

THE RIGHT TO A HEALTHY ENVIRONMENT: A BASIC CONCEPT OF FUNDAMENTAL HUMAN RIGHT

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Abstract

From the Stockholm Declaration, to African Charter on Human and people's Rights, to additional protocol to the American Convention on Human Right, the legal protection of the environment and the recognition of a right to a healthy environment have been emerging as the basic values of the twenty first century as well as the main two issues topping the United Nation's agenda. This is a very basic right to which life itself will be meaningless when not observed. The objective is to recognize the right to a healthy environment and identify the enforceable principles. The affirmation guarantee of the individual's right to a healthy environment when can enforced against corporate bodies can go a long way in ensuring corporate responsibility for environmental degradation and ultimately environmental protection. The traditional common law theories and conservation of natural resource have always had imbedded technical and procedural bottlenecks that impedes the success of a victim of degradation. However, these theories and later statutory provision are not right based with regards to the victim of degradation, but mainly conservation based. This has led to serious problem in the development of our jurisprudence as relating to protecting the right of the victim to a healthy environment. A way forward relying on statutory and judicial authorities will be to open doors to a victim to enforce his right to a healthy environment against perpetrators of degradation.

Keywords: Right, Healthy, Environment, Concept, Basic and Fundamental

Background to the Study

The impact of the environment upon the health and lifespan of many nations is a necessary impetus to consciously bring our home, school and work environment into alignment with that which promotes health in order to enjoy the other fundamental human rights enshrined in the Constitution. So many activities in the environment serve as threats to good health such as ionizing radiation from telecommunication and other transmission equipment, environmental pollution, noise pollution, air pollution, water pollution etc. The right to a healthy environment was first explicitly recognized in the Stockholm and Rio declarations as non-binding principles. Those declarations were not intended to create legal rights and obligations. However, they did contribute to the development of international and domestic laws.

Many national constitutions and laws recognize the right to a healthy environment derived from the obligation of states to adopt the principles reflected in the Stockholm and Rio declarations. Some domestic courts have also referred to principles enshrined in these declarations. Obviously the legal status of a healthy environment as a human right varies among different systems. Many countries such

as South Africa have developed constitutional provisions that guarantee the right to a health environment: The South Africa's Constitution provides that:

Everyone has the right (a) to an environment that is not harmful to their health or wellbeing; 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 technologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Other countries that have devoted constitutional provisions to the right to a healthy environment include Ecuador, Hungary, Peru, Mexico, Indonesia, Portugal, South Korea and the Philippines. The South Korea's constitution contains provisions recognizing that "all citizens have the right to a healthy and pleasant environment". Article 15/xii of the Mexican General Act for the Protection of the Environment and Ecological Equilibrium, reiterates the right of every person to live in an adequate environment for the sake of his or her development, health and wellbeing. Article 5(1) of the Indonesian Environmental Management Act recognizes the right to a healthy environment by stipulating that "every person has the same right to an environment which is good and healthy".

The 1999 Constitution of the Federal Republic of Nigeria in its chapter four (iv) contains provisions of fundamental rights. These fundamental rights are derived from natural or divine laws. These are inalienable rights of man to life, liberty and the pursuit of happiness. Fundamental Human Rights are "specie" of rights which are inherent in any human being. They are inalienable and immutable therefore cannot be taken away from any person without affront to justice. It is in line with the above that this paper seeks to examine the right to a healthy environment within the context of mineral exploitation in Nigeria. It argues that a healthy environment is necessary for the enjoyment of other Fundamental Human Rights. These Fundamental Human Rights can only be perfectly enjoyed when the enforcement mechanisms of environmental rights are certain and attainable as it obtains in other jurisdictions. It is imperative that enforcement of mining regulations be included in the Fundamental Rights (Enforcement Procedure) Rules of 2009, while Chapter four of the 1999 (CFRN) incorporate the right to a healthy environment as a Fundamental Human Right.

Conceptual Framework

The environment has been defined as the totality of physical economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and the value of property and which also affects the quality of people's lives. It means the surrounding conditions, influence or forces which include or modify life. The word environment could be better understood as the totality of the physical, biological, social and cultural conditions, which influence the growth and wellbeing of organisms. Thus, man's environment will include the totality of everything (both living and non-living,

1 Article 12 of the Constitution of the Republic of South Africa as adopted on 8, May 1996 and amended on 11, October 1996 by the Constitutional Assembly

2 Alberto Szekeley in Background Paper on National Implementation in Mexico Workshop on National Implementation of the Principles contained in the Rio Declaration on Environment and Development UN Headquarters. 12 – 14 January, 1997

air, water, and all organisms and every matter) around him. Consequently, if man's environment is sick man must be affected thereby. This therefore makes it a categorical imperative for man to make conscious effort to protect his environment for his well-being. It is pertinent to ask whether there is any danger facing the environment today. If there is, what are these problems facing the environment today? There is serious danger facing the environment and Nigeria is no exception. These problems are multiple ranging from pollution, deforestation, desertification, devastation of territories to direct destruction of biodiversity. In fact the degree of degradation of the environment has been metaphorically presented as follows:

The patient's condition is serious. Symptoms are multiple. His breath is noxious. He has a fever higher than ever before. Efforts to bring it down are not working. Poison has been found in the body fluids. When symptoms are treated in one area, more pop up in other body parts.

The constitution is the organic law of a country and it prescribes rights, duties and responsibilities of citizen. It is the *fon et origo* from which all other laws derive their validity. The 1999 Nigerian Constitution is the first constitution that attempt to address environmental problems through constitutional approach. Section 20 of the 1999 constitution provides:

The state shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria. This is a beautiful and captivating provision. But are these provisions of section 20 justifiable? Are they enforceable against the state on which a duty would appear to have been imposed therein? Section 13 further strengthen section 20 thus: It shall be the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers to confirm to, observe and apply the provisions of this chapter of this constitution.

Reading these sections together clearly shows that both sections have created a duty and responsibility for all organs of government to protect and improve the environment and for every duty there is a corresponding right. It could be safely argued that Nigerian citizens have a corresponding right under sections 13 and 20 of the constitution enforceable against the state and all organs of government to have a protected and improved environment and safeguarded water, air, land, forest and wild life.

Man's environment, be it social, spiritual, physical and otherwise greatly affects lives, families and health especially mental, emotional and physical. Living in touch with the environment creates awareness to the activities that may cause threat to good health. Environmental pollution, community relationship, appreciation of God's provision in nature, etc are all part and parcel of what will ultimately define man's health status. From the beginning, man's relationship with the environment and the obligation to protect it predates what is popularly ascribed as Fundamental Human Rights.

Genesis 1:9-2:1-5 provides... And God said; let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so. And God called the dry land Earth; and the gathering together of the waters Seas: and God saw that it was good. And God said let the eart bring forth grass, the herb yielding seed, and the fruit tree yielding fruit... let the waters bring forth abundantly the moving creatures that hath life, and fowl that may fly above the earth in the open firmament in heaven... be fruitful, and multiply and replenish the earth, and subdue it: and have

dominion over the fish of the sea, and over the fowl of the air and over every living that moveth upon the earth... and the Lord God took the man, and put him into the Garden of Eden to dress it and to keep it.

It is obvious that man's first obligation was to dress and keep the garden for his own good. Everything he needed that pertains to life and godliness was properly packaged and handed to him by the Creator. Man being rebellious did not only begin to destroy the environment, but every other thing that was necessary for the environment to flourish suffered under the gross violation of God's commandment. As the society became more sophisticated in violating natural laws and commandments of God, the concept of Human Rights became imperative. The neglect of environmental right is nothing less than giving credence to the natural laws and withdrawing the most important baseline to the enjoyment of such natural laws. What can be more fundamental to be enjoyed by man apart from having a healthy environment where such rights can be exercised?

Human rights are demands or claims made by an individual or group in the society, which demands or claims are protected by legal instrument. The Human Rights recognized and protected by the Nigerian Constitution are: the right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; right to acquire and own immovable property anywhere in Nigeria; and the right to prompt payment of compensation in case of compulsory acquisition of property. Where the society or community is vandalized and polluted by toxins emitting from exploitation of natural resources then right to life and other Fundamental Human Rights are not guaranteed.

The Illegal Activities in the Mining Industry in Nigeria

Before the oil boom of the early 1970s, the economy was largely sustained by the exploitation of solid minerals that contributed about 10% to the Gross Domestic Product (GDP). Today it contributes less than 1% of GDP. According to the National Bureau of Statistics, it contributed a mere 0.36% to the GDP in the second quarter of 2011. Nigerian government focused its attention on crude oil immediately after the Civil War as the new resource. Since then the solid minerals sector laid dormant for forty years. As a result of this dormancy, illegal miners with all the uncertainty that surround their lives have found a safe haven where serious fortune is exploited to private accounts., Nigeria is believed to be losing billions of dollars annually to illegal miners who are responsible for 95% of the activities in the mining sub-sector. Illegal mining is a serious threat to human existence especially in the Niger Delta communities in Nigeria; unfortunately, the government is reluctant to confront the illegal miners with stiffed penalties. A onetime Commissioner for Commerce and Industry Enugu State) once admitted that:

3 Black's Law Dictionary. 6th ed, Centennial ed, (1st panel Minnesota) West Publishing Co. 1990 at p. 534

4 *Ibid*

5 Awake/C. Pennsylvania: Watchover Bible and Track Society, 2003 Vol. 1 No. 22 at P. 1

6 Per Ogundare JSC In *Victor Rossek v. ACB* (1993) 10 SCJ 20

7 Akinyemi, T., (2010) Healthy Living News Letter Number 15.

8 Holy Bible (1994) King James Version. Zondervan Corp

“In a way, we are happy that they have taken to illegal mining rather than becoming armed robbers. That is why we don't call them illegal miners anymore. We now prefer to call them artisanal or informal miners”. Mr. Ifeanyi Ikeh (the one time Commissioner) observed adding that the state government is now encouraging them to go to the cadastre unit of the Federal Ministry of Mines and Steel Development to apply for small scale mining lease to carry out their businesses. This is the state of Mining Industry in Nigeria. In the case of solid minerals, it is estimated that about 500,000 Nigerians and migrants from neighbouring West African countries are involved in the industry as artisanal miners across the country. They hack at the red with pick axes and shovels until they find the substance they are looking for thereby polluting the environment.

The Rationale for Right to a Healthy Environment

The relationship between the rights to a healthy environment and development is ineluctable. The right to healthy environment is extricably interwoven with the right to life, and is a precondition for the exercise of freedom. It encompasses and enlarges the right to healthy and sufficient standard of living. The wider the dimension of the right to life and the right to a healthy environment entails consequent threats against these rights. The possible threat to human health as a result of environmental degradation, include global warming which is responsible for skin cancer, retinal eye damage, cataract and eventual blindness. Other possible threats may include neurological damage, lowered resistance to infections and alteration of the immunological system. The depletion of the ozone layer may in addition to the substantial injury to human health, result to environmental harm, to terrestrial plants and the destruction of zooplankton a key to the food chain, which are consequences of adverse environmental changes. The consequences of these adverse environmental changes are examples of threats to life in the wider sense; thus, obviating the needed convergence of human health protection and environmental protection.

The 1989 Hague Declaration on the Atmosphere states:

The right to life is the right from which all other rights stem, the right to live in dignity in a viable global environment entails the duty of community of nation's vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment.

Article 12 of the United Nations, Conference on Economic, Social and Cultural Rights set a detailed guideline for the implementation of the right to health which includes “the improvement of the environmental and industrial hygiene”. This paved way for the subsequent development in the area of right to a healthy environment. The protection of the whole biosphere entails “indirectly but necessary” the protection of human beings, in so far as the object of environmental law and the right to a healthy environment is for the benefit of mankind.

9 Eze, O (1984) Human Rights in Africa: Selected problems Macmillan Publishers p 5.
10 Sections 33 – 44 1999 (CFRN)
11 www.talng.com No. 43 October 31, 2011
12 Tell Magazine No. 43 October 2011, p 46
13 See section 99 Minerals and Mining Act (2007)
14 Ehusani, A.J; (2011) op. cit

Enforcement of Mining Regulations; a Pre-Requisite to Healthy Environment

There have been successful domestic court cases guaranteeing the right to a health environment in various countries. In India, the enforcement of the constitutional right to a healthy environment is enunciated in the case of *M.C. Mehta v. Union of India*. This case is about pollution by a number of tanneries and the failure of the authorities to take appropriate steps. The petition asked the court to restrain certain industries from discharging trade effluent into the Gangs River. The Supreme Court ordered the tanneries to close down unless the trade effluents were subjected to a pre-treatment process by setting up primary treatment plants as approved by the state pollution Board. The Court noted that "closure of tanneries may bring unemployment (and) loss of revenue, but life health and ecology have greater importance to the people.

Similarly, the Supreme Court of Costa Rica affirmed the right to a healthy environment in the Costa Rica Constitutional Clause of the Supreme Court vote No. 3705, 30 July 1993. The Plaintiff brought the action on the grounds that he and his neighbour's right to life and healthy environment had been violated because a cliff in their neighbourhood was being used as a dump. The court ordered that the dump be closed immediately and held that the authorities had not been effective or diligent enough in carrying out their obligation to protect life and environment. The court stated that life "is only possible when it exists in solidarity with nature, which nourishes and sustains us-not only with regard to physical food but also with physical wellbeing. It constitutes a right which all citizens possess to live in an environment free from contamination.

Section 65 & 66 provides:

No person shall in the course of mining or prospecting for minerals, pollute or cause to be polluted any water or watercourse in the area within the mining vase or beyond that area.

Every person who uses water in connection with mining operations, whether for:

- a) The generation of power; or
- b) The removal of mineral substance; or
- c) Concentration, milling or otherwise shall whatever may be the nature and date of the document of title under which the use is enjoyed, make such provisions and shall ensure that the water so used does not contain injurious substance in quantities likely to prove detrimental to animal or vegetable life when the water leaves the mining area in which it has been so used.

Similarly section 99 provides:

The holder of mining title shall in exercise of its tights under the license or lease have regard to the effect of the mining operations on the environment and take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation.

Reading these three sections together brings to light one crucial matter which is water pollution. The main gist of these sections can be summarized thus:

- a. No person shall pollute or cause to be polluted any water course while mining;

- b. A miner must ensure that the water used for mining activities does not contain injurious substance in quantity likely to be detrimental to plants and animals;
- c. A miner should take necessary steps to prevent pollution of the environment.

Section 127(3) Provides:

A person who commits an offence which involves the pollution of the environment contrary to the federal Environmental Protection Agency Act and regulations made under it, or to section 65, 65 and 69 of this Act, is liable on conviction to a fine not exceeding N50,000.000 or imprisonment for a term not exceeding three years or to both fine and imprisonment.

The Federal High Court has jurisdiction to try offences committed under the Mining Act and Regulations made therein. Mining of natural resources is under the Exclusive Legislative List therefore under the Federal Government controls, however, the enforcement mechanism of environmental right as applied in different jurisdictions achieve different levels of effectiveness.

Challenges of enforcing Mining Regulation and Environmental Right

Environmental issues are no longer mere abstractions but daily realities; affecting and impacting human lives. Thus the need for protection of human life from the adverse effects of environmental pollution by collective right deserves attention. Nigeria is not devoid of laws on environmental protection, and the constitutional bases for the enforcement of these laws are also guaranteed. But the question is how often does the court give credence to violation of environmental right? The major challenges to the enforcement of environmental right in Nigeria include:

a. Technicalities of Legal Process

Where the collective environmental right of citizens is breached by mining activities, it is not out of place for a well spirited individual to bring an action to enforce the right. The technical issue of locus standi before now usually worked against the individual as he must proof to the court that he had suffered injury over and above other members of the public. This was enough discouragement to a high spirited fellow from instituting an action for breach of environmental right.

The supreme Court of Nigeria supports the abolition of locus standi by holding that section 6(6) of the constitution has the effect of empowering a private person to sue in the public interest without obtaining the consent of the Attorney General or joining him as a party.

15 Cited in Bright C.A. Toebes; (1999) 'The Right to Health as a Human Right in International Law' (Intersenti-Hart, Groningeri: school of Human Right Research)
16 Mrs Zohra Ksentini (1994) Commission on Human Rights: UN DOC. E/CN.4/Sub.2/1994/9
17 Minerals and Mining Act 2007
18 *Ibid*
19 *Ibid*
20 Section 125 Minerals and Mining Act 2007
21 Akinbola B.R., (2011) 'Environmental Right and Human Right Enforcement in Nigeria visiting the Nexus and a clause for Reform' Human Right Review Journal 10/2.No.2p.192-193

b. Reluctance of Courts to grant injunctions

In *Amoco Production Co. v. Village of Gambell, Alaska*, the Supreme Court of the United States held as follows:

Environment injury, by its nature can seldom be adequately remedied by money damage and is often permanent or at least of long duration. That is irreparable if such injury is sufficiently likely, therefore the balance of harm will usually favour the issuance of an injunction to protect the environment.

It is absolutely correct that money cannot remedy the adverse damage caused to the community through illegal mining or even mining wells caused by licensed mining. The best remedy should be injunction restraining the miners from further exploitation of the environment. But Nigeria will hardly grant injunctions against companies causing pollution considering the economic impact on the companies and government, instead of the need for the protection of the environment, property, individual health and life. Nigerian court should take a cue from other jurisdictions which grant injunctions in cases deserving same.

c. The Problem of Interpretation of Statute

Having mentioned that the right to a healthy environment is as weighty as the right to life, a person whose environmental right has been breached may institute an action by way of Foundational right enforcement under the Fundamental Right Rules. Even with this procedure, most Courts will rather entertain technicalities over justice. Most times the merit of the case is ignored and legal technicalities will be favoured at the expense of justice. In *Okpara v. Shell PDCN*. The court ruled that the suit could not be maintained in a representative capacity, nor maintained for wrong joinder of cause of action, and therefore struck out on preliminary objections without looking into the merit of the case. This is a major hurdle in enforcing environmental right vide the fundamental rights enforcement procedure.

Environmental pollution is usually colossal with widespread effect, affecting many people or the whole community. Actions brought in representative capacity aid to curb multiplicity of actions and minimize costs, knowing that victims are often poor and helpless. Environmental right is and should be considered as belonging to a special class of people and not be defeated by unnecessary technical rules.

d. Government Attitude towards Illegal Miners

Buried deep inside the earth all over Nigeria are solid minerals of different categories that can make the country rich beyond its dreams. But mining activities in the country are not organized to produce fruitful results like putting more money in state coffers and creating jobs for millions of job-seekers in the country. Both the state and federal government are reluctant to face illegal miner head on; but prefer to polish their activities and call them informal or artisanal miners. The government policy on mining does not encourage both small-scale and commercial mining. To guarantee an explosion of business activities in the solid mineral sector the government must encourage both small scale and commercial miners.

After 50 years of oil exploitation and environmental degradation from other industries and illegal (informal) miners the Nigerian (1999) constitution is still couched in sour terms. It passively made mention of the duty of the state “to protect and improve the environment and safeguard the water, air, land, forest and wild life...” without more.

Conclusion

An unhealthy environment will surely nourish unhealthy people. Sick and weak people cannot be said to enjoy life as a right. There is a nexus between a healthy environment and a right to life. Life is only pleasant when it exists in solidarity with nature which nourishes and sustains it – not only with regards to physical food but also with physical wellbeing. It constitutes a right which all citizens possess to live in an environment free from contamination.

Recommendation

Under International Human Rights Instrument, the assertion of inherent right to life of every human being is accompanied by an assertion of the legal protection of that right and of a negative obligation not to deprive arbitrarily of life. Nigeria is under obligation to take all appropriate measures to protect and preserve life.

The right to a healthy environment encompasses and enlarges the right to health and the right to an adequate or sufficient standard of living. The right to healthy environment is inextricably interwoven with the right to life therefore the 1999 Constitution of Federal Republic of Nigeria be amended to include right to healthy environment as part of chapter four of the Constitution i.e. Fundamental Human Rights.

The courts should emulate the decisions in other jurisdictions like India and the Philippines where a breach of environmental right is a breach of Fundamental Human Rights. Judges should de-emphasize procedural technicalities in the interest of environment justice.

Governmental policies should encourage both small scale and commercial mining in order to discourage informal or illegal mining thereby creating employment opportunities in the country.

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- 22 *Amos and Ors v. Shell-BP PDCN Ltd & Anor* (1974) I.R.S.L.R p. 23-24
23 See *Adediran & Anor v. Interland Transport Ltd* (1991) 9 NMLR Pt. 214 P. 155
24 480 U.S 531 (1987)
25 See *Okpara v. Shell PDCN* Suit No. FHC/PH/C5/518/2005 (unreported)
26 *Supra*
27 See Section 20 1999 CFRN
28 Costa Rica Constitutional Charter of the Supreme Court, Vote number 3705, 30, July 1973.
29 Article 4, African Charter on Human Right
30 See *Ratlam Municipality v. Vadhi Chad* 67 A.I.R.S.C.P 1622 (1980)

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