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APPRAISING THE APPLICATION OF ENVIRONMENTAL AND SANITATION LAWS IN NIGERIA

By

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Abstract

The application of environmental and sanitation laws in Nigeria has been replete with diverse challenges. Despite these challenges, the law may still have prospects of addressing environmental quandaries in the form of air, water, land pollution, improper institutional and household hygiene, deforestation, gaseous emission from oil exploration and exploitation that could cause ozone layer depletion. The objective of this research work is to analyze these issues in the light of extant environmental criminal and civil legislative frameworks in Nigeria in juxtaposition with some aspects of the international legal regime. The research methodology is doctrinal. In this research, vital Federal Environmental related laws were identified and analyzed. The analysis of these laws were coupled with the laws of our states of the Federation. The paper recommends the amendment of Chapter IV of the 1999 Constitution. It is also recommended that the adoption of simplicity in drafting methodology by draftsmen, and purposive judicial construction of environmental law be made less cumbersome. The contribution of the paper to knowledge is that the legal system of environmental and sanitation laws in Nigeria has prospects when the laws are effectively enforced.

Keywords: Environmental, Environmental Law, Environmental Sanitation Constitution

Introduction

Due to the fact that the society is dynamic in nature, so law is also dynamic. Because of progressive development in international jurisprudence, some international environmental law principles have evolved to establish standards for the application of environmental and sanitation laws worldwide, especially because of the exponential growth in international trade and transboundary effects of pollution and natural resources depletion, environmental and sanitation problems are no longer entirely local.

Understanding these basic principles is therefore vitally critical for an effective understanding of environmental and sanitation laws and their implementation. Notable among these principles are the principle of state sovereignty over Natural Resources and responsibility not to cause damage to the environment of neighbouring states or areas beyond national jurisdiction, Polluter-Pays-Principles; principle of preventive action; the principle of corporation; the principle of common but differentiated responsibilities, as well as the precautionary principle, principle of sustainable development which according to the Brundland Report,[1] Sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs…" The principles of sustainable development are encapsulated in Agenda 21 of the 1992 Rio Declaration, which was adopted by the United Nations World Commission on Environment and Development (UNWCED) at Rio De Janeiro, Brazil in 1992.

Clarification of Vital Terms

This section will clarify some terms that have a nexus with the subject of discussion.

Environment: The term environment is a very complex one and it is a term that can be classified differently. It can be classified into physical environment, biotic environment, social environment, economic environment and political environment. It appears that there is no universally accepted definition of the word "environment". The reason for this is perhaps due to the diverse nature of the human environment itself. Nevertheless, for the purpose of this project, both statutory and judicial definitions will suffice. According to Section 37 of the NESREA Act, [2] environment includes "water, air, land and all plants and human beings or animals leaving therein and the inter-relationships which exist between these or all of them". The definition also has a striking semblance with the definition of the word as offered by the Environmental Impact Assessment (EIA) Act.[3] In the express words of the EIA Act, the environment comprises "the totality of physical, economic, cultural, aesthetic and social circumstances, which affects the durability and value of life and property". These statutory definitions contrast aptly with the definition of a word by the Supreme Court of Nigeria in Attorney General of *Lagos State v the Attorney General of the Federation*. [4] In that case, the Nigerian Apex Court stated that "the environment connotes the natural conditions. For example, land, air and water in which people, animals and plant live".

Also, "environment" can be described as the totality of our surrounding. Black's Law Dictionary defines environment as:

> ...the totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of people's lives. The surrounding condition, influence or force, which influences or modifies.[5]

The environment has been further defined as "a description of physical matter being air, the sea, the land, natural resources, flora and fauna, and the cultural heritage (being items of archaeological, historical, artistic and scientific interest").[6] The United Kingdom Law defined the environment to consist of land, air and water – the three environmental media each of which has its own pollution control regime.[7]

According to the United States Environmental Protection Agency,[8] environment is defined as " the sum total of external conditions affecting life, development and the survival of an organism. Albert Einstein once said "the Environment is everything that isn't me.[9]

Environmental Law

Environmental law is a body of law concerned with protecting the natural resources of land, air, water (the three environmental media) and the flora and fauna which inhabit them.[10] Wolf, white and Stanley in Principle of Environmental Law [11] observed that much of the environmental law concerns the regulation of pollution emission discharged into the three environmental media – air, water and land. They posit that the primary function of Environmental Law is not to eliminate pollution, except in the case of a relatively few highly toxic pollutants, but to balance the pollution emission generated by economic activity against the demands of society for a tolerable healthy environment.

According to the Black's Law Dictionary, [12] environmental law is the field of law dealing with the maintenance and the protection of the environment, including preventive measures such as the requirements of environmental impact assessment as well as measures to assign liability and provide clean-up for incidents that harm the environment.

Environmental Sanitation

Sanitation simply refers to measures for the promotion of health, especially drainage and sewage disposal.[13] By this definition, sanitation laws could therefore connote rules, and codes guiding the use of facilities and services for safe disposal or re-use of waste; and maintenance of hygienic conditions through services such as garbage collection and wastewater or liquid disposal.[14]

Principle of State Sovereignty Over Natural Resources and the Responsibility Not to Cause Damage to the Environment of Neighbouring States Or to Area Beyond National Jurisdiction

The principle allows states to conduct their activities as they choose within their territorial jurisdiction, including activities that will have effects on their own environment. It is equally called the Principle of Trans-boundary Responsibility.[15] It imposes an obligation to protect one's environment and to prevent damage to the neighbouring environment.[16] The principle involves a

duty of States to ensure sustainable use of natural resources.[17] The Trail Smelter case (*USA v Canada*) is always a locus classicus in this regard. It involves a dispute over trans-boundary pollution incidents involving the federal governments of both Canada and the United States. Smoke from the smelter caused damage to forests and crops in the surrounding area and also across the Canada-US border in Washington. The dispute between the smelter operators and affected landowners could not be resolved, resulting in the case being sent to an arbitration tribunal. Negotiation and resulting litigation and arbitration were settled in 1941.

Principles of Sustainable Development

International understanding of both sustainability and development has evolved a great deal in recent decades.[18] The current global trend is that international courts and tribunals in their pronouncement are becoming more willing to go beyond a simple "balance" of environmental and economic concerns towards actual integration of environmental, economic and social considerations in development.[19] According to the Brundland Report,.[20] Sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs…" The principles of sustainable development are encapsulated in Agenda 21 of the 1992 Rio Declaration, which was adopted by the United Nations World Commission on Environment and Development (UNWCED) in Rio De Janeiro, Brazil in 1992. As a general principle, international fora have contributed to the growth and expansion of sustainable development by providing a space which State and Non-state actors may come together for a collective discussion of their sustainably-related challenges.[21]

In the 2005 Iron Rhine Railway case (*Belgium v Netherlands*) [22] award of Arbitral Tribunal, which was struck under the auspices of the Permanent Court of Arbitration, the tribunal emphasized the need for a balance between environmental and development considerations. In this case, the Netherland sought to reactivate a railway across the territory of Belgium pursuant to a venerable treaty, but it was unclear which state should bear the burden of Environmental Impact Assessment (EIA) and mitigation measures. In its decision, the tribunal recognized that "… the emerging principles, whatever their current status, refer to conservation, management, notion of prevention of sustainable development and protection of future generation".

Contextually, it could be seen from the decision of the Rhine Railway case that the Arbitral Tribunal applied both the preventive principle and the integration principle as encapsulated in Agenda 21, in order to find that the loss of impact assessment and mitigation measures should be borne by Netherlands which was carrying out the development as an integral part of the reactivation of the Iron Railway rather than the Belgium through whose territory the railway would pass. It is submitted that this decision is a landmark judicial precedent in the sense that the finding bordered essentially on the adoption of necessary precautionary measures by way of Environmental Impact Assessment and the generational index of sustainable development. It follows that where there is doubt as to whether a particular treaty creates rights and liability enforceable by an individual in future, a member of the present generation may bring claims in court by relying upon substantive rules of environmental treaties. Ecuador is famous as the first country in the world to have entrenched laws of nature in its constitution.[23] By the constitutional provision, the environmental rights of nature, comprising animals, flora and fauna have been

fully guaranteed. Any person or class of persons can initiate public interest litigation action in Ecuadorean court against such violation.[24] Such a person or class of person can even speak on behalf of nature in public forums. The constitutional provision is therefore in tandem with the Stockholm Declaration of 1972 which provides a solemn responsibility to protect, and improve environment for present and future generations. [25]

Polluter-Pays –Principle.

The Polluter-Pays-Principle requires the polluter to bear the cost or expense of preventing, controlling and cleaning up pollution to prevent damage to human health or the environment.[26] Its main goals are cost allocation and cost internalization.[27] The principle appears to be an explicit part of legislation in some nations and others, it may be an explicit subtext for both environmental regulation and liability for pollution.[28] The principle contrasts with the principle of preventive action[29] and the precautionary principle.

Application of Environmental and Sanitation Laws in Nigeria

It is very obvious that the Nigerian environmental legal regime is comprised of many laws, statutes, rules and regulations. Essentially the application of these laws when complemented by international conventions which Nigeria had ratified, is targeted at protecting the natural environment from man-induced pollution.

Domestic Application of Laws

Without mincing words, the Federal Environmental Sanitations Laws slated for discussion are the Constitution of the Federal Republic of Nigeria 1999 as (amended 2011), [30] which is the organic law of the land, or the grundnorm that provides that 'the state shall protect and improve the environment and safeguard the water, air, and land, forest and wildlife of Nigeria, the African Charter on Human and People's Right (Ratification and Enforcement) Act,[31] the Fundamental Right (Enforcement Procedure) Rules 2009;[32] the National Environmental Standards and Regulation Agency (NESREA) Act; [33] the Criminal Code Act; [34] the Harmful Waste (Special Criminal Provision etc.) Act; [35] the Nigerian Urban and Regional Planning Act; [36] the River Basin Development Authority; [37] the Oil Pipeline Act; [38] and the Oil in Navigable Waters Act.[39]. They include Locus Standi, negligence, the case of *Ryland v Fletcher*, [40] trespass, and nuisance. Remedies of damages and compensation.

Constitutional Provisions Relating to The Environment

The right to a healthy environment in any country should involve reference to a combination of relevant national principal environmental and human rights legal instruments like the Constitution. Such reference would help to determine the extent to which they generally or impliedly accord recognition to the rights. In the course of this research, it was obvious that none of the environmental laws in Nigeria, including the more recently enacted National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, expressly provided for environmental rights.

Taking together with international legal instruments to which Nigeria is a party, the Nigerian Constitution in Section 20 of Chapter II makes environmental welfare, a fundamental Objective

and Directive Principle of State Policy. A critical perusal of the provision of Chapter II of the Constitution would reveal that there was no express provision for the right to a healthy environment therein. Nonetheless, the Constitution in Chapter IV provides for substantive rights like right to life, dignity of the human person, private and family life, equality and property.[41] These rights appeared to have been expansively interpreted to include the rights to a healthy environment; especially with regard to such public interest matters like the case of *Jonah Gbemre v. Shell Petroleum Development Company (SPDC) Nigeria Limited.*[42] In this case, the Federal High Court held that the action of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration was a gross violation of the plaintiff's constitutionally guaranteed right to life, including the right to a healthy environment and dignity of the human person.

However, the importation of these existing human rights provisions into environmental protection appeared to have been riddled with procedural limitations, including most significantly the requirement that the claimant should establish injury to his health and well-being. A factor which may be usually detrimental to the action. Besides, such importation would equally depend on the orientation of the court, i.e. whether the court is a timorous court or an activist or a 'strong court.' If the court has a timorous orientation, there can never be any judicial leaning towards judicial novelty. On the other hand, an activist or 'strong court', would almost always invoke innovative and intuitive thinking based on laws and facts in order to meet the justice of a case involving obvious environmental rights violations. The court can do this by way of establishing a connection or nexus between the alleged environmental rights violation and the substantive human rights in Chapter IV of the Constitution, as well as, the circumstances which were incidental to the emergence of the environmental problems in question. Incidentally, this qualification is often minimally ascribed to many courts in Nigeria, especially with regard to environmental matters before them. Understandably, the reason appears to be that most of the sitting judges during their law education at the university appeared not to be versed in environmental law and the tenets of environmentalism and Public Interest Litigation. Understanding such tenets would have enabled them to expansively and purposively interpret these environmental rights in juxtaposition with the constitutionally guaranteed substantive fundamental rights in Chapter IV of the Constitution.[43] These constitutional procedural rights when mobilized for environmental protection are enabling rights.[44] They could make it possible for people to contribute actively to the crusade towards environmental protection.[45]

It is advised that although Section 20 of the Nigeria Constitution 1999, places a mandatory duty on the state to direct its policy towards achieving the above environmental objectives. It is obvious that it however never places any corresponding legal right on the citizens to enforce such provision or any other provisions of Chapter II of the Constitution in the event of non-compliance by the state. The reason for this state of affairs might have stemmed from the fact of the constitutional limitation imposed by Section 6(6)(c) of the Constitution against the justiciability of the rights under the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution.

The stipulation of Section 6(6)(c) was judicially interpreted in *Okogie (Trustees of Roman Catholic Schools) v. Attorney General, Lagos State* [46], which is based on the equivalent position of the erstwhile 1979 Nigeria Constitution. The case dealt with the constitutional issues of the plaintiff's fundamental rights under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the state governments like Lagos state government to ensure equal and adequate educational activities at all levels under section 18(1) of Chapter II of the 1979 constitution, which is the equivalent provision of the 1999 Constitution.

On reference to the Court of Appeal, the court while considering the constitutional status of the Chapter II of the 1979 Constitution stated that it was not justiceable by virtue of Section 6(6(c). With equal force, it is respectfully contended that the obligation of the judiciary to observe the provisions of Chapter II ought to be limited to purposive interpretation of the general provisions of the constitution in such a way that the provisions of Chapter II would be adequately observed. The reasoning in the decision was affirmed in the later case of *Adewole v. Jakande*.[47] Also significant is the case of *Attorney-General Lagos State v. Attorney-General of the Federation* [48] where the Supreme Court as per Niki Tobi JSC (as he then was) stated that… "the courts are available to accommodate all sorts of grievances that are justiciable in law and section 6 of the constitution gives the court the power to adjudicate on matters between two or more competing parties." The effect of these decisions is that the provisions of Chapter II of the Nigeria Constitution are only regarded as mere declarations or cosmetic constitutional provisions while their constitutional weight lies at the moral level and this research agrees with the view of Mamman Nasir JCA (as he then was) in the Okogie's case, that its justiciability can only be attained through the appropriate legislation or constitutional amendment via the National Assembly. This appears to have been reaffirmed by the Nigeria Supreme Court in the case of *Attorney-General, Ondo State v. Attorney General, Federal Republic of Nigeria*,[49] involving the constitutional validity of the corrupt practices and other related Offences Act No.5 of 2000 and the Independent Corrupt Practices (ICPC) and other related offences. Both the Act and ICPC were established to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy.

However, in the interim, the decision of the court in *Gbemre v. Shell*.[50] has remained one of the landmark judicial decisions on the right to environment in Nigeria. In that case, the presiding Judge, Justice C.V. Nwokorie commendably adopted the interpretational orientation of considering environmental rights in the African Charter expansively in conjunction with rights to life in section 33 of the 1999 Constitution to arrive at his decision. Jonah Gbemre's case [51] is also a demonstration of glaring instances of situations where even the government may brazenly manipulate the court system for economic interest. The case also illustrates an attempt to use the courts as forums for social protest. However, this goal was never met for lack of a truly independent judiciary. Jonah Gbemre, on behalf of the Iwherekan Community in Edo State, brought the suit against Shell Petroleum Development on the ground that the Shell's gas-flare practices had violated the fundamental rights of the people, which are guaranteed under sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and the African Charter on Human and People's Rights (Ratification and Enforcement) Act. [52] The plaintiff also

argued that the Shell's failure to engage in an assessment of the effects of the gas flares in the Niger Delta region had violated the Environmental Impact Assessment,[53] and that Section 2(2)(a) &(b) of the Associated Gas Re-Injection Act, [54] which permits gas flaring, ought to be declared inconsistent with Section 33(1) and Section 34(1) of the Nigeria Constitution of the Federal Republic of Nigeria,1999 and as such, the Re-Injection Act should be deemed void. Consequently, the plaintiff sought injunctive relief to stop the shell from flaring gas. In November 2005, the Federal High Court in Benin considered the matter. The court issued an injunction stopping Shell and other oil companies which would have included AGIP, Exxon, Mobile, Texaco, Chevron, Total and Addax among many others from engaging in gas flaring activities. The Federal High Court reasoned that gas flaring violated the constitutional rights to life and dignity of the people of the Niger Delta community. The court also found that the gas flaring laws were unconstitutional and void and thereby instructed the Federal Attorney General, as well as the Federal Executive Council to create new gas flaring regulations that would pass constitutional muster.

Although this decision appeared to be historic, victory on the stoppage of gas flaring appeared to be only short-lived, because of the alleged violation of the court's order by Shell which continually engaged in gas flaring. On the contrary, Shell argued in a motion for stay, inter alia, that the Federal High Court had failed to apply proper judicial procedure and that Shell lacked adequate resources to liquefy gas flares.

Ironically, the court was not able to firmly uphold the constitutional principle guiding the case after November 2005, which was the date the court issued an injunction to Shell. It could have done this by enforcing the rights of the plaintiff to a clean, poison-free and pollution-free healthy environment. The court's inability to implement its decision was evidenced by the fact that in April 2006, the court relieved Shell of its obligation to stop flaring gas on the condition that Shell met the quarterly step-by-step reduction in gas flaring. By adopting a step-by-step approach, the goal was to end gas flaring by April 30, 2007. However, the Nigeria Court of Appeal restrained the Federal High Court that Gbemre's case from sitting on May 31, 2006, the date set for the personal appearances regarding Shell's step-by-step proposal to halt gas flaring.

Regrettably, by April 30, 2007, Shell failed to present the quarterly step-by-step gas flaring reduction proposal and was still flaring gas. Between April 2006 and April 2007, Shell did not reduce the amount of gas flared. Moreover, after Shell violated the order and a contempt case was filed, the trial Judge, Justice C.V. Nwokorie who originally heard the case was transferred to Katsina State, a different Judicial division, and the case file was reported to have been lost.

Recommendation

i From the analysis of the cases of *Gbemre v. Shell and Ken Saro-Wiwa Jr. v Shell*, the researcher recommends the amendment of Chapter IV of the 1999 Constitution.

ii It is recommended that the right guaranteed in Section 20 of the 1999 Constitution should be made an enforceable and justiciable right under chapter four of the 1999 Constitution.

iii It is recommended that since environmental protection law is now based on strict liability in advanced countries like the U.S.A, Germany and Australia, Nigeria should follow suit because this is the only way victims of environmental pollution can be compensated.
iv The researcher also recommends that the rule in *Ryland v Fletcher* should be strictly applied in environmental and sanitation laws in Nigeria.
v It is also recommended that the adoption of simplicity in drafting methodology by draftsmen, and purposive judicial construction and interpretation of environmental law be made less cumbersome.
vi It is recommended that law enforcement agents and officers should faithfully enforce the provisions of the environmental and sanitation laws.

Conclusion

This paper has introduced the environmental and sanitation framework in Nigeria, their application, and challenges. If these laws are properly enforced. It is also noticeable that Nigeria like other developing countries has a lot of challenges in the application of environmental and sanitation laws. The paper has shown that by effective application of these legal frameworks, there is a prospect and hope in addressing challenges that have affected the environment and humanity. It has also been critically seen or clear in this paper that environmental and sanitation laws could be effective if they are applied by law enforcement agents.

Endnotes

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