment is provided, are not justiciable in a court of law.[23] This, in turn, means that their enforcement cannot be compelled in Court at face value.[24] The courts have affirmed over time the meaning of these provisions in cases including *Attorney General of Ondo State v Attorney General of the Federation*[25]*; Okogie v Attorney General of Lagos State*[26]and even in *Morebishe v Lagos State House of Assembly*[27], that these provisions of the law are not justiciable. As a matter of opinion, adage arrangements of Constitutions of most just nations state the natural regulations, the incomparable regulations, and the grundnorm from which every other regulation should start or be established. All the more so, the arrangements of such constitutions

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[22] Ngozi C. Ole, 'Situating the right to a healthy and satisfactory environment in the Nigerian legal framework for human rights protection and enforcement', *Nassarawa State University public and international law journal* p. 126.

[23] The issue of non-justiciability had been justified on various grounds. Professor B.O. NWABUEZE maintained in "Fundamental Objectives and Directive Principles of State Policy. Its Nature and Functions" in the Great Debate Nigerian viewpoints on the Draft constitution (Lagos: Daily Times, 1977) 49.

[24] N Ekanem, 'National Assembly should make Chapter 2 of the 1999 Constitution Enforceable- Abotti' the Daily Independent accessed 27th June 2022.

[25]*(2002) 9 NWLR (pt. 772).*

[26]*(1981) NCLR 2187.*

[27] (2003) 3 WRN 134.

have restricted power on all institutions and people, and such is the situation in the Nigerian Constitution as expressed in *FRN v Ifeagwu.*[28] To the degree that where any regulation or act conflicts with the Constitution's arrangements, it is to the degree of any irregularity invalid and void as given in segment 1(1) (3) of the Constitution. In this way, any Nigerian protected arrangement made non-justiciable should not be in the Constitution with the goal that the Courts can complete their established obligations of understanding the law comprehensively of the Constitution.[29] Non-justiciability of section II[30] implies that the courts can't settle on any arrangements of part II. In this way, such structures can't be deciphered. This present circumstance prompts restrictions on the improvement and responsibility of the public authority. Non-justiciability surmises restrictions on the organ of government qualified for deciphering the Constitution, which is the judiciary. It further sums to forswearing of the privileges (but; economic rights) of Nigerian residents' endless supply of freedoms as given in section II CFRN 1999 should look for a change in Courts of regulation. Such is a distortion since the Constitution is not simply the incomparable regulation or grundnorm but also the natural (living) regulation that should be moderate to accomplish civil rights, improvement, and shun debasement.[31]As the supreme law of the land, the Constitution ought to grow as the nation grows, as in *Oyewunmi v Ogunesan.*[32]

Thusly, in the current time of issues of privileges and advancement, no financial or potentially friendly freedoms arrangements in any constitution should be made non-justiciable. Any other way, the public authority can't be considered responsible to individuals, which thusly should spread debasement and thwart improvement. Besides, any country's Constitution is the common agreement between the public

[28]*(2003) NWLR pt. 798*
[29] Ozogwu V C Ikpeze, 'Non-justiciability of Chapter II of the Nigerian Constitution as an impediment to economic Rights and Development' (2015) 5 (18) Developing Country Studies 48.
[30] CFRN 1999
[31] *Ibid*.
[32]*(1996) 3 NWLR (pt. 137) 182*

authority and the administered, targeting excellent administration, and civil rights, ensuring harmony, security, and advancement of individuals. Any law that then ousts the power of the Court to interpret any constitutional provision should be intolerable and a total aberration of the tenets of government.[33]

However, the whole point of this study has been to establish that environmental protection can be realized as a direct bearing on the enjoyment of most fundamental human rights, including the human right to life and dignity.[34] It is then important to state that these enforceable rights are enshrined in Chapter IV of the 1999 Constitution. If given a wide interpretation, they can be a precursor for the enforcement of the right to a clean environment. This is what is referred to as the human rights-based approach to attaining environmental protection. It allows litigants to argue that the existing legal framework on fundamental human rights can be interpreted to include environmental protection in that none of these fundamental rights can be achieved without environmental protection.

In the Indian case of Minerva Mills Ltd V. Union of India, Justice Bhagwati stresses that the second era of human rights, which incorporates the right to a perfect and sound climate, ought to be given due consideration and consequently make them justiceable. The learned Justice Bhagwati observed as follows:

> *The large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation though representing some of the most cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and the well to do and the only solution for making*

[33] Ozogwu V C Ikpeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (2015) 5 (18) Developing Country Studies 48.
[34]*Ibid,* 50

> *these rights meaningful to them was to re-make the material conditions and usher in a social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.*

The human rights-based approach, as analysed by Pathak that 'by applying the rights-based approach to environmental approach to environmental protection is a clear example of how the framework of human rights can contribute to the protection of the environment and the very existence of humanity'.[35] In other words, for instance, section 33 (1) of the Constitution provides 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".*

Albeit the above arrangement has no immediate relationship with ecological protection, it very well may be contended that permitting an individual to live in an unprotected or undesirable climate could add to the hardship of the individual's right to life since a poor or undesirable climate could jeopardize their life.[36] In the same vein, the right to life will make no difference to living in an undesirable and unprotected individual environment "for whom life is one whole long story of want and destitution."[37]

Likewise, the right to privacy is pointless to an individual who has no house and can be gone after by wild monsters. Obviously, of what importance is the right to personal dignity to an individual without good living conditions? Additionally, in the radiance of the arrangements S.44 of the 1999 constitution,[38] which ties down the right of a property to have and appreciate property inside Nigeria, clearly causing circumstances which will imperil the climate wherein a

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[35] Pathak, 'Human rights Approach to Environmental Protection' (20140 7 (1) Pathak / OIDA, *International Journal of Sustainable Development* 18.
[36] Ransome Kuti v. A.G. Federation (2001) FWLR (PT 80) 1637
[37] *Views of Justice Bhagwati in Minerva Mills Ltd. v. Union of India AIR (1980) SC*
[38] CFRN 1999 (as amended)

property is found or arranged or prompt a decrease in the worth of the property or the interest of the proprietor of the property can add up to hardship of the option to possess enforceable property and without a doubt justiciable under the expressed S.44 of the Constitution.

In application, the Federal High Court of Nigeria has recognized the human rights-based approach to environmental protection in *Gbemre v Shell*,[39] which was laudable for declaring gas flaring in Nigeria as illegal under the aegis of a breach of fundamental human rights. The plaintiff instituted the action on behalf of the Iwehereken community in Delta state, Nigeria, against Shell Petroleum and Development Company, Nigeria, the Nigeria National Petroleum Corporation (NNPC), and the Attorney General of the Federation. The plaintiff, Mr Gbemre, amongst other things, sought a declaration that the continued gas flaring by the defendant amounted to a violation of the fundamental human right to life, dignity of the human person, and by extension, the right to a clean and healthy environment. The Federal High Court, on November 14th, 2005, gave judgment in favour of the plaintiff. This decision resonated and caused a shift in judicial attitude on the need for environmental protection over exploration activities.

Although this case is celebrated for this achievement in Nigeria's jurisprudence, the strength of case law is based on the doctrine of judicial precedent.[40] As such, being that the Federal High Court is a trial court, it is not a strong enough judicial precedent as the Court of Appeal or Supreme Court can overturn it. However, the Supreme Court in *Center for Oil Pollution Watch v Nigerian National Petroleum Corporation*[41] affirmed this judicial precedent connecting that the right to life[42] is sacrosanct to achieving the right to a clean and healthy environment and that anyone who had breached the latter had

[39] FHC/B/CS/53/05

[40] G N Okeke, 'Judicial Precedent in the Nigerian Legal System and a Case for its Application under International Law' (2007) JILJ 107.

[41] *(2019) 5 NWLR 531*

[42] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 33.

also breached the former. The Court per EKO, J.S.C. at page 598, paras D- E established:[43]

> *The Acha community and all people living around and beside Inch and Aku streams, who depend on the two rivers as their source of drinking water, fishing, and other economic activities, 'have a right to a general environment favourable to their development.' They, each, have the right to life guaranteed by the Constitution. The State, including the defendant, a statutory Corporation, owes the community a duty to protect them against noxious and toxicant pollutants and to improve and safeguard the water they drink, the air they breathe, the land and forest, including wildlife in and around the two rivers, they depend on for their existence, living and economic activities.*

However, the next point expatiates on another approach used to enforce environmental rights apart from the argument that the actualization of the rights in Chapter II is implicit to Chapter IV – the human rights-based approach. Several jurists have used this approachto enforce other economic, social and cultural rights. By virtue of the wordings of Section 6 (6) (c) of the CFRN 1999, environmental rights are not justiciable 'except as otherwise provided by the CC. In other words, as pronounced by the Supreme Court, in the case of *Federal Republic of Nigeria v. Alhaji Mika Anache & Others*[44], it was reasoned that: The non- Justiciability of section 6(6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words '*except as otherwise provided by this Constitution'*. This means that if the Constitution otherwise provides another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts. Any provision in making the National Assembly that provides for any of the Economic,

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[43]*Center for Oil Pollution Watch v Nigerian National Petroleum Corporation (2019) 5 NWLR 531*

[44]*14 WRN (2004) 1-90 61*

social and cultural rights renders it justiciable under the 1999 CFRN.[45] As such, while the provisions of the Constitution have been shown to provide the framework for the enforcement of the right to a healthy environment, it requires subsidiary legislation to provide it with full expression and actualization.

4. African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights, otherwise called the Banjul Charter, was taken on in Banjul, the Gambia, on June 1st, 1981 and came into force on October 21st, 1986.[46] The Charter has widely accommodated social and political privileges and economic, social, and cultural freedoms as it connects with Africans.[47] The Charter additionally perceives different freedoms like the privileges of improvement, self-assurance, and a satisfactory environment.[48] The institutional organs of the African Charter are the African Commission on Human and People's Rights and the African Court on Human and Peoples's Rights. According to the ACHPR official website, the Charter has been ratified by Nigeria.[49] However, this long list includes Nigeria, which signed the Charter on August 31st, 1982, signed it on June 22nd, 1983, and adopted it on July 22nd, 1983. The African Charter is a precise instrument that encompasses both the civil and political groups of rights and the social, economic, and cultural rights. In relation to the topic, the right to a healthy environment is clearly provided for in Article 24 of the ACHPR 1983.[50] It provides that: *"All*

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[45] African Charter on Human and People's Rights (Ratification and Enforcement) Act 2004.

[46] Akingbehin, E.O, 'The Justiciability of Right to free Basic Education Conundrum in Nigeria, South Africa and India: from Obstacle to Miracle' *Acta Universitatis Danubius. Juridica*, *17*(1) 2021, pp.60-85.

[47] Articles 3 – 14 on Civil and Political Rights and Articles 15 – 18 on Economic, Social and Cultural Rights.

[48] Articles 19 – 24 on Peoples' Rights

[49] ACHPR, <*https://www.achpr.org/statepartiestotheafricancharter*>, accessed 08 May 2022.

[50] ManisuliSsenyonj (ed), *The African Regional Human Rights System*: 30 years after the African Charter on Human and People's rights (Martin Nijhoff Publishers 2012).

peoples shall have the right to a general satisfactory environment favourable to their development."

However, as analysed earlier, environmental rights can also be derived from other Articles like Article 2, which provides the right to freedom of discrimination. A case that can be built on that is that it constitutes a basis to protect those poor neighbourhoods who suffer from heavy pollution and toxic substance concentration in their lands as some form of discrimination based on social status and income.[51] Article 4 also provides for the right to life. In contrast, Article 5 provides for the right to dignity in being a human, which could be interpreted as that situation that could inadvertently cause the death of a person or cause any form of exploitation and degradation of the human person, should be prohibited.[52] In Nigeria, the 1999 Constitution provides that: *'No treaty between the federation and any other country shall have the binding force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.'*[53]

By virtue of this provision, an international instrument under which we have the ACHPR 1983 cannot have any binding force on Nigeria's government unless it has been ratified and domesticated as national law in Nigeria. However, Nigeria has not only signed but also domesticated the ACHPR as a local/ Federal law titled 'African Charter on Human and People's Rights (Ratification and Enforcement) Act.[54] Consequently, this eliminates doubts about the enforceability of the Charter in Nigeria and in enforcing the rights provided therein against any person or authority.[55] This then raises a legal as to whether this implies that the economic, social, and cultural rights, already

[51] *Ibid.*
[52] Damilola S. Olawuyi, *the Principles of Nigerian Environmental Law* (First published in 2013, Afe Babalola University Press 2015) 250.
[53] CFRN 1999 as amended, s.12.
[54] Awolowo, O., Environmental Rights and Sustainable Development in Nigeria. *OIDA International Journal of Sustainable Development,* 2017, *10*(06), pp.17-24.
[55] *Ibid.*

declared non-justiciable under the Nigerian Constitution,[56] would still be enforceable regardless of the ousted powers of the Court.[57]

In *Abacha v. Fawehinmi*[58], the Supreme Court held that the Charter now has the force of law within the Federal Republic of Nigeria. Ejiwunmi JSC observed in the case that: *"The African Charter on Human and People's Rights, having been passed into our municipal law, our domestic courts certainly have the jurisdiction to construe or apply the treaty. It follows then that anyone who felt that his rights as guaranteed or protected by the Charter have been violated could well resort to its provisions to obtain redress in our domestic court."* In spite of this notable obiter dicta, the Supreme Court has held that the Charter was not superior to the Constitution and that in the hierarchy of laws in Nigeria and as it relates to treaty implementation, the provisions of the Constitution are supreme.[59] In the aforementioned case of *Abacha v. Fawehinmi*,[60] the issue of the supremacy of the Constitution over the African Charter on Human and Peoples Rights came up for consideration. The Supreme Court, per Ogundare, JSC held,

> *No doubt Cap.10 (The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990) is a Statute with International flavour. Being so therefore, I would think that if there is a conflict between it and another Statute, its provision will prevail over those of that other Statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the court below that the Charter possesses 'a greater vigour and strength' than any other domestic Statute. But that is not to say that the Charter is superior to the Constitution as*

[56] S. 6 (6)
[57] *Ibid.*
[58] (2000) vol. 77, Law Reports of Courts of Nigeria p. 1254 -1401.
[59] S. 1 (1) & (3)
[60] [2001]51WRN 29

> *erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavour present the National Assembly or the Federal Military Government to remove it from our body of municipal laws by simply repealing Cap.10 nor also is the validity of another Statute necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter.*

As such, what is in contention is not the treaty implementation of the ACHPR in Nigeria but whether it can be held supreme over the provisions of the Constitution that are inconsistent with the enforceability of some economic, social and cultural rights, especially the right to a healthy environment in the Nigerian Courts. The position of the Supreme Court above is predicated on the Nigerian Constitution in section 1 (3): *'If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.'*

This position of the law has also been accentuated in *Oloruntoba-Oju v. Dopamu,*[61] held per Oguntade JSC that 'any provision of an existing law which conflicts with the provisions of the 1999 Constitution must be pronounced void to the extent of such inconsistency.' This pronouncement underscores the Nigerian Constitution's supreme position in the law hierarchy. However, there seems to have been a change in the judicial attitude of the Supreme Court and by extension, backed up with legislation. In the landmark case of the *Attorney General of Ondo State v. Attorney General of the Federation & 35 Ors,*[62]while still on the ousted powers of the Court as it relates to the rights provided in chapter II of the Constitution, the Supreme Court seems to have breathed a new life into the powers of the Court as it held that all the rights are enforceable in instances where the government has enacted statutes to actualize them. L. UWAIS, C.J.N. (Delivering the Leading Judgment) said:

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[61]*(2008) All FWLR [Pt. 411]810*
[62]*(2002) 9 NWLR (Pt. 772), 222.*

> *'It was contended that the duty and responsibility of all organs of government and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of Chapters II of the Constitution (section 13) is limited by section 6(6)(c) of the Constitution which excludes from the courts any issue or question as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy. This argument in my view is limited to the extent that courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement as has been done in respect of section 15(5) of the Constitution by the enactment of the ICPC Act.'*

In the case, it was also observed by the Court that: as to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section (6) (6) (c) stipulates that while they remain mere declarations, they cannot be enforced by the legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them, the nature of the consequences of which have to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But legislation can make the Directive Principles (or some) justiciable. The Supreme Court in *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*[63] held that the African Charter, having been domesticated, forms a part of Nigeria's corpus juris. As such, the African Charter breathes life into the justiciability of Chapter II and, in turn, the right to a safe and healthy environment which the Nigerian Courts must protect and vindicate the human rights entrenched therein.

[63]*(2019) 5 NWLR 531.*

5. National Environmental Standard and Regulations Enforcement Agency (Establishment) Act 2007[64]

This Act repealed the Federal Environmental Protection Act of 1988. In 1999, the government made the correct decision to consolidate the FEPA with other relevant departments. Ministries have been consolidated into a single Federal Ministry of the Environment. On the other hand, the new Ministry of the Environment lacked the necessary expertise. Laws are required to permit enforcement. This resulted in a void in the efficacy of environmental laws, standards, and regulations in the country's regulations. To close the distance per section 20 of the Federal Republic of Nigeria's Constitution of 1999, the Federal Government formed the NESREA Act, a Federal Ministry of Environment parastatal. Since the Supreme Court has established that the right to a safe and healthy environment is enforceable by virtue of the African Charter above, it can be analysed that the pronouncement of the Supreme Court in *A.G. Lagos State v A.G. Federation*[65] that it was within the powers of the National Assembly under Section 20 of the CFRN 1999 when it enacted the FEPA (now NESREA Act). Paying further attention, item 60 (a) of the exclusive legislative list[66] allows the National Assembly to make laws regarding the establishment and regulation of authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles in the Constitution. The NESREA Act extends this power to the National Assembly in enforcing the justiciable right to a safe and healthy environment.

The National Environmental Standard and Regulations Enforcement Agency (Establishment) Act, 2007 is Nigeria’s principal legislation on environmental protection; it establishes an Agency entrusted with the regulations and enforcement of environmental standards, regulations,

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[64] Hereinafter referred to as NESREA.

[65] *15 NWLR [Pt.842]113(2003), 175.*

[66] Constitution of the Federal Republic of Nigeria 1999 (as amended), Second Schedule, item 60.

laws, policies and guidelines.[67] The functions and powers of the agency as established in the Act are outlined to include enforcing compliance with laws, guidelines, and policies on environmental regulations and standards on air, land, and pollution abatement, among others.[68] However, it is worthy of note that none of these regulatory functions extends to the oil and gas sector, which then renders it defective to a substantial extent on environmental protection and rights in general.[69] In relation to the Act's impact on the enforcement of the right to a clean and safe environment:

Table 1.1

S/N	**NESREA ACT 2007**	**Sections related to environmental rights**
1.	Section 7 (c)	(c) enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wildlife, pollution, sanitation and such other environmental agreements as may from time to time come into force
2.	Section 7 (d)	(d) Enforce compliance with policies, standards, and legislation.
3.	Section 23 (1)	The Agency shall in collaboration with other relevant agencies, make regulations to protect public health or welfare and enhance the quality of water to serve the purpose of this Act.

[67] National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007, LFN 2004, c N164, s. 1.
[68] *Ibid*, ss. 6&7
[69] *Ibid*, the agency's governing council comprises of stakeholders from several ministries but excluding the ministry of petroleum resources, s. 3(1), 7(h).

4.	Section 25 (1)	The Agency may make regulations to protect public health and promote sound environmental sanitation.

Although, as seen above, most of the provisions in the NESREA Act are regulatory and specify the powers and functions of the Agency. However, despite its exclusion of the oil and gas sector, the Act powers the Agency to enforce international agreements and policies that Nigeria is a party to and encourages environmental rights.[70] As such, it dedicates an entire force and Agency to ensure compliance with regulations and policies set out to create a clean and safe environment. It empowers the Agency to stipulate penalties and punishments for violators of these environmental standards. Also, subject to the CFRN 1999,[71] and in collaboration with the relevant judicial authorities, establish mobile courts for expeditious delivery of justice to violators of environmental regulation. As such, by implication, the Act empowers the Agency to enforce the environmental rights and policies that are implicit to actualising environmental rights in Nigeria.

6. The Climate Change Act 2021

The Climate Change Act (the Act) became law on November 18th, 2021, when President Muhammadu Buhari of the Federal Republic of Nigeria signed the proposed law approved by the Senate on October 13th, 2021.[72] In reaching the domestic and international climate change policies and deliberate steps towards energy transition in

[70] *Ibid*, s. 7 (c).
[71] CFRN 1999 (as amended)
[72] Detail commercial solicitors, "A review of Nigeria's Climate Change Act, 2021", <*https://www.financialnigeria.com/a-review-of-nigeria-s-climate-change-act-2021-feature-459.htm*l>, accessed 06 June, 2022.

Nigeria, Nigeria was a signatory to the Kyoto Protocol[73] and the Paris Agreement 2015.[74]

After the COP26 in Scotland, Nigeria's dedication to global climate change and general energy transition was accentuated. According to Section 1 of the Act, the main objectives can be summarised to include planning programs and actions toward reducing GHG emissions and achieving net-zero emissions between 2050-2070. It also states that there is a climate action plan, and according to Section 2 of the Act, the Act shall apply to all Federal ministries, departments, agencies, and private and public entities. The Act from Section 3 creates the National Council on Climate Change (the Council). The Council is vested with the power to develop policies and make decisions on all matters concerning climate change in Nigeria. The Council is also required to manage the implementation of the provisions of the Act.[75]

Some other provisions dedicated to climate change, can be found to be incidental to environmental rights in Nigeria.

Table 1.2

S/N	**CLIMATE CHANGE ACT**	**SECTIONS**
1.	SECTION 19 (a)	A set carbon budget for Nigeria to keep average increases in global temperature within 2°C and pursue efforts to limit the temperature increase to l .5°C above pre-industrial levels;

[73] Nigeria ratified the Kyoto Protocol on the 10th December 2004, <*https://unfccc.int/node/61130*>, accessed 4th June 2022.

[74] Nigeria ratified the Paris Agreement on 16th May, 2017 <*https://unfccc.int/node/61130*,> accessed 4th June 2022.

[75] Jumoke Lambo *et al* " Nigeria: The Climate Change Act 2021: Key Points For Consideration", available at https://www.mondaq.com/nigeria/climate-change/1281268/the-climate-change-act-2021-key-points-for-consideration#:~:text=In%20order%20to%20protect%20the,on%2018th%20November%202021, (accessed 14 May 2023).

2.	SECTION 34 (2) (a) (b)	A Court, before which a suit regarding climate change or environmental matters is instituted, may make an order - (a) to prevent, stop or discontinue the performance of any act that is harmful to the environment; (b) compelling any public official to act in order to prevent or stop the performance of any act that is harmful to the environment; (c) of compensation to the victim directly affected by the acts that are harmful to the environment.

In the analysis of the provisions above, it can be inferred that the Act mostly describes the duties of the Council to achieve 1.5% temperature at pre-industrial levels in order to reduce global temperature. Pollution, environmental degradation and climate change are global phenomena that can only be curbed with global efforts. As such, every country like Nigeria, must show their commitment as a member country to fight for the right of every individual and the state as a whole to a clean and safe environment. As seen above, it also recognizes climate justice and the procedural aspect of the enforcement of environmental violations in Nigeria's courts, accentuating Nigeria's commitment. Owing to the transboundary nature of carbon pollution in the atmosphere, every country must play its part in solving the problem because only those alive and in good health can enjoy other rights.

Therefore, as can be related to the analysis above on item 60 (a) of the exclusive list,[76] the Climate Change Act 2021 is a product of the constitutional power granted to the National Assembly to make laws as it relates to the enforcement and regulation of the right of a clean and safe environment in Chapter II of the Constitution. However, given the

[76] CFRN 1999 (as amended), Second Schedule, item 60 (a).

analysis of the provisions of the Act,[77] there is a seeming downside to the development of eco-rights in Nigeria. This is in the sense that there is no clear framework on how the aforementioned will be actualised and, as such, projects a tendency to be a dormant legislation in the coming years unless addressed.

Evidently, one may conclude that although if Nigeria's achievement of her established NDCs faces observable challenges, the Act represents a significant advancement in the battle against climate change. Unfortunately, the legislation contains significant flaws that might prevent it from diverging any further from the treaties. This issue is that it has no enforcement mechanism, which renders it questionable. It is evident that generating enough income to cover the National Determined contributions is not likely. Additionally, there is no defined enforcement or penalty system in the Act, which even leaves it up to the Council's discretion to punish violators without explicitly granting the Court any authority. Duplicate regulatory agencies, duplicative taxation with regard to the carbon and hydrocarbon taxes, and the potential burden on Nigeria's oil and gas sector—the backbone of the country's economy—have also been noted as issues. The absence of information on the ability to enforce laws and the consequences for crimes and offenders in the Act can be a peril to its enforceability.

7. Way Forward

Finally, as much as this Act is an important milestone on the road to achieving eco-rights in Nigeria, there is a need for some of the problems in the Act to be addressed. Thus, it is recommended that given that the Council is a corporate body with the ability to sue and bring legal action, it should have a legal department and a public relations department that can raise awareness of and interest in environmental concerns in Nigeria and the fight against the causes and impacts of climate change. A dedicated environmental court with concurrent jurisdiction with the Federal High Court and the High Court should exist to address these issues, or the existing High Court

[77]Climate Change Act 2021.

should be granted civil and criminal jurisdiction over such matters in the Act. As a follow-up on the criminal jurisdiction, it would need to specify the matters that would constitute crimes under the Act, what those offences are, and the required punishment that goes along with them in order to be compliant with Section 36 (12) of the Constitution.[78]On the proposed civil jurisdiction, the Court must have procedural laws on environmental claims, and judges that are vast on environmental matters should be appointed on such cases.

The lack of a clear and well-thought-out provision for an enforceable environmental right in Nigeria's laws seems to be the biggest challenge on the general body of work of environmental rights. The unenforceability of a supposed human right is a robbery of the power and entitlement of every citizen. However, this should not be a lacuna if every country's right to a clean and safe environment is respected and enforceable. There is still a need for extensive judicial activism in recognizing this human right and ensuring compliance by other stakeholders.

Also, environmental policies are seemingly declaratory without strict penalties for violators. There should be strict enforcement of fines and, when applicable, terms of imprisonment because of the right to life and other rights such as weighty sanctions; just as it is the rationale for the rights-based approach, so should the right to a clean and healthy environment. Oil spillages by Multi-National Oil Companies, host community sabotages, and host community militancy in Nigeria should be utterly dealt with. Often, fines imposed on MNOCs are not enough to deter them from committing grave pollution another time. Regulations such as ensuring every of such oil companies is held heavily responsible for their actions will contribute positively to the fight for environmental protection. More so, procedural rights like the participation of non-state actors like NGOs and concerned citizens in general in making environmental decisions and policies should be ensured.

[78]Constitution of the Federal Republic of Nigeria, as amended, 1999.

8. Conclusion

This paper has exhaustively looked at relevant Nigerian laws that play a role in the rights-based approach to environmental protection and accentuates that the environment does not exist in isolation as it is intertwined with human ecology and survival.[79] These Nigerian laws elevate the status and make the actions garnered at achieving environmental protection through the right-based approach more realistic, as its successful result heavily depends on their enforcement. The Nigerian Constitution has provided a perfect framework as the pronounced non-justiciability of environmental rights is not absolute. Thereby, the judicial pronouncements of the Supreme Court in achieving environmental rights through the ACHPR 2004, NESREA 2007, and now, the Climate Change Act 2021 is a ray of hope as to the direction of the country in achieving environmental protection, making it not just a pious wish but a reality.

[79] Alan Boyle, 'Human Rights and the Environment: where next' (2012) 23 (2) *The European Journal of International Law*, 613.