An Appraisal of the Justice Ability of Environmental Violations Arising from Pollution in Nigeria's Oil and Gas Industry: Insight from the Cases of (*Shell Petroluem Development Company (SPDC) Ltd V. Chief Joel Anaro and Others (2017)* and (*Joshua Gbemre V SPDC and Others (2005)*

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Abstract
Environmental degradation has become the bane of the oil and gas industry in Nigeria. When the polluting incidents occur, they leave in their trail, victims whose buildings, farmlands, fishing ponds and sources of drinking water are destroyed. Most often, these victims rush to the courts unaware of the booby traps in the form of defences available to the polluters. At the end, they spend long years in the judicial system and come out with either insufficient remedies or in some cases, no remedies at all. Environmental rights are being recognized across the world as human rights worthy of enforcement as other human rights. This paper examines the justice ability of environmental violations arising from pollution in Nigerian oil and gas industry. The paper found that there are no adequate provisions in extant Nigerian statutes for the rights of the victims of oil and gas pollution. Environmental rights are relegated as non- justice able by the Nigerian Constitution, As a consequence victims of oil and gas pollution in Nigeria fall back on their common law remedies which are often weakened with the availability of an avalanche of defences to the polluters. The result is that victims of oil pollution go home with insufficient or no remedies.

Key Words*: Environmental Rights, Justice-ability, oil and gas, common law remedies, Constitution, compensation, oil pollution, victims*

Introduction

An understanding of the concept of environmental law is necessary for appreciating the essence of environmental rights. Environmental law has been defined as:

> The field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental measures to assign liability and provide clean-ups for means that harm the environment (Garner, 2004).

The major objective of environmental law is the attainment of environmental justice. Access to environmental justice is therefore the possibility of getting redress from the judicial system by victims of activities that harm the environment. In other words, it is the possibility of enforcing environmental rights within the context of the judicial system.

Environmental Rights as Human Rights

Environmental rights have been defined in various ways by scholars of different persuasions.

For example, K. Solo defines the right to environment to mean:

> The right, whether of individuals or a group, to a decent environment; and more Specifically, such rights as the right to be free from excessive pollution of the land water or air, or pollution, from noise, the right to enjoy an un spoilt nature, and the right to enjoy biological diversity (Solo, 1995).

The above definition envisions environmental rights to belong either to the individual or to the human group to which the individual belongs. The American Convention on Human Rights, for example, vested the right to a healthy environment on individuals whereas the African Charter on Human and Peoples' Rights accords the right collectively to the people. Either way, the ultimate beneficiary of a legally assured healthy environment is the individual either in his capacity as a human being or as a member of a human community comprising of him and other human beings.

Environmental Rights in the context of International Environmental Law.

Environmental protection and human rights are closely related such that environmental rights became viewed as human rights. Environmental rights are however connected to human rights in three main ways: Firstly, extant international environmental law provides for the recognition of environmental rights as human rights. Again, international and regional human rights law accord environmental rights the status of human rights. Lastly, International and national case laws have been pro-active in upholding environmental rights as human rights worth enforcing as other aspects of human rights. The problem however has been that of enforcement. In Nigeria for instance, environmental rights are provided for only under Chapter 11 of the constitution which section has been held to be non-justice able (Constitution of the Federal Republic of Nigeria, 1999). Thus, an aggrieved victim of environmental rights violation cannot bring his action under the Fundamental Rights Enforcement Procedure Rules, 2009 but will have to content himself with any of the traditional common law remedies that often times occasion delay and injustice.

Despite their separate beginnings, human rights law and environmental law have an important element in common (Perez, 2000). Both of them have intertwined objectives and ultimately strive to produce better conditions of life on earth (Cullet, 1995). Accordingly, environmental rights are intrinsically related to a number of other human rights both as a precondition and an outcome of the enjoyment of such human rights. As a pre-condition, the preservation, conservation and protection of the environment requires the right to information, participation in decision making and the right of access to justice which are human rights by themselves. As an outcome, protection and conservation of the environment plays a vital role to the enjoyment of other human rights including the right to life and health. This is why many international environmental law instruments directly or indirectly recognize the linkage between human rights and environmental protection.

The 1972 Stockholm Declaration is the first authoritative statement supporting the linkage between of human rights and environmental rights. Principle 1 of the Stockholm Declaration contains the *"fundamental right of man to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being.* Besides, Principle 7 of the Stockholm Declaration provides that states be required to take steps to prevent pollution of the environment by substances, which affect human health. The above positions posit environmental rights as a major component of the right of man to health and life.

Since Stockholm Declaration, a number of other non-binding but widely accepted

declarations supporting the individual's right to a healthy and life supporting environment have been adopted." These instruments approach environmental protection as a pre-*condition to the enjoyment of internationally guaranteed human rights, especially the rights to life and health"* (Shelton, 2004). Environmental protection is thus an essential instrument in the effort to secure the effective universal enjoyment of human rights. "This approach, for example, is supported by the General Assembly which has called the ...preservation of nature a prerequisite for the normal life of man" (Shelton, 2004). Besides, Principle 1 of the 1992 Rio Declaration states that human beings are "entitled to a healthy and productive life in harmony with nature." Compared with Principle 1 of the Stockholm Declaration, the reference in Rio Declaration to a vague entitlement to live "in harmony with nature" tends to water down the human rights dimension of environmental protection. "Nonetheless, the Rio Declaration recognized the critical role of the exercise of human rights in sustainable development by public participation, access to information and access to judicial remedies and well-recognized procedural rights in environmental matters" (UNCOED, 1992). Thus, the procedural rights that are contained in all human rights instruments are adopted in environmental texts in order to have better environmental decision-making and enforcement. There is however, no explicit reference to environmental rights as human rights under the Rio Declaration.

Another international environmental law regime known as the 1998 Aarhus Convention recognizes the linkage between human rights and environmental rights. "The preamble of the Aarhus convention envisioned that adequate protection of the environment is essential for human well-being and the enjoyment of basic human rights, including the right to life itself" (Aarhus Convention, 1998). This agreement represents probably the most important step yet taken towards entrenching environmental rights as human rights. The Convention establishes rights—to information, to participation in decision-making, and to access to justice in environmental matters,—which it expressly affirms is aimed at securing the right to a healthy environment.

The Aarhus convention further establishes a conceptual link between substantive and procedural environmental rights by stating as follows: citizens must have the right of access to environmental information; be entitled to participate in decision-making and have access to justice in environmental matters." This is in order "to be able to assert" their right to live in an environment adequate for their health and well-being, as well as to "observe" their concomitant duty "to protect and improve the environment for the benefit of present and future generations (Aarhus Convention, 1998).

Finally, the link between human rights and environmental rights was given a further impetus with the Brundtland Report of 1987, which presented the basic goals of environmentalism as an extension of the existing human rights discourse, and proposed the formulation of the right to environment as an integral and quintessential component of human rights (Brundtland Report, 1987). This proposal was made in line with the position that "All human beings have the fundamental right to an environment adequate for their health and well-being" (Brundtland Report, 1987). In summary, it must be stated that there are to date no internationally binding environmental instruments that have explicitly recognized environment rights as human rights. However, the above instruments point to an emerging trend in international environmental law towards the global acceptance of the right to a healthy environment as an enforceable human right.

Existing international human rights instruments indirectly refer to the relationship between environmental rights and human rights. In these instruments, although there is no express mention of environmental rights as human rights, the instruments generally link

environmental rights to other human rights such as the right to health and life. "In the mid-twentieth century, for example, the UN Declaration on Human Rights made no mention of it, and nor did ICCPR and ICSECR." (Hayward 2005). The Human Rights Committee of the United Nation in its commentary on the content of the right to life confirmed this fact. The Committee has also taken the view that the right to life in the ICCPR does require states to take positive measures to reduce infant mortality and to raise life expectancy. "As the right to life can be affected by environmental disasters and more long-term environmental degradation, which produce life-threatening diseases, state party to the convention has to take environmental measures" (UNCOED, 1992). Environmental rights are therefore imp liable with the right to life in international human rights treaties. The above positions have been affirmed in the case of EHP *v Canada* (UN Human Rights Committee (1990) where a group of Canadian citizens alleged that the storage of radioactive waste near their home threatened their right to life and the Human Rights Committee acknowledged the allegations.

The Position in Nigeria

The statutory framework for the enforcement of environmental rights in Nigeria is grossly inadequate especially in the oil and gas sector. The Oil Pipelines Act, which is one of the earliest legislation in the Nigerian oil industry, provides for compensation to be paid for damages done to buildings, economic trees or crops or for disturbance or damage occasioned by a license holder's negligence and for any other loss in value of the land (Oil Pipelines Act, (1956). The Act also provides for compensation to injured members of the public (Oil Pipelines Act (1956). However, the Act negates this provision by exempting oil pollution damages occasioned by the malicious act of third parties from the ambit of compensation. This has reduced the efficacy of this statutory remedy to the same level as that obtainable under the common law tort of negligence. The Petroleum Drilling and Production) Regulation, 1969 also made similar provisions when it provided for the payment of fair and adequate compensation to owners of productive trees and fishing rights whose activities are disrupted in the course of oil production (Petroleum Drilling and Production) Regulation, (1969). The Act failed to define what it meant by "fair and adequate" compensation. The National Environmental Standards Regulation and Enforcement Agency Act (NESREA), which is currently the umbrella environmental legislation in Nigeria, expressly exclude the oil and gas sector from the ambits of its application (NESREA Act (2006). The National Oil Spill Detection and Response Agency Act did not make provisions for compensation of victims of oil and gas pollution in Nigeria. The Constitution of the Federal Republic of Nigeria, 1999 as amended did not also provide for environmental rights as enforceable justice able rights (Constitution of the Federal republic of Nigeria (1999). The consequence of the foregoing is that victims of pollution in Nigeria's oil and gas sector can only fall back on their common law remedies. These common law remedies because of the avalanche of defences inherent in their application have proved to be a myth rather than a reality of access to environmental justice for victims of oil and gas pollution in Nigeria. This has placed a big question mark on the justice ability of environmental rights in Nigeria.

Oil and Gas Pollution in Nigeria and the Myth of Environmental Justice

The exploitation of oil and gas resources in the Nigerian Niger Delta has led to a gross violation of the human rights of the inhabitants of the area. Transactional oil companies (TNC's) such as Shell, Chevron, and Mobil etc are exploiting the loopholes in Nigeria's environmental laws to degrade the environment catastrophically with corporate impunity. They fall back on archaic technicalities to defeat the claims of members of the Niger Delta Communities when they are sued in court by some of them who are aggrieved,.

In other cases where the Courts lean towards substantial justice to ensure a healthy

environment, the TNC's fall back on the weak enforcement mechanisms to evade compliance. At other times, the cases drag on for such a long time from the High Courts to the Supreme Court so that the litigants become tired and wearied. The outcome in the two cases of *SDPC v Anaro & others* and *Jonah Gbemre v SDPC and others* are case studies, for determining the extent of environmental justice available in Nigeria.

SDPC v Anaro & others

Facts: The respondents who represent different agrarian and fishing communities in the Niger Delta, as plaintiffs, instituted four separate suits against the Shell Petroleum Development Company Limited in 1983, to wit suit numbers W/16/83, W/17/83, W/72/83 and W/80/83. The suits were by an order of Court, consolidated on 21/3/85. In the consolidated suit, the respondents as plaintiffs were seeking damages for oil spill against SDPC. The said oil spill ravaged their farmlands and fishing ponds and wiped out their sources of livelihood. On 27th May, 1991 the High Court granted the reliefs of the plaintiffs and granted several sums in favour of the different sets of plaintiffs against the current appellant. The appellant was dissatisfied and immediately appealed to the court of appeal in the same 1997. The court of appeal dismissed the appeal in 2000. After several rigmaroles with motions for stay of execution, the appellant eventually appealed to the Supreme Court in 2005 in Appeal No.SC/52/2005.

Main Issues Distilled for Determination at the Supreme Court were:

a. Whether the State High Court had jurisdiction to try the consolidated suits in the light of Admiralty Jurisdiction Decree No. 59 of 1999, Federal High Court (Amendment) Decree No. 60 of 1991, Federal High Court (Amendment) Decree No. 16 of 1992 and Constitution (Suspension and Modification) Decree No. 107 of 1993;

b. Whether the trial court and the Court of Appeal were right in holding that the aforementioned Acts did not have impact on the respondents' claim; and

c. Whether the trial court and the Court of appeal were right in holding that the doctrine of *res ipsa loquiteur* was available to the respondent

Decision: The Supreme Court on Friday the 5th of June, 2015 dismissed the appeal and affirmed the judgment of the Court of appeal and awarded a cost of N500, 000.00 each in favour of the three sets of respondents against the appellant.

Jonah Gbemre v SDPC and others

Facts: The plaintiff on behalf of himself and the Iwherekan community of Edo State brought the instant suit under the Fundamental Rights Enforcement Procedure Rules, 2009. The suit was seeking for a declaration that the continued flaring of natural gas by the respondent was a violation of their fundamental right to life guaranteed under the constitution of the Federal Republic of Nigeria, 1999 (as amended) and the African Charter on Human and People's Rights.

Issues raised for Determination at the trial Court

Whether the continued flaring of gas by the respondents in the Iwherekan community which poisons the environment in the community as a result of massive emission of carbon dioxide and other cocktail of toxins that affect the health and livelihood of the Iwherekan people, is not a violation of their fundamental right to life guaranteed under the constitution and the African Charter on Human and Peoples' Rights.

Decision: The Court upheld the reliefs of the applicant and ordered for a stop to gas flaring in

the Iwherekan Community. Shell has refused to obey this court order and claims to have appealed to the Court of Appeal. However, efforts to ascertain the veracity of this claim of an ongoing appeal by the SPDC against this landmark decision of the Federal High Court have proved abortive as the Nigerian Court of Appeal, Benin Division claims that the file is missing.

Commentary on the two cases

It is shocking to note that in the case of *SDPC v Anaro*, the fishermen and farmers whose means of livelihood was wiped away by an oil spill that occurred in 1983 occasioned by the drilling activities of the appellants did not get any redress until 2015. This was a period of over 30 years away from the date of the environmental damage suffered by them. The litigation lasted for 12 years at the High Court, 3 years at the Court of appeal and another 15 years between the Court of appeal and the Supreme Court. By this time, it is probable that most of the original fishermen who were harmed by the oil spill were no longer alive. This certainly cannot be justice by any stretch of the imagination. Again, the quantum of damages sought by the respondents was not adequately aggravated or increased despite the undue delay.

Furthermore, the appellant used the issue of jurisdiction, which is a threshold issue, as a ploy to delay the conclusion of the litigation. According to their Lordships of the Supreme Court:

> The issue of jurisdiction is the livelihood of any adjudication. It is so fundamental that it must be resolved before any other step is taken in the proceedings…Any proceedings conducted without jurisdiction would amount to a nullity and any decision reached therein is liable to be set aside (Anaro v SPDC (2015).

With due respect, this is a succinct statement of the position of the law. However, the worrisome part of the issue of jurisdiction is that it could be raised at any time **(***Dagash v. Bulama (2004).* It can even be raised for the first time at the Supreme Court. The implication is that a party who wants to benefit from undue delay can decide to wait until a matter goes on appeal to the Supreme Court before raising the issue of jurisdiction. In the case of *SDPC v Anaro*, the (SDPC) was questioning the jurisdiction of the State High Courts of former Bendel State to try a matter concerning minerals. It was contending that the matter was within the exclusive jurisdiction of the Federal High Court in view of the Admirably Decree No. 59 of 1991, Federal High Court (Amendment) Decree No.16 of 1992, the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the Minerals Act.

To my mind, one way out of this Logjam is to restrict the right of raising the issue of jurisdiction as it concerns the parties to an environmental litigation to the court of first instance only. An appropriate but inexpensive way of achieving this is by expressly conferring special exclusive jurisdiction for environmental matters as substantive rather than ancillary matters, on some already existing superior courts of records. In other words, any question of jurisdiction not raised at the trial court in the course of an environmental litigation ought not to be entertained beyond the court of first instance. Happily enough, the Supreme Court achieved substantial justice in the instant case by maintaining that the suits were commenced before the coming into force of the laws which conferred exclusive jurisdiction on the Federal High Court over petroleum matters.

In the case of *Jonah Gbemre V. SPDC*, the Federal High Court sitting in Benin-City courageously upheld the law by declaring the right of the appellants and ordering SPDC to stop gas flaring in the Iwerekan Community of Edo State. Nevertheless, SDPC has again fallen back on the weakness inherent in a judicial system, where case files could become missing at the push of a finger, to claim that it has appealed. The law however is that an

appeal cannot act as a stay of execution (*Governor of Oyo State v. Akinyemi (2003).* Consequently, the applicants ought to have commenced contempt proceedings against the Chief Executive Officer (CEO) of SDPC. Information available to us at the time of this writing does not indicate that this has been done or whether there are hindrances that have led to the non-commencement of such proceedings against the CEO of SDPC.

In the instant case, the problem is that there is lack of compliance with the order of Court by SDPC due to lackluster enforcement mechanisms that can enable the applicants to take the necessary steps to ensure that the judgment of Court is obeyed by SPDC despite their unsubstantiated claims of a pending appeal. Besides, it is doubtful if this judgment can stand on appeal. This is because environmental rights are not yet part of Chapter IV of the Nigerian Constitution and are by extension not yet included in the list of justice able rights so as to support a pronouncement under this chapter.

Recommendations

1. Institutional mechanisms for the avoidance of delays in the administration of justice in Nigeria should be put in place especially at the appellate level as it concerns environmental disputes.
2. The appellate Courts should have the power and discretion to increase the quantum of damages awarded to environmental litigants to bring them in line with the economic realities on the ground at the time of giving judgment on appeal.
3. The right to raise the threshold matter of jurisdiction by parties in an environmental litigation should be limited to the Courts of first instance.
4. Judgments on environmental disputes delivered by international Courts to which Nigeria subscribe by way of multilateral treaties ought to be directly enforceable in Nigeria without subjected to undue technicalities. This is because such courts are usually faster and most environmental problems have a common global outlook.
5. Compliance with judgment on environmental disputes ought to be enforceable even while appeals are pending.
6. In view of the ubiquitous nature of environmental degradation, the Court of appeal should be the last Court on environmental matters. Appeal to the Supreme Court from the Court of Appeal should be limited to matters pertaining to Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and should be by leave granted by the Supreme Court.
7. Environmental rights should be included as fundamental rights in the Nigerian Constitution in any proposed amendment of the constitution.
8. Statutory provisions should go beyond criminal sanctions and provisions for environmental restoration to make adequate provisions for compensation of victims of oil and gas pollution
9. Nigeria should endeavour to domesticate international environmental treaties to which it has subscribed

Conclusion

From the review of the foregoing cases, it is clear that environmental rights are not yet justice able rights in Nigeria. This has served as a clog on the judiciary whenever questions of environmental rights are before the courts. There are also no adequate provisions in extant legislation for the protection of individual environmental rights of the citizens. This state of affairs has made the attainment of environmental justice impossible in Nigeria. However, all hope is not lost if the appropriate steps can be taken to acknowledge that environmental justice is necessary for the building of a just and egalitarian society, and measures put in

place to ensure its attainment by giving environmental rights its pride of place in our statutes and in the constitution.

A critical Look at the cases reveals clearly that there are clear material contradictions in the system such as delays and technicalities that work against victims of environmental degradation seeking redress from the Courts. This is because only the common law remedies are available to the litigants. The avalanche of defences available to the defendants weakens these common law remedies. In cases where the Courts have been commendably pro-active, enforcement and compliance becomes the next problem. This is because the delays occasioned by the appellate system could frustrate enforcement. It is therefore necessary to include environmental rights as part of the fundamental rights entrenched in Chapter IV of the Nigerian Constitution. This will enable victims of environmental degradation to avail themselves of the expedited procedure for enforcement of these rights made pursuant to the Constitution.

There is also an urgent need to provide extensively for civil remedies for victims of environmental degradation in a comprehensive legislation that deals with oil pollution management. Thus, urgent action is needed on the bill currently before the National Assembly for the enactment of an Act for the establishment of the National Oil Pollution Waste Management Agency. This is because the bill proposes far reaching provisions for the compensation of oil pollution victims.

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