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## CONTEXTUAL APPROACHES TO ENVIRONMENTAL JUSTICE IN AFRICA

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### 1 Introduction

Beyond the classical thoughts associated with social justice, society also considers the institutionalisation of justice as part of the utilitarian value that government should build on to perpetuate fairness and a balanced disposition of public trust. Two significant theories of justice have shaped the philosophical approach of lawyers and sociologists to understand the essence of justice: the modern theory and the classical theory. According to James King's description of the contemporary theory of justice, it is

one which treats justice as a moral quality, in fact as one moral quality among a multitude of moral virtues, and which accordingly takes the obligation to be just as pre-eminently a moral obligation.<sup>1</sup>

As expected, this view of justice entreats an argument directed at the question of the obligatory standing of justice in any society. Should the delivery of justice be a matter of a traditional belief in the morals of its philosophical premise or the legal dictates prescribed by the legislative institution? In contrast, the classical theory of justice presents the rule of fairness not as one of several moral values society lives on but as the fundamental element that qualifies morality itself. Without drawing arguments of contradistinctions that are not necessary for the context of this scholarship, one meeting point for both theories is the obligation of justice to the entities that are willful or made to be subject to its supreme spirit.

Considering the primacy of justice amongst the essential elements that make up society's social, economic, and political environment, it has become customary for people to think first of crime whenever they think

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1 J King 'Hume's classical theory of justice' (1981) 7 *Hume Studies* 32-54.

of the application of justice. The preoccupation of the human mind with the factors of security, the penalty for a crime, and the remedy for injury has narrowed the understanding of justice. Although the institutions that ensure justice, such as the police and the courts, are more visible to the people who make up society, justice as a concept entails more than the operational or procedural system of ensuring security and remedy. In order to appreciate the essence of justice, there must be a good understanding of the cultural and behavioural thoughts of the diverse races, nationalities, and political systems that have reposed their faith in the offerings that justice presents to society. For example, what can be seen as the passing negligence of a civil servant that resulted in the injury of citizens in Nigeria can constitute a crime in the United Kingdom. While the prosecution in the United Kingdom might have to charge a public official in comparable circumstances with criminal negligence, the government of Nigeria might easily persuade its citizenry that the public officer did not commit a crime but rather made a deadly error within the bounds of human fallibility, the prosecution in the United Kingdom may have to charge such officer with criminal negligence. Different factors can inform the disparity in the definition of the same action by two countries that practice the same common law system: cultural, economic, and social.

An understanding of justice encompasses every facet of our society: the reward people get for their work, the proprietary right a creative person gets for his invention, and the correct proportion of the profit a shareholder is entitled to from the profits declared by a corporation. Is the distribution of benefits and duties fair? Do developing countries receive a reasonable price for their goods and services in other parts of the world, or do their developed trading partner countries exploit their disadvantaged position for economic gain? Are multinational corporations in developing countries making their employees work long hours for little pay compared to what is obtainable in their countries of origin? How is the environment of some of these developing countries supplying oil and other natural resources exploited? How do exploration activities affect people and impact climate change? Is there a fair distribution of the impact of the activities of high polluting countries on less-polluting, and developing countries? The above considerations can be drawn from the form of justice required: Is it distributive, as in, who gets what? Retributive, based on punishment for wrongdoing? Restorative, which tries to restore relationships to 'rightness'? And procedural, determining how fairly people are treated.

Considering the diverse theoretical postulations of justice related to definite and indeterminate schools of thought may not help explain the strength or weakness of the concept in addressing societal issues. Therefore, our demand for more light on the dark shades of contemporary

struggles that have defied consensual discourse should edge us towards a perceptual definition of justice in relation to issues contending with the wellbeing of humanity and not just the heterogeneous complexity that we have traditionally burdened justice to untie at every knotty junction. Contemporary issues, such as our environment and the global climate change challenge, have been the subject of intense disagreements and debate at our societies' intellectual, political, and informal levels. Yet, the role of justice is less talked about compared to prolonged negotiations regarding the influence of finance in framing a formidable strategy for combating climate change. The environment and its inhabitants are affected differently and in various locations by anthropogenic hazards, requiring a global response to ensure justice.

Mulvale et al., in their analysis of the various issues and topics identified with the study of justice, noted specific rules that should guide our understanding and application of the concept of justice, regardless of the area under reference, including environmental justice.<sup>2</sup> The first rule is that our ethnocentrism (or preferences for practices and values reflective of our culture) must be recognised. Second, in studying justice, one must acknowledge that the dominant viewpoint or the majority's views are often not the same as 'justice'. These abovementioned rules rightly capture what can be a misconception of the essence of justice if gleaned primarily from its inclination towards the moral standard of society. According to Mulvale, to achieve the full potential of justice studies, we must look beyond our particular cultural backgrounds and consider broader factors that are known to affect outcomes. This does not mean that cultural factors are not significant determinants in understanding justice's effectiveness in addressing societal challenges such as environmental degradation and operational activities that generate harmful emissions for humans and the environment. However, other factors likely to undermine the course of fairness and just remedial actions in response to a breach or abuse should be identified and explored. While researching the extent of the interaction of culture and other factors with the provision of justice, it is pertinent that the peculiar ethnocentric features of society be considered within the normative thoughts, perspectives, experiences, and values of the people and not just the laws that govern them. For example, suppose we are to consider how a multinational oil company exploiting oil and gas in a community in the Niger Delta region of Nigeria is destroying the environment and depriving the people of their right to a healthy and clean environment. In that case, we must consider the perspective of the people of the Niger Delta and not a general perception of how people would naturally react to the same anywhere in the world.

2 M Hurlbert & JP Mulvale *Defining justice* (2011).

No theory or concept of justice can capture the essence of justice without considering its emergence from normative customs and the interaction of multiple perspectives. Consideration must be given to the views of marginalised communities, the poor, environmentally endangered people, and other minorities. When defining justice, we must acknowledge that sometimes minorities and oppressed groups need special treatment and privileges to ensure they are not dragged down by the majority of the most influential groups in society. A limited perspective, especially when it is the dominant standpoint or a majority of the population, limits meaningful participation in broader issues of justice. For example, seeking and achieving environmental justice in a developing country could get to the point where the emotional enumeration of the people can be wrongly adduced to predict the response of authorities to the main issues. In such a case, the absence of compliance with normative steps that should lead to justice for the environment and the people may cause justice to be delayed perpetually or never achieved.

## **2 Environmental justice: Origin and perspectives**

In the interest of the environment and its inhabitants who are under siege by environmental hazards caused by anthropogenic processes, the broad topic of justice has found a space for environmental justice. The dominant understanding of environmental justice sees it as distributive justice. But distributive in what sense? The United States Environmental Protection Agency (EPA) defines environmental justice as the fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income, concerning the development, implementation, and enforcement of environmental laws, regulations, and policies.<sup>3</sup> The South African Environmental Justice Networking Forum (EJNF) closely related the concept to human and democratic rights when it defined environmental justice thus:

Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues, the environmental justice approach seeks to challenge the abuse of power, resulting in poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution and rural communities without firewood, grazing, and

3 'Environmental justice-related terms as defined across the PSC agencies' <https://www.epa.gov/sites/default/files/2015-02/documents/team-ej-lexicon.pdf> (accessed 30 October 2023).

water. In recognising that environmental damage has the greatest impact on poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making.<sup>4</sup>

The definition of environmental justice provided by the EPA draws from the history of the environmental justice movement, a movement founded by people of colour who feel their communities and the health of their citizens have been neglected while living in conditions far from what is expected of a dignified life. Professor Robert Bullard, in his description of the state of the communities of colour in the early 1970s, wrote,

whether, by conscious design or institutional neglect, communities of colour in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastations in the nation.<sup>5</sup>

However, the historical context of the EPA's description of environmental justice presents a background that talks more about racial discrimination in the distribution of public resources that should protect the environment of a minority community from environmental degradation of disastrous proportions. The minority stratification of the most affected people is common in societies where environmental justice is raised. An exception may be pointed out in cases where the majority was affected by the decisions of the minority, especially during colonial and apartheid rule in the global south. For example, the struggle for the end of apartheid in South Africa, at least from equal access to land and resources, was about the opposition to extreme 'white environmental policies' by the apartheid government. Under colonial and apartheid governments, coloured South Africans were forced to leave their ancestral lands and homes to make way for parks and public gardens accessible to only white South Africans. Also, public funds were expended to preserve environmental areas of primary interest to the whites. At the same time, the communities dominated by coloured South Africans were left without sanitation, clean water, and other basic amenities that should make their environment conducive for habitation.<sup>6</sup>

4 EJNF (Environmental Justice Networking Forum) Environmental Justice Networker (Autumn 1997).

5 RD Bullard (ed) *Confronting environmental racism: Voices from the grassroots* (1993); Bullard explained environmental injustice in the United States from the perspective of race and the higher likelihood of communities of colour to suffer neglect than the white communities.

6 W Beinart & P Coates *Environment and history: The taming of nature in the USA and South Africa* (2002).

The contemporary notion of environmental justice focuses more on the global threat to the natural environment through pollution, climate change and global warming.<sup>7</sup> As the history of the environmental justice movement in generational phases has shown, environmental justice movements in the United States and former colonies of Western countries were about more than equal resource distribution; they were about equal funding of public services and resources to protect communities from environmental harm.<sup>8</sup> From the foundational phase, the definitive meaning of environmental justice found its roots. It then evolved to become pivotal in standing up to the challenge of the inequitable distribution of hazardous environmental impacts associated with the activities of private and state-owned large and influential corporations.<sup>9</sup>

The evolution of the concept of environmental justice was approached by civil rights activists in the United States as one that required social activism and not legal action.<sup>10</sup> But their revolutionary stand against the liberal capitalists did not limit their concentration to the United States. They emphasised the sanctity of the global environment and its right to be protected from ecological destruction. In his account of how leaders of the people of colour in the United States started the environmental justice movement, Bullard stated that the principles of environmental justice proclaimed by the leaders in October 1991 included affirmation of the sacredness of Mother Earth and the right to be free from ecological destruction; people's right to self-determination; rights of participation and enforcement of principles of informed consent; and rejection of military occupation, repression, and exploitation of lands, peoples, and cultures, and other life forms.<sup>11</sup>

7 M Chemhuru 'The paradox of global environmental justice: Appealing to the distributive justice framework for the global South' (2019) 38 *South African Journal of Philosophy* 30.

8 RD Bullard 'Environmental justice in the 21st century: Race still matters' (2001) 49 *Phylon* (2001) 151 <https://doi.org/10.2307/3132626> (accessed 30 October 2023).

9 FO Adeola 'Environmental injustice and human rights abuse: The states, MNCs, and repression of minority groups in the world system' (2001) 8 *Human Ecology Review* 39 <http://www.jstor.org/stable/24707236> (accessed 30 October 2023).

10 AC Perez et al 'Evolution of the environmental justice movement: Activism, formalization and differentiation' (2015) 10 *Environmental Research Letters* 105002.

11 Delegates to the first National People of Color Environmental Leadership Summit held between 24-27 October 1991, in Washington DC, drafted and adopted 17 principles of environmental justice. Since then, these principles have served as a defining document for the growing grassroots movement for environmental justice. The 17 principles are: 1. Environmental justice affirms the sacredness of Mother Earth, ecological unity, and the interdependence of all species, and the right to be free from ecological destruction. 2. Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias. 3.

Although the above principles align with the philosophical foundations of environmental justice, the contextual frames reflect a set of thoughts that responded to a situational paradigm for the people who conceptualised them. From the preamble of the principles, it appears the drafters intended to make the principles a universal document. The 17 principles are still relevant, but given the political and scientific contexts of justice at all levels of global and local society, it becomes problematic to broadly internalise the principles into the environmental management system at the international and national levels. Another challenge in applying the principles is the expanded understanding of environmental justice in relation to other concepts such as sustainable development and

Environmental justice mandates the right to ethical, balanced, and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things. 4. Environmental justice calls for universal protection from nuclear testing, extraction, production, and disposal of toxic/hazardous wastes and poisons, and nuclear testing that threaten the fundamental right to clean air, land, water, and food. 5. Environmental justice affirms the fundamental right to political, economic, cultural, and environmental self-determination of all peoples. 6. Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and containment at the point of production. 7. Environmental justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement, and evaluation. 8. Environmental justice affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards. 9. Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality healthcare. 10. Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide. 11. Environmental justice must recognise a special legal and natural relationship of Native Peoples to the US government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination. 12. Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honouring the cultural integrity of all our communities, and providing fair access for all to the full range of resources. 13. Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of colour. 14. Environmental justice opposes the destructive operations of multinational corporations. 15. Environmental justice opposes military occupation, repression, and exploitation of lands, peoples, cultures, and other life forms. 16. Environmental justice calls for the education of present and future generations which emphasises social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives. 17. Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritise our lifestyles to ensure the health of the natural world for present and future generations.



energy justice. This challenge requires the specificity of the principles to be abridged form to reflect the present scope of environmental justice.

Finding the philosophical foundations for environmental justice extends its significance beyond understanding the discourses that legal science necessarily stimulates to invoke the primacy of the law without prejudice to the socio-philosophical ties that the concept of justice shares with the environment. However, how different countries legislate the doctrines of law to bring the use of the environment under the control of the state for the benefit of the people is often a matter of the politics that dictates the interest in the environment and not how the political system inclines itself to the sustainability of the domain. For example, the administration of President Barack Obama admitted the theory of anthropogenic climate change and proposed actions that would reduce greenhouse gas emissions.<sup>12</sup> But the administration of President Donald Trump did not officially debunk the science of climate change while withdrawing from commitments made by the previous administration.<sup>13</sup>

### 3 Scope of environmental justice

Environmental justice is often classified into distributive justice and procedural justice.<sup>14</sup> Distributive justice is concerned with the unfair distribution of good or bad environmental impacts. It is substantive in its application and different from procedural justice, which is institutional. In assessing distributive justice, the quantitative method is usually applied in determining the indices for measuring the differential factors in the quality of the environment while also taking into consideration the social

12 United States President's Climate Action Plan (June 2013) <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf> (30 October 2023).

13 The Obama administration introduced several policies in support of its action plan for climate change mitigation at the domestic level. In keeping to its promise of commitment to the Copenhagen Accord, the Obama Administration, over four years increased its budget request for direct climate assistance from \$321 million in 2009 to \$1.328 billion in 2012. See G Kincaid & JT Roberts 'No talk, some walk: Obama administration first-term rhetoric on climate change and US international climate budget commitments' (2013) 13 *Global Environmental Politics* 41. In opposition to the approach of the Obama Administration, the Trump Administration rolled back more than 125 environmental safeguards put in place by his predecessor. See the J Eilperin, B Dennis & J Muyskens 'Trump rolled back more than 125 environmental safeguards: Heres how' *Washington Post* 30 October 2020 <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/> (accessed 30 October 2023).

14 RR Kuehn 'A taxonomy of environmental justice' (2000) 30 *Environmental Law Reporter News & Analysis* 10681.



structure of the communities under review.<sup>15</sup> When understood in the light of an institutional democratic process or tool, procedural justice is defined as the pathway required to achieve distributive justice.<sup>16</sup> Following these foundational conceptual understandings of environmental justice has limited its applicability to its relationship with urban demography and environmental planning. From the standpoint of leaders of colour, social injustice and human rights are also viewed through the lens of what justice means as an instrument for determining fairness in how public authorities fulfil their democratic duties to the diverse communities that constitute their society. It is not intended to undermine the centrality of the concept of justice as a valid arbiter that can influence the diverse perspectives that influence the discussion of environmental justice. Rather, it is meant to expand the scope of the debate beyond arguments related to 'social imbalance' and 'discriminatory' dynamics that described the pre-social justice movement stage. According to Clayton, the issue of 'justice', in terms of environmental justice, is the most pressing question. However, there are multiple justices to consider that make it 'impossible to satisfy all justice concerns simultaneously'.<sup>17</sup>

The environmental justice movement defines environmental justice as the fair and equitable distribution of environmental burdens and benefits. They emphasise the importance of addressing environmental issues and ensuring fairness in their distribution. The movement recognises that the way these issues are distributed impacts the level of equity involved, leading to a focus on procedural justice. Nevertheless, some scholars have expressed concerns about the initial theoretical premise that restricts the scope to distributive and procedural justice. Critics of the distributive justice theory disagree with the assumption that goods are static, arguing that the impact of social and institutional relations is not adequately considered.<sup>18</sup> David, explaining how globalisation may have expanded the scope of environmental justice to include the concepts of recognition and political participation, argued that a thorough notion of global environmental justice needs to be locally grounded, theoretically broad, and plural, encompassing issues of recognition, distribution, and participation.<sup>19</sup> Though the notion of scholars who share the same view as David regarding the imbalanced focus on the process of distributing

15 G Walker *Environmental justice: Concepts, evidence and politics* (2012).

16 D Schlosberg *Defining environmental justice: Theories, movements, and nature* (2009).

17 S Clayton 'Models of justice in the environmental debate' (2000) 56 *Journal of Social Issues* 459.

18 IM Young *Justice and the politics of difference* (2011).

19 D Schlosberg 'Reconceiving environmental justice: Global movements and political theories' (2004) 13 *Environmental Politics* 517.

burdens and benefits give much credence to the essence of the right to participate in decisions that will ensure equitable distribution. It may be difficult to arrive at a substantive agreement on what measure of benefit and burden is fair for all once participation is adjudged on the strength of equal representation. The argument for social justice emphasises proportionality in representation and affirmative action where certain groups have suffered from systemic discrimination and deprivation. In order to develop a theory of justice that will not unintentionally formalise inequality through proportionality, Rawls suggests that

we are to step behind what he calls a veil of ignorance to a place where we do not know our own strengths and weaknesses or our own place in the grand social scheme of things.<sup>20</sup>

Apart from David, several other scholars have also identified recognition as an important concept within the context of environmental justice. It refers to the acknowledgement and respect of diverse cultural, social, and historical perspectives regarding the environment and environmental issues. Recognising the unique experiences, knowledge systems, and values of different communities is crucial for addressing environmental injustices effectively.<sup>21</sup> Within the framework of environmental justice, there is a strong emphasis on recognising the struggles faced by minority groups and disadvantaged communities, who have historically borne a disproportionate burden of environmental harm. Moreover, it acknowledges the vital role played by these communities in preserving their cultural heritage and the wealth of traditional knowledge and understanding they possess about their local ecosystems. This recognition underscores their potential to contribute valuable insights and actively participate in the development of sustainable and equitable solutions.

Also, the concept of corrective environmental justice has been discussed and defined to address past or ongoing injustices that have disproportionately affected communities that are vulnerable and marginalised.<sup>22</sup> It seeks to achieve equity in environmental protection and resource allocation, ensuring that all communities, regardless of their socioeconomic status, race, ethnicity, or other factors, have equal access to a clean and healthy environment by allowing remediation approaches, initiating public health programmes, encouraging public participation,

20 J Rawls *A theory of justice* (1971).

21 G Walker *Environmental justice: Concepts, evidence and politics* (2012).

22 P Mohai & R Saha 'Reassessing racial and socioeconomic disparities in environmental justice research' (2015) 52 *Demography* 199.

ensuring equitable resource allocation and increasing awareness through environmental education.<sup>23</sup>

From a universal standpoint, there is no dispute regarding the essence of justice. In contrast, what is just and what is not are still shaped by cultural norms and economic factors that have been ingrained in people's social psychology. Therefore, it makes sense for most social conflicts to have a background of justice conflicts. However, constructing this reasoning into what environmental justice entails will require an expanded demand for the forms of justice that the people and the environment can earn from their agitations and activism. Should justice only mean a just distribution of impact, or should it include a remedial action that will restore what is lost to environmental neglect and injustice? What about a penalty for violating laws that protect the environment from mistreatment? These are compelling considerations that the environmental justice movement is examining and talking about, thus moving environmental justice away from its early proponents' initial colouration of its objectives. The main contemporary issues revolve around how people living in communities affected by environmentally hazardous exploration activities can exercise their rights to a clean environment and receive compensation for the adverse effects of these activities. People at the receiving end of the actions precipitating environmental pollution have endured hardships because of the complexities that politics has introduced to seeking justice.

#### 4 Perspectives on environmental justice: Africa

Given the variety of views and debates on the origin and concept of environmental justice, which give much credence to a Western perspective,<sup>24</sup> an African perspective is necessary to present a model of environmental protection and a management mechanism that characterises the peculiar factors that tend to limit justice for the environment and the people. There is the notion that the concept of environmental justice in Africa is primarily concerned with the communities' access to, use of, and control of natural resources.<sup>25</sup> While this notion is not wrong within the socio-economic

23 D Schlosberg *Defining environmental justice: Theories, movements, and nature* (2007). Some scholars have mentioned productive and ecological environmental justice. However, these concepts can also related to distributive and corrective environmental justice depending on the approaches initiated to address environmental injustice.

24 M Ssebunya, SN Morgan & BD Okyere-Manu 'Environmental justice: Towards an African perspective' in M Chemhuru (ed) *African environmental ethics: A critical reader* The International Library of Environmental, Agricultural and Food Ethics 29 (2019) [https://doi.org/10.1007/978-3-030-18807-8\\_12](https://doi.org/10.1007/978-3-030-18807-8_12) (accessed 30 October 2023).

25 L Obiora 'Symbolic episodes in the quest for environmental justice' (1991) 21 *Human Rights Quarterly* 477.

context of the challenges that most resource-rich African communities may be contending with, it does not present an encompassing definition of what environmental justice means to Africans. In addition to the right to manage the resources on their land, a community also seeks the right to pursue justice against any entity that mismanages natural resources or exploits natural resources in a manner that negatively impacts their environment. There is a profound impact on the existential factor of injustice in African national systems in most of the cases presented and analysed in subsequent chapters, particularly in the extraterritorial cases.<sup>26</sup>

Environmental justice encompasses a variety of factors and disciplines, including but not limited to law. From the position of law, environmental justice is seen through a triangular prism of compensatory, regulatory, and adjudicatory elements of the national legal systems. But those legal systems are products of custom that evolved into norms and further crystallised to become laws that form the legal systems' frames. Access to justice, substantive and procedural rights, participatory rights, and the right to remediation are specific areas where contemporary environmental justice movements have engaged national systems in different jurisdictions. In Africa, those legal systems are products of the African cultures and customs over whom they have jurisdiction and are still the products of northern states that formerly colonised many African cultures. Africa occupies a critical place in global sustainability, with a population twice Europe's size and a wealth of biodiversity and natural resources. Each of the 54 sovereign African states should have a justice system capable of supporting a functioning society and protecting citizens' rights to a dignified and healthy environment. But in practice, as seen from the case studies presented in subsequent chapters, they demonstrate examples and patterns of environmental deprivation, exposure to hazardous risks, uncompensated incidents of injury caused by environmental pollution, and other environmental injustices that weigh down on citizens and residents. These facts reveal the deficiencies of legal institutions that may seem capable of delivering justice, including environmental justice, but fail to do so. There are cultural reasons why foreign legal systems have been ineffective when implemented in African states. Furthermore, the current economies are still in a transitional phase, heavily reliant on colonial practices and structures, as cultures cannot easily transition from a colonial to a fictive status of "never-been- colonized".

26 *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) African Human Rights Law Report (AHRLR) 151 (Federal High Court, Nigeria); *Okpabi v Royal Dutch Shell* [2021] UKSC; *Kiobel v Royal Dutch Petroleum Co* 06- 4800, 2010 US App LEXIS 19382, at 1 (2d Cir Sept 17, 2010).

For African countries, the culture of law and justice begins with the traditional backgrounds of the various clustered communities that make up today's states. The system of communities was altered with the introduction of the Western justice system by colonial occupying nations. In most countries, the Western justice system remains dominant, even after liberation from colonial rule. The post-colonial state is still a Western state structure. Due to political and economic dependencies that stay with the West, globalising and colonising interests still exercise power in decisions about environmental justice. The injustices witnessed by African states under colonial rule remain a distasteful legacy.<sup>27</sup> The dispossession of indigenous peoples from their traditional lands and resources by colonial masters is presently being constitutionally institutionalised by governments under the pretext of overriding public interest.<sup>28</sup>

As a constitutional value, every African country recognises and provides justice through legal sources, beginning with statutory legal tools enabled by their national constitutions. However, the state often cannot support legal rights when they have not been institutionalised. Because of failures in obtaining justice at home, some African citizens and states have sought solutions from international sources of law and international institutions. African citizens have recently begun seeking redress from courts in foreign jurisdictions.

The perception of justice in its institutional and substantive context naturally raises questions about human rights, their recognition and protection, and how they can be remedied for abuse or breaches of human rights. It also applies to how society measures a functioning system in its provision and administration of independent, neutral, and forthright judicial institutions that fully protect the rule of law. In cases where a national system fails to meet the standard that law expects from its judicial institutions and the legal processes that ensure their accessibility, society seeks an alternative national institution to administer justice conscientiously, albeit extraterritorially. As Luis Moreno-Ocampo pointed out in his statement on the principle of complementarity, this does not apply only to environmental justice,

[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence

27 RL Bryant & S Bailey *Third world political ecology* (1997).

28 L Aladeitan, RA Wabunoha & CT Odaghara 'Harnessing oil as natural resource wealth: A focus on the legal frameworks of Nigeria and Uganda' (2019) *InLaw | Environment | Africa* 267-292.

of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.<sup>29</sup>

It is best to understand the implications of the statement above if we examine the passive correlation between state crime and environmental torts in the reliance on judicial independence to guarantee the effectiveness of the converged concept, particularly within the context of environmental justice. Under the broader concept of human rights and national legal frameworks for environmental protection, the African context of environmental justice is not dialectically different from environmental racism, which is particularly important concerning African legal systems. Rather, it accentuates the peculiar elements of the struggle for resource control, environmental information access, substantive and institutional justice, and fair distribution of development. Wangari Maathai, a distinguished environmental activist from Africa, underscored the connection between environmental degradation and environmental injustice, especially in the context of the African continent.<sup>30</sup> She contended that colonial powers capitalised on Africa's natural resources without regard for the lasting outcomes, resulting in ecological decline and the uprooting of indigenous communities from their traditional lands.

## **5 Elements of environmental justice: African context**

### **5.1 Resource control**

In some countries, the concept of natural resource ownership is subject to the constitutional system, not environmental interests. If a natural resource is defined broadly as 'property', it reinforces the ownership status of the property owner. Naturally, whoever owns a property, item or resource should have the power of direct or indirect control, as the state usually protects the right. However, in the case of resources that have national value and could have national security and economic implications, most countries don't grant property rights over lands that hold natural resources. In some cases, the state either shares control with the landowner or takes exclusive control of the resources on the land while the landowner is compensated for the land. However, in the United States of America, a landowner legally owns the land and all that is beneath the

29 K Urbanová 'The principle of complementarity in practice' in P Šturma (ed) *The Rome Statute of the ICC at its twentieth anniversary: Achievements and perspectives* (2018) 163-176.

30 W Maathai *The green belt movement: Sharing the approach and the experience* (2003).

ground, one of the few countries that confer property rights on landowners of landholding natural resources.<sup>31</sup>

Natural resource control sensitively involves property rights, especially when discussing revenue and environmental protection. It becomes increasingly important to understand where natural resources belong and how property rights affect interpretations of who owns them, especially in relation to a person's right to a healthy environment. Suppose the property that should be enjoyed quietly without interference from others can become harmful to the health of its owners. Why should they not have the right to decide what to do with the property and how to use it in the safest possible way? What should determine the constitutionality of the right to resource control as a property right? Is it the land tenure system adopted by the country or the interpretation of the human right to own property? While researching the nexus linking natural resource management to environmental justice, scholars have not adequately explored these questions.

Most African countries are perpetuating the colonial national-based tenure system of land ownership as part of the instrument of government sovereign control. Though, as earlier mentioned, this is a global practice, research conducted by a rights and resource organisation revealed that only 13 per cent of the total land of countries studied in sub-Saharan Africa is owned or controlled by Indigenous Peoples and local communities, compared to 18 per cent globally.<sup>32</sup> Across resource-rich African countries, communities, indigenous peoples, and minorities, the locals' agitation for control of the natural resources continues to increase, with some turning violent, resulting in the loss of lives and destruction of properties and installations. Tying their agitation to their quest for environmental justice, claimants for resource control describe as injustice the exploitation of rich natural resources in their backyard, leaving them with polluted lands and

31 The historical origins of natural resource ownership can be traced back to the 19th century, during which the federal government enacted homestead and development acts to promote the settlement of the Western region. Through these acts and the General Mining Law of 1872, federal public domain lands and the natural resources they contained were transferred into private ownership. However, as the 20th century progressed, the United States implemented legislation that gradually restricted the settlement and development of certain natural resources and public domain lands. This led to the preservation of these lands and their natural resources under federal ownership, a status that remains in effect today. See M Clawson *The land system of the United States: An introduction to the history and practice of land use and land tenure* (1968).

32 The Rights and Resources Initiative 'Factsheet: Who owns the land in Africa? Formal recognition of community-based land rights in sub-Saharan Africa' (October 2015) [https://rightsandresources.org/wp-content/uploads/FactSheet\\_WhoOwnstheWorldsLand\\_web2.pdf](https://rightsandresources.org/wp-content/uploads/FactSheet_WhoOwnstheWorldsLand_web2.pdf) (accessed 16 December 2021).



no corresponding development to show for all that the land provided for the state.<sup>33</sup>

## 5.2 Freedom to access and share information.

Access to environmental information is becoming increasingly important, especially in countries where natural resources are heavily exploited. As one of the principles of accountable governance, access to information is recognised in the constitutions of African countries, particularly the member states of the African Union. Access to information and free expression are sacrosanct for exercising other fundamental rights. An African adage says that what you don't know can hurt you more. The level of participation of people in a decision-making process that could be beneficial to their development or harmful to their environment depends on their orientation towards the subject matter. Exposure has two sides; merely being informed does not determine effective and positive participation. The kind or adequacy of the information available to people will drive participation.

A fundamental requirement for fair treatment of the environment and the people inhabiting the land exploited for economic gains is the right to express themselves and advocate for a better deal freely. To understand the enormity of what affects them and the environment, the people must have access to the correct information at the right time. At the UN Conference on Environment and Development in Rio de Janeiro, where 178 countries endorsed the Rio Declaration, they agreed that the best way to address environmental challenges is by ensuring the people of the land are involved. For this cause, three key elements were mentioned in Principle 10 of the Declaration: access to environmental information, participation in environmental decision-making, and judicial and administrative proceedings. They were described as the pillars of sound environmental governance and the key procedural aspects of achieving environmental justice and were thus regarded as rights.<sup>34</sup> The North American Agreement on Environmental Cooperation, 1993 (NAAEC)<sup>35</sup> provides for specific obligations on the part of the government to ensure individuals with legal standing to pursue the course of justice have access to the institutional and

33 CC Egugbo 'Resource control and the politics of revenue allocation in Nigerian Federation' (2016) 5 *AFRREV IJAH: An International Journal of Arts and Humanities* 186.

34 C Schwarte *Access to environmental information in Uganda forestry and oil production* (2008).

35 The North American Agreement on Environmental Cooperation (NAAEC) is a side agreement to the North American Free Trade Agreement (NAFTA) involving the United States, Canada, and Mexico. The NAAEC aims to promote environmental protection and cooperation among these countries while addressing potential environmental issues resulting from trade and economic activities.

constitutional processes necessary for upholding national environmental laws and seeking redress for environmental wrongs.<sup>36</sup>

The objective of the agreement is to create a harmonious relationship between economic advancement and safeguarding the environment. Designed as an adjunct to the now-discontinued North Atlantic Free Trade Agreement (NAFTA),<sup>37</sup> the agreement was intended to safeguard environmental values from being compromised during the pursuit of open trade goals among the NAFTA member countries. The provisions within the NAAEC underscore the importance of granting legal entities the right to seek injunctions against trade-related actions that could potentially inflict environmental harm. Africa created a continental free trade area through the agreement that established the African Continental Free Trade Area in 2018. Until this moment, there has been an independent or associated instrument that commits member states to ensure a fair and unhindered process in initiating legal actions where the implications of intracontinental trade are seen in harmful environmental practices. Governments and private operators see access to environmental information in African countries as a potent empowerment tool that people use to counter policies and activities that are harmful to them and their environment. For the sustained adoption of safe environmental policies that will serve the cause of environmental justice for the people and the environment, the people always advocate for transparency and the right to access information that will help them contribute to the decision-making process. In recognition of the right to access information, the Zambian government passed the Access to Information Bill in March 2020. In its SDG Voluntary National Review Report for 2020, the Zambian government noted that to ensure justice, the public should have access to information that will enable them to be adequately informed to hold gatekeepers accountable.<sup>38</sup> For example, Zambia's environmental laws are in more than 33 pieces of legislation, and statutory responsibilities are fragmented amongst at least ten-line ministries. Considering the tight-fisted bureaucracy typical of African public sectors, accessing environmental information without a coordinating legal framework can be impossible.<sup>39</sup> A study conducted

36 Article 6 of the North American Agreement on Environmental Cooperation.

37 The NAFTA has been replaced with the United States Mexico Canada Agreement (USMCA) on 1 July 2020.

38 Zambia Sustainable Development Goals Voluntary National Review 2020 [https://sustainabledevelopment.un.org/content/documents/26304VNR\\_2020\\_Zambia\\_Report.pdf](https://sustainabledevelopment.un.org/content/documents/26304VNR_2020_Zambia_Report.pdf) (accessed 30 October 2023).

39 DO Agelebe 'Integrating liberal economic regulation with environmental protection: Ethiopia, Zambia, Mali and Ghana' (2019) 40 *Australasian Review of African Studies* 105.

by the International Growth Center on the environmental quality and economic development in Zambia, among other things, observed

that the management of environmental data and policies in Zambia are highly decentralised as many ministries are involved in issues about the environment with relatively little information sharing and coordination among them.<sup>40</sup>

People affected by corporations' operations in the mining sector are increasingly finding it difficult to access information about policies, actions, and data related to Zambia's environment to formulate their advocacy drives and action plans.

The Rio Declaration recognises that for communities to feel a sense of belonging, they must be progressively engaged in matters concerning their environment. Restricting access to information is a strategy that repressive governments, in collaboration with insensitive private operators, use to frustrate every move by the people and civil society in seeking remedial justice for environmental pollution. Besides the information needed for judicial processes, access to reports of environmental impact assessments is also restricted, thereby raising the suspicion of deliberate negligence by governments in matters that result in severe and almost irreversible damage to the environment and the well-being of the people. In 1996, a complaint was brought before the African Commission on Human and Peoples' Rights by two NGOs about the environmentally degrading activities of Nigerian-based multinational oil companies. The complainants, in their communication, *inter alia*, alleged:<sup>41</sup>

The government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development and has responded to protests with massive violence and executions of Ogoni leaders.

The African Commission, in finding the Nigerian government in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, urged

40 K Jack 'Final report: Environmental quality and economic development in Zambia' (June 2018) <https://www.theigc.org/wp-content/uploads/2018/08/Jack-2018-Final-Report.pdf> (accessed 30 October 2023).

41 As above.

the government, to inter alia:<sup>42</sup> ‘provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.’

## 6 Access to justice

The principle of the rule of law makes access to justice one of the basic requirements for a functional and fair society. As part of the rule of law, everyone has the right to equal access to justice, even vulnerable groups. Following the principle, governments must take all necessary steps to provide fair, transparent, adequate, non-discriminatory, and accountable services that promote access to justice for all. According to Mauro Cappelletti,

access to justice can then be considered the most basic requirement, the most fundamental human right, in an egalitarian legal system that seeks to guarantee and not only proclaim all rights.<sup>43</sup>

Trust in an independent judicial institution keeps the hope of the deprived, oppressed, and abused alive in the face of the tyranny of state and non-state actors. Accordingly, access to justice means removing all cultural, economic, legal, and political barriers that prevent minorities, less privileged and disadvantaged groups from getting a fair hearing and redress for any wrong committed by state or non-state actors against them.<sup>44</sup> However, the availability of a judicial body does not mean accessibility to justice. Accessing justice means the process that should culminate in the delivery of substantive justice in whatever form desired by the complainant should be seamless, open, impartial, and devoid of interference.

According to Lerner, belief in a just society is based on the people’s desire for justice.<sup>45</sup> According to the swing of this desire for justice, the tempers of people burdened by a system that checks their pulses for signs of life but never considers whether life itself is threatened determines the swing of their mood. The absence of a balance in the access and dispensing of justice among African minorities, particularly those whose lands are rich in natural resources, has led to a loss of confidence in

42 As above.

43 C Crawford & DB Maldonado ‘Access to justice: Theory and practice from a comparative perspective’ (2020) 27 *Indiana Journal of Global Legal Studies* 1, citing M Cappelletti & B Garth *El acceso a la justicia: La tendencia en el movimiento mundial para hacer efectivos los derechos* (1996) 12-13.

44 Global Alliance against Traffic in Women (GAATW) <http://www.gaatw.org/atj/> (accessed 27 December 2021).

45 MJ Lerner *The belief in a just world: A fundamental delusion* (1980).

the judiciary and the legal system. This has fueled the drive to seek and access justice outside African legal systems. The alternatives available to Africans include the African Court on Human and Peoples' Rights. The Court was conceptualised in light of accusations of marginalisation and oppression by minorities against governments with a majority rule. Also, national governments, civilian and military, were accused of influencing the judicial systems, disregarding the principle of separation of powers and the rule of law.

Over the years, the inability to enforce regional courts' decisions made claimants look out for the possibility of accessing justice in developed countries with statutory laws empowering their legal system to be involved in cases of human rights abuse. As a result of the combined influence of the state and multinational companies on the courts, African communities that wish to enforce agreements made with multinational companies have had to turn to extra-territorial means of getting justice for their environment and their people. The *Zambian Vedanta/Konkola Copper Mines* case illustrates how people frustrated by their shredded confidence in the *Zambian* judicial system decided to pursue justice in the United Kingdom. In 2004, Vedanta Resources Limited, a UK-based mining company, acquired controlling equity shares in *Zambia's Konkola Copper Mines*, making it Konkola's parent company. In 2015, 2 000 *Zambian* residents filed a claim against Vandeta for damages caused by the discharge of toxic effluent from the Nchanga copper mine over an extended period. For the English Court to assume jurisdiction, the claimants, inter alia, convinced the Court of the presence of a high risk of a miscarriage of justice had the case been heard in the *Zambian* courts.<sup>46</sup> This case and several others from Africa have put a face to the essence of a functional, reliable, fair, and independent judicial system guaranteeing justice access.

To protect environmental and human rights in general, access to justice to facilitate effective legal remedies is one of the crucial elements that define environmental justice. In a report<sup>47</sup> by the International Commission of Jurists on access to justice in the Democratic Republic of Congo, it was noted that despite the Mining Code providing for a procedure for arriving at a compensation agreement between individuals and corporations, justice is still out of reach for many affected by the environmental impact of mining corporations. The report mentioned

46 *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

47 International Commission of Jurists 'Access to justice: Human rights abuses involving corporations – Democratic Republic of The Congo' (2012) <http://www.icj.org/wp-content/uploads/2012/06/Democratic-Republic-of-Congo-rights-abuses-corporations-publication-2012.pdf> (accessed 30 October 2023).

political control of the judiciary, prohibitive proceedings, and corruption as factors that frustrated claimants from accessing justice.

## 7 Distributive environmental justice

Climate change has increased global discussion on the equitable distribution of benefits and burdens from anthropogenic activities that alter our environment. Yet, the subject of satisfying the principle of common but differentiated responsibilities remains unresolved by the Conference of Parties to the United Nations Framework Convention on Climate Change.<sup>48</sup> However, mainstreaming the developmental needs of environmentally exploited communities has been a constant demand in the African States, which describes a context of distributive injustice common amongst minorities in the global south. The majority of groups affected by environmental hazards or neglected in the developmental plan of the government are also part of the agitation for a fair distribution of social development. An equitable distribution of social development indicates the recognition of humans' fundamental right to a safe and healthy environment. Resource-rich communities in the African States have often been left to bear the burden of gross underdevelopment caused by the effects of years of exploitation of natural resources.

Most people in resource-rich communities struggle with abject poverty because their traditional means of livelihood have been cut off due to environmental pollution and a declining population. Sudan, Uganda, Nigeria, Côte d'Ivoire, the Democratic Republic of Congo, and several other African countries have experienced violent conflicts with the agitations of neglected resource-rich communities. The Advisory Consortium on Conflict Sensitivity (ACCS), in its analysis of the conflict in Northern Uganda, identified economic disparities, unequal distribution of wealth, and resource competition, as the drivers of conflict in Uganda.<sup>49</sup> The agitation for resource control by the people of the Niger Delta area of Nigeria was started by the marginalisation of the people in employment, social welfare, essential infrastructure development, and regular engagement.<sup>50</sup>

48 Climate Action Network International 'Cop26: Rich nations betray vulnerable people of the world' *Climate Network* 13 November 2021 <https://climatenetwork.org/2021/11/13/cop26-rich-nations-betray-vulnerable-people-of-the-world/> (accessed 6 November 2023).

49 Advisory Consortium on Conflict Sensitivity (ACCS) 'Northern Uganda conflict analysis' (September 2013) [https://reliefweb.int/sites/reliefweb.int/files/resources/ACCS\\_Northern\\_Uganda\\_Conflict\\_Analysis\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/ACCS_Northern_Uganda_Conflict_Analysis_Report.pdf) (accessed 28 December 2021).

50 Egugbo (n 33).

Distributive environmental justice transcends the demand for fair distribution of physical development; it includes integrating the democratic right to participate in decision-making processes that will affect the well-being of people and the environment. Furthermore, it entails the seamless process of accessing the institutional framework established to address environmental issues by all groups, irrespective of their political, religious, or ethnic affiliations.<sup>51</sup> Therefore, determining the distribution of benefits and handling the burdens of the people living in areas affected by natural resource exploitation must be fair and inclusive of adequate representation.

## 8 Conclusion

As defined by a country's Constitution, an environmental right is the legitimacy cloak that drives citizens to demand environmental justice as far as the institutional framework permits. Whether we define environmental justice based on the environment's rights or as a comprehensive description of environmental rights, specific elements of human rights that convey environmental justice must be institutionalised, and principles of environmental justice must guide their legal enforcement. These elements are the right to freedom of information, self-determination, the right to equal representation, the right to legal representation, and the right to a fair hearing. These elements encapsulate the character of the procedural and substantive form of human rights that will birth institutional and substantive environmental justice for African people in African countries, especially in resource-rich communities. Several African countries have included these elements in their national constitutions, either in the form of legal protection or the obligation of the state. For example, Section 24 of the Constitution of the Republic of South Africa, 1996 provides as follows: 'Everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected through reasonable legislative measures.'

The guarantee of environmental rights in the South African Constitution provides a statutory platform for accessing environmental justice. The ideological understanding of what environmental justice should provide to the disadvantaged through equitable distribution of benefits and burdens are often viewed by the cultural and social priorities of the underprivileged and contested by the government's economic development plans, particularly concerning the extractive sector. No

51 Friends of the Earth Scotland 'Environmental justice' <http://www.foescotland.org.uk/environmentalrights> (accessed 28 December 2021).



matter how explicit the protection provided by the Constitution and the assurances of implementation by the government, the people will always respond to the choice between environmental injustice and government projected development. From the point of view of what the legal system of the country allows citizens to do in the face of deprivations and marginalisation, African people living in communities exposed to environmental hazards caused by the activities of operators in the extractive industry and the manufacturing industries adopt strategies for achieving remedial, distributive, or retributive environmental justice.

Fundamentally, the purpose of the constitutional provision for the protection of environmental rights should be to ensure that the people understand their participatory rights, without ambiguity, and to structure the procedure in a way that makes environmental justice accessible. Not much literature has subjectively investigated the context of Africans' conceptual considerations demanding environmental justice. Nevertheless, some researchers have aligned with positing cultural ideologies and social gaps as influencers of the dynamics that shape the adoption of a definition of environmental justice. The progenitors of the environmental justice movement did well by offering a template for environmental justice that is not linear. However, there is a need to draw from the principles of environmental justice and abridge principles that reflect the cultural, social, and legal context driving the demand by African communities for environmental justice.

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