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Article

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1 INTRODUCTION

Nigeria like most other African countries is presently experiencing the problems of severe environmental degradation and uncontrolled depletion of its natural resources.[1] It should be noted that while environmental degradation and attendant human rights violations associated with oil production activities in Nigeria usually tend to grab worldwide attention, it does not imply that other industrial sectors in Nigeria do not have their share of environmental degradation as witnessed by the numerous complaints of communities living around their facilities.[2] The cause of these environmental problems is not due to lack of regulatory frameworks as Nigeria boasts a developed legal, policy and institutional frameworks for the protection of its environment and natural resources.[3] Rather, the problem of environmental degradation is not unconnected with the lack of political will to enforce environmental regulations in Nigeria.[4] As discussed in an earlier article, this unwillingness may be induced either by corruption, economic benefits derived from the activities of the degrading industries in form of revenues and employment opportunities, or the need to attract foreign investment to boost socio-economic development.[5] Whatever may be the reason for not enforcing environmental regulations in Nigeria, the regulatory lacunae has been exploited by most industries to degrade or continue the degradation of the environment with adverse consequences on the health and overall well-being of Nigerian citizens including their enjoyment of the right to a healthy environment.[6]

In most instances of the State failing to implement or enforce the provisions of environmental regulations against polluters, and the polluters failing to adopt good environmental standards in their operations, the only option left to the aggrieved citizens whose rights including their right to a healthy environment have been affected by environmental degradation, is to approach the court for appropriate judicial remedy.[7] Environmental litigation is not only vital for inducing the State to implement or enforce the provisions of environmental regulations, but also, constitutes a very important strategy for holding polluters including transnational companies (TNCs) accountable for the adverse environmental consequences of their activities.[8]

1 *See* Emeka Polycarp Amechi, 'Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment', 5/2 *Law, Environment and Development Journal* 107, 110 (2009).

2 For example, the host community of the Kaduna industrial complex have been complaining about the unhygienic state of River Kaduna, their only source of portable water, caused by the discharge of industrial effluent and toxic water into the river by the cluster of textile mills in the complex. *See* Ifeanyi Anago, Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience 8 (paper prepared for FIG XXII International Congress, Washington D.C., USA, 19-26 April 2002), available at http://www.fig.net/pub/fig_2002/Ts10-3/TS10_3_anago.pdf. *See* also Emeka Ezekiel, 'In Mpampe, Residents Contend with Noise, Dust', *The Punch*, 24 June 2010 at 38 (detailing the environmental degrading activities of stone-mining companies in Mpampe, a satellite town in Bwari Area Council of the Federal Capital Territory (FCT), Abuja) and Simeon Nwakaudu 'Much Ado About Red Eyes, Rice Chaff', *The Guardian*, Monday, 28 June 2010 at 13 (detailing environmental degradation by a local rice company).

3 *See* Amechi, note 1above and Hari M. Osofsky 'Learning from Environmental Justice: A New Model for International Environmental Rights', 24/1 *Stanford Environmental Law Journal* 1, 3 (2005).

4 *Id.* at 117. *See also* Ososfsky *id.* and Okechukwu Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria', 6 *Environmental Change & Security Project Report* 19 (2000).

5 *See* Amechi, note 1 above at 117-119. *See also* Alison Lindsay Shinsato, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria', 4/1 *Northwestern Journal of International Human Rights* 185, 189 (2005).

6 *See* Ezekiel, note 2 above; Nwakaudu, note 2 above; John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law', 25 *Columbia J Envtl L* 283, 289-290 (2002) and Joshua P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', 15 *Boston Univ. Int'l LJ* 261, 278- 292 (1997).

7 *See* A.J. Perry, 'Sustainable Gateways to Environmental Justice', *in* C. Pugh ed, *Sustainable Cities in Developing Countries* 15-16 (London: Earthscan, 2000).

8 *See* Amechi, note 1 above at 112; Michael R. Anderson, 'Individual Rights to Environmental Protection in India', *in* Alan E Boyle and Michael Anderson eds., *Human Rights Approaches to Environmental Protection* 210 (Oxford: Clarendon Press, 1996) and Jedrzej George Frynas, 'Social and Environmental Litigation Against Transnational Firms in Africa', 42/3 *The Journal of Modern African Studies* 363, 365-366 (2004).

However, in instances of actual or threatened degradation of the environment, litigating the right to a healthy environment is dependent on the access of the victims or potential victims to court. Access to court for victims of environmental degradations is usually dependent on the intersection of two factors vis-à-vis legal rights recognised in a given society, and the procedural gateways created by law for the enforcement of such rights.[9] The latter is very important as most people whose rights had been infringed or threatened by environmental degradation in Nigeria, have been denied access to justice because of the burdensome procedural rules or injustices in the legal and court systems.[10] It is in view of this that the recent adoption of the Fundamental Rights (Enforcement Procedure) Rules, 2009,[11] is a welcome development in promoting access to court for victims of environmental degradation in Nigeria. The Rules provide for the rules of procedure to be followed in applications for the enforcement or securing the enforcement of fundamental rights in Nigerian courts.[12]

This Paper examines the impacts of the Rules in ensuring or enhancing access to environmental justice for victims of environmental degradation. Specifically, the focus will be on how the Rules contribute in ensuring or enhancing access to justice for persons whose right to a healthy environment has been infringed or threatened by environmental degradation in Nigeria. It starts with a discussion of the legal framework providing for the right to a healthy environment in Nigeria. This is very important, as the Rules cannot be used to enhance the promotion or realisation of a right that is alien to Nigeria. This will be followed by a discussion of the impacts of the new Rules in enhancing or ensuring access to justice for victims of environmental degradation in Nigeria. Finally, the paper concludes with the recommendation that the existence as well as the importance of the new Rules should be actively promoted by the judiciary, media and NGOs in order to enhance their effectiveness in guaranteeing access to court for victims of environmental degradation. It should be noted that the use of the adjective 'healthy' in qualifying the right in this paper should not be construed as an adoption of any particular constitutional or statutory adjectives,[13] as it is used purely to convey an idea of the environment that the right, irrespective of the qualifying adjectives, aims to achieve, which is an environment of such a minimum quality that will enhance the attainment of human health and well-being.[14]

9 *See* Michael Anderson, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC, Paper for Discussion at WDR Meeting, 16-17 August 1999, , available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf .

10 For example, where a cause of action arises in private law, failure to discharge the onerous burden of proof associated with reliance on tort rules, has led to the failure of many environmental cases. Similarly, the strict application of the *locus standi* rules in causes of action arising from public law, has led to the failure of environmental cases against governmental bodies. *See Chinda and 5 others v Shell-BP Petroleum Development Company* (1974) 2 RSLR 1; *Shell Petroleum Development Company v Chief W. W. Amachree and 5 others* (2002) FWLR 1656 and *Oronto-Douglas v. Shell Petroleum Development Company and 5 Others,* Unreported Suit No. FHC/CS/573/93, Delivered on 17 February 1997. *See also* Amechi, note 1 above at 115-116; Perry, note 7 above at 17; Taiwo Osipitan, 'Problem of Proof in Environmental Litigation', *in* J. A. Omotola ed., *Environmental Law in Nigeria Including Compensation* 115-125 (Lagos: University of Lagos, 1990); Theodore Okonkwo, *The Law of Environmental Liability* 143 (Lagos: Afrique Environmental Development and Education, 2003) and World Resources Institute et al, *The Wealth of the Poor - Managing Ecosystems to Fight Poverty* 71, 76 (Washington DC: WRI, 2005) .

11 Fundamental Rights (Enforcement Procedure) Rules, 2009, entered into force on 1 December 2009, available at http://www.accesstojustice-ng.org/articles/New%20FREP%20Rules%20.pdf.

12 *Id.*

13 Several national and regional human rights and environmental instrument have used different adjectives to qualify the right. *See* Michael R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', *in* Boyle and Anderson ed., note 8 above at 10 and Alexandre Kiss and Dinah Shelton, *International Environmental Law* 23 (Ardsley-on-Hudson, NY: Transnational Publishers , 1991).

14 *See* Eaton, note 6 above at 299; James W. Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification', 18 *Yale JIL* 281, 284 (1993); Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergency of a Human Right to a Healthy Environment Under International Law', 16 *Tulane Environmental Law Journal* 111 (2002) and Patrick D. Okonmah, 'Right to a Clean Environment: a Case for the People of Oil-Producing Communities in the Nigerian Delta', 41 *JAL* 43, 55 (1997).

2 AN OVERVIEW OF THE RIGHT TO HEALTHY ENVIRONMENT IN NIGERIA

A discussion of the right to a healthy environment in any country usually involves an examination of relevant national environmental and human rights instruments to determine the extent that they expressly or impliedly accord recognition to the right. Presently, none of the environmental legislation in Nigeria including the more recently enacted National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,[15] provided for this right. Therefore, the discussion in this section will naturally gravitate towards the principal human rights instrument in Nigeria vis-à-vis the constitution of the Federal Republic of Nigeria,[16] and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[17]

2.1 The Constitution of the Federal Republic of Nigeria 1999

Chapter IV of the Nigerian Constitution does not provide for an express right to environment among its fundamental rights. However, it provides for substantive rights like the rights to life, dignity of human person, private and family life, equality, and property that can be expansively interpreted to include the right to a healthy environment.[18] This is evident in *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others*,[19] where the Federal High Court held that that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person.[20] However, the reinterpretation of these existing human rights for environmental protection is riddled with procedural limitations.[21] These include the claimant establishing injury to his/her health and well-being or rights, a failure of which is usually detrimental to the action.[22] In addition, the reinterpretation of existing right is dependent on a progressive judiciary, as the court is required to make a connection between the alleged human rights violation and the environmental problem in question.[23] This qualification cannot be ascribed to many judicial systems in developing countries especially African countries like Nigeria.[24]

In addition, the Nigerian Constitution provides procedural rights that can also be mobilised for environmental protection. These include the rights to fair hearing, freedom of expression and the press, and peaceful assembly and association.[25] Constitutional procedural rights when mobilised for environmental protection are enabling rights as they make it possible for people to contribute actively to the protection of their environment.[26] As aptly argued by Atapattu,

> The importance of these rights is that they contribute to the development of a decision—

15 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, No. 25 of 2007. It supersedes Federal Environmental Protection Agency (FEPA) Act (Cap F10 *LFN* 2004) as the principal environmental instrument in Nigeria.

16 Federal Republic of Nigeria Official Gazette, No. 27, Lagos, 5 May 1999, Vol. 86, GN No.66. (Hereinafter the Nigerian constitution).

17 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, *LFN* 2004. (Hereinafter African Charter Ratification Act).

18 *See* generally Anderson, note 8 above and Dr Jonah Razzaque, *Human Rights and the Environment: Development at the National Level, South Asia and Africa,* Background Paper No.4, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva, available at http://www2.ohchr.org/english/issues/environment/environ/bp4.htm.

19 *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others,* Unreported Suit No. FHC/B/CS/53/05, Delivered on 14 November 2005.

20 *Id.*, paras 3-4.

21 *See* Anderson, note 13 at 8.

22 *See* Atapattu, note 14 at 99 & 111 and S. Douglas-Scott, 'Environmental Rights in the European Union—Participatory Democracy or Democratic Deficit', *in* Boyle and Anderson ed., note 8 above at 111-112.

23 *See* Douglas-Scott, note 22 above.

24 *See, e.g.*, O*ronto-Douglas* case, note 10 above. In this case, the plaintiff's application to compel the defendants to observe the provisions of the EIA Act was dismissed by the Nigerian Federal High Court for lack of *locus standi*.

25 *See* Federal Republic of Nigeria Official Gazette, note 16 at ss 36, 39 & 40 respectively.

26 David Hunter, James Salzman and Durwood Zaelke eds, *International Environmental Law & Policy* 1312 (New York: Foundation Press, 2nd ed. 2002). *See also* Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' *in* Boyle and Anderson eds, note 8 above at 60 and *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others,* (1999) 2 SA 709 (SCA).

> making process which is transparent and participatory and which holds the government entity in question accountable for its actions. Applied in relation to environmental issues these include: the right to have access to information affecting one's environment, the right to participate in decisions affecting the environment, and the right to seek redress in the event one's environment is impaired.[27]

Furthermore, the Constitution provides among its Fundamental Objectives and Directives Principles of State Policy, that '[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'.[28] This provision places a mandatory duty on the State to direct its policies towards achieving the above environmental objective.[29] However, it does not place any corresponding legal right on the citizens to enforce such provision or any other provisions of the Chapter in the event of non-compliance by the State. The reason for this state of affairs is because of section 6 (6) (c) of the Constitution which provides that '[t]he judicial powers vested in [the courts]…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 law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution'.

The above stipulation was judicially interpreted in *Okogie (Trustees of Roman Catholic Schools) and other v Attorney-General, Lagos State*,[30] which is based on equivalent provision of the erstwhile 1979 Nigerian constitution. The case dealt with the constitutional issues of the Plaintiffs' fundamental right under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the Lagos State government to ensure equal and adequate educational activities at all levels under section 18(1), Chapter II of the 1979 Constitution.[31] On reference to the Court of Appeal, the Court while considering the constitutional status of the said Chapter stated:

> While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution.[32]

The reasoning in the above decision was affirmed in the later case of *Adewole v Jakande*.[33] The effect of these decisions is that the provisions of Chapter II of the Nigerian Constitution are now regarded as mere declarations or 'cosmetic constitutional provisions'[34] while their constitutional weight lies at the moral level.[35] Indeed, in the *Okogie* case, Justice Mamman Nasir, President of the Court of Appeal (as he then was) expressed the view that the arbiter for any breach of the provisions of Chapter II is the legislature or the electorate.[36] However, the *Okogie* case suggests that the provisions of the Chapter can be made justiciable by appropriate implementation legislation provided the fundamental rights of any citizen or any other expressed constitutional provision are not infringed.[37] This has

27 *See* Atapattu, note 14 above at 90-91.

28 *See* Nigerian Constitution, note 16 above, S. 20. These Fundamental Objectives and Directive Principles are essentially a set of guidelines designed to secure the 'national' targets of social well-being, social justice, political stability, and economic growth in accordance with the espoused vision of the Preamble to the Constitution. *See* Dejo Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees', 69 *Saskatchewan L. Rev.* 56 (2006).

29 *See* Nigerian Constitution, note 16 above, S. 13.

30 *Okogie (Trustees of Roman Catholic Schools) and other v Attorney-General, Lagos State,* (1981) 2 NCLR 337.

31 In pursuit of this objective, the State government purported via a circular letter dated 26 March 1980 to abolish the operation of private schools in the State. *See Okogie* case *id.*

32 *Id.*

33 *Adewole v Jakande,* (1981) 1 N.C.L.R. 152.

34 *See* Olowu, note 28 above.

35 Peter Oluyede, *Constitutional Law in Nigeria* 174 (Nigeria: Evans Brothers, 1st ed. 1992).

36 *See* Okogie, note 30 above.

37 *Id.*

been reaffirmed by the Nigerian Supreme Court in *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria*,[38] involving the constitutional validity of the Corrupt Practices and Other Related Offences Act No. 5 of 2000 and its Independent Corrupt Practices and Other Related Offences Commission (ICPC). Both the Act and ICPC were established to enforce observance of the Directive Principle set out in section 15(5) of the Constitution.[39] The Court held that '[a]s to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, s. 6 (6) (c)... says so. While they remain mere declarations, they cannot be enforced by 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 Directive Principles can be made justiciable by legislation'.[40]

The Nigerian judicial attitude to the Directive Principles is influenced by the initial position of the Indian Supreme Court with regard to the justiciability of article 48A of the Indian Constitution, which is similar to section 20 of the Nigerian Constitution.[41] The Court's decisions in the 1950s established that article 48A and other provisions of Part IV of the Indian Constitution relating to the Directive Principle, are not justiciable as a result of article 37 which provides that the Directive principles ' shall not be enforceable by any court'.[42] Presently, the judicial position has changed in India starting with the decision of the Supreme Court in *Minerva Mills v Union of India*,[43] which elevated the constitutional status of the Directive Principles. It is from the philosophy underlying the elevated status of the Directives Principles, that the Supreme Court began interpreting fundamental rights under Part III in the light of the provisions of Part IV.[44] In the area of environmental protection, the Court has recognised the right of every Indian to live in a healthy or pollution-free environment by utilising the environmental provisions of Part IV to flesh out the constitutional right to life.[45] As observed by Dam and Tewary:

> In recognising the right to a clean environment, the Court drew inspiration from article 48-A enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the Constitution. This recognition of the right to a clean environment and, consequently the right to a clean air and water was a culmination of the series of judgements that recognised the duty

38 *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria,* (2002) 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.) [Ondo State].

39 In holding that the Act and the commission were constitutional and valid, the apex court referred extensively to the Fundamental Principles in Chapter II of the Nigerian Constitution. As stated by the Court, 'it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy.... The ICPC was established to enforce the observance of the Directive Principle set out in S. 15(5) of Chapter II, which provides that 'The State shall abolish all corrupt practices and abuse of power'.

40 *See -General, Ondo State v Attorney-General, Federal Republic of Nigeria,* note 38 above. This position tallies with the almost uniform position of the state courts in the United States that general constitutional environmental provisions are ineffective save with the aid of additional legislative enactment (*see* Pollard III, 'A Promise Unfulfiled: Environmental Provisions in State Constitutions and the Self-Execution Question', 5 *Va. J. Natural Resources Law* (1986) as cited in Francois Du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties', *in* Boyle and Anderson ed., note 8 above at 154). This judicial attitude flowed from the doctrine of 'self-execution'. This doctrine requires a provision to constitute 'a sufficient rule by means of which the right which [it] grants may be enjoyed and protected…without the aid of a legislative enactment' before it will be judicially enforced. (*See State ex rel. City of Fulton v Smith,* 194 S.W. 2d 302, 304 (Mo. 1946). Thus, since only provisions couched in prohibitory language are regarded as satisfying this test, the mandatory language of environmental prohibitions in US state constitutions has disqualified them from being regarded as self-executing (Fernandez, 'State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question'?, 17 *Harvard ELR* 333, 361-365 (1993) as cited in Francois Du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties', *in* Boyle and Anderson ed., note 8 above at 155). It should be noted that section 20 of the Nigerian Constitution is also couched in a mandatory language.

41 *See Okogie* case, note 30 above.

42 *See State of Madras v Champakam Dorairajan,* (1951) AIR (SC) 226 at 252 and *Mohd Nanif Qureshi v State of Bihar,* (1958) AIR (SC) 731.

43 *Minerva Mills v Union of India* (1980) AIR (SC) 1789.

44 Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment'? 17/3 *Journal of Environmental Law* 383, 386 (2005). *See also* Anderson, note 8 above at 214 and *Francis Coralie Mullin v Union Territory of India* (1981) AIR (SC) 746 at 752-753 (interpreting the right to life).

45 *See* Dam and Tewary, note 44 above and Anderson, note 8 above at 215-216. For the judicial decisions, *see Subash Kumar v State of Bihar,* AIR 1991 SC, 1991 (1) SCC 598; *L.K. Koolwal v Rajasthan,* (1988) AIR 2 (High Court of Rajasthan); *Charan Lal Sahu v Union of India* (1990) AIR (SC) 1480; T. *Damodhar Roa v Municipal Corp of Hyderabad* (1987) AIR 171 at 181; and *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213.

> of the state and individuals to protect and preserve the environment.[46]

The Nigerian constitution does not contain a provision similar to article 51A of the Indian Constitution. Despite this, the Indian judicial decisions constitute persuasive precedents for Nigerian courts. Thus, when confronted with a similar situation, the courts are urged to re-interpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, in order to uphold the constitutional right of every Nigerian to live in an environment adequate to their health and well-being.[47] However, the Indian approach when applied to the Nigerian context has a unique drawback. This is due to the fact that since Chapter II of the Nigerian Constitution does not contain a provision similar to article 51A of the Indian Constitution, it will be difficult to extend the constitutional duty of protecting the environment directly to private individuals. This perhaps explains why *Ghemre* case, which is the only judicial decision on the right to environment in Nigeria, made no mention of section 20 of the Constitution.[48]

2.2 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act

The Act domesticates the provisions of the African Charter on Human and Peoples' Right in Nigeria.[49] Thus, by virtue of this Act, article 24 of the Banjul Charter providing for the right to environment as well as other provisions of the Charter are now part of Nigerian law.[50] This Act now forms part of existing Nigerian legislation recognised under the Constitution and has such effect until modified by the appropriate authority.[51] The domestication of the Banjul Charter in Nigeria extends the corresponding obligations not only to the State (government of Nigeria), but also, to private individuals in Nigeria.[52] Thus, any person who felt that any of the rights provided by the Act including the right to a healthy environment, in relation to him is infringed or threatened by conducts of the State or private individuals can bring an action in any of the Nigerian high courts depending on the circumstances of the case for appropriate relief.[53] Bringing such action under the Act will decrease the over reliance on the onerous tort rules as litigants or victims do not necessarily have to prove fault or causation, but only the creation of an unhealthy environment. It also obviates the need for the reinterpretation and mobilisation of existing human rights for environmental protection, which as earlier noted is riddled with procedural limitations. Under the Act, the claimant only needs to establish that the degradation resulted or will result in the creation of environment that is not favourable to his health and well-being or socio-economic development.[54]

Article 24 and other provisions of the Act are subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it.[55] The effect of this is that in the event of any conflict between the provisions of the Act and that of the Nigerian Constitution particularly its fundamental human rights provisions, the latter prevails.[56] While it may be argued

46 *See* Shubhankar Dam, note 44 above.

47 *See* Nasir JCA (as he then was) in *Okogie* case note 30 above. Note that some of these rights such as rights to private and family life and property under article 8 of the European Convention and article 1 of Protocol 1 respectively now form the basis of environmental protection in Europe. Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties', *in* Boyle and Anderson ed., note 8 above at 91-95.

48 *See Jonah Ghemre v Shell Petroleum Development Company of Nigeria and 2 Others,* note 19 above. For a criticism of this omission, *see* Obiajulu Nnamuchi, 'Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria', 52/1 *Journal of African Law* 20 (2008).

49 *See* African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, OAU Doc.CAB/LEG/67/3 rev.5, 21 *Int'l Leg. Mat.* 58 (1982). (Hereinafter Banjul Charter).

50 *See* African Charter on Human and Peoples' Rights, note 17 above, S. 1. *See also*, Nigerian Constitution, note 16 above, S.

51 *See* Nigerian Constitution, note 16 above, S. 315 and *Abacha* case, note 50 above at 596C-E. 'Appropriate authority' according to the Supreme Court in *Attorney-General, Abia State and 35 others v Attorney-General, Federation,* is the President of the Federal Republic of Nigeria, (2003) 4 NWLR (Part 809) 124 at 175D-H.

52 *See Ghemre* case, note 48 above, para 6. (The Court held that a government legislation that allows the 1st and 2nd Respondents to continue flaring gas is a violation *inter alia* of articles 4, 16 and 24 of the Act).

53 *See Abacha* case, note 50 above at 590E-H & 591A and *Ogugu v the State* (1994) 9 NWLR (Part 366) 1.

54 *See* Atapattu, note14 above at 99.

55 *See Abacha* case, note 50 above at 586F-G.12(1) and *Abacha v Fawehinmi* (2000) FWLR 585G-P; 586A-C; & 653G.

56 *See* Nigerian Constitution, note 16 above, S. 1(3). *See also Ransome-Kuti v Attorney-General, Federation* (2001) FWLR 1677F and *Akulega v B.S.C.S.C* (2002) FWLR 288E-F.

that the provisions of both the Act and the Fundamental Rights Chapter of the Nigerian Constitution complement each other,[57] the possibility of such conflict arising still exists especially with regard to the provision of article 24 of the Act providing for the right to a healthy environment, and that of sections 43 and 44 of the Nigerian Constitution providing for the right to property. Thus, in the event of such conflict ever arising, the provision of the latter sections prevails. The fact that a right provided in a legislation cannot override express provisions of the Constitution can be inferred from the decision of the Kenyan High Court in *Park View Shopping Arcade Ltd v Charles M. Kangethe and 2 others*,[58] where the defendants/respondents purported to justify their trespass on the basis of section 3 of Environmental Management and Coordination Act (EMCA),[59] as the disputed land is located on an ecologically fragile area. It was contended on behalf of the Defendants/Respondents *inter alia* that while the activities of the Plaintiff/Applicant (the owner) is bound to imperil the land which is a river-bed, the current activities of the Defendants/Respondents through the propagation of flowers and seedling will lead to its conservation. The Court in rejecting the above argument held:

> On the basis of that provision [section 3 of the EMCA), if nothing else is taken into account, the Defendants/Respondents in this case could very well contend that by denying the Plaintiff/Applicant access to his own land [that] they are protecting the environment. But I have already discounted the validity of such argument…. I should add that, although 'every person' has been empowered by section 3(1) of the Act to aforesaid to 'Safeguard and enhance the environment', this must be subject to the State's policy and management directions. This is essential for the efficacious and well-ordered environmental management and for compliance with the governing law, the relevant ministerial regulations, and authoritative provisions of the Constitution. Once this principle is observed, then it will be readily seen that the claims now being made by the Defendants/Respondents must be subject to the Constitution. The claims of the Defendants cannot be upheld if they run counter to the express provisions of the Constitution.[60]

However, the prevalence of the constitutional right to property over the right to a healthy environment under the Act is not absolute and therefore will depend on the circumstances of each case. The reason for the above assertion is where the conflict arose in the course of the state fulfilling the obligations imposed by the right to a healthy environment under the Act, its infringement of the constitutional right to property which is not absolute,[61] can still be justified albeit indirectly under the same Nigerian Constitution if the property is in such a state as to be injurious to the health of human beings, plants or animals,[62] or where the property involves land, the infringement is necessary for carrying out work the purpose of soil conservation.[63] In the same breath, if the conflict occurs between two individuals asserting different conflicting rights, the person asserting his right to a healthy environment under the Act can still prevail if he can be able bring it under the Fundamental Rights Chapter of the Nigerian Constitution by proving that the exercise of the latter person's right to property is injurious or adverse to the enjoyment of either his constitutional right to life, private and family, or human dignity.[64] This is evident in the *Gbemre* case, where despite the fact that the defendant had a valid gas flaring licence under section 3(2) (a)-(b) of the Associated Gas Re-Injected Act (AGRA),[65] and section 1 of the AGRA (Continued Flaring of Gas) Regulations,[66] and hence, an interest that is subject to protection under section 44 (1) of the Nigerian Constitution, the Federal High Court declared not only that the above provisions of both AGRA and AGRA Regulations unconstitutional,[67] but also, that

57 *See Abacha* case, note 50 above at 586D.

58 *Park View Shopping Arcade Ltd v Charles M. Kangethe and 2 others* (2004) eKLR at 21.

59 Environmental Management and Coordination Act, No. 8 of 1999. (Provides for the right to a clean and healthy environment in Kenya) available at http://www.nema.go.ke/images/stories/pdf/EMCA.pdf.

60 *Park View Shopping Arcade* case, note 58 above at 18.

61 The right is made subject to the provisions of the Constitution.

62 *See* Nigerian Constitution, note 16 above, S. 44 (2) (f).

63 *See* Nigerian Constitution, note 16 above, S. 44 (2) (i).

64 *See* Nnamuchi, note 48 above at 19.

65 Associated Gas Re-Injected Act, Cap. A25, Vol. 1, Laws of the Federation of Nigeria, 2004.

66 AGRA Regulations, S.1. 43 of 1984.

67 Gbemre case, note 48 above at para 4 (declarations).

> The Actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Arts 4, 16 and 24 of the African Charter (Ratification and Enforcement) Act….[68]

The above discussion of these human rights instruments shows that they explicitly or implicitly recognised the right to a healthy environment. Hence, it can be argued that there is an established right to a healthy environment in Nigeria. It also shows that espousing or litigating the right to a healthy environment under these legal instruments has some limitations. Despite these limitations, it is submitted that relying on the environmental right provisions of these instruments in instances of environmental degradation presents a better avenue of obtaining environmental justice in Nigeria courts than reliance on the onerous tort rules. Most importantly, such reliance allows victims of environmental degradation to proceed against degraders using the enforcement of fundamental rights procedure.[69]

3 THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES, 2009 AND ACCESS TO ENVIRONMENTAL JUSTICE

3.1 Recognition of the Justiciability of the Right to Environment in Nigeria

The 2009 FREP Rules, which came into force on 1 December 2009, was promulgated by the Chief Justice of Nigeria in exercise of the powers under section 46(3) of the Nigerian Constitution. The Rules replace the erstwhile 1979 Fundamental Rights Enforcement Procedure Rules,[70] and seek to improve access to judicial remedies for persons whose rights including the right to a healthy environment were threatened or infringed. The Rules are therefore vital to the protection of the environment in Nigeria as they afford victims of environmental degradation improved access to judicial remedies in Nigerian courts. The basis of such access being that the environmental degradation in question has adversely affected or threatened their right to a healthy environment guaranteed under the Nigerian Constitution and the African Charter Ratification Act. This is evident in the overriding objectives of the Rules which *inter alia* aims at the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act with 'a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them'.[71] It should be noted that the reference to the African Charter Ratification Act not only distinguishes the Rules from the 1979 Rules,[72] but also, reinforces the applicability of the rights and freedoms contained under the Act including the socio-economic rights in Nigeria. Indeed, the Rules laid to rest any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment, by expressly defining fundamental right as including 'any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.[73]

68 *Id*, at para 2 (declarations).

69 *See Abacha* case, note 50 above; *Ransome-Kuti case, note* 56 above, para 2 and *Onokerhoraye v Igbinovia* (2001) *FWLR* 156, para 1.

70 *See* Fundamental Rights (Enforcement Procedure) Rules, 1979, S.I. I of 1979, available at http://www.nigeria-law.org/FundamentalRights(EnforcementProcedure)Rules1979.htm

71 *Id.,* Para 3 (a). See also Fundamental Rights (Enforcement Procedure) Rules, 2009, note 11 above, Preamble.

72 However, this is not surprising as the 1979 Rules were adopted before the adoption of the Banjul Charter and its subsequent ratification and enactment into law in Nigeria. In addition, the Nigerian Courts have held in a long line of decided cases that application for the enforcement of the rights and freedom contained in the Act can be brought under the 1979 Rules. *See Abacha* case, note 50 above.

73 Order 1 (2). For arguments regarding the justiciability of the socio-economic provisions of the Act, *see* Hakeem O. Yusuf, 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria', 8 *African Human Rights Law Journal* 79, 81 & 93-96 (2008); Solomon T. Ebobrah 'The Future of Economic, Social and Cultural Rights Litigation in Nigeria', 1 (2) *Review of Nigerian Law and Practice* 108, 114-124 (2007) and Nnamuchi, note 48 above at 15-19.

However, the fact that the rights under the Ratification Act are now regarded as fundamental rights under the Rules does not negate the earlier argument in this paper regarding the primacy of constitutional rights over rights provided in the Act. In essence, it can be argued that the definition of a fundamental right under the Rules to include any right under the African Charter Ratification Act does not place rights under the Act on the same fundamental level with rights guaranteed under Chapter IV of the Nigerian Constitution. This is due to the fact that unlike constitutional rights, fundamental rights under the Act are still not immune from alteration, modification or suspension by the Legislature in the ordinary process of legislation.[74] Despite this, it can be argued that the inclusion of rights under the Act as fundamental implies that the executive, the legislature and the judiciary are all enjoined to preserve and protect the rights and freedoms under the Act, and any violation by any person or group of persons, even the government is ultra vires.[75]

3.2 Liberalisation of the Locus Standi Rule in Human Rights Litigation

Ordinarily under the existing rule of *locus standi* in Nigeria, persons bringing public law actions including those relating to the protection of the environment against the State must show that they are 'person aggrieved', that is persons whose legal rights are infringed or threatened by the State's act, neglect or default in the execution of any environmental law, duties or authority.[76] Discharging this procedural requirement in environmental public law litigation has proved burdensome to persons including Non-Governmental Organisations (NGOs) that either are interested in the general protection of the environment or in championing the rights of persons affected by environmental degradation.[77] Their inability to satisfy this requirement had led to the failure of many deserving environmental cases in Nigerian Court. This is evident in *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others*,[78] where the plaintiff, an environmental activist sought to compel the respondents to comply with provisions of the Environmental Impacts Assessment (EIA) Act before commissioning their project (production of liquefied natural gas) in the volatile and ecologically sensitive Niger Delta region of Nigeria. The Federal High Court (per Belgore, CJ, as he then was) dismissed the suit on the grounds *inter alia* that the plaintiff has shown no legal standing to prosecute the action. It should be noted that a fall-out of the *Oronto-Douglas* case was the practice of environmental NGOs sponsoring victims of environmental degradation to litigate against those responsible.[79] Such practice is dependent on the determination of the victims to prosecute such suits to the logical conclusion. A no mean feat as they may be induced financially to discontinue the suit by the polluters.[80]

74 *See Abacha* case, note 50 above at 586F-G.

75 *See* J. Nnamdi Aduba, 'The Impact of Poverty on the Realization of Fundamental Human Rights in Nigeria', 3 (1) *Journal of Human Rights Law and Practice* 2-3 (1993) and Anthony O. Nwafor, 'Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges', 4 *African Journal of Legal Studies* 1, 6-7 (2009).

76 *See Oronto-Douglas* case, note 10 above; *Adesanya v President of Nigeria* (1981) All NLR 1 at 39; *Inyangukwo v Akpan* (1985) 6 NCLR 770; *Attorney-General of Kaduna State v Hassan* (1985) 2 NWLR 483; *Irene Thomas and others v Reverend Olufosoye* (1986) 1 NWLR 669, and *Adediran and another v Interland Transport Limited* (1992) 9 NWLR (Part 214) 155. For a criticism of this position, *see* Tunde I. Ogowewo, 'Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria', 26 *Brooklyn JIL* 527 (2000).

77 *See* Amechi, note 1 above at 115-166.

78 *See Oronto-Douglas v. Shell Petroleum Development Company and 5 Others,* note 10 above. For an equivalent Ugandan decision, *see Byabazaire Grace Thaddeus v Mukwano Industries*, Misc. Application No. 909 OF 2000, High Court of Uganda (Kampala Division).

79 For example, *Ghemre* case was sponsored by Environmental Rights Action/Friends of the Earth Nigeria, with scientific and legal support from E-LAW U.S. *See* Yusuf, note 73 above at 93 and Anonymous, 'Nigerian Judge Rules Gas Flaring Violates Constitutional Rights', *ENS*, 15 November 2005, available at http://www.ens-newswire.com/ens/nov2005/2005-11-15-04.asp.

80 For example, in the Tiomin mining incident which resulted in *Rodger Muema Nzioka and 2 others v Tiomin Kenya limited*, Civil case No.97 of 2001, High Court of Kenya, Mombassa, available at http://www.elaw.org/node/1996, there was the allegation that some of the parties were bought off thereby facilitating easy extra-judicial settlement of the dispute. *See* Dr Patricia Kameri-Mbote, Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention (Geneva: International Environmental Law Research Centre, Working Paper 2005-1, 2005), available at www.ielrc.org/content/w0501.pdf.

Presently by virtue of the 2009 FREP Rules, discharging this burdensome requirement does not apply any longer to the enforcement of fundamental rights. This is due to the fact that the new Rules expressly mandate the Court to 'proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented'.[81] This is a very important objective as the poor are not only adversely affected in instances of environmental degradation,[82] but also, lack the financial wherewithal to offset the cost (including the opportunity cost) involved in diligently prosecuting lawsuits against those responsible for the degradation or threatened degradation.[83] Achieving this objective invariably will include granting access to courts to NGOs and other persons representing these classes of people. Most importantly, the Court are required to 'encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*'.[84] Furthermore, the Rules expanded the class of persons that can bring action in instances of human rights violation. These include anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest, and association acting in the interest of its members or other individuals or groups.[85] Hence, by virtue of these provisions, NGOs and other public-spirited individuals can now validly bring action to enforce the fundamental rights of persons affected or threatened either by environmental degradation or by any act, neglect or default of the Nigerian government in the execution of any environmental law, duties or authority.

3.3 Commencement of Action

Furthermore, the Rules provide for an easier mode of commencing fundamental rights enforcement actions. It should be noted that under the previous Rules, it is a *conditio sine qua non* for an applicant to obtain leave of the appropriate court before an action for infringement of fundamental rights can be instituted. An application for such leave is in form of a motion *ex parte* supported by an affidavit, the statement of material facts and verifying affidavit.[86] These requirements usually occasioned delays and encumbrances in the process thereby leading to many deserving cases for the enforcement of fundamental rights not being heard in court.[87] The 2009 FREP Rules seek to simplify the mode for commencing fundamental rights actions by obviating the need for the requirements of obtaining leave as well as a verifying affidavit.[88] Hence, applicants are only required to commence such action using any originating process accepted by the Court.[89] The application shall be accompanied by a statement, affidavit in support, and a written address.[90] In addition to simplifying the mode of commencement, the Rules removed the time limit within which such application can be commenced by providing that 'an application for the enforcement of Fundamental Right shall not be affected by any limitation Statute whatsoever'.[91]

In commencing an action for the enforcement of the right to a healthy environment, a victim of environmental degradation 'may apply to the Court in the State where the infringement occurs or is likely to occur, for redress'.[92] Court under the Rules means 'the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja'.[93] This provision implies that both the Federal High Court and State High Court have concurrent jurisdiction in respect of matters dealing with the enforcement of fundamental rights.[94] However, where the infringement

81 FREP Rules, 2009, note 11 above, Para 3 (d).

82 *See* Bakary Kante, 'The Environment, the Wealth of the Poor'?, *Poverty & Environment Times* No. 2, March 2004 and Peter Hazlewood, Geeta Kulshrestha and Charles McNeill, 'Linking Biodiversity Conservation and Poverty Reduction to Achieve the Millennium Development Goals', *in* Dilys Roe ed., *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* 144 (London: IIED, 2004).

83 *See* Amechi, note 1 above at 112-113.

84 FREP Rules, 2009, note 11 above, Para 3(e).

85 *Id.*, Para 3(e).

86 *See* 1979 FREP Rules note 70 above, Order 1 (2).

87 *See* Nwafor, note 75 above at 8-10.

88 *See* FREP Rules 2009, note 11 above, Order II (2).

89 *Id.*

90 *Id.,* Order II (3) & (5).

91 Order III (1). *Cf* Order 1 (3) (1) providing that leave shall not be granted to apply for an order under these Rules unless the application is made within twelve months from the date of the happening of the event, matter, or act complained of.

92 *See* FREP Rules, 2009, note 11 above, Order II (1).

93 *Id.*, Order I (2).

94 *See*, Nigerian Constitution, note 16 above, S. 272; *Tukur v. Government of Gongola State* (1989) 4 *NWLR* (Pt. 117) 517; *Zakari v IGP* (2000) 8 *NWLR* (pt.670) 666 and *Jack v. University of Agriculture, Makurdi* (2004) 14 *WRN* 91.

implicates the Federal Government or any of its agencies or falls into matters within the jurisdiction of the Federal High Court as contemplated under section 251 of the Nigerian Court, the application can only be brought in the Federal High Court.[95] Likewise, where the infringement implicates matters outside the jurisdiction of the Federal High Court or involves state governments and their agencies, then the State High Court assumes jurisdiction.[96] The fact that action for enforcement of fundamental rights against the Federal Government and any of its agencies can only be commenced in the Federal High Court is further given support under the Rules which provide that '…where … [such] infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the State shall have jurisdiction'.[97]

The perpetuation of the jurisdictional dichotomy between the Federal High Court and State High Court in the commencement of fundamental rights enforcement actions is a major drawback of the new Rules with regard to promoting access to court in instances of environmental degradation.[98] It should be noted that it is litigants and their lawyers who determine which disputes will reach the courts, when and how often courts will be petitioned, and how intensively conflicts will be pursued.[99] Hence, a situation where Federal High Court judicial divisions are not evenly situated in all the States of the Federation, and even where it is sited in a particular State, is usually situated in the State capital, usually presents a logistical problem to victims of environmental degradation in Nigeria.[100] The effect of this is that most victims of the degradation especially those associated with the oil industry in Nigeria, who often hail from the rural areas of the State, may not have the financial wherewithal to institute and diligently prosecute enforcement actions at the Federal High Court. A good example is the *Ghemre* case, where the applicant who sued in a representative capacity on behalf of the people of Iwherekan, a rural community in Delta State, then had to institute the action for enforcement of their fundamental rights in the judicial division of the Federal High Court located at Benin, Edo State. It is doubtful if the applicant would have had the resources to institute and prosecute the suit without the intervention of environmental NGOs.

3.4 Other Salient Provisions

The 2009 FREP Rules also provide for the general conduct of proceedings in an application for the enforcement of fundamental rights.[101] Such application shall be fixed for hearing within 7 days from the day it was filed.[102] In addition, the hearing of the application may be adjourned from time to time where extremely expedient 'depending on the circumstances of each case or upon such terms as the Court may deem fit to make, provided the Court shall always be guided by the urgent nature of applications under these Rules'.[103] The latter as well as the provisions of the Rules regulating filing of notice and hearing of preliminary objections disputing the Court's jurisdiction,[104] are vital in ensuring access to environmental justice for victims of environmental degradation as it eliminates the use of dilatory tactics usually adopted by oil companies and other degraders to frustrate the hearing of actions for enforcement of fundamental rights as well as actions for compensation in instances of environmental degradation.[105] Such dilatory tactics usually increase the actual and opportunity costs of poor litigants who most times are forced to abandon their actions either entirely or for monetary compensation.[106]

Other provisions of the Rules relating to the speedy hearing of an application for enforcement of fundamental rights include those regulating the service of court process;[107] amendments of statements and

95 *See Tukur* case, note 94 above at 516-517; and *NEPA v Edegbero* [2002] 18 *NWLR* (pt.798) 79.

96 *See Alhaji Shehu Abdul Gafar v The Government of Kwara State* (2007) 20 *WRN* 170 and *Executive Governor, Kwara State v. Mohammed Lawal* (2005) 25 *WRN* 142.

97 *See* FREP Rules, 2009, note 11 above, Order II (1).

98 *See* Nwafor, note 75 above at 8.

99 *See* Anderson, note 9 above at 20-21.

100 *See* Nwafor, note 75 above at 8.

101 *See generally* FREP Rules, 2009, note 11 above, Order IV.

102 *Id.*, Order IV (1).

103 *Id.,* Order IV (2).

104 *Id.,* Order VIII.

105 *See* Agency Reporter, 'Prospects and Challenges of New Fundamental Rights Rules', *The Punch*, 22 February 2010, available at http://www.punchontheweb.com/Articl.aspx?theartic=Art201002222433585.

106 *See* WRI et al., note 10 above at 76; Mbote, note 80 above; and Engobo Emeseh, The Limitation of Law in Promoting Synergy between Environment and Development Practices in Developing Countries: A Case Study of the Petroleum Industry in Nigeria, at 23, available at http://userpage.fu-berlin.de/ffu/ akumwelt/bc2004/download/emeseh_f.pdf.

107 *See* FREP Rules, 2009, note 11 above, Order V.

affidavits;[108] consolidation of several applications relating to the same infringement;[109] and the mode of hearing the application.[110] The latter dispensed with the requirement of oral address except 'on matters not contained in their written addresses provided such matters came to the knowledge of the party after he had filed his written address'.[111] This is subject to the proviso that the Court shall not allow oral argument of more than twenty minutes for such matter.[112] In addition, non-compliance of any proceedings with the requirement as to time, place or manner or form, shall be regarded as an irregularity and may not nullify such proceedings except as they relate to the mode of commencement of the application, or that the subject matter is not within the provisions of Chapter IV of the Constitution and the African Charter Ratification Act.[113]

Furthermore, 'any person or body who desires to be heard in respect of any Human Rights Application and who appears to the Court to be a proper party to be heard, may be heard whether or not the party has been served with any of the relevant processes, and whether or not the party has any interest in the matter'.[114] The hearing of *Amici curiae* is also encouraged under the Rules.[115] Finally, the Court may during the hearing make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Nigerian Constitution or African Charter Ratification Act to which the applicant may be entitled'.[116]

4 CONCLUSION

This paper examines the impacts of the newly enacted 2009 FREP Rules in ensuring access to justice in Nigerian court for persons whose rights including their right to a healthy environment have been infringed or threatened by environmental degradation in Nigeria. In examining these impacts, it argues that the right to a healthy environment is a recognised human right in Nigeria as it is not only derivable from fundamental rights under Chapter of the Nigerian Constitution, but also, expressly falls under the rights recognised under the African Charter Ratification Act, an existing law in Nigeria. This argument is giving further supported by the express provision of the Rules recognising rights including the right to a healthy environment under the Act as fundamental rights. Hence, victims of actual or threatened environmental degradation can now rely on the provisions of the Rules in enforcing their right to a healthy environment in Nigeria. Dependency on the provisions of the Rules to enforce the right to a healthy environment is not only restricted to victims as environmental organisations and any other person interested in the protection of the environment in Nigeria can now petition the court for appropriate reliefs. The main weakness of the Rules relates to the perpetuation of the jurisdictional dichotomy between the Federal High Court and State High Court in the commencement of fundamental rights enforcement actions. This weakness is a major drawback in promoting access to court in instances of environmental degradation especially where it involves the oil company, the major environmental degraders in Nigeria.

Despite this drawback, it is apparent from the above discussion that the Rules through its various innovative provisions have impacted positively on the ability of victims either through themselves, representative or through the instrumentality of NGOs to access environmental justice in Nigerian courts. In addition, by ensuring access to judicial remedies for not only victims, but also, NGOs and any other person interested in the protection of the environment in Nigeria, it can be argued that the adoption of the Rules may be the single most important factor in kick-starting environmental activism within the legal arena. Such activism will in turn translate to the fostering of an extensive and innovative jurisprudence on environmental rights as presently being experienced in other developing countries such as India, Pakistan, Kenya, and South Africa. This is not far-fetched as the Rules have already kick-started legal activism on other provisions of the Act as evident by a suit recently filed at the Lagos Division of the Federal High Court by an NGO seeking

108 *Id.*, Order VI.
109 *Id.*, Order VII.
110 *Id.*, Order XII.
111 *Id.*, Order XII (2).
112 *Ibid.*
113 *Id.*, Order IX.
114 Order XIII (1) of FREP Rules, 2009, note 11 above.
115 Order XIII (2) of FREP Rules, 2009, note 11 above
116 *See* Nigerian Constitution, Order XI.

an enforcement *inter alia* of the right to receive information (information relating to recovered stolen public funds).[117]

Perhaps, the greatest challenge with the Rules and their effectiveness in promoting access to justice for victims of environmental degradation relates to their effective utilisation by victims, lawyers, NGOs and other persons or organisation interested in the protection of the environment in Nigeria. This is no mean feat as there is still a general lack of knowledge of the legal means of protecting the environment in the country. Surprisingly, this ignorance is not restricted to laymen, but also, lawyers. Even some lawyers that have some elements of environmental consciousness, have held on to the view that that there is no justiciable right to a healthy environment based on the non-justiciability of the provisions of Chapter two of the Nigerian constitution. This is despite the existence of the African Charter Ratification Act since 1983 as well as various judicial decisions of the Indian Supreme Court proclaiming the right to a healthy environment. There is therefore the need for the judiciary, institutions of higher learning, media and NGOs to bring to the consciousness of the general public including judges and lawyers of not only the importance of the environment to their general well-being, but also, of the legal gateways for enforcing their fundamental right to a healthy environment in Nigeria. Otherwise, like the provision of article 24 of the Act, the provisions of the Rules may go untapped for a long period in relation to enforcing the right to a healthy environment in Nigeria.

117 *See Registered Trustees of Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and others*, FHC/L/CS/89/2010, 26 January 2010 (pending). *See also* Tony Amokeodo, 'Falana Sues FG Over Two Federal Highways', *The Punch*, Thursday, 24 June 2010, at 5. (Suit recently filed by a human right activist seeking to enforce repair of two major roads under the right to life).

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