



An appraisal of the attitude of Nigerian courts in oil and gas pollution cases

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Abstract

The aftermath of oil and gas exploration and production is usually the degradation of the environment which invariably has a negative impact on flora and fauna. In order for the victims of the pollution of the environment to get redress they oftentimes resort to courts. Nigerian courts unlike courts in other jurisdictions approach the cases of oil and gas pollution in different ways. Some of these ways can be that, one, victims must prove damage before getting justice. This often results in technicalities which may not be in favour of the victims. In another situation, victims do not have access to justice which deprive them of their rights. In other jurisdictions like, the United States of America, Canada, India and Bangladesh to mention a few, there is a different approach by the courts in handling cases of this nature. In the jurisdictions, under comparison, the courts are proactive, pragmatic and active in handling cases of this nature. This work therefore, sought to appraise the attitude of Nigerian courts in handling oil and gas pollution cases vis-à-vis the happenings in other jurisdictions and make possible recommendations to be adopted in Nigeria.

Keywords: substituted Li ferrite, magnetostatic and spin waves, microstrip array antenna, X-band frequency range

Introduction

Somewhat one can say or concludes that Nigerian courts have not done much in the area of oil and gas pollution prevention and control. This is true because there are many decided cases where Nigerian courts have not given attention to the issue of prevention or control as well as restoration of the environment. What the courts do is to give remedy by way of compensation to victims of oil pollution [1].

The reason for the attitude of the courts is that the entitlement to bring legal action in tort against those who violate regulations like those contained in Environmental Guidelines and Standards for the Petroleum Industries in Nigeria (EGASPIN) has not been extended to 'any person' or at least to public interest organisations [2]. The issue primarily, here is predicated on the core concept of law which is 'Locus Standi.' Thus, for an individual to take action at private law, such a person whether human or legal persons must show that his or her private rights as provided by law have been harmed or injured. In order words, where a person is not able to show that he has suffered damage special or peculiar to him or that a legal right peculiar has been infringed, then he would not be able to maintain an action [3].

This position has posed a lot of challenges for the use of private law in the protection of the environment. This is in the sense that unless where the constituents of the environment e.g. plants, animals, rivers, lakes, forests are owned by an individual organisation that has legal recognition, it is only the state that will be able to offer them legal protection in the event of any damage. This is not the case in any other jurisdictions. In other jurisdictions, the right to sue in respect of environmental liability has been recognized is that in the course of enforcing environmental statutes, they have in pragmatic ways developed as corpus

of case law that has introduced unwritten norms of environmental due diligence.

Attitude of Nigerian Courts

In order to buttress the above attitude of Nigerian courts in their inability to protect, the environment, prevent and control oil and gas pollution here are a few cases in that regards.

In *Amos & Anor. v. Shell B.P. Petroleum Development Co. of Nig. Ltd. & Anor* [4], the plaintiff sued the defendant in nuisance for constructing a dam across their creek, as a result of which their farms were flooded and damaged. The position of the court, among others was that since the creek was a public waterway, blocking it constituted a public nuisance and there had to be proof that the plaintiffs had suffered damage peculiar to them. Going by common law principles, the court was right, but the question is that a decision like this how can oil pollution prevention and control be?

In *Allar Iron v. Shell B.P* [5], the High Court refused a prayer for injunction to restrain the defendant from further polluting lands, creeks and fish ponds on grounds that the injunction if granted, could stop the defendant's trade and render many unemployed and even affect the country's revenue since oil was the main income generator.

In *Siesmograph Services Limited v. Benedict Onokpasa* [6] the issue before the court was whether the schooling operations that is carried out by the defendant company was the proximate cause of the extensive damage to some buildings owned by the plaintiff. After emphasizing the fact that it was the plaintiff who should prove negligence of the defendant, the court held that the plaintiff failed to discharge the burden because the facts of negligence were not within his knowledge.

In *Shell B.P Petroleum Dev. Co. (Nig.) Ltd. v. Otoko* [7] the

plaintiff claimed the sum of N1, 499, 856.00 as compensation for the damage done to him which caused oil spillage due to the negligence act of the defendant. The trial Judge awarded the sum of N491,700.00 in favour of plaintiff under the rule in *Rylands v. Fletcher*. The Court of Appeal however reversed the judgement on the ground that the rule is an aspect of negligence and since the defendant's witness had actually disproved negligence by stating that the equipment was properly maintained, the defendant was not liable.

In another case of *Jumbo v. Shell B.P* ^[8], the plaintiff instituted an action against the defendant for negligence whereby oil spillage occurred and escaped from the defendant's tank at Bonny Terminal into the plaintiff's creek and caused extensive damage to fish, marine life and fishing nets. The court held that the burden of proof of negligence was not discharged by the plaintiff and witnesses, since they could only show that the nets were only soaked with oil. In addition, the plaintiff who sued on behalf of 9,600 fishermen of Jumbo House of Bonny was himself not a fisherman and those directly affected ought to have instituted actions themselves ^[9].

Attitudes of Courts in other Jurisdictions

It is noteworthy that in other jurisdictions, the courts have as much as possible tried to approach the question of access to justice and prevention and control of oil pollution in different ways ^[10]. In the United States, for instance, there are cases where courts have imposed strict liability on defendant who carries out abnormally dangerous activities irrespective of whether the defendant has adopted the utmost care in its operations. Similarly, in Norway, the courts have reflected the need to jealously protect the environment by applying strict liability in cases involving hazardous activities ^[11]. In 2010, in the United States, the court ordered BP oil to pay compensation to the victims of the Mexico oil spills to the tune of \$10m. This is because the oil company was asked to pay more than what it could pay ordinarily and the company was asked to pay more than what could it could play ordinarily and the company directors were charged and convicted while the company was asked to restore the environment through a clean-up ^[12]

In *Canada, the court in R. v. Vanicolor Chemical TRIUnion Chemical of Elinira and Severin Argenton Director / owners and officers* ^[13], the accused company, its director / owner and its officers in Ontario were charged for an alleged breach under the Environmental Protection Act for unlawfully discharging hazardous waste into the environment. The company was not fined as it went out of business. However, the owner was fined and sentenced to eight months imprisonment. The officer was fined the cost for clean-up of the site.

In *R. (Environment Canada) v. R. (Northwest Territories Canada)* ^[14] the Government of the Northwest Territories was charged for discharging raw, untreated sewage of up to 56,000 cubic metres from the liquit sewage lagoon into the waters of Koojesse inlet on Baffin Island in the Northwest Territories. The Lagoon is owned and operated by the government of the Northwest Territories.

The court found that the territorial government failed to exercise due diligence in the prevention of the sewage discharge. The lagoon had failed five times in ten year even though the government had the policy, the necessary engineering and scientific studies, and the management and

operational guidelines. Following the argument that had the policy been applied, it would have prevented the offence, the territorial government was convicted and fined \$49,000,000.00. It was also ordered to pay \$40,000.00 to Environment Canada in trust for the purpose of promoting conservation and protection of fish and fish habitats in the Northwest Territories.

The court rejected the submission that the accused, being a 'Government' should be excused from financial penalty as that would amount to the transfer of the same taxpayer's money from one government consolidated revenue fund to another's and therefore inappropriate and / or unnecessary. It was a view of the court that a more compelling argument may be made for the opposite perspective namely, that governments accused of offences should receive no special consideration in proper cases.

The court further noted that government can commit offences as readily as human or corporation and they are not immune to breaking the law. Government conduct resulting in an offence against the law is not something that should be taken lightly. It is antithesis of good government and arguably constitutes a breach of trust ^[15].

The jurisprudence in this area has also developed greatly in developing countries like Bangladesh, India, Pakistan and Philippines. In the case of *Dr. Monhiuddin Faroog v. Bangladesh* represented by the *Secretary, Ministry of Irrigation, Water Resources and Flood Control and Ors* ^[16], the petitioner, the Secretary General of the Bangladesh Environmental Lawyers Association (BELA) appealed against an order of the High Court Division summarily dismissing a writ petition filed on behalf of a group of people in the district of Tongail whose life, property, livelihood, vocation and environmental security were being seriously threatened by the implementation of a flood control plan, the compartmentalization pilot project FAP-20. The High Court dismissed the petition on the ground that BELA was not an 'aggrieved person' within the meaning of Article 102 of the constitution of Bangladesh. The issue before the court was whether the fundamental right to life as contained in Articles 31 and 32 of the Constitution including the protection and preservation of the environment free from pollution are essential for the enjoyment of the right to life.

The appellate division of the Supreme Court of Bangladesh allowed the appeal, granting the petitioner *locus standi* to move the High Court Division under Article 102 of the Constitution, stating that the expression 'any person aggrieved' in Article 102 is not confined to individual affected persons only, but extends to the people in general, as a collective and consolidated personality.

Thus, Hon. Justice B. B. Ray Chadbury has this to say; Although we do not have any provision like Article 48A of the Indian Constitution for protection of environment; Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environmental, ecological balance free from pollution of air and water, sanitation without which, life can hardly be enjoyed. Any act or omission contrary thereto will violate the said right to life.

In India, the courts are even more pro-active. In the case of *M.C. / Mehta v. Kamal Nath & Ors* ^[17], the court took notice of a report which appeared in the Indian Express to the effect that a private company by the name Span Motels Pvt Ltd to which the family of Kamal Nath, a former Minister of Environment and Forest had a relationship had built a motel

on the bank of the River Beas on land leased by the Indian Government in 1981. Span Motels had also encroached upon an additional area of land adjoining these leasehold areas and this area was later leased out to span Motels when Kamal Nath was Minister in 1994. The motel used earth movers and bulldozers in turn the course of the River Beas, create a new channel and direct the river's flow. The course of the river was diverted to save the Motel from future floods.

The Supreme Court of India held that prior approval for the additional leasehold land given in 1994 is quashed and the government shall take over the area and restore it to its original condition. Span Motels will pay compensation to restore the environment, and the various constructions on the bank of the River Beas must be removed and reversed. The court further ruled that Span Motel must show why a pollution fine should not be imposed pursuant to the 'polluter pay principle'.

In *Vellore citizens Welfare Forum v. Union of India*^[18], the petitioner, the Vellore citizens Welfare Forum, filed the action to restrain tanneries in the state of Tamil Nadu from discharging waterways and open lands. It is estimated that nearly 35,000 hectares of agricultural land in the tanneries has become either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning processes have severely polluted the local drinking water. The court has passed other orders relating to the case in almost five years that the petition has been motivated.

The Supreme Court noted that although the leather industry is a major foreign exchange earner for India and provided employment, it does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards.

In *Kinkri Devi & Anor v. State of Himachal Pradesh & Ors*^[19], the petitioners sought an order of the court to have a mining lease cancelled, to restrain the Respondent from operating the mines covered by the lease in such a manner as to pose a danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, environment and the inhabitants of the area, and for compensation for the damage caused by the uncontrolled quarrying of the limestone. The court observed that:

... to ensure the attainment of the constitutional goal of the protection and improvement of the natural wealth and environment and to protect the people inhabiting the vulnerable areas from the hazardous consequences of the arbitrary exercise of the power of granting mining leases and of indiscriminate operation of mines on the strength of such lease without due regard to their life, liberty and property, the court will be left with no alternative but to intervene effectively by issuing appropriate units, orders and directives in operation whereof if proving to be hazardous and the total prohibition of the grant or renewal of mining lease till the government evolves a long-term plan based on a scientific study with a view to regulating the exploitation of the minerals in the state without detriment to the environment, the ecology, the natural wealth and resources and the local population...^[20]

Conclusion

Looking at this work under review, it can be concluded that Nigerian courts have not reflected much influence in the area of oil pollution prevention and control which are the aftermath of oil and gas pollution. Thus, there are decided

cases where Nigerian courts have not given enough focus on the issue of pollution control or prevention, rather only intervention on the basis of compensation of the victims which is even predicated on the right to relief as structured under private law. On the other hand most of the decisions of Nigerian courts are based on technicalities whereby victims have little or no remedies. Furthermore, where remedy is even available to a victim of oil and gas pollution, the issue of *locus standi* or proof of injury over and above the generality of the people become the order of the day. As a result, it becomes difficult if not impossible for one to access justice. The sad thing to note is that even the courts are not pro-active enough to be decisive in their judgement in order to control or even prevent pollution.

In the other jurisdictions under review, the courts are pro-active in this regards. The courts have made landmark decisions in most of the cases above, thereby helping in the legal system of the countries under review. A mention should be of India and Bangladesh.

Recommendations

With the above findings, it is hereby recommended as follows:

One, it is suggested that for environmental matters, individuals should be allowed access to justice in both public and private law. A situation where an individual who takes a legal action at private law must show that his or her right is over and above others before he / she can succeed has to stop.

Also, it is recommended that the issue of technicalities used by Nigerian courts as it is the case in *Shell / BP v. Otoko* should be stopped. This has greatly hampered the rights of the victims of oil pollution in Nigeria.

The issue of looking as the revenue accruing to the government and employment to the citizenry at the detriment of the populace of Nigerians as it was in the case of *Allar Iron v. Shell / BP* should be stopped. Nigerian courts should rather adopt the decision in *Vellore citizens Welfare Forum v. Union of India*.

If the above recommendations are anything to go by, then the efforts made by Nigerian courts can meet up with the challenges of environmental protection globally. This can be possible given the recent decision of the Federal High Court in Port Harcourt, Nigeria in upholding the Senate of the Federal Republic of Nigeria vote when asked Shell Petroleum Dev. Co. (Nig.) Ltd to pay the ethnic Ijaw communities in Bayelsa State the sum of \$1.5bn in damages for pollution^[21].

In another development, on November 14, 2005 another court in Benin, Edo State ordered the Shell Petroleum Development Company of Nigeria Limited and the Nigerian National Petroleum Corporation^[22] to immediately take steps to stop gas flaring in Iwhereken community. In that case the court held that the constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution free healthy environment.

Finally, therefore, imbibing the happenings in other jurisdictions as well as spurring our courts to be proactive, there is an urgent need for appropriate legal reforms which will place individual citizen, non-governmental organisations and other pressure groups in a better position than ever before to have an influence in all matters that concern the protection of the environment, as a result of oil and gas pollution. And again as earlier stated, they must also

be empowered to have access to courts in circumstances where they wish to challenge the way pollution control authorities and other government agencies conferred with powers under the statute have, or have not exercised their discretion.

References

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3. *Ibid*
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6. (1972) 4 S.C. 123
7. (1990)6 NWLR 12(pt. 59) p. 698
8. (1999) 13 NWLR (pt 633) p. 57
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15. His Lordship quoted from a judgement of a superior court judge in Quebec, where Environment Canada had successfully prosecuted public works Canada: He said "The Court must be much more severe when a disaster in caused by agents of an arm of the crown, since it is precisely the crown on which the public relies to protect both the resources and the environment.
16. Cited from SACEP/UNEP/NORD Publication series on Environmental Law and Policy, No. 3 Sri Lanka 4-7 July, 1997.
17. SACEP / UNEP / NORAD, p. 15
18. AIR 1996 SC 2715
19. AIR 1988 Himachal Pradesh 4
20. See Bombay Environment Action Group, Shayu H.K. Chainani Indian Inhabitant, Save Pure Citizen's Committee v. Pune Cantonment Board – High Court of Judicature of Bombay Appellate side, writ petition No. 2733 – Where the attitude of the court is not different from the ones decided above.
21. See for details <http://www.caorpwatch.org/article.php?=13323>> (accessed on 20th July, 2019)
22. Jonah Gbemre & Ors v. Shell / BP Petroleum Dev. Co. Nig Ltd and Ors