

## BERICHTE / REPORTS

## The 2014 Nigerian National Conference and the Development of Environmental Law and Governance

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### A. Introduction: The National Conference – Nature & Structure

Nigeria was formed in 1914 - 100 years ago. Since then, a major feature of the various epochs of its political landscape has been the significant agitation by civil society for ‘national dialogue’ as a means for defining and addressing the country’s socio-economic and political challenges and fostering national development.<sup>1</sup> This agitation continued even after Nigeria returned to civil rule on 29 May, 1999; and the 2005 National Political Reform Conference convened by President Olusegun Obasanjo in response to pressure from proponents of national dialogue was widely considered inadequate.<sup>2</sup> Hence, with public agitations unabated, the government headed by President Goodluck Jonathan finally organised a National Conference which held from 17 March – 14 August, 2014, with the aim of proffering solutions to the diverse challenges facing the country and defining pathways for national development.<sup>3</sup>

A major part of the organisation of the National Conference was the establishment of its composition and the design of administrative structures that would enable it achieve its aim. The Conference was composed of 492 delegates that were broadly representative of the diverse political, social, cultural, religious and economic interests in Nigeria.<sup>4</sup> Importantly, the delegates were nominated by the government and civil society.<sup>5</sup> According to the Rules of Procedure of the Conference, decisions were to be reached by consensus, and where a consensus is not possible after much effort, by seventy per cent (70%) majority.<sup>6</sup> The first two

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1 2014 National Conference Report, 4 (on file with author).

2 *Ibid*, pp. 19-22.

3 *Ibid*, p. 2-3 and p. 23.

4 Vanguard, List of National Conference Delegates, [www.vanguardngr.com/2014/03/list-national-conference-delegates/](http://www.vanguardngr.com/2014/03/list-national-conference-delegates/) (last accessed on 17 November 2014).

5 Sahara Reporters, Nigeria to Convene 494-Man “National Conference” in 2014, [www.saharareports.com/2014/01/30/nigeria-convene-492-man-“national-conference”-2014](http://www.saharareports.com/2014/01/30/nigeria-convene-492-man-“national-conference”-2014) (last accessed on 17 November 2014).

6 2014 National Conference Report, p. 74.

(2) weeks of the Conference was dedicated to general debates and contributions from delegates, after which delegates were distributed into 20 specialist Committees<sup>7</sup> that mainly reflected the major issues of concern raised during the initial general deliberations. ‘The Committees worked for a period of six (6) weeks and produced Reports which presented [sic] in the Plenary on the basis of which Conference took decisions’<sup>8</sup> that formed the resolutions and recommendations of the Conference as contained in the 2014 National Conference Report.

The significance of the 2014 National Conference lies in the fact that, to an extent, it gave the wider populace a formal opportunity to have their voices heard in a manner that complements the role of other arm of government. In addition, it is the express intention of the government to rely generally on the recommendations of the Conference in improving and reshaping the nation’s laws and policies.<sup>9</sup> Hence, the Federal Government has set up a committee – headed by the Attorney-General of the Federation and Minister of Justice – charged with the responsibility of developing strategies for the implementation of the recommendations in the National Conference Report.<sup>10</sup> It is the case that the resolutions of the Conference broadly reflect current and impending developments in several aspects of law and governance in Nigeria,

In view of the above, and considering her well-known history of environmental challenges, this report will seek to outline and appraise the resolutions of the National Conference with respect to environmental law and governance in Nigeria.

## **B. National Conference Resolutions on the Environment – An Appraisal**

This section will discuss key resolutions on the environment, and this discourse will be executed under four (4) loosely styled headings for the purposes of organisation and clarity.

7 Namely: Agriculture and Water Resources; Citizenship, Immigration and Related Matters; Civil Society, Labour and Sports; Devolution of Power; Economy, Trade and Investment; Energy; Environment; Foreign Affairs and Diaspora Matters; Judiciary, Law, Human Rights and Legal Reform; Land Tenure; National Security; Political Restructuring and Forms of Government; Political Parties and Electoral Matters; Politics and Governance; Public Finance and Revenue; Public Service; Social Sector; Religion; Science, Technology and Development; and Transportation. *Ibid*, pp. 75-77.

8 *Ibid*, p. 77.

9 Daily Independent, Text of President Goodluck Jonathan’s Address at the Inauguration of National Conference, [www.dailyindependentnig.com/2014/03/text-of-president-goodluck-jonathans-address-at-the-inauguration-of-national-conference/](http://www.dailyindependentnig.com/2014/03/text-of-president-goodluck-jonathans-address-at-the-inauguration-of-national-conference/) (last accessed on 17 November 2014).

10 *Friday Olorok*, Confab Report: FG set up Implementation Committee, <http://www.punchng.com/news/confab-report-fg-sets-up-implementation-committee/> (last accessed on 17 November 2014).

### *I. Elevated & New Environmental Rights*

Major environmental resolutions from the National Conference relate to the elevation and creation of new environmental rights which, upon implementation, would have the potential effect of advancing the potency of environmental protection campaigns and improving access to justice in environmental matters in Nigeria.

On the elevation of environmental rights, the Conference resolved that Article 24 of the African Charter on Human and Peoples' Right<sup>11</sup> (African Charter) – which provides that '[a]ll peoples should have the right to a general satisfactory environment favourable to their development' – should now be enshrined in the 1999 Constitution of the Federal Republic of Nigeria<sup>12</sup> (the Constitution) (as amended) as a justiciable right.<sup>13</sup> This is despite the fact that the African Charter, including its Article 24, has been domesticated in Nigeria by the enactment of the 1983 African Charter on Human and People's Rights (Ratification and Enforcement) Act.<sup>14</sup> Nonetheless, the enforcement of the equivalent Article 24 provision in the national legislation may easily be trumped when faced with a counter constitutional provision, giving that the Constitution is the supreme law of the land and takes precedence over any other in cases of inconsistency.<sup>15</sup> Therein lies the reasonableness of the recommendation to clothe Article 24 with constitutional status, thereby strengthening it against other constitutionally protected interests and improving its capacity to secure a satisfactory environment.

The National Conference also decided that section 20 of the Constitution – which stipulates that '[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria' – be transferred from Chapter II of the Constitution which is not justiciable to the justiciable fundamental rights chapter of the Constitution.<sup>16</sup> This proposed transfer of section 20 would help to avoid potential conflict with a justiciable Article 24 provision in the Constitution if the latter is implemented. However, considering the general similarity between section 20 (when recomposed as a right) and Article 24 above and the need to ensure clarity, a better implementation approach may be for the provisions to be fused as a single justiciable constitutional environment right, rather than both manifesting in the Constitution as separate provisions. The further proposal by the Conference that '[t]he phrase right to life in a healthy environment should be added to

11 27 June, 1981, 1520 UNTS 217.

12 Cap C23, Laws of the Federation of Nigeria, 2004.

13 2014 National Conference Report, pp. 199 – 200.

14 Cap A9, Laws of the Federation of Nigeria, 2004.

15 The Constitution, section 1 (1) and (3). Examples of such potentially trumping constitutional provisions may be section 43 on the right to acquire and own immovable property, and section 6 (c) which stipulates that Chapter II of the Constitution – containing section 20 that requires the state to 'protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria' – is non-justiciable.

16 2014 National Conference Report, p. 200, p. 201, and p. 231.

Chapter II of the 1999 Constitution (as amended)<sup>17</sup> may also be merged with the aforementioned environmental rights.

What is more, considering the further and ‘vital need to preserve the integrity of the Nigerian environment and thus secure its sustainability for present and future generations’,<sup>18</sup> the National Conference resolved to create a new kind of environmental right for the country that should be enshrined in the Constitution: ‘the rights of nature to maintain its natural cycles without disruption’.<sup>19</sup> What is new about this proposed environmental right is that it is generally less anthropocentric than the aforementioned environmental rights or any other currently in existence in the country; it is a right *for* nature, and less so for humans. This proposed new environmental right potentially expands the scope for environmental protection and conservation in Nigeria as it can be enforced solely for the good of the environment, as against other environmental rights that are mainly focused on securing the good of humans within the natural environment.

## *II. Public Participation in Environmental Matters*

The National Conference also touched on issues regarding public participation in environmental matters especially as it relates to access to justice, participation in environmental decision-making and management, and public environmental education and access to environmental information. In this light, in making general recommendations for constitutional reforms, the Conference called for the entrenchment of the concept of ‘resource democracy’ in the polity by ensuring the right of the people to own, develop and manage their natural resources as a way of ensuring the sustainable development of the nation.<sup>20</sup> In addition, the Conference called for legal structures to ensure transparency and accountability in resource exploitation and management beyond financial transparency.<sup>21</sup>

Specifically, on the issue of improving public access to justice for the public, the National Conference, recommended that: section 251 (1) of the Constitution (which defines the exclusive jurisdiction of the Federal High Court) should be amended to also give jurisdiction to the State High Court over the items listed under section 251 (1) (n) of the Constitution (i.e. ‘mines and minerals (including oil fields, oil mining, geological surveys and natural gas’)) in order to ensure easier access to justice;<sup>22</sup> requirements of Pre-action Notice (generally) and Limitation Clause should be excised from the Nigerian Environmental Stan-

17 *Ibid*, p. 202.

18 *Ibid*, p. 199.

19 *Ibid*, p. 200.

20 *Ibid*, p. 201.

21 *Ibid*, p. 205.

22 *Ibid*, p. 200.

dards and Regulations Enforcement Agency (Establishment) (NESREA) Act<sup>23,24</sup> the requirement of locus standi should be abolished in cases of Public Interest Litigation;<sup>25</sup> and ‘the capacity of existing courts should be strengthened to enable them tackle the rigours of environmental cases’.<sup>26</sup> The aforementioned are generally commendably. Yet, it is felt that more fundamental issues bedevilling access to justice in environmental matters in Nigeria, as commonly noted in empirical studies (e.g. litigation cost, delays in court proceedings, etc.),<sup>27</sup> could have been highlighted and elaborately addressed by the Conference.

Furthermore, highlighting the fact that the concept of public participation in environmental decision-making and management is fundamental to securing sustainable development and environmental protection, the National Conference made detailed recommendations to the effect that steps should be taken to implement it in measures relating to climate change, gully and costal erosions, natural disaster, desertification and drought, bush burning, and biodiversity conservation and management.<sup>28</sup> In addition, the Conference proposed the review of the Nigerian Bio-Safety Bill to make it ‘obligatory’ to ensure public participation when applications to introduce GMOs are being considered’ and that ‘Environmental NGOs, Farmers organizations should be represented on the Governing Board’ of the relevant regulatory body.<sup>29</sup>

What is more, the National Conference also touched sparingly on the need to implement measures to ensure public environmental education,<sup>30</sup> and for agencies in the environmental sector to produce and disseminate relevant environmental information to the public giving the dearth of key environmental information kept by those agencies.<sup>31</sup>

On the whole, in charting the way forward for public participation in environmental matters, by way of guiding potential implementers, the Conference could have made reference to instruments in that area that are broadly reflective of international best practice relevant to Nigeria, such as the Principle 10 of the 1992 Rio Declaration on Environment and Development<sup>32</sup> and the 2010 UNEP Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines).<sup>33</sup>

23 Federal Republic of Nigeria Official Gazette, Vol. 94, No. 92, 31 July, 2007.

24 2014 National Conference Report, p. 202 and p. 239.

25 *Ibid.*, p. 239.

26 *Ibid.*, p. 201.

27 E.g. see *Jedrzejj George Frynas*, Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners, Social and Legal Studies, Vol 10 (2001).

28 2014 National Conference Report, p. 201 and pp. 207-213.

29 *Ibid.*, p. 91.

30 E.g. see *ibid.*, p. 206.

31 See *ibid.*, p. 205 and pp. 208-213.

32 (1992) 31 ILM 874.

33 Adopted by the Governing Council of UNEP, UNEP/GCSS.XI/11, Decision SS.XI/5, Part A, 26 February 2010.

### III. Specific Measures on Mitigation & Prevention of Environmental Pollution

The National Conference went further to recommend the amendment of some environment-related legislation and the regulation of certain activities, all aimed at mitigating and preventing environmental pollution and ensuring public wellbeing.

The Conference recommended that the Oil Pipelines Act<sup>34</sup> be replaced with a ‘new law on oil and gas pipelines’ that meets international standards and better addresses the compensation and remediation needs of those whose interest suffer injury as a result of the execution of powers granted under the Act;<sup>35</sup> a brief elaboration on this point could have majorly assisted potential implementers. On the Associated Gas Re-injection Act,<sup>36</sup> the Conference, in line with popular outcry, recommended the excision of ‘the provision that empowers the minister to authorize the flaring of gas’ and the imposition of ‘stiffer sanction including fines equivalent to commercial price of natural gas [flared?] and holding the heads of offending agencies personally liable’.<sup>37</sup> And with respect to the Environmental Impact Assessment (EIA) Act,<sup>38</sup> the Conference commendably recommended that the Act ‘be reviewed to provide for the social dimension in environmental management’;<sup>39</sup> however, the Conference could have gone further to propose that the Act be updated in relevant aspects and address several other shortcomings in the 22-year old Act that have over the years hindered the practical realization of the goals of an EIA.<sup>40</sup> Laudably, the Conference also proposed that ‘all policies, plans and programmes be subjected to Strategic Environmental Assessment (SEA) in pursuance of environmental sustainability’;<sup>41</sup> this aligns with international best practice as broadly reflected in the Bali Guidelines.

Furthermore, the National Conference recommended ‘a legislation to prohibit the use of asbestos’;<sup>42</sup> strict liability and redress in bio-safety/bio-technology matters and barring of untested/unregulated biotechnologies;<sup>43</sup> the regulation of ‘electronic waste disposal’;<sup>44</sup> the

34 Cap O7, Laws of the Federation of Nigeria, 2004.

35 2014 National Conference Report, p. 202.

36 Cap A25, Laws of the Federation of Nigeria, 2004.

37 2014 National Conference Report, p. 203.

38 Cap E12, Laws of the Federation of Nigeria, 2004.

39 2014 National Conference Report, p. 203.

40 See for instance, *Yinka Omorogbe*, *The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless*, in: Donald Zillman/Alistair Lucas/George Pring (eds.), *Human Rights in National Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resource*, Oxford 2002, p. 549 and p. 568.

41 2014 National Conference Report, p. 203.

42 *Ibid*, p. 204.

43 *Ibid*, p. 204 and p. 214.

44 *Ibid*, p. 204.

establishment of ‘a framework for the regulation of noise pollution’;<sup>45</sup> the regulation of ‘emission of fumes from vehicles that ply Nigerian roads’;<sup>46</sup> the regulation of ‘waste from the leather industry’;<sup>47</sup> and the prohibition of ‘[d]efecation in public places’.<sup>48</sup> Apart from the recommendations on asbestos and bio-safety, there was seemingly a major oversight in the making of the other recommendations as, surprisingly, they call for the regulation or prohibition of what is already regulated or prohibited under existing laws without reference to the latter. For example, electronic waste management is already regulated by the 2010 National Environmental (Electrical/Electronic Sector) Regulations;<sup>49</sup> noise pollution is regulated by the 2009 National Environmental (Noise Standards and Control) Regulations;<sup>50</sup> fumes from vehicles is regulated by the 2010 National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations;<sup>51</sup> leather industry waste is regulated under the 2009 National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations;<sup>52</sup> and defecation in public places has since been prohibited under section 247 of the Nigerian Criminal Code Act.<sup>53</sup>

#### IV. Environmental Institutions

In view of the need to ensure better environmental governance and effective implementation of environmental laws in Nigeria, the National Conference proposed the strengthening of some existing environmental institutions and the establishment of new ones.

First, the Conference recommended that the statutory regulatory power of NESREA – Nigeria’s apex environmental regulatory agency – be extended to cover ‘the entire environment including the oil and gas sector’.<sup>54</sup> Currently, it is widely considered that NESREA has no regulatory powers over the oil and gas sector,<sup>55</sup> especially as the NESREA Act contains potentially conflicting provisions on the subject matter: while section 7 (c) of the NESREA Act empowers the agency to ‘enforce compliance with international agreements’ on the environment including as it relates to ‘oil and gas’,<sup>56</sup> section 7 (g) empowers NES-

45 *Ibid.*, p. 205.

46 *Ibid.*, p. 206.

47 *Ibid.*, p. 215.

48 *Ibid.*

49 S. I. No. 23, Federal Republic of Nigeria Official Gazette, Vol. 98, No. 50, 25 May, 2011.

50 S. I. No. 35, Federal Republic of Nigeria Official Gazette, Vol. 96, No. 67, 19 October, 2009.

51 S. I. No. 20, Federal Republic of Nigeria Official Gazette, Vol. 98, No. 47, 17 May, 2011.

52 S. I. No. 34, Federal Republic of Nigeria Official Gazette, Vol. 96, No. 66, 16 October, 2009.

53 Cap C38, Laws of the Federation of Nigeria, 2004.

54 2014 National Conference Report, p. 202 and p. 214.

55 See *Ibid.*

56 It is important to bear in mind that, according to section 12 of the Constitution, treaties ratified by Nigeria are only enforceable in Nigeria if they are enacted into law by the National Assembly (Parliament)..

REA to ‘enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste *other than in the oil and gas sector*’.<sup>57</sup> A number of other provisions of the NESREA Act expressly exclude the oil and gas sector from the jurisdiction of NESREA.<sup>58</sup> The Conference’s recommendation above would clearly help place the oil and gas sector under the jurisdiction of NESREA.

However, giving the above recommendation, one would have expected the National Conference to make a recommendation on the fate of the 2006 National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act<sup>59</sup> and NOSDRA. This is because NOSDRA, under its establishing Act, is, among others, specifically responsible for environmental protection and the enforcement of environmental legislation in the petroleum sector,<sup>60</sup> which statutory responsibility is potentially in conflict with the earlier resolution of the National Conference on NESREA (Act). Without dealing with this issue, the Conference simply recommended that NOSDRA ‘should be well funded, and allowed to recruit more personnel to carry out its functions’.<sup>61</sup>

Furthermore, the National Conference recommended the establishment of a Nigerian Environmental Health & Safety Agency,<sup>62</sup> ‘an agency to address the issue of desertification’;<sup>63</sup> a National Forestry Commission;<sup>64</sup> and a special agency dedicated to environmental clean-up in the Niger Delta.<sup>65</sup> Firstly, these responsibilities are already generally under the jurisdiction of NESREA (by virtue of sections 7 and 8 of the NESREA Act) and NOSDRA (by virtue of section 6 of the NOSDRA Act) – a fact the National Conference did not comment on. Secondly, apart from the fact that the need for those new agencies was not articulated by the Conference, arguably, the disintegration of environmental institutions in that manner would most likely be inimical to effective environmental governance; existing problems of underfunding and inadequate inter-sectoral communication and co-ordination among environment-related public institutions in Nigeria<sup>66</sup> would be further heightened.

57 Emphasis added.

58 See sections 7 (g) - (i), 8 (g) (k) (i) (m) (n) and (s), 24 (3) and 29.

59 S. I. No. 15, Federal Republic of Nigeria Official Gazette, Vol. 93, No. 72, 29 December, 2006.

60 *Ibid*, Section 6.

61 2014 National Conference Report, p. 205.

62 *Ibid*, p. 200.

63 *Ibid*, p. 206.

64 *Ibid*, p. 214.

65 *Ibid*, p. 206.

66 Nigeria, ‘Institutional Aspects of Sustainable Development in Nigeria’, presented by the Government of Nigeria to the 5<sup>th</sup> session of the United Nations Commission on Sustainable Development, held in New York, on 7-25 April 1997, <http://www.un.org/esa/agenda21/natlinfo/countr/nigeria/inst.htm#info>. See also, Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, London 2009, p. 29.

### C. Conclusion

Indeed, it is commendable that the 2014 National Conference gave the 'environment' a centre place in its deliberations and recommendations. However, whether or not this opportunity was adequately explored and exploited by the delegates to contribute to the furtherance of environmental law and governance in Nigeria is an entirely different matter. In light of the above analysis, on the one hand, some laudably recommendations were made on environmental law and governance in the country. On the other hand, it is obvious that more could have been done within the time-frame of the Conference, in terms of addressing other fundamental environmental issues left untouched and improving the quality of environmental recommendations made, some of which reflected a lack of thoroughness in their formation. However, the Conference has ended. And with the setting up of the presidential committee on the implementation of the Conference report as earlier noted, Nigerians now look forward to the execution of the recommendations.