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Original Research Article

Environmental Justice and Sustainable Development in Nigeria

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The study examined environmental justice and sustainable development in Nigeria. The study revealed that to effectively protect the environment and sustainably develop resources, enlightened citizens should take active part either by expressing their opinions or by having recourse to law. The study revealed again that while the constitution of Nigeria provided for environmental protection under section 20, this same constitution by the provision of section 6(6)(C) rendered the judicial organ impotent in adjudicating on environmental matters. The study suggested that the fact that way and manner in which the state and its agencies carry out the duty of protecting the Nigerian environment cannot be challenged in a court of law, which is the effect of section 6(6)(C), is not therefore a genuine excuse for the government and its agencies to abandon their constitutional responsibilities.

Keywords: Environmental justice, Law, Sustainable development.

INTRODUCTION

It is believed that environmental laws are put in place to mitigate or prevent the threatening environmental problems which emanate from human activities in the quest for economic growth and development¹. There is no doubt that these human activities which cause environmental problems can be controlled or prevented, or even modified and improved so that they will not cause severe problems to the environment which in turn affect humans who inhabit the affected environment. Greater recognition of indigenous peoples rights over land, water natural resources, based on traditional occupancy or use, may be a key path towards greater pollution prevention and sustainable development². Many indigenous groups have historically lived in harmony with their surrounding

environments and effective, efficient resource management systems have been developed based on customary practices and laws. The Rio Declaration, however, in principle 22 only recognizes in a very general way the need to effectively involve indigenous communities and other local communities with traditional knowledge and practices in decision making processes. Principle 22 provides:

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Ecological problems affecting the clean environment have been brought before the courts in many cases. The factual situations provide an opportunity to determine the judicial

¹ Okafor O., Environmental Laws and Factor Affecting them in Nigeria: Case Study of Gas Flaring Laws in Niger Delta Nigeria, Unpublished M.Sc thesis submitted to the Environmental, Policy, Group, Environmental Sciences, Wageningen University, September, 2011, 1.

² Vanderzwaag D. Canada and Marine Environmental Protections Charting a Legal Course Towards Sustainable Development, Kluwer International, 38

attitude in the matter. The remedial measures provided under the laws – civil or penal – have been resorted to control and prevent pollution. The jurisdiction of the superior courts is also being invoked by citizens on their becoming aware that environmental imbalances have the potential of affecting their fundamental rights under the constitution.³

Considering that the purpose of sustainable development is to allow the co-evolution of both man-made systems and ecosystems, the thrust of this paper is to rationalize that in order to effectively protect the environment and sustainably develop resources, enlightened citizens should take an active part in protecting the environment, in collaboration with the state. This can only be done through efficient judicial administration of environmental justice by recognizing the right of citizens to participate in the process of public decisions concerning the environment, either by expressing their opinion or by having recourse to law.

Background to Law and Policy Development in Environmental Justice

It was not until 1988 that the traditional government approach to environmental law changed. Prior to the time, what existed were little parchments of law and some referrals in statutory provisions making allusions to specific aspects of environmental protection. The earliest provision was made in the omnibus provision of section 247 of the Criminal Code Act⁴ which states as follows:

Any person who –

- (a) *Vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way; or*
- (b) *does any act which is, and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, whether human or animal, is guilty of a misdemeanour, and is liable to imprisonment for six months.*

This provision of the Criminal Code does not cover noxious fumes which cause harm to the forest or the aesthetic view of the environment. Another provision for environmental protection was the oil in Navigable Waters Act of 1968 which was then deemed to be the most exhaustible statutory provision for environmental protection. There were minor or skeletal environmental protection provisions made in the Petroleum Act of 1969.

However, it was not until in 1988 that a bold step was made to tackle environmental problems in the country with the promulgation of the Federal Environmental Protection Agency Decree, 1988. By far, it became the most comprehensive and far reaching legislation on environmental protection in Nigeria.⁵ The Federal Environmental Protection Agency Act, of 1988 has been repealed by the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act, 2007. The 1999 Constitution of the Federal Republic of Nigeria made a direct provision on the environment in its chapter II, section 20, which is titled the Fundamental Objectives and Directive Principles of State

Policy. The Constitution requires the state to protect and improve the environmental quality of the nation and to exploit its natural resources for the good of the community, and ensure healthy and sustainable development⁶ of the country's natural resources.⁷

Perhaps, this provision was made in compliance with the provisions of Article 24 of the African Charter on Human and People's Rights to the effect that "All Peoples shall have the right to a general satisfactory environment favourable to their development". But the provision on environment made in the Constitution is vitiated by the provision of section 6(6)(c) which directly renders inefficient the provision of section 13 of chapter II of the same Constitution dealing with Fundamental Objectives and Directive Principles of State Policy. Section 13 provides thU:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this chapter of this constitution.⁸

From the provision above, it is then obvious that the three arms of government are by the Constitution entrusted with the responsibility of protecting, improving and safeguarding the water, air and land, forests and wildlife of Nigeria, which invariably represent the Nigeria environment. But how can the judicial organ of government effectively carryout its responsibility when it has been rendered impotent by virtue of the provision of section 6(6)(c) to the effect that:

The judicial powers vested in accordance with the foregoing provision of this section shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this constitution.

This provision makes it difficult to challenge in court, the state and its agencies on the issue of environmental protection regarding their actions. However, in the view of Osundu,⁹ while it is conceded that section 6(6)(c) directly renders the judicial organ of government impotent with respect to the duty to conform to and apply the provisions of chapter II duly imposed on it by section 13 of the constitution, it is submitted that the other organs of government are not so incapacitated.

Therefore, the Executive (which is the Federal Ministry of Environment and other environmental regulatory agencies) and the Legislative organs of government are duty bound to carryout their Constitutional responsibilities despite the provisions of section 6(6)(c)¹⁰. The author takes the view that the position of Osundu is the true position of the law if the canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative (*expression unius est exclusion alterius*) is invoked. From the

³ Principle 22, Rio Declaration of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, Report of the UNCED Vol.1 (New York)

⁴ Section 247 of the Criminal Code Act

⁵ Ehighelua I., Environmental Protection Law, New Pages Law Publishers Co., Effurun/Warri, 2007, 186.

⁶ Emejuru, C.T. Incorporating Health Impact assessment as Corporate Social Responsibility via Environmental Impact Assessment in Niger Delta, Australian Journal of Management, Policy and Law, 2014, www.scie.org.au

⁷ See Sections 17 and 21 of the Constitution of the Federal Republic of Nigeria, 1999; see C.T. Emejuru, Human Rights and Environment: Whither Nigeria, Journal of Law, Policy and Globalisation, vol.30, 2014, 21-22.

⁸ See Section 13 of the Constitution of the Federal Republic of Nigeria, 1999.

⁹ Osundu, A.C., Our Common Environment: Understanding the Environment, Law and Policy, University of Lagos press, 2012, 181 – 184.

¹⁰ Ibid; C.T. Emejuru, Human Rights and Environment: Whither Nigeria, op cit.

foregoing, the fact that way and manner in which the state and its agencies carry out the duty of protecting the Nigerian environment cannot be challenged in a court of law, which is the effect of section 6(6)(c), is not therefore a genuine excuse for the government and its agencies to abandon their Constitutional responsibilities.

The Nigeria Constitution laid down the basic foundation for environmental legislations in the Directive Principles of State Policy. The state is obligated by the Directive Principles to improve the quality of human life by controlling the exploitation of natural resources and protecting the environment. The state is also obligated to direct its policy towards the control of material resources of the community to subserve the common good.¹¹ It is thus, within the duties and powers of the state to impose restrictions on the use of those resources and factors which adversely affect life and its development. The policy elements seek the actual implementation of objectives with the increased use of legislation and regulations along with other instruments.¹²

Common law of Torts and Environmental Justice

This is the body of law derived from judicial decisions, rather than from statutes or constitutions, case law. The common law is inarticulate until it is expressed in a judgment. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision.

The common law is a form of private law, regulating the relationship between individuals. It includes civil law, which provides a framework of legal rules through which individuals can assert their rights. The common law is case centred and hence judge centred, allowing scope for a discretionary, ad hoc, pragmatic approach to the particular problems that appear before the court.

The aspect of the common law that is relevant to the protection of environment is the law of torts. A tort has been defined as a civil duty imposed by the common law and not arising out of contract. A breach of this civil duty entitles the injured party to an action for unliquidated damages. Damages are said to be unliquidated when they are not ascertained but have to be assessed by the courts. In most cases, the plaintiff must show that the conduct of the defendant caused him actual damage before he can succeed in his claim.

The common law of torts that deal with environment are: nuisance, negligence and the rule in *Rylands v. Fletcher*¹³. Actions in nuisance may be divided into private nuisance and public nuisance. The tort of private nuisance attempts to reconcile the competing interests of landowners; public nuisance is a crime which protects public rights, although an individual may bring an action where he or she has suffered damage over and above that suffered by the public generally. Today, The tort of nuisance is recognized as the area of common law which has contributed most significantly to environmental protection.

There are remedies in nuisance actions. They include the following:

- a) Abatement
- b) Injunction
- c) Damages

Damages are certainly available for physical damage to the claimant's property, although it is not clear if damages can be awarded for personal injury. Some commentators are of the view that an action under negligence may be the only way to claim damages for personal injury. It is also possible that damages for economic loss may be available although there is no clear judicial guidance on this point.

Negligence

The negligence principle states that one has a duty of care over his neighbour. Meaning that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure his neighbour. Neighbour in the context of negligence means persons who are so closely and directly affected by one's act that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to the acts or omission which are being called into question *Donoghue v Stevenson*.¹⁴

By operation of the neighbourship principle, every owner of land or other property owes a duty of care to all his neighbours in his use of the land or property.

There have been environmental cases of negligence in relation to failure to warn. In Nigeria, the negligence principle is firmly established in the common law even though little litigation seems to have been done so far with respect to negligence of a land occupier. In *Ifeagwu v. Tabansi Motors Ltd*¹⁵ Aseme J. easily found the Defendants liable in negligence when petrol spilled and burst into flames from a tanker driven by the first Defendant and caused damage to the plaintiff by way of burns. In *Graham Otoko and 5 Ors v. SPDC Nig. Ltd*,¹⁶ it was established that if a man brings 'dangerous things' upon his premises which are likely to escape and cause damage, he should be held liable in negligence for any damage resulting therefrom.

The remedy in negligence action is damages. It is a general principle of the tort of negligence that it is possible to claim damages for physical damage to the person or the property and for loss consequential to this damage. It would be possible to claim damages for injury caused by a chemical spillage which causes damage to people and property; it would be possible to claim for the clean-up costs, but it would not be possible to claim money for lost of profits for the time the site was shut.

The Rule in *Rylands v. Fletcher*

The classic definition of this principle is found in the judgment of Blackburn J. in the case of *Rylands v. Fletcher*¹⁷, where it was held:

that person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

The case involved the construction of a reservoir on the defendant's land by independent contractors. The contractors failed to block off a number of miner shafts under the defendant's land which was connected to the plaintiff's mine

¹¹ Sengar, D.S., Environmental Law, Prentice – Hall of India Private Limited, 6-7.

¹² Ibid

¹³ (1868) CR HL330

¹⁴ (1932) AC 562

¹⁵ (1972) 2 ECCLR 790

¹⁶ (1990) 6 NWLR (pt159) 693, SC

¹⁷ (1868) CR HL 330

and became flooded. The defendant, although personally not at fault, was held strictly liable for the damage. He had brought onto his land and collected there something which was likely to do damage if it escaped. The defendant failed in his duty to prevent the escape and was therefore liable for all the damage which was the natural consequence of the escape.

The Rylands v. Fletcher¹⁸, principle imposes strict, but not absolute liability for damage caused by the escape¹⁹ of dangerous things. The principle has been applied to a wide range of escapes of substances or objects including water, fire, gases and fumes, electricity, oil, chemicals, colliery waste, poisonous vegetation, acid smelters, explosives, vibrations, trees and animals. Because the rule imposes strict liability the claimant does not need to prove that the defendant was negligent. The claimant must establish a connection between the escape and the damage sustained.

An extra facet to the rule, was added by Lord Cairns, when the case reached the House of Lords. The rule was restricted to circumstances where the defendant had made a "non-natural" use of his land. The rule applies to things not naturally (ordinarily) present on the defendant's land. The defendant incurs liability by bringing these things on to his land which subsequently escape and cause damage. This has, until the decision in Cambridge Water Case, played an important part in restricting the application of the rule. This restriction came to be associated with the idea that to fall within the rule, the defendant's use of his land had to pose an increased risk of injury to others. This idea of "non-natural" use was referred to in Rickards v. Lothian²⁰ as some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.²¹

To be able to commence an action the claimant was required to establish that the defendant's use of his land was an abnormal use involving an especially hazardous activity. As earlier said, the rule in Rylands v. Fletcher is dead in any country or jurisdiction that accepts the Cambridge Water Company Case as authoritative. The rule in Rylands v. Fletcher would no longer, as a distinct tort, continue to be a significant part of tort law as plaintiff or courts would find little advantage in using it.

However, there should be environmental protection with some specified subjects, contents and objectives, specially to co-ordinate and govern the relationship between human being and the environment. The courts can also make use of the doctrine of no fault liability, in order to award damages in environmental damage cases such as pollution and so on. This is established for the protection of the environment. According to the doctrine of no – fault liability, the court is to investigate only three requirements constituting the tort of environmental pollution in the trial of a dispute over compensation for environmental pollution. They are as follows:

- a) The act which caused environmental pollution resulting in violation of the environmental protection law of the state.
- b) The facts of damage
- c) Causation between the act of environmental pollution and pollution

¹⁸ (1868) CR HL 330

¹⁹ These are very essential elements that must be established in order to succeed in the action.

²⁰ (1913) ac 263

²¹ Okoroma 8 ors v. NADC td, suit no PHC/320/74, Judgment of 2213176

The doctrine of no – fault liability simply ignores faults and holds the defendant liable for any pollution. It is unnecessary for the court to investigate the faults of the parties concerned unless the person discharging the pollutant asked to be exempted from liability for pollution damage on the grounds of pollution damage, resulting entirely from the fault of a third party. In this respect, fault is basically an irrelevant factor in the trial of a dispute over damages or compensation for environmental pollution. In environmental pollution cases, the doctrine of no – fault liability appears more reliable and efficacious than the rule in Ryland v. Fletcher or the Cambridge Water Company Case, which we have referred to above. It may be submitted that subjects liable in the legal relationship of environmental protection are persons or companies directly discharging pollutants.

Sustainable Development and Environmental Justice

In 1992, the Earth summit ushered in the new development paradigm of sustainable development, equity and social justice and it stands out as the most important milestone in environmental justice. The conceptual innovations brought about by sustainable development in environmental transactions profoundly transformed the philosophy of project Level Environmental Impact Assessment.²²

In tandem with the trend in recasting environmental issues in the context of sustainable development, environmental management practices, especially environmental impact assessment, were repositioned and recognized as an essential tool for ensuring sustainable development through the integration of environmental, social and economic factors.²³ The first principle of environmental law is that of sustainable development. Sustainable development is arguably the commanding general principle of environmental law.²⁴ This entails giving equal consideration to environmental protection as economic, social, cultural and other conditions in the development process. It also entails periodic reviews of developmental policies vis-à-vis environmental policies with a view to balancing the two by means of national legislation.

Effective operationalization of environmental laws, legislation and guidelines through compliance monitoring for sustainable environmental management in Nigeria is constrained by the existence of a high potential for role conflicts. The issue revolves around role conflicts involving the Federal Ministry of Environment, other federal and state agencies and professional institutions and even, individual enforcement of rights. The outcome is an uncoordinated approach to environmental management which is inimical to the nation's efforts in environmental management and sustainable development.

This observation suggests that neither the efficiency nor the sustainability criterion is sufficient to ensure environmental justice. The achievement of environmental justice depends on the empowerment of the minority and how – income populations most likely to be adversely affected. Empowering low – income and minority communities with better information

²² Nwafor J.C. Environmental Impact Assessment for Sustainable Development: The Nigerian Perspective, EDPCA Publications, 2006, 15-17.

²³ Ibid

²⁴ Dokun Oyeshola, O.P., Sustainable Development: Issues and Challenges for Nigeria, Daily graphics Nig. Ltd, 2008, 111; Igwe, Williams O. & Osaro, Ebimere, Human Rights Implication of the Right to Safer Environment and Drinking Water in Ogoni Land: A Legal Investigative Approach, Sacha Journal of Human Rights, vol.4 number 1, (2014), pp.32-43.

and more inclusive decision making processes would certainly make the largest difference.

Increasing, environmental control has been centred on statutory, rather than voluntary controls. This has meant that, under statutes such as NESREA and NOSDRA Acts, the control of the environmental enforcement bodies often depends upon the judiciary.²⁵

The problem in general with judicial review is the restrictive nature of the grounds on which a court will intervene. However, judicial review is important both where a regulator has decided not to prosecute and in relation to a decision to permit a polluting activity by granting a licence.

An action has to be brought promptly and in any case within three months. An applicant has to establish locus standi (standing) – this means that he has to establish sufficient interest in the case. In civil actions the claimant must show an identifiable and direct harm, and this test has been used as part of the basis for locus standi, although the courts are beginning to widen the notion. This is important, as public interest argument are often at stake. There have been a few important recent cases in relation to this. In *R v. HMIP exp. Greenpeace*,²⁶ although Greenpeace lost the case, it did establish standing and the judge widened the notion beyond that of a class action. This is important, as it explodes the myth of group actions on civil claims; that is, a group is seen as an amalgam of individuals where no individual is in a stronger position than any others.²⁷

There has been a large number of judicial review cases in relation to environment and planning, and many pressure groups have been given locus standi to bring actions. Some examples include:

- I. *Twyford PC v. secretary of state for the environment*²⁸
- II. *R v secretary of state for the Environment exp. RSPB*²⁹
- III. *R v secretary of state for the environmental exp friends of the Earth and Another*³⁰
- IV. *Bushel v. secretary of state for the environment*.³¹ Here, objectors in a motorway inquiry wished to cross-examine civil servants about the government's methods of forecasting traffic growth. The House of Lords stated that the government did not have to provide the materials, on the ground that these were matters of policy and confidential within the departments.

However, the problem with these developments is that they have been left to the discretion of individual judges, rather than being a statement of general principle. There is also a concern that there needs to be a specialist court to deal with environmental and planning matters.

CONCLUSION

An important technique for environmentalists is the possibility of asking a court, within its supervisory jurisdiction, to check

that a decision made by a public body has been made in the correct manner. This is known as the action for 'judicial review'. The action is subject to four important limitations. First, it is only available in respect of the decisions of public bodies. It can sometimes be difficult to know whether a body is 'public' or 'private'. The second limitation is implicit in the very nature of the action for review. The courts have repeatedly emphasized that their role is to supervise procedural propriety and not the rights and wrongs of the actual decisions made.

In other words, the courts will not ask themselves whether the decision is a correct one, but only whether it was correctly made. In order to be correctly made, a decision must not be *ultra vires* (i.e. outside the powers granted to the agency, implicitly or explicitly, by the parliament. It must also be reasonable made. The third limitation is the fact that a person can challenge a decision of a public body in a national court unless he or she has a right of hearing, referred in legal parlance as a right of 'standing' or locus standi. In this matter a balance must be maintained. On the one hand, courts tend to believe that it is their duty to block 'mere busybodies' who would otherwise clog up the legal system. On the other hand, there is value in the quasi – regulatory role of interested and well-informed citizens. Indeed, principle 10 of the Rio Declaration reminds us that

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level... Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided.

The fourth limitation is one of costs. To bring an action for judicial review in most common law jurisdictions is to run the risk of financial ruin. The general rule for the award of costs in common law states is that 'costs follow the event'. This means that a litigant may find herself liable not only for her own costs, but also for the costs of the public body whose decision is being challenged: a rather unappetizing prospect. Courts have discretion to depart from the general rule in unsuccessful but meritorious cases.

²⁵ *Rv. Secretary of State and Midland Expressway (MEL) exp Alliance against the Birmingham Relief Road* (1998) New Prop Cas 129.

²⁶ (1994) 2 CMLR 548

²⁷ *R v. North Somerset DC and Pioneer Aggregates (UK) Ltd ex P Garnett* (1998) Env. LR 91;

²⁸ *Twyford PC V Secretary of State for the Environment* (1991) 3 LMLR 89

²⁹ (1997) Env LR 431

³⁰ (1996) Env LR 198

³¹ (1981) AC 75