PREVAILING HUMAN RIGHTS ISSUES IN THE NIGERIAN EXTRACTIVE INDUSTRY: A CRITICAL AND COMPARATIVE DISCOURSE

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ABSTRACT

The extractive industry in Nigeria is plagued with a myriad of human rights challenges arising from the activities of Multi-National Companies (MNCs) often working in tacit cahoots with the government which result in flagrant violations and abuse of human rights. The Nigerian government has demonstrated minimal ability to stem the tide of these violations. This paper undertakes an expository analysis into the nature and categories of human rights and how they are recognised under Nigerian laws and interpreted by the courts. It further identifies the various types of abuse that take place in this sector of the economy. It finds that there is a stratification of rights into justiciable (enforceable) and non-justiciable (non-enforceable) rights with violations by the MNCs cutting across both. The research reveals that this grouping of rights has worked severe hardship on victims of abuse in Nigeria and this is not tenable in some jurisdictions. This paper calls for a more proactive approach to the recognition and interpretation of human rights with regard to those touching on the activities in the extractive industry to be in tandem with the practice in some jurisdictions. It further calls for the express incorporation of human rights clauses into prospecting, mining leases and other agreements entered into with the MNCs.

Key words: Prevailing Human Rights Issues, Nigerian Extractive Industry, Activities of Multi-National Companies (MNCs), Comparative Discourse, Victims of Abuse in Nigeria.

INTRODUCTION

The extractive industry refers to activities of industries geared towards the removal of raw materials from the earth for use by consumers. It includes all mechanical operations that remove minerals, metals and aggregates from the earth and necessarily attach processes of oil and gas exploration, quarrying, mining/dredging of solid minerals, especially, gold, diamonds, sand, laterite, and so on.

The extractive industry in Nigeria may be categorised into the petroleum (oil and gas) sector, and the mining (solid minerals) sector. Extractive activities refer to the activities of extractive industries, companies or persons. The statute regulating the activities of this sector does not define extractive industry; it however defined Extractive Industry Company as:

> *"…any company in Nigeria that is engaged in the business of prospecting, mining, extracting, processing and distributing minerals and gas including oil, gold, coal, tin, bitumen, diamonds, precious stones and such like, includes any agency or body responsible for the payment of extractive industry proceeds to the federal government or its statutory recipient".*

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Extractive activities can also be defined as "*process that involve different activities that lead to the extraction of raw materials from the earth (such as oil, metals, mineral and aggregates), and their processing and utilization by consumers (Sigam & Garcia, 2012).*"

The petroleum and mining industries are strategic and central to the Nigerian economy. Multinational companies (MNCs) such as Exxon Mobil Unlimited, Shell Petroleum Development Company Incorporated, Chevron Nigeria Limited and a host of others in the extractive industries are usually granted oil mining lease and oil prospecting lease to carry out their extractive activities in Nigeria. Their activities have resulted in cases of gross human rights abuses. Communities have been devastated; individuals have been rendered vulnerable following activities of operators, particularly the MNCs which are major players in the extractive industry. These abuses are as a result of excessive profiteering, desperation, absolute disregard for best trade practices, disregard for the rule of law and lack of value for life and the environment. The development becomes more worrisome as the Nigerian government appears either helpless or less concerned with the development. The government has shown greater interests in "*harvesting*" more foreign direct investments (Opemuti, 2020) without adequate regulation of the activities of MNCs. Human rights of citizens become secondary as government sometimes authorise the coercive agencies of the state to secure and protect the illegalities of the MNCs.

In lieu of the above, this paper identifies and highlights issues of human right abuses in Nigeria's extractive industry and steps that should be taken to eradicate or drastically curtail these abuses while suggesting new ways of ensuring zero abuses of human right in the extractive sector. Succinctly, the paper is discussed under the following sub headings to wit: the evolution of human rights, the recognition and application of human rights in Nigeria and the recognition and application of human rights in select jurisdictions. Others include, human rights issues in the extractive industry in Nigeria, stemming the tide of human rights abuses in the extractive industry in Nigeria. In the long run, useful recommendations are preferred and conclusion made.

The Evolution of Human Rights

The concept of human rights is fundamental and underpins the emergence of the contemporary world. Under classical philosophy, the idea of human rights broadly situates within natural law and positivism. The traditional African society developed its own unique values of human rights such as evident in African norms and practices (Shivji, 1989).

Human rights constitute in those rights which human beings enjoy by virtue of their humanity, the deprivation of which would constitute a grave affront to one's natural sense of justice. Ajomo's view represents the natural law jurisprudence which conceptualised human rights as natural, imprescriptible, inherent and inalienable. It is however doubtful if human rights can still be so conceptualised in contemporary times given their documentation/prescription in form of charters, bills, declarations and constitutions of the modern states/countries (Eze, 1984).

In the light of the foregoing, human rights have been defined as:

> *"Demands or claims which individual groups make on society, some of which are protected by law and have become part of ex-lata while others remain aspirations to be attained in the future (Dakas, 1986)".*

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By and large, human rights are a set of universal moral [right], something which all men, everywhere, at all times ought to have, something which no one may be deprived without a grave affront to justice, something which is owing to every human simply because he is human (Magnarella, 2003). These rights are indivisible; none is less important or more essential. Human rights are values which culminate in a complementary framework with each dependent on another. The attempt to pigeon - hole these rights or elevate some over others is rather preposterous.

The evolution of human rights may be categorised into three generations of subjective rights. The first generation of rights is a product of man's revolt against absolute authority of a sovereign and the desire to tame such powers. It relates to private liberties of the individual to participate in the governance of the individual's society. It was a demand by citizens made on the state and a definition of freedom circles to which man is capable of private administration.

These liberties were political and civil rights ventilated in documents such as the British Magna Charta, the Petition of Right, the Bill of Rights (Declaration of Rights) in England, the American Declaration of Independence (Rosen & Rubenstein, 2022), the French Declaration of Human and Citizen Right, the Geneva Convention and so on. These set of rights have in contemporary times been consecrated into constitutions and laws of states, regions and international instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights and the Additional Protocols, the African Charter on Human and Peoples' Rights (Eneh & Agbazue, 2011) and so on. These rights have been expressed in chapter four of the CFRN. They are the first generation rights. They are justiciable rights (De-Villiers, 1992; Miamingi, 2009).

The second generation of subjective rights had evolved from positive law as well as certain international Conventions (Ssenyonjo, 2009). These rights are not self-executor in most states. They require institutional support mechanisms from the state. In Nigeria, these rights are contained in chapter II of the CFRN (Akande, 2000) and made non-justiciable (Akande, 1999). The stratification of the rights into enforceable and non-enforceable rights has generated unabated controversy (Currie & De-Waal, 2005; Olowu, 2006). These rights are bashful and only prohibit and allow for future without a certain overdue.

The third generation of human rights has been identified as solidarity rights which may only be exercised collectively (Cornescu, 2009). These set of human rights include the rights to self- determination, the right to development, environmental rights, and the right of sexual minorities and so on (Cornescu, 2010). The doctrine of environmental right crystallises as "*right of future generations*" ventilated as sustainable development in contemporary times (Emas, 2015).

There appears to be an evolving set of new rights classified as the fourth generation of subjective rights. These rights relate to genetic engineering (Harmon, 2005). As man advances in science and technology, a new kind of human right which allows the exercise of genuinely human intelligence, a set of epistemic rights, evolves to strengthen "*traditional*" human rights. These are recognised as part of the fourth generation of rights (Risse, 2021). It is argued that democracy, development and human rights must adjust to new technological interventions in the digital life worlds. The advocates of this new set of rights have thrown up debates on issues of assisted euthanasia, maintaining artificial life after brain death, sterilisation, fetal status,

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infanticide and so on. Human rights generally have transformed from the humble conceptual beginning in the treatise of legal philosophers to sanctity of human life and other forms of right in the digital era.

Recognition and Application of Human Rights in Nigeria and Other Countries

Nigeria is one of the countries in the world that has recognised two sets of rights. The first set is classified as the civil and political rights and listed in chapter IV of the CFRN. The second set of rights is the socio-economic and cultural rights listed in chapter II of the same constitution.

The CFRN is among the various constitutions in contemporary times that have aligned with the compartmentalisation of human rights into two broad heads, namely: fundamental human rights and fundamental objectives and directive principles of the state policy. Olowu posits that coterminous bills of rights and directive principles is a common experience of most countries originally colonised by Great Britain and particularly, the recent commonwealth countries in Africa, Asia, the Caribbean and the Pacific.

It has however become unnecessary for some states to recognise human rights along the divides of Civil and Political Rights (ICCPR) on the one hand and socio-economic rights (ICESCR) on the other hand. To this end, the constitution of South Africa 1996 (Kende, 2009) has guaranteed a number of rights contained in the ICCPR and ICESCR in a single bill of right. The South African constitution has guaranteed as enforceable rights, those rights classified and listed in chapter II of the CFRN. In Government of the Republic of South Africa v. Grootboom (Wesson, 2004), the South African Constitutional Court held as follows: Our constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting.

The Indian Constitution also classified rights into two broad heads. The civil and political rights (fundamental) which are justiciable are listed in part III whereas economic rights which are non - fundamental and non - justiciable are listed in part V. The Indian courts have through judicial activism, creatively and purposively interpreted the constitution for pragmatic promotion of democracy and human rights (Twinomugisha, 2009). Bold judicial decisions in India have closed up the divide between fundamental rights that are justiciable and directive principles of state policy that are otherwise and hitherto non-justiciable. In Kesavarianda v. State of Kerala, the Indian Supreme Court held that parts III and IV of the Indian Constitution touch and modify each other. They do not run parallel to each other. None is superior or inferior to the other.

To this end, it has been stated that the right to life includes the right to live with human dignity and all that goes along with it, including the basic necessities of life such as adequate nutrition, clothing and shelter. The position in Ghana is similar to what obtains in Nigeria under the CFRN. The Ghanaian legal system recognises every item listed under the Directive Principles of State Policy as non-justiciable. However, through judicial activism, Ghanaian courts have breathed life into some of the otherwise non - justiciable provisions. In New Patriotic Party (NPP) v. Attorney-General (Heyns, 2002), the Ghana Supreme Court held the Directive Principles of State Policy contained in chapter VI of the Constitution of Ghana, 1992 as justiciable. It stated that chapter VI cannot be contravened without doing violence to articles 1 (2) and 2 (1) of the Constitution which declares the supremacy of the Constitution. Similarly, in NPP v. The Attorney-General, the Ghana Supreme Court held that in circumstances where the

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Directive Principles of State Policy are integral to the rights guaranteed under the Constitution, such items of Directive Principles shall be enforceable without more.

From the foregoing it is clear that the Ghanaian judiciary has created an enabling atmosphere for the recognition and enforcement of socio-economic and cultural rights in Ghana. In Nigeria, justifiability and enforceability are key distinguishing characteristics separating fundamental rights from directive principles.

Thus, in Joseph Odafe v Attorney-General of the Federation and Others, the Federal High Court rightly held that the African Charter has entrenched the socio-economic rights of Nigerians. The courts are enjoined to ensure compliance with these rights. Again, in Sani Dododo v Economic and Financial Crimes Commission and Others, the Court of Appeal made categorical pronouncement on the justifiability of socio-economic rights of Nigerians as guaranteed under the African Charter on Human and Peoples' Rights Act.

However, the recognition and enforcement of rights listed in chapter IV of the CFRN has been seamless. Abdullah suggests that the bias in favour of civil and political rights as captured in chapter IV of the CFRN may be linked to factors such as political and civil repression experienced by Nigerians under successive military governments.

Prevailing Human Right Issues in Nigeria and Other Countries' Extractive Industry

The present reality is that extractive activities in Nigeria can broadly be grouped into the petroleum sector (Edu, 2007) and the solid minerals sector (Damulak, 2017). The discovery of crude oil in commercial quantities in 1956 (Fagbohun, 2010) and the desire for quick cash to develop a newly independent Nigerian State after independence in 1960 pushed Nigeria into becoming a monolithic economy. However, the recent policy by the government to re-diversify the economy has re-ignited the desire to develop and harness the mining of solid minerals across Nigeria, a development which has come with attendant abuses of human rights. These abuses cut across the different shades and generations of human rights. The CFRN specifically provides for and recognises the right to life as a fundamental right. The inviolability of this right appears to be whittled down or completely eroded when MNCs in the extractive industry are involved. The MNCs ply their trade without recourse to best practices and in brazen violation of human rights (Idemudia, 2009). The impunity has often resulted in protests by host communities against the concerned MNCs.

The MNCs deploy their influence to control and manipulate the Nigerian Government into unlawful or excessive application of the coercive powers of the state. The Nigeria military and police are posted to duties to torture, dehumanise, man-handle and assault such protesters under the pretext of attempting to disperse the civil action (Cayford, 1996). Their mandate is to protect the extractive industry facilities at all cost and so during such duties, they fire live ammunitions resulting in murder of protesters at the behest of the MNCs.

Similarly, the refusal of MNCs and other operators to operate within the trades' best practices caused the death of more than 400 children in Bagega community of Zamfara State of Nigeria. More than 2,000 children have been treated with chelation therapy and thousands more have been on continuous poisoning by exposure to pervasive lead dust. It was discovered that miners deploy the services of children and young adults as cheap labour in the grinding of leaded rocks in which gold is found at mine sites.

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Another human right flagrantly abused in the extractive industry in Nigeria is the right to property. Under Nigerian law, this right is inviolable as the law prohibits compulsory land acquisition against the interest of the land owners. However, section 44 (3) of the CFRN divests minerals, minerals oils and natural gas from the ownership and control of individual landowners and other tiers of government other than the Federal Government of Nigeria. Mines and minerals, including oil fields, oil mining, geological surveys and natural gas are in furtherance of the foregoing section 44 (3) listed in the exclusive legislative list.

In the light of the above arrangement, extractive companies often disregard the rights to property upon their being granted licences/permits by the Federal Government of Nigeria to extract minerals and natural resources. In the Niger Delta region of Nigeria, the exploration and development phases of extractive activities are often characterised by the lack of consultation with local population and deprivation of the people's right to participate in their own affairs (Olaleye, 2010). At this stage also, the MNCs violate the right to land and the right to own property by expropriating and displacing the native land owners and disrupting their livelihood without prior informed consent (Kamga, 2011).

In a more recent development, 12 complainants sued Barricks Gold Mine and North Mara Gold Mine Limited in the High Court of England and Wales, London on 30 July 2013. The companies were alleged to have engaged excessive use of force through the police in their mine areas which resulted in several deaths and injuries of the aborigines. The police which were part of the companies' securities had fired live ammunition on villagers who were protesting the companies' high - handedness. The companies settled amicably out of court.

The human rights that are most critically violated with impurity in Nigeria's extractive sector are the socio-economic and cultural rights (Atsegbua, 2004; Okonmah, 1997). These set of rights are next in importance to the right to life since they engage a person's privilege to indulge in economic activities for self – sustenance (Anderson, 1996). Prominent among these rights abused on daily basis by extractive industries is the right to "*healthy*" and safe environment. The environmental abuses unleashed by the extractive industry on Nigerians include gas flaring, oil spillages, erosion, collapse of infrastructure/buildings and so on. The incessant abuse of environmental rights by mining companies is connected to Nigerian's government collaboration or the lack of political will by the government to enforce the laws (Ameehi, 2009).

Section 20 of the CFRN provides for healthy and pollution-free environment in Nigeria (Ibe, 2010). Certain laws have been enacted to give effect to the foregoing provision of the constitution with minimal or zero compliance by the critical stakeholders.

The Nigerian government's lack of will power to enforce environmental rights is evident in its approach in Gbemre v Shell. Thus, in Bodo Community v The Shell Petroleum Development Company of Nigeria, plaintiffs challenged the degradation of their environment by reason of oil spill which occurred from defendant's facilities in 2008 and 2009. This is clear contrast of Bodo's suit which was filed in United Kingdom. Defendant took responsibility, settled amicably and compensated plaintiff.

In Social Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria, a rights group communicated the African Commission on Human and Peoples' Rights alleging violations of the human rights of the Ogoni people of Rivers State in Nigeria. The violations complained about were in respect to healthy environment housing, health and life by Shell with the active connivance of the Federal Government of

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Nigeria. The preliminary objection raised by the Nigerian Government was refused by the commission. The commission loudly re-stated Nigeria's obligations to Nigerians (in their environment) under the African Charter (Onoria, 2003).

In tandem with the disposition of the Nigerian Government, the judiciary in Nigeria has not shown sufficient boldness to hold violators of human right in the extractive industry much more accountable. The only hope to enforce human rights and claims deriving from socio - economic rights lies with regional or such other adjudicating bodies external to Nigeria.

Steming the Tide of Human Right Abuses in the Extractive Industry in Nigeria

There is a myriad of human right issues arising in the extractive industries in Nigeria. The issues touch substantive fundamental human rights (chapter IV) of the CFRN such as right to life, right to dignity of human person, right to peaceful assembly/protest and right to property. The right to clean and healthy environment is also flagrantly infringed upon with little or no consequences. There is the urgent need to stem this tide of human rights violations; to this end, the following suggestions have become imperative.

Express incorporation of human right clauses and obligations into mining leases and bilateral investment agreements with MNCs

The extractive industry has passed through stages of legal and technological developments in Nigeria (Olade, 2019). Presently, it is an exception rather that the rule to find any contract or document creating obligations to which MNCs are parties in Nigeria without an arbitration clause. In the same vein, insertion of human rights clauses in all authorisations pertaining to the activities of extractive companies would show the premium the Nigerian government places on human rights and the standard expected of the operators.

Most MNCs deal in Nigeria under the arrangement of foreign direct investment (FDI). Foreign investors are so powerful that most time they approach host countries with already prepared agreements with terms and conditions somewhat alien to the local experience (Joseph, 2009). This makes such MNCs to dictate the tone of its operations from the start. Where such bilateral agreements are entered into, they are subject to the law of treaties and such rules of international law as may be applicable.

Where a human rights clause is inserted in the agreement and made a fundamental term, the Nigerian government could rely on it to protect Nigerians from human right violations. In Piero Forest; Laura de Carli v Republic of South Africa, the company sued South Africa at the International Centre for the Settlement of Investment Dispute (ICSID) for violating bilateral investment treaties by enacting a law which was unfair to foreign investors as the law sought to empower the local, disadvantaged black people. In 2010, the case was settled with cost awarded against the claimant. In Agues del Tunari v Bolivia, in a Bilateral Investment Trade Treaty/ Agreement (BIT) between Holland and Bolivia, claimant was offered a contract to privatise the water supply in Cochabanba region of Bolivia. There was failure of standards resulting in a violation of the right to water. Water became unaffordable resulting in insecurity and uprising by the people of the region. The Bolivian government terminated the engagement and Aguas Del Tunari sued on the agreement. The right to life makes availability of water for human sustenance non-negotiable. Human rights violation has been stated as a good ground to terminate BITs.

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Thus, in Argentina where investors decided to raise tariffs on provision of water supply because the government devalued its currency, the government asserted that the people have a right to economic and physical access to water.

Engaging international mechanisms/institutions on human rights

Human rights are the epicenter of the United Nations (UN) operations and as such, it is too weighty to be left to state parties alone. This is imperative as state parties are most often the sole violators or joint tort-feasors with the MNCs. The UN established Human Rights Council to monitor implementation of human rights by member states (Viljoen, 2012). The African continent also has courts and other institutions saddled with human rights responsibilities. State parties to relevant international and regional treaties are liable for human rights violations within their domain. In Lopez Ostra v Spain, the European Court of Human Rights held that Spain was responsible for pollution caused by a private company for its failure to take appropriate steps to contain the pollution. In Lubicon Lake Band v Canada, the Human Rights Committee held Canada to be in violation of the cultural rights of the indigenous communities around Lubicon Lake Band for allowing the state of Alberta to dislodge the communities from their land in favour of a private corporation.

Similarly, the Inter-American Court of Human Rights held the government of Nicaragua in violation of human rights under the American Convention on Human Rights for permitting the establishment of a South Korean company on the land of the Awas Tinani people without their prior and informed consent. Care must; however, be taken to ensure that only parties to the treaty or protocol are brought before the court.

The main disadvantages of operations of regional or international human right institutions or commissions are: they are not ordinarily accessible to indigent community or persons who are at the centre of these abuses; the cost of litigation in regional courts is prohibitory; there is no proper 'coercive' enforcement mechanism for the decisions of the regional courts. It is only a moral burden on the state party to comply.

RECOMMENDATION

The extractive industry through mining activities (petroleum and solid minerals) is drastically changing the Nigerian landscape and tenure system. Everything from coal, sand, gold, petroleum and other precious stones are mined often in pristine ecosystem like the creeks, forests and mountains. The operators deploy all tactics to make financial profit at the detriment of human rights of the host communities and without recourse to environmental concerns, best trade practices and labour standards.

The Nigerian government has done little to aid attempts to hold human rights violators in this sector accountable. This is either because the Federal Government of Nigeria is a stakeholder (joint venture partner) with the MNCs operating in the extractive sector or the government do not prioritise human rights despite various international instruments/treaties to which Nigeria subscribes. In order to reduce human right abuses to the barest minimum in Nigeria, the following recommendations are made: The Nigerian government acting through the National Assembly should take steps to amend section 36 (6) (c) of the CFRN in order to make chapter II of the CFRN justiciable. The Nigerian Bar Association (NBA) through its Session on Public

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Interest and Development Law (SPIDEL) renewed and consistent aggressive campaign/town hall meetings geared towards realising this goal is highly commendable. This position has shown to produce great results in South Africa.

The Nigerian judiciary should seize every opportunity to prioritise human rights. Nigeria should appreciate the Indian experience and judicial boldness in Ghana to construe chapters II and IV of the CFRN as compatible and inseparable. This courageous step which was taken by the Federal High Court (Benin Division) in Gbemre vs Shell should be sustained and encouraged to herald new era of human rights renaissance in Nigeria.

The Nigeria Human Rights Commission or other such bodies with bias in human right matters should be proactive. Human right abuses in the extractive sector should be followed to a logical conclusion with every progress made available to the public. This would ensure that cases such as the massive deaths of children and young adults in Zamfara State of Nigeria in 2012 would no longer be swept under the carpet or treated with levity.

Human rights clauses should be inserted into all terms of engagement (mining leases, bilateral investment trade agreements, and so on). To this end, observance of the highest tenets of human rights should be the ground for continued operations of the investors in the sector. This step has been shown to be effective in Bolivia and Argentina and in harmony with Article 2 (2) of the UN Charter of Economic Rights and Duties of the States 1974.

Corporate entities involved in extractive activities in Nigeria should be made to comply with the highest standards of human rights in their operations. The Companies and Allied Matters Act and other such relevant laws should be amended to contain express clauses/sections on human rights obligations of MNCs. The Act should further mandate companies to include in their memorandum and articles of association such company's obligation/commitment to uphold human rights and their responsibility for breach. Accordingly, company directors should depose and file an oath of their fiduciary obligation to uphold the highest tenets of fundamental human rights in all their operations. This would ensure that executive officers of the company are held personally responsible for every breach of human rights in the operations of their company. This approach which has been adopted in South Africa is highly commendable.

CONCLUSION

This paper set out to engage issues of human right abuses in Nigeria's extractive industry. From the outset, it interrogated human rights as an evolving ideology and ideal in modern society from the time of ancient philosophers to the present constitutional societies. It dissected the various generations of right and their classifications into fundamental rights and fundamental objectives and directive principles of state policy as characterised by the justice ability principle. The approaches in the interpretation of the categories of rights with regards to rights which are "*ordinarily*" enforceable and rights which are not are appreciated through the experiences of countries such as India and South Africa. It was found that in India and South Africa, the distinction between enforceable and non-enforceable rights have become academic as the judiciary and statute have respectively blurred the dividing line thereby giving human rights an eloquent posture in those countries' jurisprudence.

However, the Nigerian experience is different. There have been established cases of mass deaths, child labour, police brutality, environmental pollution and expropriation of proprietary rights in the extractive industry which have received much less attention as human rights abuses

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as they should. The Nigerian government is under obligation to uphold human rights and create a safe environment for Nigerians to thrive. To this end, the recommendations made above would raise the bar and improve government engagement with human rights (in the extractive industry) in practical sense and not just as letters in legal instruments.

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