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PUBLIC PARTICIPATION MECHANISMS IN ENVIRONMENTAL GOVERNANCE IN NIGERIA

BOLAJI RAMOS*

ABSTRACT

The significance of public participation in environmental governance is inherent in its ability to validate, legitimate and democratize environment-related decisions made or intended to be made by public authorities in exercise of their powers to approve construction projects, make physical development plans, grant licences, permits, approvals and leases or make policies and/or binding legal instruments that may have significant effects on the environment or livelihoods of the public concerned. With a thorough review of subject-specific literature on public participation and relevant environment-related enactments in Nigeria, the article explores and enlightens on the status of public participation in Nigeria, with highlights on different mechanisms through which public participation can be statutorily actualized in Nigeria. The article identifies that while some of the reviewed statutes recognize public participation as a right and others recognize it as a mere privilege that is subject to the discretion of certain public authorities, most mechanisms for public participation are not statutorily structured in a way that will ensure effective and meaningful public participation in line with international standards and best practices. This, in a way, affects the reputation of Nigeria as a leader in the African region. With insights drawn from the Aarhus Convention and other international documents/instruments, practical recommendations are made on how Nigeria can tailor its laws and policies on public participation to meet international best practices.

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I INTRODUCTION

Nigeria occupies an enviable position both in leadership and the scheme of things in the whole of Africa. From playing a leadership role in the Economic Community of West Africa States (ECOWAS) to being an influential member state of the Africa Union (AU) and contributor to the AU's Agenda 2063, which encourages a people-driven Africa, Nigeria has been in the centre of events in Africa for decades. This pedestal, upon which Nigeria is seen, comes with a larger expectation from other countries in the African region in terms of Nigeria's democratic values. As a result, public participation in (environmental) governance is undoubtedly one of the values that other countries (particularly in Africa) expect to see how developed it has been in a country like Nigeria, because the Nigerian experience can foster a wider debate in comparative jurisdictions.

When citizens of a country elect their representatives through general elections to occupy various posts at the legislative and executive levels, and their elected representatives in turn appoint other people to various administrative (legislative, executive and judicial) positions, a stage is set for governance at all levels. When this happens, what is yielded by the citizens directly to their elected representatives and indirectly to the appointed individuals is usually the democratic authority to carry out the day-to-day affairs of the country in line with existing laws. In most jurisdictions, the citizens or the (general) public still retain, most times by law, the right or opportunity to be invited, notified, consulted or carried along by their elected representatives and/or the appointed individuals on matters that may have significant effects on their livelihood and affect their sustainability, or matters they are simply interested in.¹

This article accentuates the various mechanisms employed under Nigerian law to bring about public participation in environmental governance. To achieve this, the article is divided into seven parts. This present introduction is the first part. In the second part, the concept of environmental governance in Nigeria is considered. Part 3 of the article deals with public participation as an environmental right. In this part, the concepts of 'public participation' and 'environmental right' are explained with reference to relevant literature. Provisions of the

¹ Key theories of public participation are hinged on the fact that administration must involve the people in important decision-making process for the purpose of legitimacy, diversity and inclusion, expertise and participation. See Kathy Quick and John Bryson, 'Public Participation' in Jacob Torbing and Chris Ansell (eds), *Handbook in Theories of Governance* (2016) 158.

Constitution of Federal Republic of Nigeria 1999 (the ‘*Constitution*’) are also engaged in this part as they relate to the status of public participation under it. Part 4 draws out and analyses all the different mechanisms in Nigeria for public participation in environmental governance. Part 5 of the paper introduces a discussion on the legal framework for public participation in Nigeria. Attention is paid here to description of selected environment-related statutes at the federal level and in Lagos State (as a case study for the states in Nigeria) and analyses of the various mechanisms of public participation under the laws in terms of their effectiveness. Part 6 of the paper focuses on standards and best practices of public participation under international law. Part 7 is the conclusion which comes with recommendations that can ensure effective and meaningful participation of the public in environmental governance in line with international standards.

II ENVIRONMENTAL GOVERNANCE IN NIGERIA

Environmental governance is the generality of legal and regulatory processes, structures and mechanisms through which issues affecting the environment or people and animals relating with the environment are addressed through laws and policies by various actors (state and non-state, whether formal or informal) empowered to act in different degrees or ways under such laws and policies. While environmental governance is historically seen only from the lens of the local and national governments as the exclusive actors, in recent times it has taken on board the activities of multiple actors such as industry, non-governmental organizations (‘NGOs’) and the public.² The prevailing environmental governance approach has now moved from the erstwhile ‘command-and-obey’ approach to an all-party interactive one. According to United Nations Environmental Programme (‘UNEP’), environmental governance:

comprises the rules, practices, policies and institutions that shape how humans interact with the environment. Good environmental governance takes into account the role of all actors that impact the environment. From governments to NGOs, the private sector and civil society, cooperation is critical to achieving effective governance that can help us move towards a more sustainable future.³

² David Benson and Andrew Jordan, ‘Environmental Governance’ in Douglas Richardson et al (eds), *The International Encyclopedia of Geography* (John Wiley & Sons, 2017) 2. See also Martin Jänicke and Helge Jörgens, ‘New Approaches to Environmental Governance’ (2004) 27(3) *Zeitschrift für Umweltpolitik & Umweltrecht* 297.

³ United Nations Environment Programme, ‘Environmental Governance’ (Factsheet, 2010) <<https://wedocs.unep.org/handle/20.500.11822/7935>>.

Strategies or mechanisms for environmental governance and the extent of involvement of different classes of parties are different from one country to the next, depending on the applicable legal and regulatory frameworks. As there cannot be governance without government and laws that will regulate the extent of involvement of different actors in governance, in Nigeria the main law that compartmentalizes legislative competence on environmental matters and governance is the *Constitution*. The first relevant provision in the *Constitution* is s 20 which vests the overall governance of different aspects of the environment (such as water, air, land, forest and wildlife) in the State, which has been defined by the *Constitution* itself and interpreted by the Supreme Court to cover the three tiers of government.⁴

The federal legislature is empowered under s 4(2) of the *Constitution* to make laws for good governance in relation with matters included in the Exclusive Legislative List. In addition to that, both the federal and state legislatures are empowered to make laws for good governance as set out in respect of matters in the Concurrent Legislative List. More explicit environmental-related matters in these schedules which these legislative bodies are empowered to legislate on include fishing and fisheries in lakes and inland waters, maritime shipping and navigation, mines and minerals, oil fields and natural gas, national parks, nuclear energy, quarantine, traffic on federal roads, inter-state waters,⁵ antiquities and monuments, electric power, and industrial commercial and agricultural development.⁶

The state legislature is also empowered to legislate on environmental governance in respect of environmental matters not included in both Exclusive Legislative List⁷ and environmental matters included in the Fourth Schedule to the *Constitution* in relation to the functions of a local government council, especially the involvement and participation of the local government councils in the nation's natural resources.⁸

⁴ In *A-G (Lagos State) v A-G (Federation)* (2003) 12 (Pt 833) Nigerian Weekly Law Reports 1 (Supreme Court of Nigeria), the Supreme Court interpreted the word 'State' in this section to cover both the Federal and State Governments. See also s 318 of the *Constitution of the Federal Republic of Nigeria 1999* ('*Constitution*'). Even though the decision of the Court of Appeal in *Helios Towers Nigeria Ltd v NESREA* (2014) 24624 Law Pavillion Electronic Law Reports (Court of Appeal of Nigeria) erroneously held that only the Federal Government has legislative competence on environmental matters, the correct position is as settled by the Supreme Court in *A-G (Lagos) v A-G (Federation)* (n 14) that both the both Federal Government and State Government have legislative competence on environmental matters. It was a split decision (four against three), with the majority holding that the word 'State' used in s 20 of the *Constitution* (as amended) applies to both Federal Government and component State Governments in Nigeria.

⁵ See generally items 29, 36, 39, 40–41, 54 and 60 of the Exclusive Legislative List: *Constitution* (n 4) sch 2 pt 1.

⁶ See generally items 3, 13 and 17 of the Concurrent Legislative List: *Constitution* (n 4) sch 2 pt 2.

⁷ See *Constitution* (n 4) s 4(7)(a).

⁸ See *Constitution* (n 4) s 7, sch 4 items 1(c), (e), (f), (h), (k), 2(b).

More comprehensive provisions on environmental governance in Nigeria are usually provided in environment-related laws and regulations and/or policies made under them. The patterns of most of these laws include provisions in relation to the establishment of regulatory bodies empowered to carry out environmental protection, compliance and enforcement; specific functions of regulatory bodies; composition and governance structure; involvement of both state and non-state actors; and powers to make regulations, guidelines and/or policies, among others.⁹ Some of the regulations, guidelines and policies made under these laws have provisions on environmental governance as well. A good example is Nigeria's *National Policy on the Environment (Revised 2016)* which incorporates the following as part of environmental governance in Nigeria:

- a) encouraging individual and community participation in environmental improvement initiatives;
- b) raising public awareness and engendering a national culture of environmental preservation;
- c) building partnership among all stakeholders, including government at all levels, international institutions and governments, non-governmental agencies and communities on environmental matters.¹⁰

Environmental governance in Nigeria, in the final analysis, has theoretically indoctrinated and taken on board a multi-actor approach, public participation, access to justice and access to environmental information, and it has somewhat moved beyond the state-oriented, command-and-obey approach. Sufficiency of this recognition and effective enforcement/implementation of provisions on these matters are what appears to be lacking.

⁹ See, eg, *Environmental Impact Assessment Act 1992* (Nigeria) ('EIA Act'); *Climate Change Act 2021* (Nigeria); *National Environmental Standards and Regulatory Enforcement Act 2007* (Nigeria) ('NESREA Act'); *Nigerian Urban and Regional Planning Act 1992* (Nigeria), *Laws of the Federation of Nigeria 2010* ch N138 ('NURP Act'); *Nigeria Minerals and Mining Act 2007* (Nigeria) ('NMM Act'); *Electric Power Sector Reform Act 2005* (Nigeria); *Petroleum Industry Act 2021* (Nigeria); *Lagos State Environmental Protection and Management Law 2017* ('EMP Law'); *Lagos State Urban Planning and Regional Development Law 2010*, *Laws of Lagos State 2015* ch U2 ('UPRD Law').

¹⁰ See NESREA, *National Policy on the Environment (Revised 2016)* (Policy, 2016) para 3.2 ('Strategic Objectives').

III PUBLIC PARTICIPATION AS AN ENVIRONMENTAL RIGHT

Public participation has been defined as the processes by which public concerns, needs and values are incorporated into decision-making.¹¹ It can happen in places such as civil society and electoral, legislative and administrative arenas, and can take many forms, ranging from information exchange to democratic decision-making.¹² It is the practice of involving members of the public in the agenda-setting, decision-making and policy-forming activities of institutions responsible for policy development.¹³ Environmental rights, on the other hand, are defined as ‘access to the unspoiled natural resources that enable survival, including land, shelter, food, water and air’.¹⁴ This definition is, however, anthropocentric. Ecological rights, which are ecocentric in nature, have also been said to be inclusive of environmental rights.¹⁵

Public participation under international law is an environmental right,¹⁶ and it is one of the trio of rights that are often referred to as procedural environmental rights (‘PERs’).¹⁷ The other two environmental rights that make up the trio are the right of access to environmental justice and right of access to environmental information.¹⁸ PERs are those environmental rights that relate to procedural steps to achieve environmental justice. These procedural steps normally bridge the gaps between the people, and the respective organs and agencies of government involved directly or indirectly in environmental

¹¹ Tina Nabatchi, ‘A Manager’s Guide to Evaluating Citizen Participation, Fostering Transparency and Democracy Series’ (Guide, IBM Center for the Business of Government, 2012) 6.

¹² *Ibid.*

¹³ Gene Rowe and Lynn Frewer, ‘A Typology of Public Engagement Mechanisms’ (2005) 30(2) *Science, Technology, and Human Values* 251.

¹⁴ ‘Environmental Rights are Human Rights’, *Friends of the Earth International* (Blog Post, 18 June 2004) <<https://www.foei.org/what-we-do/environmental-rights-human-rights#>>.

¹⁵ *Ibid.*

¹⁶ See, eg., , *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, opened for signature on 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) arts 4–9 (‘*Aarhus Convention*’); *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, opened for signature 4 March 2018, 3388 UNTS 1 (entered into force 22 April 2021) arts 5–8 (‘*Escazu Agreement*’). See also Lawrence Atsegbua, Vincent Akpotaire and Folarin Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ababa Press Ltd, 2003) 131–132.

¹⁷ United Nations Environment Programme, *UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases* (Report, 8 April 2014) 4. See also *Arhus Convention* (n 16); *Escazu Agreement* (n 16); *Revised African Convention on the Conservation of Nature and Natural Resources*, opened for signature 11 July 2003 (entered into force 23 July 2016) (‘*Revised African Convention*’).

¹⁸ United Nations Environment Programme (n 17); *Arhus Convention* (n 16); *Escazu Agreement* (n 16); *Revised African Convention* (n 17).

management and protection, owing to the fact that the steps enable the people and the government to work hand in hand to ensure proper environmental management.

PERs serve not only as ‘a guarantee of the right to environment and a tool to increase participatory democracy and active involvement of the public in environmental protection, but also as an effective instrument of monitoring compliance with and enforcement of environmental law.’¹⁹ As good and forward-looking as it sounds, some jurisdictions still see public participation in environmental governance as a mere privilege or discretionary power vested in administrative authorities. Where public participation in environmental governance is left by laws or regulations to the discretion of state authorities, it can no longer be said to be an environmental right. It will come under the purview of a mere privilege that is subject to the discretion of public authorities, and its denial cannot be a cause of action for a lawsuit against the state authorities.²⁰

In Nigeria, the *Constitution* does not directly provide for or recognize public participation in environmental governance as an environmental right or any type of right at all, though there are provisions in the *Constitution* that direct that such right be recognized. The three major sections in the *Constitution*²¹ that reflect on public participation are part of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the *Constitution* which are, subject to s 6(6)(c) of the *Constitution*, not justiciable. The first is s 14(2)(c). This section specifically provides that ‘*the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution*’.²² The next is s 15(4) that directs the State to ‘*foster a feeling of belonging and of involvement among the various peoples of the Federation*.’ The last is s 24 which comes in the form of a directive on the duties of the citizens. The citizens have a duty to render national service, make positive and useful contribution to the advance of their community, and render assistance to lawful authorities in the maintenance of law and order.²³

¹⁹ Jerzy Jendrośka, ‘Introduction’ in Jerzy Jendrośka and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in Theory and in Practice* (Intersentia, 2017) xvii.

²⁰ In *Oko v A-G (Ebonyi State)* (2021) 54988 Law Pavillion Electronic Law Reports (Supreme Court of Nigeria) 25 paras D–C, a right is defined as ‘*a legal right...recognizable in law. It means a right recognized by law and capable of being enforced by the plaintiff*’.

²¹ See generally *Constitution* (n 4) ss 14(2)(c), (4), 15(4), 24(b), (d)–(e).

²² See also *Constitution* (n 4) s 14(4) which directs the State’s affairs must be carried out in a manner that recognizes the diversity of the people and to promote a sense of belonging.

²³ See paragraphs (b),(d) & (e) of section 24 of the 1999 *Constitution*.

The ‘*provisions of this Constitution*’²⁴ confer legislative powers on the lawmakers at the federal and state levels to make laws for the peace, order and good governance of the Federation or any part of it.²⁵ This power will, unarguably, include power to act on the directive in s 14(2) of the *Constitution* and make public participation in environmental governance an environmental right. This will appear to have been done to an extent under some extant environment-related enactments both at the federal and state levels in Nigeria.

IV MECHANISMS FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL GOVERNANCE IN NIGERIA

Mechanisms for public participation are tools or methods through which participation is ensured. They can also be loosely conceived as types or levels of public participation. General literature on public participation has offered different mechanisms or tools of public participation.²⁶ Arnstein in her seminal article identified eight levels of citizen participation (manipulation, therapy, information, consultation, placation, partnership, delegated power and citizen control) and classified them into three different categories: (a) non-participation which comprises manipulation and therapy; (b) degrees of tokenism which comprises information, consultation and placation; and (c) degrees of citizen power which comprises partnership, delegated power and citizen control.²⁷ Her analyses and conclusions in respect of the three are as follows:

- a) The levels of participation under the first classification (manipulation and therapy) are as bad as not participating at all because they have been contrived to substitute for genuine participation. ‘Their real objective is not to enable people to participate in planning or conducting programs, but to enable power holders to “educate” or “cure” the participants’.²⁸ Here, the citizens are given the impression that they are lacking in something (such as information or

²⁴ This is the term used in s 14(2)(c) in relation to recognition of public participation as a right: *Constitution* (n 4).

²⁵ *Constitution* (n 4) s 4.

²⁶ See, eg, Judith Petts and Barbara Leach, *Evaluating Methods of Participation: Literature Review* (Research and Development Technical Report No E135, November 2000); Douglas Miskowiak, ‘Crafting an Effective Plan for Public Participation’ (Bulletin, Centre for Land Use Education, November 2004); Kirsten M Leong, John F Forester and Daniel J Decker, ‘Moving Public Participation Beyond Compliance: Uncommon Approaches to Finding Common Ground’ (2009) 26(3) *The George Wright Forum* 23.

²⁷ Sherry Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35(4) *Journal of the American Institute of Planners* 216.

²⁸ Arnstein (n 27).

knowledge) and the authorities will be giving them a ‘cure’ or ‘therapy’ in respect of it.

- b) The levels of participation under the second classification (information, consultation and placation) allow the citizens to exercise a reasonable degree of participation, as they can hear and be heard. However, ‘they lack the power to ensure that their views will be heeded by the powerful’ or the government.²⁹ Here, citizens are given information and are consulted for comments by the authorities. There is, however, little or no follow-up feedback and dialogue.
- c) The levels of participation in the third and last classification (partnership, delegated power and citizen control) are the ones that give the citizens reasonable power to participate and influence government policies. Here, the citizens are seen as part and parcel of agenda-setting, decision-making, implementation and monitoring parts of activities that warrant public participation.

Public participation scholars agree that Arnstein’s ladder of participation is one of the best-known theories and has continued to remain relevant.³⁰ Rowe and Frewer built on Arnstein’s typology of mechanisms of public participation.³¹ They laid emphasis on the distinction between public communication, public consultation and public participation based on information flow. Distinguishing public participation from other mechanisms of public engagement, Rowe and Frewer state that public participation must necessarily involve exchange of information between members of the public and the sponsors (policymakers) and some degree of dialogue, and not just simple, raw opinions being conveyed by the sponsors without an act of actual dialogue.³² In public participation, information sharing flows both ways—that is, the government shares information on proposed environmental projects, decisions and policies with the public, and the public is allowed to scrutinize and also share valuable information with the government on the information shared through a dialogue or other similar means.

Public communication is closely related to public participation, the major difference, according to Rowe and Frewer, being information flow.³³ It may be succinctly defined as the involvement of the members

²⁹ Ibid 4.

³⁰ See Andrea Cornwell, ‘Unpacking “Participation”: Models, Meanings and Practices’ (2008) 43(3) *Community Development Journal* 269, 270.

³¹ Gene Rowe and Lynn J Frewer, ‘A Typology of Public Engagement Methods: A Framework for Evaluation’ (2000) 25(1) *Science, Technology, and Human Values* 25.

³² Ibid.

³³ Ibid.

of the public in the agenda-setting, decision-making and policy-forming activities of institutions responsible for policy development but only by way of conveying information to the public and nothing more. There is, thus, no involvement of the public per se in public communication in that '*public feedback is not required or specifically sought. When the public attempts to provide information, there are no mechanisms specified a priori to deal with this at any level beyond, perhaps, simply recording the information.*'³⁴ In public communication, information sharing flows only from the government on proposed environmental projects, decisions and policies to the public through sensitization of or meeting with the public or by any other means. Nothing goes back to the government from the public in terms of valuable, effective and meaningful contributions.

In Nigeria, the major mechanisms for public participation in environmental governance (and non-environmental related matters also) usually owe their origin to statutes. As drawn from the statutes reviewed in the next section of this paper, the mechanisms include public comments/submission of objections (especially on draft EIAs or exhibition of certain documents), public information or notification, public inspection, public hearings, public enlightenment, public engagement, public notice, public access to information, mediation, membership of committees, meetings, community development agreement ('CDA') and litigation. Findings from the review in the next section of this paper show that provisions of the statutes and subsidiary legislation relating these mechanisms have gaps that fall short of public participation standards under international law.

V LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION MECHANISMS IN ENVIRONMENTAL GOVERNANCE IN NIGERIA

Apart from constitutional provisions on public participation, some environment-related enactments in Nigeria have provisions that relate to public participation in environmental governance which will translate into a right. A right should be understood as a claim or enforceable entitlement that has a legal backing, as distinct from a moral or ethical claim. An environmental right, therefore, becomes recognized when a right in question has linkages with matters of an environmental nature. In addition to federal enactments to be considered, some environment-related laws in Lagos State are also given consideration as a case study.³⁵

³⁴ Ibid 255.

³⁵ The choice of Lagos State as a case study is based on the fact that Lagos State has always shown itself to be more progressive and responsive in law making to attend to emerging social issues.

A *Relevant Federal Enactments*

(a) The Environmental Impact Assessment Act ('EIA Act')³⁶

The *EIA Act* comes with provisions that recognize different degrees and types of public participation in environmental decision making. The Act prohibits the public or private sector in Nigeria from undertaking, authorising or embarking on any project or activities that are likely to have significant environmental effects without carrying out an environmental impact assessment in line with the provisions of the Act.³⁷ The Act also empowers the agency established under it to carry out a screening or mandatory study of proposed projects and prepare screening reports afterwards.³⁸ When an environmental assessment is undertaken or to be undertaken and submitted to the agency by a proponent of a project, the agency has to take a decision and communicate it to the project proponent in writing. Courts in Nigeria have pronounced that any failure to conduct an environmental impact assessment in line with the Act before commencement of any project covered under the Act will render the activities done by the project proponent unlawful.³⁹

There are five major areas in the Act where the public can participate in the process of decision making of the agency on whether a proposal of a project with significant environmental effects should be favourably considered. The first is in the area of the assessment submitted by the project proponent. The agency is mandated to, before taking its decision on the assessment, give opportunity to members of the public and other stakeholders to make comments on the environmental impact assessment of the proposed project.⁴⁰ The second is in the area of the screening report made by the agency. The agency has an obligation to give the public an opportunity to examine and comment on the report, taking into consideration comments filed by the public or other stakeholders.⁴¹

The third covers the area where the agency is required to publish the mandatory study report in respect of any project listed in the mandatory list.⁴² This report is expected to be made available to the public for comments (if any), with a deadline for making the comments and the

³⁶ *EIA Act* (n 9).

³⁷ *Ibid* s 2.

³⁸ *Ibid* s 15.

³⁹ See *Oronto Douglas v Shell Petroleum Development Company of Nigeria Ltd* (Federal High Court of Nigeria, 17 February 1997); *Gbemre v Shell Petroleum Development Company of Nigeria Ltd* [2005] 151 African Human Rights Law Reports (Federal High Court of Nigeria); *NESREA v OK Isokariari and Sons Ltd* (Federal High Court of Nigeria, Aliyu J, 2018).

⁴⁰ *EIA Act* (n 9) s 7.

⁴¹ *Ibid* s 21(3).

⁴² *Ibid* sch 1.

places where the copies of the report will be made available clearly stated.⁴³ The fourth relates to the power of the agency or its Council to refer a project to a mediator where the project is likely to cause significant environmental impacts or the people's concerns warrant such referral.⁴⁴ During mediation, determination of which parties or the public concerned that will take part in the mediation is at the discretion of the council.⁴⁵

The fifth area of public participation in the Act is the one involving a review panel appointed by the agency. The review panel is to be involved by the agency where mediation cannot resolve the dispute between the proponent and the public concerned.⁴⁶ The panel is empowered, inter alia, to hold hearings in a manner that will enable the participation of the public in the assessment⁴⁷ and to summon or subpoena witnesses to give evidence and/or produce documents.⁴⁸ The use of mediation or a review panel by the agency is discretionary, and will not to this extent constitute a right to the public.

Pursuant to the Act, the Federal Ministry of Environment has made a number of guidelines on environmental impact assessment, covering different activities such as EIA Guidelines for Renewable Energy, EIA Guidelines for Oil and Gas Projects, EIA Guidelines for Urban Development, EIA Guidelines for Pesticides, EIA Guidelines for Food and Beverages, EIA Procedural Guidelines and Strategic Environmental Assessment (SEA) Guidelines.⁴⁹ The EIA Procedural Guidelines regulate step-by-step practical procedures for the EIA process. The steps within the process include project proposal, screening, scoping, draft EIA report, review process, final EIA draft, technical committee/decision-making, certification, project implementation, mitigation compliance monitoring (prior to commissioning) and environmental auditing (post commissioning).⁵⁰

The *EIA Act* comes with no fewer than three different public participation mechanisms at different stages of the environmental assessment review process. The mechanisms are public comments,⁵¹ mediation,⁵² and public hearing by a review panel (which must ensure

⁴³ Ibid s 24.

⁴⁴ Ibid ss 25(i)–(ii), 26(b), 29–30.

⁴⁵ Ibid s 32.

⁴⁶ Ibid s 34.

⁴⁷ Ibid s 36.

⁴⁸ Ibid s 37.

⁴⁹ See 'New and Revised Guidelines', *Environmental Assessment Department* (Web Page) <<https://ead.gov.ng/environmental-guidelines-revision/>>.

⁵⁰ Ibid.

⁵¹ See *EIA Act* (n 9) ss 7, 16(1)(c), 21(1)(b), (3), 24.

⁵² See ibid ss 30–33.

public participants have access to all relevant information).⁵³ The use of public comments under the Act applies to the screening and the mandatory study reports to be prepared by the agency on the one hand and the draft/displayed EIA report to be prepared by the project proponent on the other hand. None of the provisions of the Act relating to public comments go further to make provisions for post-comment dialogue or physical engagement with the agency and the project proponents with a view to elucidating or throwing more light on the comments already made by the public. The Act also does not provide for feedback on the comments made by the public on the reports, by way of sharing the updated or final EIA report with the public before eventual approval and commencement of the project.

The use of the other two mechanisms (mediation and panel review/hearing) of public participation under the Act, which would have salvaged the possible ineffective use of comments, is subject to the discretion of the agency or its council.⁵⁴ For this reason, the agency may not even use them at all, especially where there are vested interests or political influence. The EIA Procedural Guidelines made by the Federal Ministry of Environment also do not have sufficient consideration and provisions for effective public participation. Of the eleven procedural EIA steps recognized in the Guidelines, only two (draft EIA Report and Review) expressly take cognizance of public participation. This challenge has the tendency of jeopardizing the whole essence of public participation in the EIA process and the ultimate protection of the environment. Having the public and other stakeholders merely commenting on the EIA report and the reports made by the agency without more will amount to what Arnstein refers to as a degree of tokenism⁵⁵ and what Rowe and Frewer see as raw opinion without actual dialogue.⁵⁶

*(b) The Nigerian Mining and Minerals Act ('NMM Act')*⁵⁷

The *NMM Act* grants the Mining Cadastre Office ('MCO') the power, upon the approval of the Minister, to grant qualified applicants the right to search for and obtain mineral resources (mineral rights) in Nigeria.⁵⁸ Mineral rights are conferred on applicants by way of permits, leases and licences. The Act recognizes six major types, to wit: Reconnaissance

⁵³ See *ibid* ss 36(b), 37.

⁵⁴ The use of the word 'may' in ss 29 and 34 of the Act and subjecting the decision to use mediation and/or a review panel to the opinion of the Council suggest discretionary power to use or not use mediation and/or review panel.

⁵⁵ See Arnstein (n 27).

⁵⁶ See Rowe and Frewer (n 31).

⁵⁷ *NMM Act* (n 9). The Act was enacted in 2007.

⁵⁸ *Ibid* ss 5(4)–(5).

Permit, Exploration Licence, Small Scale Mining Lease, Mining Lease, Quarry Lease, and Water Use Permit⁵⁹ or licence.⁶⁰

Before commencing operations, the holder of a Small Scale Mining Lease, Mining Lease or Quarry Lease is mandated to reach a CDA with the host community.⁶¹ The CDA is expected to capture, *inter alia*, the holder's commitment to transfer socio-economic benefits to the community and an undertaking that the project will enhance sustainability of the community, including provision of roads, water and power. The CDA must also have environmental and local governance enhancement.⁶² The CDA is also expected to specify the means through which the community may participate in planning, monitoring and implementation of the activities to be carried out.⁶³

In the same vein, s 130 of the Act obligates an applicant for a water licence to enter into an agreement with persons that are likely to be adversely affected by the grant of the licence. The applicant is expected to do this before or at the time of applying for the licence. Where the applicant and the concerned public are not able to resolve their issue and the Minister is also not successful in intervening in the disagreement, the issue will be referred to arbitration.⁶⁴ Through all these processes, the concerned public is able to assert their right of participation in environmental governance.

The Act has two mechanisms of public participation, and they are CDA⁶⁵ and water licence agreement (WLA).⁶⁶ Even though the CDA and the WLA (as mechanisms for public participation in activities relating to mining and water use) allow the host community and affected persons to participate in planning, management, implementation and monitoring of activities in the agreements, the Act does not have sufficient provisions on the implementation of both the CDA and the WLA, especially on continuous or post-project monitoring of the activities agreed in the CDA and the WLA.

Two provisions in the Act that sparingly address the concerns are those relating to: (a) failure to conclude the CDA between the host community and the mineral titleholder which must be referred to the Minister for resolution,⁶⁷ and (b) inclusion of consultative and monitoring

⁵⁹ *Ibid* s 46.

⁶⁰ See *ibid* ss 127, 130.

⁶¹ *Ibid* s 116.

⁶² *Ibid*.

⁶³ *Ibid* s 117.

⁶⁴ *Ibid* s 130(2).

⁶⁵ *Ibid* s 116.

⁶⁶ *Ibid* s 130.

⁶⁷ *Ibid* s 116(4).

frameworks in the CDA.⁶⁸ Another concern is that s 116 of the Act leaves out application of the CDA to Reconnaissance Permits and Exploration Licences. This simply indicates that the public is not allowed under the Act to participate in activities relating to these excluded two.

The general assessment of the two public participation mechanisms recognized under the Act can also be likened to Arnstein's degree of tokenism because the Act shifts substantially to the mineral titleholder and the host community the obligation of public authorities (the Minister and the Mining Cadastre Office) established under this Act to be responsible for conducting and drawing up the CDA and WLA, with little or nothing to be done by the authorities. This can create a situation of intimidation, oppression and unbalanced assessment/consideration of important environmental issues due to unequal bargaining power between the mineral titleholders and the host communities. All these will eventually affect effective public participation.

*(c) The Nigeria Urban and Regional Planning Act ('NURP Act')*⁶⁹

By virtue of the decision of the Supreme Court in *Attorney-General (Lagos State) v Attorney-General (Federation)*,⁷⁰ which nullified the application of the *NURP Act* to states in Nigeria, the provisions of this Act are now to be deemed to apply only to the Federal Capital Territory, Abuja. The Act regulates urban development and regional planning through preparation and administration of plans.

Public participation under the Act, as it pertains to development plan, comes at two different periodic times: (i) before preparation of the draft National Physical Development Plan ('NPDP') when the Commission established under the Act is obligated to call for submissions of input from interested members of the public and other stakeholders,⁷¹ and (ii) after preparation of the NPDP by the Commission's technical committee when the draft is shared with the public by exhibition and objections are called for in writing.⁷² With the comments and objections in view, the Commission will come up with the operative NPDP which is to be reviewed five-yearly. The review of the operative NPDP will follow the same procedure as the making of the NPDP.⁷³

The participation of the public may also be considered by the Control Department of the Commission in respect of physical development to be carried out by a developer. This happens where the Control

⁶⁸ Ibid s 117.

⁶⁹ *NURP Act* (n 9).

⁷⁰ *A-G (Lagos States) v A-G (Federation)* (n 4).

⁷¹ *NURP Act* (n 9) s 13.

⁷² Ibid s 15.

⁷³ Ibid s 21(2).

Department exercises its discretion in favour of concerned public that may be affected by an intended development.⁷⁴ Unlike public participation in the making of the NPDP that is a right, participation of the concerned public in granting approval for a development is not a right under the Act. It is subject to the discretion of the Control Department.

The Act employs public submissions/representations⁷⁵ and public objections⁷⁶ as mechanisms for public participation. The concerns under the Act in relation to the extent of public participation are similar to those raised above in respect of the *EIA Act*, if not worse. Once the public and other stakeholders have made submissions in respect of proposed physical development plan, objections in respect of the draft physical development plan, and representations in respect of proposed development, there is no provision for feedback to or engagement and dialogue with the public, especially in respect of submissions from informed members of the public and experts that may warrant serious post-comment deliberation.⁷⁷ Scrutiny and further consideration of the submissions and objections are left to the Commission established under the Act alone.⁷⁸ The participation levels stops at the preliminary stages for the respective participation mechanisms under the Act. This gives the physical planning authorities the leeway to overlook important comments and decide which comments or objections to be factored in the eventual operative NPDP. To the extent that the procedure for public participation under this Act does not even recognize public or committee hearing, it is similar to Arnstein's degree of tokenism and devoid of effective participation.

(d) National Environmental Standards and Regulations Enforcement Agency Act ('NESREA Act')⁷⁹

The *NESREA Act* establishes the National Environmental Standards and Regulations Enforcement Agency ('NESREA') and confers a number of functions and powers on it relating to regulation of environmental standards. NESREA's functions that can translate to public participation are in ss 7(b) and (i) of the Act which are coordination with stakeholders on making environmental standards, regulation and enforcement, and creation of public awareness through provision of environmental education on sustainable environmental

⁷⁴ See *ibid* s 32.

⁷⁵ *Ibid* ss 13, 32.

⁷⁶ *Ibid* s 15.

⁷⁷ See generally *ibid* ss 13, 15, 32.

⁷⁸ See *ibid* s 17.

⁷⁹ *NESREA Act* (n 9). Enacted in 2007 and amended in 2019.

management. NESREA is also empowered under section 8(n)–(p) of the Act to enter into agreement with public organisations and individuals to develop and share environmental monitoring programmes; collaborate with relevant agencies to establish programmes for standards on environmental protection; and make public information on environmental standards available to public and private organisations.

Notwithstanding this, the *NESREA Act* does not leave much to be happy about in relation to public participation. There is nothing in the Act that clearly recognizes public participation. Besides, mechanisms such as agreement with public organisations and individuals on environmental standards, creation of public awareness and environmental education, and offering information to the public on environmental standards are all at the discretion of NESREA. This leaves them out of the realm of a right of the public. Also, mechanisms such as NESREA's offering environmental education, information and awareness without dialogue and exchange of ideas can never bring about effective public participation.

*(e) Freedom of Information Act ('FOI Act')*⁸⁰

Under the *FOI Act*, both the right to access to information⁸¹ and right of access to justice⁸² are recognized as means of getting public information. The Act is not an environmental enactment or related to it, but it comes with provisions that can activate an environmental right to public participation in environmental governance if the information sought under the relevant provisions of the Act relates to environmental information, and it is meant to project environmental protection, environmental sustainability and/or environmental rights. The major challenge facing this Act is that there is no provision in the Act on how to effectively enforce its provisions.

B Relevant Enactments in Lagos

*(a) Environmental Management and Protection Law ('EMP Law')*⁸³

This Law appears to be the most comprehensive law in Nigeria presently on provisions relating to public participation in environmental governance both generally and as a right. The Law consolidates all the

⁸⁰ *Freedom of Information Act 2011* (Nigeria) ('*FOI Act*').

⁸¹ See *ibid* s 1.

⁸² See *ibid* s 20. An applicant for access to public information is given the *locus standi* to institute an action in court for review where the public authority refuses to make the information available to the applicant.

⁸³ *EMP Law* (n 9). Enacted in 2017.

major laws in Lagos relating to environmental management, protection and sustainability.⁸⁴ Apart from having certain individual sections that relate to public participation in environmental decision making,⁸⁵ Part 7 of the *EMP Law* makes extensive provisions on the three major procedural environmental rights—public participation in environmental governance, access to environmental information and access to environmental justice.

The Law specifically recognizes as an environmental right, public participation in procedures relating to environmental protection,⁸⁶ the duty to consult the public on environmental decisions⁸⁷ and citizens' right to commence lawsuits against environmental authorities that fail to respond to environmental complaints lodged by the citizens.⁸⁸ Section 209 of the Law provides that:

Members of public shall have the right to submit comments, recommendations and inputs in the course of formulation of environmental policies, guidelines, regulations and environmental decisions affecting the environment of the State.⁸⁹

The Law has fourteen (14) parts and creates a number of agencies and authorities, including the Lagos State Waste Management Authority ('LAWMA'), the Lagos State Environmental Protection Agency ('LASEPA'), the Lagos State Parks and Gardens Agency ('LASPARK'), the Lagos State Signage and Advertisement Agency ('LASAA'), Lagos State Water Regulatory Commission and Lagos Water Corporation in different parts. The environmental right of public participation recognized in Part 7 of the Law is applicable to all other parts of the Law and the authorities established under some of them.⁹⁰

The Law appears to be standard, at least in theory. It comes with a number of public participation mechanisms such as public information and awareness,⁹¹ public education and enlightenment on environmental issues,⁹² public comments, recommendations and inputs,⁹³ public

⁸⁴ See the Long Title of the Law.

⁸⁵ See, eg, *EMP Law* (n 9) ss 5(o), 18(p), 94, 166(e).

⁸⁶ *Ibid* s 209.

⁸⁷ *Ibid* s 210.

⁸⁸ *Ibid* s 212.

⁸⁹ *Ibid* s 209.

⁹⁰ These authorities are described in s 200 of the Law as 'appropriate authority' which includes Ministry, Local Government Areas, Authorities, Agencies, Departments, Units, Panels and other enforcing authorities under the Law.

⁹¹ *EMP Law* (n 9), s 5(o).

⁹² *Ibid* ss 5(o), 166(e)

⁹³ *Ibid* s 209

hearing by an administrative body⁹⁴ and litigation.⁹⁵ It is said that where public participation involves an assumption that the public does not know and has to be enlightened, educated or cured of their ‘ignorance’, we may be dealing with what is called ‘manipulation’ or ‘therapy’ which make up Arnstein’s first category known as ‘non-participation’.⁹⁶ Rightly so, public education, enlightenment, awareness and information (if one-sided) under this Law cannot on their own be said to be meaningful or effective ways of participation, except if combined with other mechanisms such as public comments, public hearings, public dialogue and interaction, and litigation (as a last or necessary resort).

As above board as some of the participation mechanisms of public participation in this Law seem, there are concerns around some specific provisions of the law on granting of licences, permits and approvals on projects and environmental-related activities without corresponding provisions on specific involvement, engagement and participation of the concerned public and stakeholders in the process.⁹⁷ Unless the provisions of Part 7 of the Law on Public Participation and Citizens’ Right are interpreted by the court to apply to all other Parts of the Law (especially Parts 3, 6, 8, 9, 10, 11, 12 and 13), decisions of agencies established under the Law on grant of licences, permits and approvals on significant environmental-related activities could be *mala fide* done without allowing the public right of participation.

*(b) Urban Planning and Regional Development Law of Lagos State
(‘UPRD Law’)*⁹⁸

Historically, the enactment of this law by the Lagos State House of Assembly was influenced by the decision of the Supreme Court in *Attorney-General (Lagos State) v Attorney-General (Federation)*,⁹⁹ which set aside application of the *NURP Act* to states in Nigeria. The Law obligates the Ministry of Physical Planning or a relevant agency under the Ministry to invite the public and other stakeholders from time

⁹⁴ See *ibid* s 210(1).

⁹⁵ *Ibid* s 94, 212.

⁹⁶ Arnstein (n 27).

⁹⁷ See, eg, *EMP Law* (n 9) ss 63–73 on LAWMA’s powers to grant different licences; ss 180, 184, 189 on LASEPA’s powers to grant permits; ss 283, 291, 293, 298, 299, 301–304 on powers of the Wastewater Management Office to issue approvals, permit and licences; ss 335–342 on the powers of the Water Regulatory Commission to grant licences; ss 362, 364–365, 367–368 on the powers of the Office of the Drainage Services to grant approvals and permits; ss 408–410 on LASAA’s powers to grant permits.

⁹⁸ *URPD Law* (n 9).

⁹⁹ *A-G (Lagos State) v A-G (Federation)* (n 4).

to time on matters relating to physical planning and urban development.¹⁰⁰

Two major sets of activities under the Law in which the participation of the public is allowed as of right are preparation of the development plan¹⁰¹ and construction (development) by developers or undertaking of certain activities by any of the three agencies established under the Law—the Planning Permit Agency, the Building Control Agency and the Renewal Agency.¹⁰² The Law also establishes an Appeal Committee empowered to review the decisions of the three agencies.¹⁰³ Aggrieved members of the public can appeal to the Committee,¹⁰⁴ with further appeal, against the decision of the Appeal Committee possible.

The Law employs membership of committee,¹⁰⁵ public meetings,¹⁰⁶ written submissions/representations,¹⁰⁷ public hearings, public comments,¹⁰⁸ public objections¹⁰⁹, public enlightenment¹¹⁰ and litigation¹¹¹ as its mechanisms for public participation in environmental governance. Apart from public hearings, public meetings and litigation, other mechanisms of participation under this Law can barely ensure effective and meaningful participation, as they may not encourage effective dialogue, agenda-setting and efficient feedback. There are no clear provisions in the Law on feedback to or dialogue with the public and other stakeholders after making such comments, objections, written submissions and representations.

With respect to membership of committee, core representatives of the public are just two each out of the twelve members each that make up the Appeals Committee and the Advisory Committee respectively under the Law. This situation creates a void that can be easily exploited by policymakers to ensure public participation is restricted and not effective. Provisions relating to public meetings/consultation and public hearings (especially ss 5(2), 6(2)(c) and 54(1)(b) of the Law) have high possibilities of ensuring effective and meaningful public participation

¹⁰⁰ *URPD Law* (n 9) s 5(2).

¹⁰¹ See generally *ibid* ss 6, 7(2), 8, 9, 13, 15–20, 22(2), 23, 26(k).

¹⁰² See generally *ibid* ss 26(k), 33, 47(m), 54(b), 89–91.

¹⁰³ See *ibid* ss 79, 81.

¹⁰⁴ See *ibid* s 81(b).

¹⁰⁵ See *ibid* s 80(3)(j) which makes two members of the public members of the Appeals Committee. See also s 91(3)(i) that also allows two members of the public to be members of the Advisory Committee.

¹⁰⁶ See *ibid* ss 3(f), 5(2), 6(2)(c), 26(k), 54(1)(b).

¹⁰⁷ See *ibid* ss 6(2)(a)–(b), 33..

¹⁰⁸ See *ibid* s 6(2)(d).

¹⁰⁹ See *ibid* ss 8, 13, 16, 17–20.

¹¹⁰ See *ibid* ss 26(k), 47(m).

¹¹¹ See *ibid* s 89(2) which allows appeal of the decisions of the Appeals Committee to the High Court of Lagos States.

if other important requirements such as the provision of adequate notice and timely access to information needed for participation are provided. This Law presently does not provide for this, though regulations and guidelines made by authorities established under the Law may take care of that only if the authorities are willing not to subdue the right of public participation. Leaving such important issues as this to policymakers can be undesirable and easily exploited.

C *Relevant Policies*

A number of policies have already recognized public participation as a necessity in Nigeria. The *National Policy on Solid Waste Management 2020* recognises the essential nature of ‘active involvement and participation of communities during conception, planning and implementation of solid waste management programmes, projects and services.’¹¹² The *National Policy on Plastic Waste Management 2020* also takes as part of its objectives the need to, as much as possible, let decisions on plastic waste management be made by the people or representatives chosen by them.¹¹³

VI PUBLIC PARTICIPATION STANDARDS UNDER INTERNATIONAL LAW

The major objectives of public participation in environmental governance include public validation, legitimization and democratization of environmental decision making (‘EDM’) by public authorities. The extent or degrees of involvement of the public in EDM differ from one enabling statute or legal instrument to the other, and from one jurisdiction to another. Fagbohun has opined that public participation can, in some cases, come as a mandatory substantive requirement and, in other cases, as a procedural right.¹¹⁴ Irrespective of this divergence in extent and degrees in enabling legal instruments or different jurisdictions, there are minimum standards and best practices under international law of what effective and meaningful public participation entails.

According to the Austrian Council of Ministers’ report, standards for public participation can be divided into three groups: (a) standards for the preparation of the participation process; (b) standards for the implementation of the participation process; and (c) standards for the

¹¹² NESREA, *National Policy on Solid Waste Management* (Policy, 2020) para 3.7.12.

¹¹³ NESREA, *National Policy on Plastic Waste Management* (Policy, 2020) para 2.5(xiii).

¹¹⁴ Olanrewaju Fagbohun, *Mournful Remedies, Endless Conflict and Inconsistencies in Nigeria’s Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability* (Nigerian Institute of Advanced Legal Studies, 2012) 88.

monitoring and evaluation of the participation process.¹¹⁵ Effective and meaningful public participation in environmental governance or EDM warrants that the minimum standards at these three stages of participation (preparation, implementation and monitoring/evaluation) must operate conjunctively. Best practices dictate that at the preparation stage, there must be clear-cut goals on what the public participation aims to achieve, definition of the scope of participation, conditions for participation or terms of engagement, and extent of involvement of the public (informative level, consultative level or cooperative level), adequate and timely access to all information and documents needed for the process, and clear definition of target groups, which may be the organized public, the broad public or both. Best standards also take it that the public should be effectively involved at the implementation and monitoring stages.

The International Association of Impact Assessment ('IAIA') has also recommended, in the context of public participation in environmental impact assessments, best practice principles that public legislation and authorities must factor in at the foundation, operating and development levels.¹¹⁶ At the three levels, the IAIA, *inter alia*, recommends the following:¹¹⁷

Foundation Level—

- a) recognize the public has a right to be informed and proactively involved in a meaningful way in proposals which may affect their lives or livelihoods;
- b) follow the rules of effective communication among people, in the respect of all individuals and parties; and
- c) report to the actors the results of the PP process, particularly on the way their inputs have contributed to the decision making.

Operating Level—

- a) invite and stimulate participation of all affected and interested parties;
- b) not ignore absent people who may be affected by the proposal itself or by the modifications proposed; and
- c) support people in their will to participate through an adequate diffusion of information on the proposal and on the PP process, and a just and equitable access to a PP funding program.

¹¹⁵ See *Standards of Public Participation: Recommendations for Good Practice* (Standard, 2 July 2018) 7.

¹¹⁶ See Pierre André et al, *Public Participation: International Best Practice Principles* (Special Publication No 4, International Association for Impact Assessment, August 2006) 4.

¹¹⁷ *Ibid.*

Development Level—

- a) higher level of involvement, from passive participation (e.g. information diffusion or gathering) toward more active and integrated participation (e.g. co-decision, co-management) in the decision making;
- b) freedom of expression that assures no reprisals against or among participants; and
- c) access to justice and equity.

Apart from a number of international instruments that reflect on public participation,¹¹⁸ there exist two major regional international instruments—the *Aarhus Convention*¹¹⁹ and the *Escazu Agreement*¹²⁰—whose complete focus is on best practices and standards in public participation in environmental governance and EDM. Even though the *Aarhus Convention* and the *Escazu Agreement* respectively apply to state parties in Europe and Latin American and the Caribbean,¹²¹ the provisions of these instruments relating to standards and best practices are laudable and quite useful for a country like Nigeria whose laws on this subject matter, as shown in this paper, still have many gaps both in theory and practice.

The *Aarhus Convention*'s objective is to:

*contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*¹²²

¹¹⁸ See, eg, *Revised African Convention* (n 17); *Convention on the Sustainable Management of Lake Tanganyika*, opened for signature 12 June 2006, 2338 UNTS 43 (entered into force 23 August 2005); *Convention on the Transboundary Effects of Industrial Accidents*, opened for signature 17 March 1992, 2105 UNTS 457 (entered into force 19 April 2000); *Framework Convention for the Protection of the Environment for Sustainable Development in Central Asia*, opened for signature 22 November 2006 (entered into force 11 January 2007); *Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC* [2003] OJ L 156/17.

¹¹⁹ *Aarhus Convention* (n 16)..

¹²⁰ *Escazu Agreement* (n 16).

¹²¹ Both the *Aarhus Convention* and the *Escazu Agreement* are regional instruments. While the former was adopted under the framework of the United Nations Economic Commission for Europe ('UNECE') in 1998 and applies mainly to members of the European Union, the latter was adopted under the auspices of the United Nations Economic Commission for Latin American and the Caribbean ('ECLAC') in 2018 and applies to member countries in Latin American and the Caribbean.

¹²² *Aarhus Convention* (n 16) art 1.

Being an EU treaty, it recognizes public participation (and other two procedural environmental rights, that is, access to environmental information and access to justice) as a right for both present and future generations and enjoins European countries to recognize this in their national legislation. Effective and meaningful participation of the public concerned¹²³ on decisions in specific activities,¹²⁴ on plans, programmes and policies,¹²⁵ and during preparation of executive regulations and/or generally legally binding normative instruments¹²⁶ is key and recognized as a right under the Convention. With this, public participation is not only restricted to administrative EDM of the executive arm of the government. It includes EDM relating to the legislative and judicial arms, as they are involved in normative making of legally binding instruments.

The *Escazu Agreement*'s objective is stated as to:

*guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.*¹²⁷

This Convention also recognizes public participation (alongside access to environmental information and access to justice in environmental matters) as a right for both present and future generation. It also takes on board standards such as effective involvement of the public, adequate provision of access to environmental information needed for participation in a clear, timely and comprehensive manner from the early stages, and open and inclusive participation in EDM process.¹²⁸ Like the *Aarhus Convention*, environmental activities in which public participation is required under the *Escazu Agreement* also covers planning, strategies, policies, programmes, rules and regulations.¹²⁹ Where there is a revision, re-examination or update to EDM processes, the public is still entitled to effectively participate.¹³⁰

¹²³ 'Public concerned' is defined to include people directly or likely to be affected and interested environmental NGOs whether or not they are directly interested: *ibid* art 2(5).

¹²⁴ *Ibid* art 6.

¹²⁵ *Ibid* art 7.

¹²⁶ *Ibid* art 8.

¹²⁷ *Escazu Agreement* (n 16) art 1.

¹²⁸ *Ibid* art 7.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

VII CONCLUSION

Nigeria holds a leadership position in Africa in terms of involvement and participation in developmental and democratic activities in the region. Environmental sustainability and democracy are at the core of public participation in environmental governance. This in itself is not as important as mechanisms recognised by law through which the public may participate in environmental governance. In Nigeria, these mechanisms fall below international best practices, a situation that does not portray Nigeria well in the sight of the Africa region in particular. The philosophy behind the participation of the public in decisions of public authorities that may have significant effects on the environment is no longer in doubt. Apart from the fact that the legal framework on public participation in environmental governance in Nigeria substantially tilts towards public participation being a right or at least a privilege, public authorities seek public participation (irrespective of the extent or degrees allowed) for validation, legitimization and democratization of their EDM.

While a thorough review of the *Constitution* shows that public participation (either in environmental governance or generally) is not recognized as a right but a fundamental objective and directive for the state, there are other environment-related statutes both at the federal level and Lagos State (used as a case study) that envisage public participation in environmental governance as either a right or a privilege that is subject to the discretion of the public authorities. Not only do these statutes recognize public participation as either a right or a mere opportunity that is left to the discretion of the authorities, they also make provisions for different mechanisms through which the public concerned can participate in EDM. A review of the legal framework shows that mechanisms for public participation in Nigeria include public comments/submission of objections, public information or notification, public inspection, public hearings, public enlightenment, public engagement, public notice, public access to information, mediation, membership of committees, meetings, CDAs and litigation.

A general review of relevant literature and subject-specific international instruments shows that most of these mechanisms are not structured in their enabling statutes in such a way that can bring about effective and meaningful public participation in environmental governance in Nigeria. The first major challenge is that there has not been full recognition of some of the major mechanisms of public participation as a right in some of the reviewed statutes. The second is that where they have been recognized as rights, the extent of recognition is similar to Arstein's degree of tokenism. The third challenge is that where major mechanisms such as public hearings and mediation are conceived as

rights under the statutes, the statutes are silent on important best practices and standards such as agenda-setting, monitoring, post-comment dialogue/engagement and post-activity evaluation. Litigation as a mechanism for participation is made a right in some of the statutes, but certain conditions precedent must be satisfied. This comes in addition to costs of litigation and the time it normally takes because of multiple adjournments.

According to Fagbohun:

it cannot be argued with any measure of seriousness that Nigeria is where it ought to be in her sequencing of the mechanisms for public participation or amortization of the benefits that ought to come with it. The reality is that environmental regulation in Nigeria is still substantially closed to public influence.¹³¹

Goal 16 of the Sustainable Development Goals ('SDGs') concerns peace, justice and strong institutions. Target 7 of SDG 16 projects the need to '*ensure responsive, inclusive, participatory and representative decision-making at all levels.*' For Nigeria to attain this and truly democratise environmental governance or EDM, the following are recommended:

- a) There is a need to fully recognize public participation (be it in environmental issues or generally) across the board as a right, and integrate it into decision-making process of public authorities, especially if those decisions are likely to have significant effects on the environment or the livelihoods/sustainable development of the public concerned. The *Constitution* should make provisions relating to public participation justiciable. Once the *Constitution* fully recognizes public participation as a (fundamental) right like the *Environmental Management and Protection Law of Lagos State 2017* does, other statutory, regulatory and administrative provisions or procedures will follow suit by operation of law.
- b) Statutory, regulatory and administrative measures must be put in place to ensure that public participation in environmental governance in Nigeria is effective, meaningful and in line with international standards and best practices elaborated above. Participation must be recognised as a right not only at the early stage of projects, but also at implementation, monitoring and post-activity evaluation stages through the use of effective mechanisms such as continuing dialogue, strategic mutual inter-

¹³¹ Fagbohun (n 114) 89.

information exchange meetings, mediation, and strategic public hearings that will involve the organised public or public concerned.

- c) In most cases where public participation is allowed in environment-related statutes in Nigeria, it covers only approval for development projects and plans. Public participation should go beyond these and also cover decisions of regulatory authorities on policy formulation, preparation of executive regulations and/or generally legally binding normative instruments (such as bills made by the legislature and rules of court made by the heads of the judiciaries),¹³² and issuance of licences, permits, approvals, oil mining leases and the like.

¹³² In jurisdictions such as Philippines, the judiciary has made Rules of Court on environmental matters: Republic of the Philippines Supreme Court, *Administrative Matter No 09-6-8-SC: Rules of Procedure for Environmental Cases*, 29 April 2010. In making rules such as this, ensuring participation of the public is paramount.