Exposition on the Stance of the Judiciary on Environmental Constitutionalism: Evidence from India and Nigeria

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ABSTRACT

In few decades, environmental constitutionalism rapidly gained prominence at national, subnational and international levels. Various international instruments have been put in active places and national governments are seeking to expedite environmental protection activities including the enactment of environmental protection laws alongside the insertion of the valuable provisions in their national constitutions to address environmental issues. It is pertinent to note that, most scholars that religiously work on environmental constitutionalism tend to focus on literal constitutional provisions protecting the essential substantive and procedural citizens' rights to a safe and healthy environment, "what might be termed fundamental environmental constitutionalism." The outpouring interest among international scholars of legal disciplines in "constitutionalism" characterizes one of numerous determinations to re-hypothesize international governance and to draw attention and add credence to the global environmental law. By exploring the extent to which international environmental law has constitutional dimensions in India and Nigeria, this study adopts the expository research design to evaluate the degree to which the courts in the two countries are able to substantiate environmental rights as human rights. It concludes that, despite the fact that the international treaties on environmental rights have gained constitutional supports and recognitions in many countries, international environmental law in its entirety is deficient in guaranteeing a constitutional order. Hence, further research should be conducted into the perceived gaps and available options that should be adopted as solutions that will clearly continue to expand the conversation of environmental constitutionalism in India and Nigeria.

***Keywords**: Environmental constitutionalism, human rights, Nigeria, India.*

INTRODUCTION

Essentially, a constitution is "the fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution,

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and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers[1]. According to Aristotle (384–322 B.C.)[2], a constitution may be defined as an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed. Laws, as distinct from the frame of the constitution, are the rules by which the [courts] magistrates should exercise their powers, and should watch and check transgressors."[3]

The central idea behind the existence of the constitution is that, it is meant to be built upon the consensus and resolve of the people whom it administers. Apart from the creating of the institutions of government and the way in which they relate to each other and to the ordinary citizens, a constitution should also create the rights of the people and set forth the obligations and responsibilities of the authorities to preserve those rights. Constitutions, may be written (codified, such as those of the United States, India, Nigeria and others) or unwritten (as applicable in the United Kingdom). In whichever format it is, the functions are basically the same.

The environment as a concept has been a subject of intense discussion. According to section 1(2) of the British Environment Protection Act,[4] environment is made up of "of all, or any, of the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground." Also, the Environment Act of New Zealand[5] suggests a fairly inclusive definition of environment which incorporates the "ecosystems and their constituent parts; all natural and physical resources; the social, economic, aesthetic and cultural conditions which affect the environment or which are affected by changes to the environment." In the words of Simpson and Jackson[6]:

> *"In view of the fact that the environment is essential to all forms of life, and all human rights are indivisible and interdependent, it is to be expected that there should be a*

[1] http://legal-dictionary.thefreedictionary.com/constitution

[2] Georgios Anagnostopoulos (ed.), A Companion to Aristotle, Wiley-Blackwell: "First Athenian Period" (2013). See also Burton's Legal Thesaurus, 4E. Copyright © 2007 by William C. Burton. Used with permission of The McGraw-Hill Companies, Inc. (See https://legal-dictionary.thefreedictionary.com/Politics).

[3] See: http://legal-dictionary.thefreedictionary.com/constitution. Accessed 2 August 2017

[4] Act of the United Kingdom Parliament, enacted 1990.

[5] Enacted 1986

[6] Simpson, T and Jackson, V. (1997). Human Rights and the Law. *Environmental and Planning Law Journal*, 268 - 269

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convergence between the right to a healthy environment and other fundamental human rights."

Environment is the social and physical conditions that surround people and affect the way they live[7]. The environment includes the nature of the living space (sea or land, soil or water), the chemical constituents and physical properties of living space, and the assortment of other organism present[8]. According to Barrows (1993), environment is simply the relationship between man and nature and this relationship changes from time to time and from one place to another[9]. However, man modifies his environment in response to the changing conditions of his need; the environment also responds to human manipulations. This interaction between man and his environment results in environmental degradation. Though some of these manipulative activities may constitute environmental protection, preservation and conservation, many human manipulative activities are intentionally or unintentionally induced towads hurting the ecosystem. Many governments have recognized the implication of environmental degradation and thereby formulate measures, strategies and policies that mitigate, contain deprivation and protect the environment. In this regard, Abia State Government[10] posits that environmental protection is a practice of protecting individual, organizational or governmental levels for the benefit of the natural environment or humans and that environmental protection is needed due to human activities.

Protection involves an act of preventing something or somebody from harm or damage[11]. In this premise, legislation is a veritable toll for environmental protection which is an act of preventing environmental resources from being harmed or damaged. To protect natural resources from pollution, individuals and industries, governments have many obligations. These include prohibiting or limiting the use of pesticides and other toxic chemicals, limiting wastewater and airborne pollutants, preventing the production of radioactive materials, and regulating drilling and transportation of

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[7] Jimme, M. A., Kagu A. and Yahya S. A. (2010). Environmental resources management in Borno State, Nigeria: Religious perspective. *Journal of Environmental issues and Agriculture in Developing Countries*, 2(1), pp 1-15

[8] Ibid, Cited Oxford Dictionary of Geography, 1997

[9] Jimme, M. A., Kagu A. and Yahya S. A. (2010). Environmental resources management in Borno State, Nigeria: Religious perspective. *Journal of Environmental issues and Agriculture in Developing Countries*, 2(1), pp 1-15

[10] Abia State Government (2015). Issues in environmental protection and the need for a spring of synergy. Available Online at: http://www.abiastate.gov.ng/news/issues-in-environmental-protection-and-the-need-for-a-spring-of-synergy/

[11] Microsoft Encarta (2009) (DVD). Protection. Redmond, WA: Microsoft Corporation, 2008.

[12] Ibid

petroleum products[12]. The degradation of the biophysical environment is attributed to the pressures of population and technology[13]. When the regulations are put in place to safeguard the environment, caring for it becomes a pivot for consideration. This includes environmental conservation which has to do with adequate care, management and maintenance of environmental resources,[14] which can otherwise be seen as environmental preservation.

In the same perspective, constitutionalism is "a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law[15]." The concept of constitutionalism was explicitly captured and summarized by Fellman[16], that "whatever particular form of government a constitution delineates, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are ... in a properly governed state ... limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial[17]. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represents a critically significant element of man's endless quest for the good life[18]."

On the other hand, the term "environmental constitutionalism" connotes a different meaning in various situations. Environmental constitutionalism is a somewhat topical phenomenon at hanging within the pivotal interconnection of other laws, namely, "constitutional law, international law, human rights, and environmental law[19]. It embodies

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[13] Abia State Government (2015). Issues in environmental protection and the need for a spring of synergy. Available Online at: http://www.abiastate.gov.ng/news/issues-in-environmental-protection-and-the-need-for-a-spring-of-synergy/

[14] Microsoft Encarta (2009) (DVD). Conservation. Redmond, WA: Microsoft Corporation, 2008.

[15] Berstein R. B. (Nd). Thomas Jefferson and Constitutionalism. In:
Francis D. Cogliano (Ed) A Companion to Thomas Jefferson. Wiley Blackwell (See https://books.google.com.ng/books?id=YngYVO5asK4C&pg=PT455&lpg=PT455&dq

[16] David Fellman "Constitutionalism", vol 1, pp. 485, 491–92 (1973–74) (See http://www.akleg.gov/basis/get_documents.asp?session=29&docid=416)

[17] Ibid

[18] Ibid

[19] May J. R. and Daly E (2016). Global Environmental Constitutionalism. New York: Cambridge University Press (See https://www.amazon.com/Global-Environmental-Constitutionalism-James-May/dp/1316612848).

the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide[20]." For environmental protection to become a reality, it is important for the fusion of legislation, ethics and education[21]. Constitutional environmental protection has been a vital fragment of constitutional structures for more than a one century, and of the environmental and constitutional law treatise for at least 39 years[22]. Within this time frame, environmental protection has been associated with constitutional spectacles such as human rights, governance, transparency, the rule of law, among others. The concept of environmental constitutionalism is gaining relevance partly because of the contemporary global concern about several aspects of the environment including global warming. On the evolving concept of environmental constitutionalism, Kotzé explains *inter alia*,

> *"Despite some recent nascent conceptual developments, a more comprehensive systemised theory of it, is only now starting to emerge. This is also why the sources in this list of key scholarship are comparatively few. The common narrative that is emerging among the views of authors in this list could be summarised as follows: there is a discernable trend towards the constitutionalisation of environmental care that would enable one to identify the emergence of a specialised focused form of constitutionalism that is solely concerned with environmental matters. Since the Stockholm Conference in 1972, many States have adopted environmental protection provisions in their domestic constitutions. Today three quarters of the world's constitutions contain references to environmental provisions*[23]."

As countries globally within "all legal traditions" embrace environmental obligations

[20] Ibid

[21] Abia State Government (2015). Issues in environmental protection and the need for a spring of synergy. Available Online at: http://www.abiastate.gov.ng/news/issues-in-environmental-protection-and-the-need-for-a-spring-of-synergy/

[22] Louis Kotzé 2015 "Human Rights and the Environment through an Environmental Constitutionalism Lens" in Anna Grear and Louis Kotzé (eds) Research Handbook on Human Rights and the Environment (Edward Elgar) 2015: 145-169.

[23] Ibid (See www.iucnael.org/en/documents/1275-environmental-constitutionalism) (See also Sharma A and Wadhwani A. (2016). "India: Environment v/s Real Estate" (Khaitan and Co). The Stockholm Conference in 1972 was the first global action taken by the international comity of nations concerning the environment and sustainable development. It recognized principles of ecological management and the rights to a healthy environment encapsulated in an Action Plan with 109 recommendations.

and care of natural resources and the concept of sustainable development, the courts are becoming more interested in the interpretation and determination of cases aimed at the protection of environmental rights of citizens. However, environmental protection is influenced by environmental legislation and education[24]. Scholars have argued that, while constitutionalism can be no panacea to the "worsening ecological crisis" and the "pervasive global environmental problems," it aids in fashioning new substantive and procedural rules that could assist in curbing the existing inadequacies of the "global environmental law and governance regime." In practical terms, it does this by employing the means "of a normative process of constitutionalization."

Environmental constitutionalism also, refers to how to use constitutional provisions to safeguard and protect the environment and the rights of citizens to a clean and healthy environment. Environmental constitutionalism ensures that the state carries out its responsibility of improving and protecting the environment and makes provision for it. The constitution, as the national legal order or the *grundnorm* makes it an objective of the national government to improve and protect the air, land, water, forest and wildlife of the country[25]. It does this by "textual constitutional provisions protecting fundamental substantive or procedural citizen rights to a quality environment[26]." The concept also dovetails on human rights and their relations with the environment. Bosselmann[27] argues that the State "have always promoted unlimited human development with little respect for ecological limits". The scholar therefore, made a "case for a wholesale ecologically re-oriented constitutional, political, ethical, legal and state system alongside the principle of the ecological *Rechtsstaat* as a very

[24] Abia State Government (2015). Issues in environmental protection and the need for a spring of synergy. Available Online at: http://www.abiastate.gov.ng/news/issues-in-environmental-protection-and-the-need-for-a-spring-of-synergy/

[25] Remarks by Rt. Hon. Yakubu Dogara, Speaker, House of Representatives, Federal Republic of Nigeria, at the opening ceremony of the National Stakeholders Summit on Legislative Framework for Environmental Law and Policy held on the 3rd October, 2017 at the International Conference Centre, Abuja, Nigeria. (http://yakubudogara.com.ng/remarks-by-rt-hon-yakubu-dogara-at-the-opening-ceremony-of-the-national-stakeholders-summit-on-legislative-framework-for-environmental-law-and-policy/)

[26] Constitutional Mandate for Environment Protection in India. (http://shodhganga.inflibnet.ac.in/bitstream/10603/174248/9/09_chapter%204.pdf)

[27] K Bosselmann, *Im Namen der Natur: Der Weg zum Okologischen Rechtsstaat* (In the Name of Nature: The Road to an Ecological Rechtsstaat) (Scherz 1992). See also Kim RE and Bosselmann K. (2013). International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Enviornmental Agreements. *Transnational Environmental Law,* 2(2), 285-309.

[28] Humby, Tracy-Lynn (Ed) (2013). "Resilience and Environmental Law" *Essential Readings in Environmental Law*. IUCN Academy of Environmental Law at p. 3. Available at: www.iucnael.org. Accessed 22nd July 2017

useful… *potential of environmental* constitutionalism."[28] Boyd, in his innovative work undertook a global study of constitutions, human rights and the environment with emphasize on environmental human rights of "constitutions the world over"[29]. It captures the advantages of environmental constitutionalism to environmental protection "with a specific focus on rights" which it described to include constitution as the supreme law that directs government responsibilities and protects citizens' rights to a range of environmental benefits. In their work which represents the most detailed account of environmental constitutionalism to the present day, May and Daly[30] provide a very detailed narrative on "constitutionalism" covering many of the world's constitutions. Their major focus is on environmental human rights provisions and what the courts had to say. However, Jasanoff[31] adopts a different technique on the issue of environmental constitutionalism and argued on the necessity to pursue "a broad based and more deliberate involvement of experts in environmental decision-making." She further argues that countries should address climate change challenges through constitution making. To some writers, their concern focused on the fact that despite a plethora of international environmental law in existence, the earth's environment continues to deteriorate. They argue for "overarching global constitutional norm" that will address this issue. According to Rt. Hon. Allwell Asiforo Okere, Deputy Speaker, Abia State House of Assembly, environmental laws are same but the attitude and mindsets of individuals differ[32]. Overall, there seems to be agreement by many scholars on the need for constitutional environmental protection and the connection it has with human rights, "democracy, and separation of powers, the rule of law and the constitutional state."

METHOD

The study adopts the expository design focusing on in-depth discussions drawn principally from secondary sources. Flowing from the literature is the meticulous application of facts, statues, treaties and case laws to illustrate the subject-matter of environmental constitutionalism in Nigeria and India. On India, the work explores how the Indian Supreme Court and High Courts have used Article 32 of the Indian

[29] Boyd, D., The Environmental Rights Revolution: A Global Study of Constitutionalism, Human Rights and the Environment (UBC Press) (2012)

[30] JR May and E Daly, *Global Environmental Constitutionalism*, Cambridge University Press) at 311, (2015).

[31] Jasanoff, S., (2013). A World of Experts: Science and Global Environmental Constitutionalism. Boston College Environmental Affairs Law Review, 40(4), 439-452

[32] Abia State Government (2015). Issues in environmental protection and the need for a spring of synergy. Available Online at: http://www.abiastate.gov.ng/news/issues-in-environmental-protection-and-the-need-for-a-spring-of-synergy/

Constitution, which guarantees all citizens the right to petition the Supreme Court "when their fundamental rights are violated or threatened" as a template to advance enforcement of environmental rights in India. The work also examines how Nigerian Courts have used Chapter 2, Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which deals with the environmental objective (the citizens right to the environment) for the interest of the inhabitants and welfare of everybody. The Section states that the State shall protect and improve the environment and safeguard air and land, forest and wildlife of Nigeria.

ENVIRONMENTAL CONSTITUTIONALISM IN INDIA

Part IV, Article 48A of the Indian Constitution provides as follows: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country." This provision does not explicitly recognize the right to a healthy environment, but through the judicial intervention of the Courts of India in several decided cases,[33] "the value of incorporating environmental rights and protections for resources" has been established. To incorporate the decisions made at the Stockholm Conference of 1972, the Indian Government in 1976 enacted its first constitutional provision focusing on the protection of the environment.[34] This express provision contained in Article 48A has been reproduced above. However, the provision suffers from serious limitations in that it is framed by Article 37 as a "Directive Principles of State Policy and the Fundamental Duties" respectively, which regrettably "shall not be enforceable by any court." Article 51-A (g) of the Constitution of India states:

> *"It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildfire and to have compassion for living creatures."*

[33] *MC Mehta v Union of India* (2002) (4) SCC 356 (air pollution in Delhi caused by motor vehicles); *MC Mehta v Union of India* AIR (1988) SC 1037, 1115 (water pollution of the Ganges Rivers by tanneries); *M.C. Mehta v Union of India* (Taj Trapezium case) AIR 1997 SC 735 (Protection of the Taj Mahal (292 industrial plants ordered to either switch from coke/coal to natural gas or relocate); *MC Mehta v Union of India* (1997) 11 SCC 327 (industrial air pollutions); *MC Mehta v Union of India* (2004) (12) SC 118 (ground-water management); *AP Pollution Control Board v MV Nayudu* (1999) (the right to water); *The Majira Singh v India Oil Corporation* (1999) (location of a plant for liquefied petroleum gas); *MC Mehta v. Union of India* (1996) (mining and quarrying activities); *Thirumulpad v Union of India* (1999) (forest conservation); *Aruna Rodrigues v Union of India,* WP No. 260 of 2005, Order dated 22/09/2006 (genetically modified organisms).

[34] Constitution 42nd Amendment Act, 1976

In 1984, India was severely affected by the Bhopal disaster. On December 3, 1984, a release of methyl isocyanate (MK) gas killed about three thousand people and led to the death of more than fifteen thousand in subsequent weeks and months. The Bhopal gas tragedy is, till date, the world's worst industrial disaster. In 1987, cases were filed in the Bhopal District Court, which ordered the Union Carbide Corporation to pay interim compensations. The interim order could not be decreed, thus Union Carbide Corporation refused to pay the amount. In February 1989, the Indian Government and the Union Carbide Corporation reached an out of Court settlement which fixed the liability of the Union Carbide Corporation at USD470 million in full and final settlement of all claims, rights and liabilities arising out of the disaster.[35] The Parliament of India swiftly enacted the Environment (Protection) Act of 1986 (EPA) under Article 253 of the Indian Constitution, with the primary objectives of creation of an authority or authorities with adequate powers for preservation and protection of environment; regulation of discharge of environmental pollutants and handling of hazardous substances; and speedy response in the event of accidents threatening the environment and endangering humans and the biodiversity. There are key environmental legislations in India concerning a wide range of areas: wildlife;[36] water;[37] air;[38] forestry;[39] environment;[40] hazardous waste;[41] and coastal environment.[42] Flowing from these, between 1976 till date, it appears India has been moving towards ensuring that a workable legal regime exists to pursue its environmental protection agenda and promote sustainable development.

The Role of the Judiciary in the Protection of Environmental Rights in India

As previously stated, there is a vacuum in the constitution of India with regards to the codification of enforceable environmental rights in the constitution of India. Flowing from the lack of constitutional provisions, the judges made laws are actively being invoked to address environmental rights violations. Also, the courts are adopting the *ejusdem generis rule* in the interpretation of the limited sections of the constitution that laid foundations for environmental protections hence, the courts are able to bottle the textual environmental constitutional provisions that though, do not specifically address

[35] See, V Roli and R Varma (2005). The Bhopal Disaster of 1984. *Bulletin of Science, Technology and Society.*
[36] Wildlife (Protection) Act 1972 (Wildlife Act).
[37] Water (Prevention and Control of Pollution) Act 1974.
[38] Air (Prevention and Control of Pollution) Act 1974.
[39] Forest (Conservation) Act, 1980 (Forest Act).
[40] Environment (Protection) Act, 1986.
[41] Hazardous Waste (Management and Handling) Rules, 1989.
[42] Coastal Regulation Zone Notification, 2011.

environmental issue, but did establish the platform for judicial intervention. By section 32 of the constitution of India, citizens have the rights to petition the Supreme Court and High Courts when their fundamental rights are violated or threatened. Also, Article 48-A provides that "the state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country."[43] Further, the amendment also inserted Part VI-A (Fundamental Duty) in the Constitution, which provides that "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes and wildlife and to have compassion for living creature."[44] These provisions were tested in *Sachidanand Pandey v. State of West Bengal*,[45] where the Supreme Court explained that "whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48-A and Article 51-A(g).

Thus, though found under the Directive Principles (which comprise social, economic and cultural rights) and the Fundamental Rights (the traditional civil and political rights." In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*,[46] the key issue for determination was whether the violation of the rights to environment hampers the right to sustainable development.[47] The Supreme Court stated as follows: it is "the right of the people to live in a healthy environment with minimal disturbance of the ecological balance." Also in *Damodhar Rao v Municipal Corporation of Hyderabad*,[48] the court referred to Articles 48A and 51A(g) of the constitution in support of its reasoning. It thus, stated that environmental pollution is a violation of the fundamental rights to life and personal liberty as contrary to Article 21 of the Indian Constitution which forbids such violation. In *Koolwal v State of Rajasthan,*[49] the petitioner invoked Fundamental Rights and the Directive Principles of State Policy and brought to the fore the acute sanitation problem in Japur which it claimed as hazardous to the life of the citizens of Japur. The High Court of Rajasthan observed that maintenance of health, preservation of sanitation and environment falls within the ambit of Article 21 of Indian Constitution as it adversely affect the life of the

[43] Article 48-A, the Constitution of India, 1950.
[44] Article 51-A(g), the Constitution of India, 1950.
[45] AIR 1987 SC 1109.
[46] AIR 1987 SC 1037.
[47] The doctrine of sustainable development as defined in the World Commission on Environment and Development (WUCED) (Brundtland Report, named after the chairman of the Commission. GH Brundtland, 1987) to mean "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."
[48] 1987, High Court of Andhra Pradesh, discussed in CM Abraham and S Abraham "The Bhopal Case and the Development of Environmental Law in India" *International and Comparative Law Quarterly* (April), Volume 40, at 362, 1991.
[49] AIR 1988 Raj. 2.

citizens and it amounts to slow poisoning and reducing the life of the citizens because of the hazards created if not checked. The court held that the municipality had a statutory duty to remove the dirt and filth from the city within a period of six months and clear the city of Japur from the date of the judgment.

In 1991, the Supreme Court of India clarified the state of the law in *Subhash Kumar v. State of Bihar.*[50] The petitioner filed a public interest petition in terms of Article 32 of the Indian Constitution, pleading infringement of the right to life guaranteed by Article 21 of the Constitution, arising from the pollution of the Bokaro river by the sludge/slurry discharged from the washeries of the Tata Iron and Steel Company Ltd ("the TISCO"). It was alleged that as a result of the release of effluent into the river, its water is not fit for drinking purposes or for irrigation. The respondents on their part established that TISCO and the State Pollution Control Board had complied with statutory requirement and that the petitioner was motivated by self-interest. The Supreme Court observed that Article 32 is designed for the enforcement of fundamental rights and that the rights enshrined in Article 21 includes the right to enjoyment of pollution free water and air for the full enjoyment of life. If anything endangers or impairs the quality of life, an affected person or a person genuinely interested in the protection of the society would have recourse to Article 32. Furthermore, in *Vivender Gaur and others v. State of Haryana,*[51] the Supreme Court of India stated as follows:

> *"…Noise and pollution are two of the greatest offenders, the latter affects air, water, natural growth and health of the people… State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country... every citizen of India to protect and improve the natural "environment" including forests, lakes, rivers and wild life and to have compassion for living creatures." It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. … Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental*

[50] AIR 1991 SC 420.
[51] (1993) 2 SCC 577.

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> *protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore,…a constitutional imperative… Government and the municipalities, not injure…and [to] safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."*

The Indian judiciary has since then viewed the human rights on one hand and environmental protection on the other hand as interconnected and as the two faces of the same coin. In this light, it has assumed the role of "a guardian of fundamental right" and has protected the right of each individual in relation to environment under Article 21 of the Indian constitution. Judicial response encompasses compensation to victims, and the Supreme Court of India for example, in *M. C. Mehta v. Union of India*,[52] the court stated explicitly, that "the power of the Supreme Court to grant remedial relief for a proved infringement of a fundamental right (in case of Article 21) includes the power to award compensation." The judgment opened a new frontier in Indian jurisprudence by introducing a new "no fault" liability standard (absolute liability) for industries engaged in hazardous activities which has brought about radical changes in the liability and compensation legal regime in India, which makes hazardous industries absolutely liable for harm or injury resulting from its activities.

In MC Mehta v State of Orissa,[53] a petition was filed to protect the health of thousands of innocent people living in Cuttack and adjacent areas suffering from pollution from sewage being caused by the Municipal Committee Cuttack and the SCB Medical College Hospital, Cuttack. The court directed the government to immediately act on the matter. In *Charan Lal Sahu v. Union of India*,[54] the Supreme Court held that the citizen's right to a healthy environment is the same as the right to life guaranteed by Article 21 of the Constitution which also includes the right to healthy and safe environment.[55] In *Normada Bachao Andolan v. Union of India*[56] it was held that:

> *Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in*

[52] AIR 1987 SC 965.
[53] AIR 1992 Ori 225.
[54] AIR 1990 1480.
[55] See, "Human Rights Approach Towards Pollution Free Environment" available at http://www.indiastate,com /Article/14/india/full -text.pdf – United States.
[56] (2000) 10 SCC 664.

> *Article 21 of the Constitution of India … and the rights to healthy environment and to sustainable development are fundamental human rights implicit in the right to life.*

In *Union Carbide Corporation v. Union of India*,[57] the Supreme Court held that, where an enterprise is occupied with inherently dangerous or a hazardous activity and harm results to anybody by virtue of an accident in the operation of such dangerous or naturally unsafe activity, such as allowing poisonous substances to escape, the operator is strictly and completely obligated to repay every one of the individuals who have suffered harm as a result of the accident. The Supreme Court of India thus created the principle of absolute liability. The Supreme Court has also introduced the polluter pays principle into India's environmental jurisprudence. In *Vellore Citizen's Welfare Forum v. Union of India*,[58] the Supreme Court declared that the polluter pays principle is an essential feature of the sustainable development. It also developed three concepts for the precautionary principle: environmental measures must anticipate, prevent and attack the causes of environmental degradation; lack of scientific certainty should not be used as a reason for postponing measures. In *Rural Litigation and Entitlement Kendra v. State of UP*,[59] the Court considered the issue of environment and development and held that, it is always to be remembered that these are the permanent assets of mankind and or not intended to be exhausted in one generation.[60] In 2006 the Indian Supreme Court in the case of *Milk Producers Association, Orissa v. State of Orissa*,[61] stressed the need for a stringent enforcement of India's Environmental Protection Act, when it stated that:

> *"It is the duty of the State to make sure the fulfillment of conditions or direction under the Act. Without strict compliance, right to environment under Article 21 could not be guaranteed and the purpose of the Act will also be defeated."*

The environmental rights cases that come before the Indian Courts are done so within the public interest litigation. In Indian law, public interest litigation is employed to protect public interest. It is litigation introduced in a court of law, not by aggrieved party but by the court itself or by any other private party. Consequent upon its recognition of citizen's

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[57] AIR 1990 SC 273

[58] AIR 1996 SCC 212.

[59] AIR 1987 SC 1037.

[60] See also, *Vellore Citizen's Welfare Forum* case, ibid, when the Supreme Court of India observed that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living the within the carrying capacity of the supporting ecosystem.

[61] (2006) 3 SCC 229.

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right to a healthy environment, the Indian Supreme Court "has relied upon constitutional protection for the environment" as grounds for "the application of principles derived from international environmental law, including inter-generational equity.[62] The Supreme Court of India has also resorted to a unique method in its role of environmental constitutionalism. It does this by use of continuing *Mandamus* which is a writ of *mandamus* issued to a lower authority by the higher authority in general public interest asking the officer or the authority to perform its task expeditiously for an unstipulated period of time for preventing miscarriage of justice. The concept of Continuing *Mandamus* has been used to deal with pollution and forest conservation cases.[63] When a petition is filed under Article 26 or Article 32 of the Indian Constitution, the Supreme Court or the High Court respectively can issue the writ of *Mandamus* in the interest of the welfare of the general public restraining or enforcing activities likely to adversely affect the environment.[64] According to Boyd[65]:

> *"The Supreme Court has opened the door wide to judicial remedies by treating the right to a healthy environment as a fundamental right capable of being protected by citizens and NGOs by means of writ petitions… The constitutional right to a healthy environment has also contributed to improvements in the recognition of procedural rights, including access to information and participation in decision making. Additional procedural innovations pioneered by the court include making spot visits to do on-the-ground assessments of environmental problems, appointing amicus curiae (friends of the court) to speak on behalf of the environment; and using cash rewards to encourage petitioners and lawyers to draw the court's attention to environmental problems."*

In India, the judiciary in protecting a citizen's right or that of the general public to a healthy environment "denied approval for a bauxite mine on the grounds that the proposed mine did not meet the constitutional requirement of sustainable development due to major environmental impacts, impacts on tribal people, and loss of local economic

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[62] *State of Himachal Pradesh v. Ganensh Wood Products*. AIR 1996 SC 149, (1995) 6 SCC 363.
[63] *MC Mehta v. Union of India*. AIR 1988 SC 1037 (Ganges pollution).
[64] *MC Mehta v. Union of India* 1991 2 SCC 353; *M. C. Mehta v. Union of India*, orders dated 12 August 1994, 21 October 1994 and 28 March 1995 reported at 1997 4 SCALE 4, 1997 4 SCALE 5 (JP) and 19997 SCALE 6 (SP).
[65] Boyd D (2012). *The Environmental Rights Revolution: A Global Study of Constitutionalism, Human Rights and the Environment* (UBC Press, pp.443 at pp. 1-298,
[66] *TN Godavaraman v. Union of India & Ors.* (3) SCALE 430. See D.R. Boyd, ibid at 180, 2007.
[67] 1997 (2) SCR 728.

benefits."[66] In *Animal and Environment Legal Defence Fund v. Union of India*,[67] the petitioner filed the petition in public interest challenging the order granting 305 fishing permits to the tribals, "on the basis of violation of the constitutional right to a healthy environment." The court considered the constitutional right to safeguard forests and wild life under Articles 48A and 51A (g) of the Indian Constitution and upheld the fishing permits with directions as to conservation requirements.

Conservation is the sustainable use and protection of natural resources including plants, animals, mineral deposits, soils, clean water, clean air, and fossil fuels such as coal, petroleum, and natural gas[68]. The sustainable use of the environmental resources is the major issue in environmental conservation. Therefore the challenge of conservation is to understand the complex connections among natural resources and balance resource use with protection to ensure an adequate supply for future generations. In order to accomplish this goal, a variety of conservation methods are used. These include reducing consumption of resources; protecting them from contamination or pollution; reusing or recycling resources when possible; and fully protecting, or preserving, resources[69] (Microsoft Encarta, 2009). While expounding the constitutional provisions on right to life as including a right to enjoy pollution-free water and air the "traditional barriers to environmental litigation restrictions on standing, complex legal procedures, high cost, and challenges associated with the burden of proof – have been removed." The judiciary in India has developed a vast number of case law granting procedural and substantive rights to victims of environmental harm, thus, enriching "the environmental jurisprudence" of India. The Supreme Court has issued "diverse and innovative orders" restraining the government from "implementing controversial policies."

Scholars have lamented the excessive protection of the citizens' environmental rights by the courts. For example, Sharma argued that, the "…extension of constitutional umbrella over environmental issues through dynamic judicial activism has augured well for environmental governance in India[70]. By the same token, Faure and Raja,[71] argue that, "by legislating from the bench, the judiciary has become the primary protector of the environment, which is problematic given the tremendous difficulties encountered in

[68] Microsoft Encarta (2009) (DVD). Conservation. Redmond, WA: Microsoft Corporation, 2008.
[69] Ibid
[70] Sharma R. (2008). Green Courts in India: Strengthening Environmental Governance. *Law, Environment and Development Journal*, 4, 1 at 50-71,
[71] Faure, M. G. and Raja, A.V. (2010). Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables. Fordham Environmental Law Journal, Vol. 21. Available at SSRN: https://ssrn.com/abstract=1776923.
[72] Dam S and Tewary V. (2005). Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment? *Journal of Environmental Law* 17(3), 383-93.

following-up the effective implementation of judgments." Dam and Tewary[72] have also argued that:

> *"…the court's over-enthusiasm in environmental matters has severally dented India's institutional balance and has contributed to a polity that is becoming consistently reliant on the judiciary for remedying all its problems, of both life and law."*

Cassels[73] opines that there are inherent weaknesses in the public interest litigation about constitutional rights in India. He describes it as an encouraging "non-adversarial proceedings and the scepter of judge shopping". The Supreme Court has also received bashings that by appointing experts to provide evidence that are not subject to cross-examination, it negates the doctrine of natural justice. Dutta, Dubey, Gonsalves, Bhat, Gallanter and Krishnan, respectively have criticized the Indian Supreme Court for favouring the upper class of the society as is exemplified in the *Union Carbide case*, which caused the Bhopal tragedy[74]. The public interest litigation, they argue has favoured the "middle class" rather than the poor. The swipe on the Indian Supreme Court was aptly captured by DR Boyd who describes the situation in India as "a paradox, with the Supreme Court issuing many bold court orders based on the constitutional right to a healthy environment while the overall environmental quality remains poor[75]."

ENVIRONMENTAL CONSTITUTIONALISM IN NIGERIA

Nigeria like every other country grapple with environmental problems and the response has been in the nature of setting up a legal regime aimed at protecting the environment. The type of legal regime varies from country to country from national to sub-national laws, but some countries take a step further by including environmental protection matters in their national constitution, which is usually the *grundnorm* of all laws, while in other countries, they are comfortable to incorporate environmental protection in their statutory legislations. Flowing from these, is the issue of whether positive rights or negative rights are created. Positive rights place specific duties on the national government to preserve and protect the environment, while negative rights prevent individuals from

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[73] Cassels J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *Journal of Comparative Law* 37, 3 at 495-519

[74] Dutta R, Dubey S, Gonsalves C and Bhat A eds. (2000). *The Environmental Activists' Handbook* Vols. 1 and 2 (Mumbai's Socio-Legal Information Centre).

[75] Boyd D (2012). *The Environmental Rights Revolution: A Global Study of Constitutionalism, Human Rights and the Environment* (UBC Press)

[76] Burns K. (2016). Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement. *Harvard Environmental Law Review India*.

discharging of pollution into the land, water and air. Kyle Burns[76] has argued that:

> *"What becomes clear upon analyzing different regimes is that neither the source of the right (i.e. constitutional or statutory) nor the form of the right (i.e. positive or negative) is the dispositive factor determining how protective a nation's environmental law regime.… It is the manner in which those rights are enforced that controls the end result. Thus, even the loftiest promise of environmental quality can go unrealized in the face of sub-standard enforcement or outright non-justiciability, while seemingly less important statutory restrictions on pollution may achieve greater benefits."*

Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria." Thus, it is very clear that citizens have a right to clean air, pure water and to the preservation of the natural, scenic, historic and aesthetic values of the environment. However, constitutional provisions do not matter if there are no procedures in place to allow citizens to enforce them. In Nigeria, it is standing that gets in the way. Nigeria's Constitution contains provisions which include – legislative powers: exclusive, concurrent and residual powers, right to private property and payment of compensation; judicial powers; requirements of standing to sue and other jurisdictional requirements, which places serious limitations on the 'ability to address the environmental needs of present and future citizens'.

Okonkwo[77] suggests that, section 33(1) of the Nigerian Constitution, which states that "every person has a right to life and no one shall be deprived intentionally of his life" is related and can be read together with Section 20 to imply that the right to a safe and healthy environment is also the same as the right to life in that, a degraded environment is unhealthy hence, is tantamount to causing death. There is also a conflict as to the primacy of the Nigerian constitution in the face of the existence of the African Charter on Human and Peoples' Rights.[78] In *Gani Fawehinmi v. Abacha,*[79] it was held that the "human rights in the African Charter on Human and Peoples' Rights was enacted into Nigerian national law,[80] was superior to any Nigerian statute. Thus, Article 24 of the African Charter recognises healthy environment as human rights. To this end,

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[77] Okonkwo T. (2015). Environmental Constitutionalism in Nigeria: Are We There Yet? The Nigerian Juridical Review Vol. 13, pp. 175-217.

[78] Also known as the African Charter 1981

[79] (1996) 9NWLR, Part 475, p 710

[80] Nigeria adapted the African Charter into Nigerian legislation via the African Charter on Human and Peoples' Rights (Ratification & Enforcement) Act, 1990.

rather than invoking section 20 of the Nigerian constitution. It is recommended that, an aggrieved party should invoke Article 24 of the African Charter in litigations of relevant concern. This is because, pursuant to the Nigerian constitution, Section 20 is not justiciable. It is important to remark that the constitution classed all "Fundamental Objectives and directive Principles of State Policy" contained in Chapter II as non-justiciable.

Article 24 of the African Charter was the main thrust of the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[81] by which the African Commission on Human and Peoples' Rights stated that "the fact that inadequate protection of human rights at a domestic level requires the existence of human rights mechanisms at an international level." In *Shell* v. *Farah*,[82] the appellant was sued by five families from the Ogoni ethnic locality in Rivers State of Nigeria. The respondent in the appeal at the court of first instance, sought recompense against Shell for allegedly causing environmental degradation when its oil facilities blew-out and spilled huge amount of crude oil into "the farmlands and drinking water streams of the claimants, causing widespread destruction to the crops and vegetation covering an estimated 600 hectares of landscape. Shell argued that it compensated the claimants with the sum of US$35,390.04; and also argued that it had rehabilitated 132 hectares of the most affected part of the polluted land." Farah raised the relevance of Article 24 of the African Charter. The court held that the degradation of the farmland was a violation of human rights contrary to Article 24 of the African Charter. The implication of the case on environmental constitutionalism in Nigeria is that, where the courts are willing to disregard the provisions of the constitution where those provisions are contrary to the African Charter and, where the provision of Section 20 of the Constitution is rendered useless by other provisions of the same constitution.

Also, in *Shell v. Isaiah*,[83] Isaiah contended that in the Shell's oil pipelines that were laid out on the surface of the Isaiah's land were old, rusty hence, easily ruptured by

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[81] (2001) AHRLR 60 (ACHPR 2001). Kato Gogo Kingston, (2014) and, *Shell Petroleum Development Company of Nigeria Limited v. Chief Joel Amaro & 12 ORS [2000] 10 NWLR Part 675 229-449* in the cases, similar approaches were adopted by the Nigerian Courts. The lack of strength of the constitutional provisions in defence of the environment induced the courts to rely on Article 24 of the African Charter.

[82] [1995] 3 NWLR (Pt 382) 148;); Also See: *Shell v. Tiebo VII [1996] 4 NWLR (Pt 445) 657*; *Ogiale v. Shell [1997] 1 NWLR (Pt 480) 148*.

[83] [1997] 6 NWLR (Pt 508) 236; Also, see Kato Gogo Kingston, (2014). Pollution And Environmental Responsibility In Petroleum Extraction In The Niger Delta of Nigeria: Modelling The Coase Theorem. A thesis submitted in partial fulfilment of the requirements of the University of East London, England, United Kingdom for the Degree of Doctor of Philosophy (PhD) in Energy and Natural Resources Laws, at. p. 133 (July 2014).

falling trees and in the course of restoration works on the pipelines by Shell, massive amount of oil spilled into the Isaiah's land and damaged crops and rendered the only sources of drinking water useless. Both the court of first instance and the court of Appeal awarded damages and cost to the Isaiah. By reaching its verdicts, the court invoked Article 24 of the African Charter.

CONCLUSION

In India, while there is explicit provision in its constitution on the environment and environmental right, it is however found in a section of the constitution that is unenforceable. This is a fundamental gap which had rendered ineffective the constitution's "environment" and "environmental right" provisions due to its non-justiciability hence, there lies a huge 'legal beef' on the strengths of claims which falls under the environmental rights. The Indian constitution does not explicitly confer standing on citizens, and this is left to the Courts and Parliament. The Indian courts are constantly criticized for encroaching on the functions of the Parliament and Executive by legislating from the bench. This is a serious gap traceable to the non-existence of justiciable environment and environmental rights in India's constitution. The fall out are the problems and difficulties that come up when the courts want to implement judgments,[84] thus, numerous judgments is still unenforced.[85] As a response to some of these gaps, the Indian judiciary determines the protection of environment cases relying on the fundamental rights enforcement procedure thus filling the gap which the government has created by absorbing "the government's task of environmental protection." There is also the gap that obtains in Indian Constitution that requires an international treaty to be domesticated by the Parliament before given direct effect.

In Nigeria, the Constitution contains an explicit environmental right in section 20 however; the same constitution makes the provision of Section 20 non-justiciable. Unlike India, cases of environmental rights can be addressed through alternative constitutional machinery under the aegis of the provisions of the African charter. Also, in Nigeria, the courts apply environmental rights by relying heavily on the existing laws and regulations while "tightening them in accordance with fundamental rights."

This work recommends that further research should be conducted into the perceived gaps and available options that should be adopted as solutions that will

[84] Faure, M. G. and Raja, A.V. (2010). Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables. Fordham Environmental Law Journal, Vol. 21. Available at SSRN: https://ssrn.com/abstract=1776923.

[85] See, *Indian Council for Enviro-Legal Action v. Union of India & Ors.* (2011) (8) SCC. 161.

clearly continue to expand the conversation of environmental constitutionalism in India and Nigeria. Two things are undeniably clear: enforcement matters and the power of the courts. It is herein argued that though it appears that the environment and environmental rights are better protected when contained in the national constitution, the experiences of India and Nigeria have shown that this line of thought or argument is not secure. The constitutional and statutory rights can both succeed, they can also fail. It finally behooves on the nation's courts to ultimately determine whether the content and spirit of the constitution and the statutory laws can meet their legitimate expectations of translating into actionable rights. As this study has shown, this expectation in most cases has failed to be realized.

This work has shown that environmental constitutionalism in India and Nigeria, has come to be a very important part of not only the constitutions of both nations, but have actively brought the judiciary into the scene. By acting as a medium of constitutionally entrenching environmental law and protection, it has also established itself as a major tool for environmental governance whereupon its acts to facilitate "environmental protection through various constitutional features such as fundamental rights and duties, principles of environmental governance, the rule of law, and enduring aspiration values." The stance of the judiciary on environmental constitutionalism in India and Nigeria is somewhat similar in that, the courts relies on other sources of laws and judicial precedents to interpret and make decisions on cases bothering on the violation of environmental rights.

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