

# The Right To Clean And Healthy Environment Under 1999 Constitution Of The Federal Republic Of Nigeria: A Lesson From Other Jurisdictions

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*Abstract: The constitution of the Federal Republic of Nigeria 1999 (as amended) makes provision as to the right of citizens to clean and healthy environment. Section 20 of the constitution specially provides for this; the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. Despite this, one may ask how practical or workable this provision of the constitution is. Is this provision aimed at protecting the lives and property of the citizenry of Nigeria in their quest for a healthy living as well as safeguarding their property? If we critically examine this provision and Juxta position it with other jurisdictions, where this provision is entrenched in their constitutions and also used in protecting the citizenry and their property? The purpose of this work is to examine the provision of section 20 of the constitution and possibly other sections under the chapter 2 of the constitution vis-à-vis that of chapter 4 of the constitution which deals with the fundamental rights of the citizens. The work will go further to compare the provision with that of one or two other jurisdictions and weigh the work ability of our constitution in this regards and that of the selected jurisdictions.*

## I. INTRODUCTION

Since the early 1970s, the famous provision of principle 1 of the Stockholm Declaration has encouraged many national constitutional provisions to acknowledge the right to a clean and whole some environment as a fundamental right under national laws. Thus at the global, regional or national levels, relevant provisions have been incorporated into instrument and constitutions mandating states to guarantee a healthy environment to its citizens and giving rights to them. In 1990, the United Nations General Assembly possibly stimulated by the language of the 1983 World Commission on Environment and Development (WCED) which propagated the concept of sustainable development, admitted that all “individuals are entitled to live in an environment adequate for their health and well-being” The 1987 Brundland Report that was a by-product of the WCED did not intertwine social, economic and environmental concerns but also recognized the fundamental right to a healthy, life-enhancing, environment.

Prior to June 1988, Nigeria responded to most environmental problems on an adhoc basis. Although the Nigerian Criminal code contained some provisions with respect to certain environmental infringement, such as the pollution of water sources, the burial of corpses within a hundred yards of residential home, and the sale, possession or manufacture of matches with white phosphorus.

Pertinent to say here that the environmental legislative provisions in existence at the time were enacted in direct response to problems associated with the newly industrialized economy and the discovery and exploitation of oil. The Nigerian government followed this action by organizing an international workshop on the environment. The result was the formulation of a national policy on the environment. Consequently, the Federal Environmental Protection Agency (FEPA) Act, 1988 was enacted. In addition the Federal government enacted the Harmful waste (special criminal provisions) Act, 1988 to deal specifically with illegal dumping of harmful waste.

All the above and many other legislations were enacted with the aim of protecting the citizens and the environment of Nigeria, so also is the provision of Section 20 of the Constitution of the Federal Republic of Nigeria (as amended which purports to give the citizens of Nigeria the right to clean and healthy environment.

The essence of this paper is to look at the provision of the Section 20 of the Constitution of the Federal Republic of Nigeria, in providing the right to its citizens to clean and healthy environment to the extent that if this provision is breached, whether the citizens have the rights to remedy in the court or not and to Juxta- position this provision with similar provisions in other jurisdictions especially, that of India and South Africa and recommend a better and best practice for Nigeria for the protection of its citizenry and the environment with the incorporation of this provision into the 1999 Constitution.

## II. THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (AS AMENDED)

The 1999 Constitution of the Federal Republic of Nigeria (as Amended) makes provision for the environmental objectives of the government. The constitutional provision mandates the government to protect and improve the environment and safeguard the water, air and land, forest and the wild life in Nigeria.” By this provision of the constitution, hope were raised that environmental issues have at least been recognized as a constitutional subject in the country. This is particularly so as a careful perusal of the constitutional provision reveals that the wording of the section is quite wide. Though it fails to set out how the government would actualize this laudable environmental objective.

The major setback of this constitutional provision is that it has been rendered non-justiciable by virtue of Section 6(b)(c) of the Constitution. The section provides:

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 of or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directives principles of state policy set out in chapter II of this constitution.

The import of this constitutional limitation is that the observance by the Nigerian government of environmental objectives principles is not obligatory but purely directory as posited by a writer,

With the way the provision is structured, one conclusion that can easily be reached is that it is a middle-ground between two extremes formulated by a system that is not desirous of initiating any environmental change which may disturb its economic direction and strategies. In the face of obvious realities that require a country like Nigeria to give a strong effective Constitutional “bite” to her environmental protection strategies, it must be emphasized that a constitutional provision like section 20 is an initiative that is grossly in capable of catalyzing desired environmental policy performance.

Notwithstanding the non-justiciability of the provision of section 20 of the 1999 Nigerian Constitution, victims of environmental rights have had recourse to the provisions of the domesticated African Charter on Human and Peoples’ Rights. In *Jonah Gbemre v. Shell/Bp petroleum development company Nigeria Ltd and Ors*, the applicant, who instituted the action as a human rights matter and in a representative capacity for himself and on behalf of the Iwherekan community in Delta State of Nigeria, contended that the constitutionally guaranteed fundamental rights to life and dignity of human person provided under sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act inevitably includes the right to clean poison-free, pollution-free and healthy environment and that continued flaring of gas in the area constituted a grave violation of the applicant’s constitutional rights.

Despite the eye opener in the above case and the fact that there is a lee way out of the obnoxious provision of the constitution, using the African Charter on Human and Peoples’ Rights it is submitted however, that continue reliance on the right to a satisfactory and adequate environment entrenched in the African Charter is not a safe foundation as the National Assembly, may chose at any time to amend, modify or repeal the statute and the courts of law as well as the victims of environmental rights in Nigeria would be helpless in such a situation.

## III. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Section 24 of the Constitution of South Africa, entrenches a substantive environmental right which provides that:

- Everyone has the right,
- ✓ to an environment that is not harmful to their health or well being; and
  - ✓ to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
    - prevent pollution and ecological degradation;
    - promote conservation; and
    - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It is pertinent to say here that the provisions of Section 24 of the South African Constitution above makes it possible for individuals to assert their rights against the state and against other individuals whose activities may negatively affect their rights, this is unlike Nigeria where Section 20 is not justiciable. More importantly to say the least the provision of Section 24 of South African Constitution has empowered the citizens to enforced their environmental rights to life and dignity. Section 24(a) for instance has provided a classical or traditional fundamental rights that guaranties the right to life and human dignity. Even though environmental rights are traditionally classified as third generation rights, Section 24(a) is rather an individual justiciable right which may be invoked by individual where this right is breached by a state or private

person's activity. In other words, the constitution does not only guarantee a right to environment but makes this right legal enforceable by the courts. There are indeed no ouster clauses that prohibit the jurisdiction of the court from deciding whether or not this rights has been violated.

#### IV. SOUTH AFRICAN COURTS AND ENVIRONMENTAL RIGHTS ENFORCEMENT

The Grootbooms case decided by the South African Constitutional Court which is the highest court on environmental matters sets out an unprecedented and promising approach to judicial protection of environmental rights, the facts of this case is that, 900 plaintiffs who were citizens of South Africa by birth, for a long period of time spanning over 80 years the plaintiffs lived in an informal squatter settlement more popularly known as wallacedene. Most of the people there were desperately poor, living from hand to mouth. All of them lived in squalor shacks, without water, sewage system or refuse removal services. Only 5% of the shacks had electricity. The named plaintiff, Irene Grootboom lived with her family and that of her sister in a shack of about twenty square metres.

Many of those at the wallacedene settlement had applied for low-cost housing from the municipality. They were placed on the waiting list, where they remained for a number of years. In late 1998, they became frustrated by the intolerable and deplorable conditions at wellacedene and decided to move out and put up shacks and shelters on vacant land that was privately owned and earmarked for formal low-cost housing. A few months later, the owner obtained an ejection order against them. But Grootboom and others refused to leave. They contended that their former sites were now occupied and that there was nowhere else to go. Eventually they were forcibly evicted with their homes burnt and bulldozed. Their possession where all destroyed. They found shelter on a sport field in wallacedone under temporary structures consisting of plastic sheets. Their conditions was even worst here.

It was at this point that they contended, that their constitutional rights had been breached. The constitutional court held interalia, first that the right to health of the plaintiffs was justiciable, second, the court held that the right to adequate housing under Section 26(1) of the Constitution was enforceable. The court found finally that Section 26 of the Constitution was breached.

Also in *Minister of Health v. Treatment Action Campaign*. The court held that environmental rights of the citizens was justiciable.

#### V. THE CONSTITUTION OF THE REPUBLIC OF INDIA

India is arguably one of the most progressive countries that has given due attention to judicial awareness and application of contemporary concepts including environmental rights and notions of sustainable development.

The constitution of India, which is the supreme law of the land, has imposed an obligation to protect the natural environment both on the state as well as the citizens of India.

Part IV of the Constitution called the Directive Principles of State policy has imposed certain fundamental duties on the state to protect the environment.

Of pertinent to this work are the provisions of; Article 47- under Article 47, duty is imposed on the state to raise the level of nutrition and the standard of living of its people and improve public health. Article 48 generally directs the state to take to organize agriculture and animal husbandry on modern and scientific lines. In particular, it is directed to take steps for preserving and improving the breeds and prohibiting the slaughter of cows, calves, and other milch and draught cattle. Of all articles, Article 48 (a) which was added to the Constitution by the constitution of India 42<sup>nd</sup> amendment Act in the year 1976, expressly directs the state to protect and improve the environment and to safeguard forests and wildlife. The most important of all articles is Article 37 which declares that the directive principles, contained in part IV of the Constitution are fundamental in the governance of the country and it shall be the duty of the state to apply the principles in making laws.

#### VI. INDIAN COURTS AND ENVIRONMENTAL RIGHTS ENFORCEMENT

One interesting thing to note is that, Indian courts have breathed life into the above provisions by linking and enforcing these and related issues to the constitutionally guaranteed rights to life contained in Article 21. Indeed, since 1990s the Supreme Court of India has stated on unequivocal terms that issues of environment must and shall receive the highest attention from it.

In the last two decades, the Supreme Court of India has been actively engaged in many respects in the protection of the environment. The court has laid down new principles, reinterpreted environmental law, create new institutions and structures and conferring additional powers on the existing ones through a series of illuminating directions and judgments all aimed at protecting the citizenry and the natural environment.

In *M. C. Mehta v. Union of India* the Supreme Court held that these directive principles (Article 39(b), 47 and 48A) individually and collectively impose a duty on the state to create conditions to improve the general health level in the country, and to protect and improve the natural environment.

In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, the Supreme Court held that the people of Dehra dun have the right to live in a healthy environment, thus ordered the mining operation in the area to cease despite the amount of money and time the company had invested.

In *Vellore Citizens Welfare Forum v. Union of India*, the Supreme Court of India noted that although the leather industry is a major foreign exchange earner of India and provided employment, it does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards.

Finally, in the popular *Bhopal case* the Supreme Court held that the environmental rights of the victims were being violated and ordered that compensation and remediation be made.

## VII. CONCLUSION

The 1999 Constitution of the Federal Republic of Nigeria (as Amended) just like so many other constitutions world over, in its Chapter II, especially in section 20 provides that; “the state shall protect and improve the environment...” as one of its duties to the citizenry. This laudable provision for all intents and purposes is not there to protect the life and the environment of a common man of Nigeria. This is because, the provision of the constitution is not justiciable, meaning that no court of law has the jurisdiction to enforce this rights in case of any breach.

Although Nigerian courts have been pro-active in trying to entrench the right to healthy environment in their pronouncements. This can be true particularly in *Jonah Gbemie* case, but this cannot be anything compare to other jurisdictions. Also, the Fundamental Rights (Enforcement procedure) Rules, 2009 made pursuant to Section 46(3) of the Constitution 1999 (as Amended) in which the Chief Justice of Nigeria is empowered to make rules with respect to the practice and procedure for the enforcement of human rights as well as environmental rights, in Nigeria’s a good move in a right direction but that has not done much in regards to the enforcement of environmental rights of Nigeria.

Another area is that of the African charter on Human and People’s Rights which guaranteed fundamental rights to life and dignity of human person provided under the constitution. Despite the fact that this legislation is or can be ratified to be part of the constitution of Nigeria its limitation is that, the National Assembly may chose at any time to amend, modify or repeal the statute thereby making the courts of law as well as victims of environmental rights in Nigeria helpless.

## VIII. RECOMMENDATION

In the light of the above, therefore, the following suggestions are pertinent.

The Nigerian constitution being the chief source of the laws of the country lacks the requisite constitutional efficacy desperately needed in environmental protection. As noted earlier the only provision of the constitution dealing with environment falls under the non-justiciable umbrella of the fundamental objectives and directives principles of state policy, therefore, it is suggested that, that provision is removed from the chapter to where it could be justiciable or in the alternative, the provision be interpreted by courts to be justiciable.

The success in this case will depend on whether Nigerian courts will follow the current trends in South Africa, India, Ghana, Bangladesh etc where their courts have applied their interpretative jurisdictions to inject justiciable life into their fundamental objectives and directive principles.

Another area of suggestion is the fact that Nigerian government should embark on creating environmental courts which will handle environmental issues separately and speedily too.

Finally, it is suggested that, the right to environment should also incorporate the right to life and dignity of human person as provided under the Sections 33 and 34 of the

Constitution. Courts in Nigeria have taken steps to look into this direction already going by the decision in some environmental right cases. But it is further suggested that the courts are given free hand to carry out their duties and the government of the day allows courts to adjudicate on any matter and whoever is a culprit in environmental matters.

## REFERENCES

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- [2] Earth justice. Issue paper; material for the 60th session of the UN commission of Human Rights San Francisco, 2004 p.80
- [3] See UN General Assembly. Resolution 45/94, 14 December 1990.
- [4] See UN General Assembly Report of the world commission on environment and Development; our common future, 1987. AN/12/427 of August 4, 5 sub paragraph 97
- [5] M. Ikhariale “The Koko incident, the environment and the Law”, in the Law and Environment in Nigeria, Shyllon, F., ed Ibadan, Vintage Publishers, 1989. Pp 73-75
- [6] Laws of the deration 2010, see also L.A. Atsegbua et al., Environmental Law in Nigeria: Theory and practice Ababa press, 2004, P.4
- [7] Nigerian criminal code, section 245-248
- [8] C. S. Ola, Town and country planning and Environment Laws in Nigeria, 2nd ed, Ibadan, University prses, 1984 p.56
- [9] See section 20, of the constitution under the chapter II which is the Fundamental Objectives and Directive principles of state policy. See also the case of Attorney-General Lagos state V. Attorney-General, Federation (2003) 2 NWLR (pt 833) 1. Here the supreme court of Nigeria held interalia, that the main object of section 20 of the 1999 constitution is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other convenience.
- [10] O. Fagbohun, The law of oil Pollution and Environmental Restoration; a Comparative Review, Lagos, Odade publishers, p.317
- [11] This is unlike some other jurisdictions’ constitutions which stipulates the measures that government would adopt to realize environmental goals. Some examples of such constitutional provisions which state the mechanism for the actualization of its environmental objectives are for instance, section 24 of the 1996 constitution of the Republic of South Africa and Articles 38 of the 1993

constitution of the Republic of Seychelles which do not only recognize the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment but also state the mechanisms to be adopted by the respective countries to ensure the effective realization of the right.

- [12] Section 6(b)(c) of the 1999 constitution
- [13] O. Fagbohun, op, cit pp 317-318
- [14] A Federal High Court Benin Division in suit NO. FHC/B/
- [15] Under the Nigerian 1999 constitution, the legislative powers of the Federal Republic of Nigeria are vested in the National Assembly for the Federation. It consists of a senate and a House of Representatives. See section 4(1) of the constitution.
- [16] See Lord Denning Mr. in *Macarthy's Ltd. v. Smith* (1979) All ER 325 see also *General Sani Abacha & 3 others v. Chief Gani Fawehinmi* (2000) FWLR (Pt. 4) 533
- [17] *Government of the Republic of South Africa v. Grootboom* (2000) SCII BCLR 1169
- [18] Jennifer Sellin, "Justiciability of the right to health – Access to medicine – The South African and Indian Experience" (2009) *Erasmus Law Review*, vol 2 issue 4, p.436
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- [22] S. Shanthakumar, *Introduction to environmental Law*, 2nd ed, India, Butleworths, 2010, p.85.
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- [27] (2002) 4 SCC 356
- [28] S. Shanthakumar, OP. Cit., at p.86
- [29] (1985) AIR SC 652
- [30] AIR (1996) SC. 652
- [31] Compare the above case with the Nigerian case of *Allar Iron v. Shell/BP petroleum Dev. Company Ltd*, (unrep) suit No.Hc/Cs/189/7 where the court refused a prayer for injunction to restrain the defendant from further polluting lands, creeks and fish ponds on the ground that, that will stop the defendant is trade and render many unemployed. And affect the country's revenue.
- [32] See also the case of *kinkri Devi and Anor v. state of Himachal Pradesh and others* (1988) AIR HP4. Where the court held that Articles 48A and 51A (g) of the constitution placed a constitutional duty on the state and citizens to protect and improve the environment and that it was left with no alterative but to interfere effectively by issuing appropriate writes, orders and direction in furtherance of this.
- [33] See the constitutions of India, South Africa, Ghana etc.