

Distilling the Nigerian Government's Attitude towards Compensating for Environmental Injustice from Oil Exploitation*

***Fayokemi Olorundami- University of Greenwich, UK
Tokunbo Olorundami- Newcastle University, UK**

Introduction

Since petroleum was discovered in the Niger Delta area of Nigeria, Nigeria has grappled with sustainably managing this resource. Due to oil and gas exploitation activities, some persons in the Niger Delta have lost their means of livelihood. The pollution of the water and land has meant that the traditional occupations, namely fishing and agriculture, can no longer be carried out (Omukoro, 2017). This deprivation of a people's means of livelihood had led to unemployment and consequently, poverty (Ehwarieme, 2009). The Nigerian government itself admits this when it states that '[a]bout 69% of Nigerians are estimated to be living below the poverty level of USD2/day. Poor households rely disproportionately on natural resources and the environment for their livelihoods and income' (Environment Policy, 2016) The United Nations Human Rights Office (Undated) notes the correlation between human rights and poverty when it states that poverty not only deprives people of economic and social rights such as 'right to health, adequate housing, food and safe water', it also violates human dignity. Apart from poverty, there are also health problems associated with pollution from oil exploitation. Eyinla and Ukpo (2006) note that 'discomfort to humans and danger of pulmonary disease epidemic are other environmental problems arising from gas flaring.' It is these problems that have led to constant unrest and agitation in the Niger Delta and the government has responded in different ways. These ways will be examined subsequently to distil the government's attitude towards compensating for environmental wrongs.

Nigeria's Environment Policy

In 2016, Nigeria revised its National Policy on the Environment. This policy was first introduced in 1989 and revised in 1999. This new revision begins by stating that the goal of the policy is to 'ensure environmental protection and the conservation of natural resources for sustainable development'. This goal is expected to be achieved through the sustainable use of natural resources, the restoration and maintenance of the biological diversity of ecosystems, and the participation of local communities in environmental improvement initiatives, among other things. Nigeria reiterates the normal principles of environmental protection as the foundation for achieving its policy aims. These include the polluter pays principle, the precautionary principle, the principle of intergenerational equity, good environmental governance and the integrated ecosystem approach. The policy states clearly that Nigeria as the State is trustee of all natural resources on behalf of its peoples. Therefore, the State must exercise control over these natural resources for the benefit of all Nigerians (each of whom has a right to a clean and healthy environment) and within the context of strategic national interests.

These lofty ideas put forward by the Nigerian government must be taken to imply that where the environment has suffered degradation in the past or where citizens of the country have suffered losses as a result of environmental degradation, compensation is available. This is the normal inference to be made notwithstanding that this is not expressly stated in the policy document. An example may be seen from the fact that the policy alludes to the Polluter Pays Principle. If the polluter normally pays for remediation efforts on the polluted environment and the normal compensation for pollution where there have been other losses incurred, this should be taken to mean that the policy pays regard to environmental justice.

The policy also alludes to the User Pays Principle under which it states that persons involved in the use of a resource (such as land) must bear all the costs associated with the extraction, transformation and use, including the alternative and future forgone use of the resource. This indicates that where, for example, land that would normally be used for agricultural purposes can no longer be used for that purpose because oil extraction must take place on that land, the party involved in the use of the land resource must compensate for the agricultural activities that have been forgone. While all of these suggest that the Nigerian government is committed to ensuring environmental justice and thereby eliminating environmental injustice, it is not clear in practice that it is so committed.

Access to Justice

Access to justice in the courts of law is one area where the Nigerian government has not shown commitment to compensating for environmental wrongs. In a number of cases, litigants have been unable to obtain redress although it was apparent that their losses had arisen as a result of oil operations. Cases in this regard include *Seismograph Service v Onokpasa*¹ and *Seismograph Service v Ogbeni*² where the Supreme Court insisted on the claimant providing expert evidence to prove the causal link between the damage alleged and oil operations. Problems associated with the financial burden of retaining experts to carry out scientific studies of environmental damage in order to prove damage have been highlighted as one of the issues denying claimants' access to justice.

Inability to obtain sufficient redress is also a problem. In *Shell v Tiebo VII*³ and *Shell v Isaiah*,⁴ although the court found that Shell's oil spill had polluted the land and water, no order was made for the remediation of the polluted environment. Remediation was, however, ordered in *Shell v Farah*.⁵ In matters where the polluting activity is ongoing as in the case of gas flaring, the appropriate remedy which is an injunction ordering the defendant to stop flaring gas has proved difficult to obtain as shown in *Irou v. Shell-BP*⁶ where the Court refused to grant an injunction, holding that an injunction would affect oil operations and oil revenues constitute the country's main source of revenue. A similar decision was made in

¹ [1972] 1 ALL NLR 343.

² [1976] 4 SC 85.

³ [1996] 4 NWLR (Pt 445) 657

⁴ [1997] 6NWLR (Pt 508) 236.

⁵ [1995] 3NWLR (Pt 382) 148.

⁶ Unreported Suit No. W/89/71 in the Warri High Court.

*Chinda v Shell-BP*⁷ when the Court refused to grant an injunction restraining Shell-BP from flaring gas within 5 miles of the plaintiff's village, referring to the prayer as 'an absurdly and needlessly wide demand'.

However, in *Gbemre v SPDC*,⁸ the Court of first instance made an order of perpetual injunction against SPDC restraining them from flaring gas in the claimant's community on the basis of the fact that gas flaring is dangerous to health and therefore violates the right to life and right to dignity of the person guaranteed in the Constitution. Those rights included the right to a 'clean, poison-free, pollution-free, healthy environment.'⁹ While this is a welcome development, the matter has been on appeal and no decision has been forthcoming since 2005. While the appeal is ongoing, Shell continues to flare gas in the area as the appeal has the effect of staying the decision of the trial court. Furthermore, a similar case with similar prayers (*Okpara v Shell and 5 ors*¹⁰) was struck out by the Court on the ground that a human rights matter cannot be brought in a representative capacity and the claimants had failed to show how they were directly injured by the gas flaring. This raises doubts as to the seriousness of the government in dealing with matters of environmental injustice.

Locus Standi Rule

In Nigeria as in other countries, a party must have the right to bring an action before the Courts. The locus standi rule requires that for a person to be heard by the courts, he/she must have sufficient interest in the matter. In other words, he/she should show that he/she has suffered damage or is likely to suffer damage over and above that suffered by the general public. This rule can prevent parties from seeking to remedy environmental injustice through the courts if they have not been directly injured by environmental pollution or if they have been injured in a similar way as the general public. Public interest groups are thus prevented from trying to remedy environmental wrongs under this rule. In *Douglas v Shell Development Company*,¹¹ the claim was struck out because the plaintiff, who had requested that Shell comply with the law mandating the carrying out of EIA, could not show how he was injured differently from the general public or that he had a special interest in the matter. In *Gbemre v SPDC*,¹² cited above the claimant succeeded in suing on his behalf and that of his community. However, in the similar case of *Okpara v Shell*,¹³ the Court held that the claimants had failed to show how the gas flaring directly injured them.

Nigeria's recently revised environmental policy recognises that the locus standi rule is an impediment to the bringing of public interest litigation. It states that 'effective monitoring and compliance with environmental laws requires the pro-active disposition of government at all levels, regulatory agencies, civil society groups and private citizens.' It therefore sets out its strategy on the basis of this recognition, namely guaranteeing 'Access to Justice including

⁷ (1974) 2 RSLR 1.

⁸ (2005) AHRLR 151

⁹ Ibid, para 45.

¹⁰ Unreported, Suit no: FHC/PH/SC/518/2005.

¹¹ (1999) 2 NWLR (Pt.591) 466

¹² (2005) AHRLR 151

¹³ Supra.

Environmental Justice, Freedom of Information and Public Interest Litigation'. Public interest litigation, which involves the institution of an action in court 'in a strategic manner to advance the position of disadvantaged and vulnerable groups' will be helpful for the purposes of reducing the financial and literacy problem that currently stands in the way of successful prosecution of cases seeking redress for environmental injustice. The Policy further states that the government would develop and put into operation a National Strategy on Access to Environmental Justice.

These action plans are certainly welcome as they have the potential to remedy environmental injustice. The issue, however, is that this policy has no legislative backing. It must be promulgated into law to be enforceable and there is no timeline at present for when such laws are likely to come into existence. With the current administration nearing the end of its term, there is no guarantee that a new administration would carry on this policy. It is problems like this that cast a shadow on the policy. Additionally, there is no indication at the moment of what the Strategy on Access to Environmental Justice might include. Some recommendations may be thus be made in this regard.

In order to secure access to justice, the Nigerian government could consider creating a special legal aid fund directed at environmental issues. This could help indigent persons seeking redress in court for losses brought about from environmental degradation.

Regarding the problem of discharging the burden of proof when most of the knowledge is with the oil company rather than the party that has suffered losses, it is recommended that the government insists on oil companies keeping adequate records of their activities, including of issues such as spills. These records should be made accessible to the courts when they have to decide on whether a particular damage was the result of a particular spill or oil operation. This will take some of the burden off the claimant. The method of document discovery should also be used to compel parties to submit to the court documents that cover the specific oil operation that is alleged has caused damage. This will, again, enable the court come to a just decision on the apportionment of liability.

Structure of Petroleum Contracts

The structure of Nigeria's petroleum contracts also impact on environmental justice. Although the production sharing contract (PSC) is widely used in Nigeria, Nigeria also employs a different method whereby it enters into joint ventures with international oil companies. Under the JV system, Nigeria and the international oil company contribute towards the costs of petroleum operations and share the petroleum derived thereunder. This arrangement is different from the PSC because the State's agency (NNPC) acts a fellow commercial partner whereas under the PSC, the State is not involved, only companies. This JV arrangement can have implications for achieving environmental justice. If an oil company is required to make good losses caused by petroleum operations under a joint venture, it means that the government would have to contribute towards the costs of this compensation. Yet, the government has an interest in ensuring that it maximises the revenue accruable from the joint venture operations and may be unwilling to contribute toward compensation, even

though it has a responsibility to ensure that environmental standards are respected. The government as both a commercial partner and regulator exemplifies a conflict of interest that casts doubts on the ability to secure a remedy for environmental injustice in such a situation.

Niger Delta Development Commission and the Ministry of Niger Delta Affairs

The NDDC is another of Nigeria's attempts to compensate for environmental wrongs. This Commission was established in 2000 for the purpose of tackling ecological problems which arise from the exploration of oil minerals in the Niger-Delta area. The Commission states that part of its mandate includes 'advising the Federal Government and the member states on the prevention and control of oil spillages, gas flaring and environmental pollution.' The NDDC's managing director, Mr Ekere, recently noted that notwithstanding that the Commission had spent \$40billion in the last 10 years, there was no substantial development due to poor governance. One gets the right perspective when one considers that this \$40 billion represents 80% of the \$50billion originally earmarked for the Commission's work in the Niger Delta over 15 years (ThisDay, 2017). The immediate past president of Nigeria, Goodluck Jonathan, confirmed this when he stated in 2017 that the Commission has failed to provide infrastructural development to the Niger Delta (Premium Times, 2017).

The Ministry of Niger Delta Affairs (MNDA) has suffered a similar fate. It has been accused of squandering about 800billion Naira without any corresponding infrastructural development (Sahara Reporters, 2016). This indicates that a lack of political will to actually right environmental wrongs. These bodies reflect the general Nigerian problem but can, notwithstanding, be strengthened to carry out their duties. Adherence to public procurement laws, transparency and accountability must be upheld if these bodies are to make a reasonable impact.

Conclusion

This article has considered problems of remedying environmental wrongs in Nigeria with a view to distilling Nigeria's attitude in this regard. This included problems associated with access to justice and the Federal Government's intervention schemes such as the NDDC and the MNDA. While the revised environment policy indicates that the government is committed to eliminating the identified problems, it remains to be seen whether this is actually the case as the policy at the moment has no legislative backing. Recommendations made to mitigate the problems identified included passing legislation that allows for public interest litigation, setting up of a dedicated legal aid fund to help indigent litigants in environmental matters and requiring oil companies to keep adequate spill records and make this available at trials that call for them.

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