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Mechanisms For Enforcement Of Environmental Standards In Nigeria

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ABSTRACT
This study examined the thorny issues regarding the energy-environment interaction, particularly the appropriate environmental standards for the development of bio and hydro energy in Nigeria and appropriate legal steps towards addressing issues that may arise in relation thereto. It critically analyzed the various mechanisms for the enforcement of such remedies, with particular emphasis on litigation and alternative dispute resolution methods and also considered the challenges inherent in such mechanisms.
Keywords: Enforcement, Environmental standards, Litigation, ADR, Nigeria

1. INTRODUCTION

Energy is central to all human activities and it is needed to support development.[1] Indeed, the economic activities of production and consumption require the use of energy.[2] The challenge posed by the energy-environment interaction remains daunting and does not go without its adverse effects. Since the use of any source of energy has some environmental cost, regulation and enforcement of best practices are a key to a sustainable environment. Put differently, the drive towards the realization of sustainable development in the Nigerian energy sector, particularly through the development of bio and hydro energy must be matched with the articulation and enforcement of such policies, administrative and legal principles that enhance the environment. There is therefore the need to determine the extent to which legal regulation and enforcement of best practices can help promote the sustainable development of an eco-friendly environment. Undoubtedly, the despairing social vices which despondently plague the heterogeneous Nigerian society render the articulation and enforcement of environmental standards through legal regulation a herculean task. This task is rendered more onerous by the complexities and vicissitudes concomitant to the development of the bio and hydro energy in the Nigerian power sector. The resolution of this rather convoluted web of complexities bedeviling the energy-environment interaction in the Nigerian power sector, particularly in terms of the development of bio and hydro energy constitutes the essence of this study.

2. The Courts and Environmental Litigation

Nigeria operates a constitutional democracy with power constitutionally assigned to the three recognized arms of government.[3] By virtue of section 6 of the Constitution, judicial powers are vested in the courts.

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[1] AI Kankara, 'Energy-Environment Interactions: Potentials and Problems of Renewable Energy in Nigeria', (2013) 3(1) *Advance in Electronic and Electric Engineering,* 25 – 30, 25.

[2] GC Chow, 'China's Energy and Environmental Problems and Policies', <http://www.princeton.edu/~gchow/China's%20energy%20and%20envornment%20APJAE2.doc> Last accessed on 8th September, 2015.

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While the judicial powers of the federation are vested in the courts established for the federation, the judicial powers of the state are vested in the courts established for the states.[4] The judicial powers vested in the courts extends to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligation of that person.[5] Further, the judicial powers vested in the courts extend to all the inherent powers and sanctions of a court of law.[6] As courts of law by nature do not act in vain,[7] the decisions of the Nigeria courts are enforceable in any part of the federation by all authorities and persons.[8]

The courts have the fundamental role of keeping the government faithful to goals of democracy. Put differently, the courts have the sacred duty to translate into actuality the noble ideas expressed in the basic laws, and to give flesh and blood, or in fact life, to the abstract concept of rights, including environmental rights, as articulated in our laws.[9] Environmental litigation can take many forms, including civil actions based on tort, contract or property law, criminal prosecutions, public interest litigation or actions for enforcement of fundamental rights.[10] The courts also have the power of judicial review over actions and proceedings of other regulatory bodies exercising *quasi* judicial powers.[11] Thus, persons aggrieved by breach of environmental standards, including those arising from bio and hydro energy activities can approach the courts for legal redress.

Impediments to Environmental Litigation in Nigeria

Over the world, the courts have been held as the last hope of the common man. This claim only holds water where the aggrieved or oppressed member of the society not only obtains justice from the court but also does so within reasonable time with the least possible cost and minimum stress.[12]

Regrettably, over the years it has become common refrain on the lips of most Nigerians that to seek redress in our courts for any injury is a waste of precious time and resources because that relief may not come during the claimant's lifetime. Litigation in Nigeria is a very emotional and quarrelsome matter; it is a matter where Nigerians fight to a finish with all manner of gimmicks to the detriment of substantial justice.[13] The virus of endless adjournments, frivolous interlocutory applications, among others result in litigation backlogs while the current court procedures are cumbersome, bureaucratic, archaic, slow and in all respect not conducive for dispensing justice.[14] Litigation in Nigeria may drag from the High Court to the Supreme Court for many years. This usual delay inherent in the Nigerian legal system most times account for the regrettable resort to self help by some aggrieved Nigerians out of frustration.[15] Even if judgment is obtained from the court after many stressful and traumatic years, it remains a mere academic victory or an empty shell which holds no practical or tangible value in view of the several administrative

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[3] 1999 Constitution of Federal Republic of Nigeria (as amended 2011), ss. 4, 5 & 6. See also *Ugwu v Aramume* [2007]12 NWLR (pt. 1048) 367; *Ogunleye v Aina* [2011]3 NWLR (pt. 1235) 479.

[4] 1999 Constitution of Federal Republic of Nigeria (as amended 2011), ss. 6 (1) & (2).

[5] *Ibid,* s. 6(6)(b).

[6] *Ibid,* s. 6(6)(a).

[7] *Odedo v INEC* [2008]17 NWLR (pt. 1117) 5542; *Agbakoba v INEC* [2008]18 NWLR (pt. 1119) 489.

[8] 1999 Constitution of Federal Republic of Nigeria (as amended 2011), s. 287.

[9] *AG - Abia v AG - Federation* [2006]16 NWLR (pt. 1005) 265.

[10] MT Ladan, 'A Critical Appraisal of Judicial Approach to Environmental Litigation and Access to Environmental Justice in Nigeria', A Paper presented at the 5th IUCN Academy Global Symposium, 31st May – 6th June 2007, pp. 1 – 28.

[11] *Ibid.*

[12] KC Nwogu & MO Nwogu, 'Addressing Delay in the Administration of Justice: Cross Examination as a Major Challenge', (2011) 8(1) *Unizik Law Journal,* p. 1

[13] *Buhari v INEC* (2008) 19 NWLR (pt. 1120) 246.

[14] P Onyenweife, 'Reflection on the Finality of the Appellate Jurisdiction of the Court of Appeal over Appeals arising from the civil Jurisdiction of the National Industrial Court', (2013) 7(3) *Nigerian Journal of Labor Law and Industrial Relation,* p. 20.

[15] OO Akeredolu, 'Access to Justice: Problems and Solutions', (2003) 2(1) *Ibadan Bar Journal,* p. 14.

and bureaucratic bottlenecks associated with the enforcement of judgment in Nigeria, particularly where the government is an interested party.[16]

The weakness of the Nigerian justice system, particularly in environmental protection cases was exposed in the unfortunate case of *Shell Petroleum Development Co. Ltd v Chief Joel Anaro & Ors.*[17] In that case, three different communities (as plaintiffs) had through their representatives sued the defendant in 1983 for oil spillage which damaged their farmlands, streams, properties, etc. The trial court eventually delivered its judgment in 1997 and the defendant appealed to the Court of Appeal. The Court of Appeal eventually dismissed the appeal in 2000 and the defendant, still being dissatisfied, appealed to the Supreme Court. The Supreme Court eventually delivered its judgment in favour of the plaintiffs in 2015, thus bringing to an end a litigation that has lasted for 32 years.

Another impediment to effective litigation of environment matters in Nigeria is knowledge gap among the judges. In Nigeria, a Judge is expected to handle every matter even when it is obvious that he is professionally deficient in the area. Environmental disputes are not overseen by persons with relevant knowledge and experience. Environmental disputes are technical in nature which an untrained mind cannot handle. For efficient adjudication of breach of environmental standards in Nigeria, there is need for creation of environmental courts to be presided over by a crop of seasoned professionals with independent knowledge and experience in environmental matters.[18]

The attitude of the judges to victims of environmental degradation, particularly in the assessment and award of general damages is yet another constraint. It is not unusual to find cases where the courts award a paltry sum as damages, usually because of lack of understanding of the full implications of the breach complained of and the absence of a standard guideline for assessment of damages in environmental cases.[19]

Corruption in the judiciary is another problem. The Nigerian legal system is replete with allegations of judicial corruption at all levels. The socio-economic implication of such corruption is more dangerous than other forms of official corruption.[20] Usually, cases of environmental litigations are often between an economically weak individual and powerful corporations or even the government. A corrupt judge who has little or no integrity may easily be induced to give a decision that would be favourable to the violator of environmental standards. This has greatly undermined litigation as an effective tool for seeking remedies for environmental pollution and degradation in Nigeria.[21]

Burden of proof and standard of proof are other challenges to the enforcement of environmental standards in Nigeria through the court.[22] By law, the burden of proof is placed on the plaintiff in civil cases and on the prosecution in criminal trials, environmental cases inclusive. While the plaintiff is expected to prove his claim in civil cases by preponderance of evidence; in criminal trial, the prosecution is mandated to prove its case beyond all reasonable doubts.[23] In environmental claims which are usually of a highly technical nature and most times difficult for the court to appreciate, the plaintiff or the prosecution has to go the extra length to establish his case through an expert witness.[24] While the victim of environmental violation has all these legal hurdles placed on him by law, the violator who is usually financially and politically strong has little or nothing to do rather than rely on the technicalities inherent in our legal

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[16] P Onyenweife, *op. cit,* p. 20.

[17] (2015) LPELR-24750(SC).

[18] LE Nwosu, 'Appropriate Mechanism for the Enforcement of Environmental Claims', (2001) *Juriscope: A Compilation of Workshop Materials for Alpha Juris Continuing Education Series,* pp. 191 – 192.

[19] See *Shell Petroleum Development Company Limited v Ambah (supra)* where the Supreme Court awarded the sum of ₦27,000 as damages. Also see the case of *R Mons & Anor v Shell BP (supra)* where the ridiculous sum of ₦200 was awarded as damages.

[20] DK Derri, 'Litigation Problems in Compensation Claims for Oil and Gas Operations in Nigeria' in FO Emiri & G Demduomo (eds), *op. cit,* p. 24.

[21] *Ibid.*

[22] MT Ladan, 'A Critical Appraisal of Judicial Approach to Environmental Litigation and Access to Environmental Justice in Nigeria', *op. cit*.

[23] Evidence Act, 2011, ss. 131 – 135.

[24] MT Ladan, *art. cit.*

system to defeat substantial justice.[25] There is an urgent need to reform our law to make violators of environmental standards in Nigeria strictly liable. This would serve as strong deterrent to polluters in Nigeria.[26]

The concept of *locus standi* is another impediment to environmental litigation in Nigeria. In order to have standing to sue, the plaintiff must show an interest which is peculiar to him and not an interest common to the members of the general public.[27] Thus, a party who sues for damages arising from violation of environmental standards in Nigeria must show that he suffered damages over and above that of the general public.[28] Civil society, group of concerned citizens or environmental NGOs have important role to play as monitors and defenders of the environment and are better placed to enforce environmental standards through litigation.[29] By this doctrine of *locus standi*, their ability to do so is seriously limited, unless they can tie the suit as one for enforcement of fundamental human rights.[30] It is recommended that this principle of *locus standi* in environmental litigation should be reviewed towards expanding its scope.

Another major barrier to enforcement of environmental standards in Nigeria through litigation is statute of limitations. Statutes of limitation usually stipulate that an action for breach of environmental standards must be commenced within a time frame. For instance if the violator is a public officer the suit must commenced with 3 months otherwise the right of action will cease to exist.[31] Now, it must be noted that the adverse effects of certain breaches of environmental standards may not immediately manifest itself in apparent and vivid terms like harm to human health; it takes time to manifest. It may take a year or more to manifest.[32] Thus proving such harm if a suit is filed immediately after the commission of the act becomes a problem. If litigation is delayed until the manifestation of the harm, then the issue of statute of limitation becomes a problem and may be pleaded by the violator to escape liability.[33]

3. Environmental Standards and the Use of Alternative Dispute Resolution Mechanisms

Negotiation

Negotiation is a consensual bargaining process, which may or may not involve the intervention of a third party, where the parties to a dispute attempt to reach agreement on the disputed matter or the potentially disputed matter.[34] It is ranked first in order of hierarchy of alternative dispute resolution (ADR) methods.[35] Negotiation involves discussions on dealings about matters with a view of reconciling differences and establishing areas of agreement, settlement or compromise that would mutually be beneficial to the parties or that would satisfy the aspiration of each party to the negotiation.[36]

Where there is damage occasioned by a breach of environmental standards, including those resulting from bio and hydro energy activities, the violator and the affected individual or community may arrange for a joint inspection of the affected site(s) to assess the level of damage to the environment and the properties

[25] *Seismograph Services Limited v Onokpasa* (1972) All NLR 347; *Seismograph Service v Akporuovo* (1974) All NLR 97; *Ogaile v Shell Petroleum Development Co. Ltd* [1997]1 NWLR (pt. 480) 148; *Seismograph Services Ltd v Ogbeni* (1976)4 SC 85.

[26] MT Ladan, *art. cit.*

[27] RA Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel',(2013) 2(1) *Afe Babalola University Journal of Sustainable Development Law and Policy,* 149 – 170, 161.

[28] *Shell Petroleum Development Co. Nig. Ltd v Chief Otoko & Ors* [1990]6 NWLR (pt. 159) 693; *NNPC v Sele* (2004) All FWLR (pt. 223) 1859 CA.

[29] MT Ladan, 'A Critical Appraisal of Judicial Approach to Environmental Litigation and Access to Environmental Justice in Nigeria', *op. cit.*

[30] The Fundamental Rights (Enforcement Procedure) Rules 2009, by virtue of Paragraph 4(e) of the Preamble thereof, as well as Order I Rule 2 allows public interest litigation, class actions and representative actions in Fundamental Rights cases.

[31] Public Officers Protection Act, Cap. P41 *Laws of the Federation of Nigeria* 2004, s. 2.

[32] AP Isa, *op. cit.*

[33] *George Thorsfall & Ors v Shell BP Development Company* (1974)2 RSLR 126.

[34] OG Amokaye, *op. cit*, p. 683.

[35] K Damfebo & FO Emiri, 'Towards Alternative Dispute Resolution (ADR) for Compensation Claims for Oil and Gas Operations in Nigeria' in FO Emiri & G Demduomo (eds), *op. cit,* p. 37.

[36] AP Isa, *op. cit.*

of the individual or the community, or both sides may undertake independent financial assessment and evaluation of the damage for purposes of the negotiation.[37] Following this, both sides schedule and meet for the negotiation. The violator may make an offer and if accepted, the agreed amount will be paid to the affected victims. If rejected, further negotiation may be made or in some cases the aggrieved party may resort to litigation.[38] This was the position in the case of *Shell Petroleum Development Company Limited v Farah*[39] where the appellant through negotiation paid a paltry sum to the affected families for damage to their land. The said families, not being satisfied with the compensation paid, went to court and got substantial sum in damages.[40]

In order to achieve a successful negotiation, it is important for the claimant to seek the services of a legal practitioner; and to have an expert make the assessment and preparation of the pre-negotiation terms, and possibly, for the expert to be part of the negotiation team.[41]

Mediation

This is a process of resolving dispute with the aid of a neutral third party. Mediation is an important tool to resolve cases of breach of environmental standards, especially where the amount of compensation payable is the crux of the dispute between the parties and they are unable to mutually agree among themselves.[42] Mediation offers a unique opportunity for both the violator and the victims to resolve gray areas of their dispute. The use of mediation in resolving environmental dispute particularly in environmental impact assessment matters is elaborately authorized by sections 32 and 33 of the Environmental Impact Assessment Act.

Conciliation

This is also another mechanism that can be utilized by the victims of breach of environmental standards. When negotiation fails, conciliation offers another opportunity for parties in environmental cases to reach an out-of-court settlement.[43] The parties to the dispute must first consent to have same settled by conciliation.[44] The conciliatory body hears the parties and thereafter submits its terms of settlement to the parties without imposing same on them. When the parties agree to the terms of settlement, the body draws up a record of settlement for the parties to sign. If they do not agree, they may then submit their dispute to arbitration or resort to litigation.[45]

Arbitration

Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person or persons selected by them for a decision based on the evidence and agreement to be presented before such person(s).[46] In contentious environmental pollution disputes, parties may by mutual agreement, refer the case to an arbitral panel for resolution.[47] The arbitral panel hears the parties and receives evidence from their witnesses.[48] At the end of the proceedings, the arbitral panel makes an award.[49] Arbitration has its

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[37]DA Gberesu, 'The Concept of Fair and Adequate Compensation in Nigeria Oil Industry' in NNPC, 'The Petroleum Industry and Nigerian Environment', Proceedings of NNPC Seminar held at Lagos, 1989, pp. 46 – 48.
[38] *Ibid.*
[39] *Supra.*
[40] *Shell Petroleum Development Company Limited v Edamkue* [2003]11 NWLR (pt. 832) 533.
[41] OG Amokaye, *op. cit*, p. 682.
[42] DK Derri, *op. cit*, p. 38.
[43] OG Amokaye, *op. cit*, p. 685.
[44] Arbitration and Conciliation Act, Cap. A18 *Laws of the Federation of Nigeria* 2004, ss. 37 – 39.
[45] *Ibid,* ss. 40 – 42.
[46]JO Orojo & MA Ajomo (eds.) *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates, 1999) p. 37.
[47] Arbitration and Conciliation Act, s. 1; AP Isa, *op. cit.*
[48] Arbitration and Conciliation Act, First Schedule (Arbitration Rules), Arts. 24 & 25.
[49] *Ibid,* s. 27.

advantages over litigation. Arbitral proceedings are usually overseen by professionals with relevant knowledge and expertise in the subject of arbitration unlike the regular court.[50] Arbitration pursues substantive justice because arbitral proceedings are very liberal and devoid of technicalities and complexities associated with the regular court.[51] Arbitration is flexible, speedy and cheaper when compared with litigation. In arbitration the concept of burden of proof associated with adversarial mode of adjudication is dispensed with. There is lack of publicity in relation to the proceedings and hearing is expeditious since the vexatious delays in litigation are avoided.[52] However, arbitration has its own constraints such as the issue of impeachment of an award, enforcement of an award and sitting aside of an award since the parties may have to resort to litigation in such cases.[53]

4. CONCLUSION

It is no news that currently, Nigeria aside hydro energy is heavily dependent on fossil fuels for her energy needs, such that generation of electricity in Nigeria, to a reasonable extent, relies on natural resources like petroleum, natural gas, and coal. The extraction and conversion of these fossil fuels into electricity have significant impact on the environment. The increased emphasis being placed on renewable energy sources such as biomass and hydro energy further compounds the problem, since these also have negative environmental impacts. The problem then is that in so far as electricity generation in Nigeria is concerned, environmental pollution and degradation is bound to occur. Hence, adequate mechanisms by way of litigation and/or ADR must be put in place.

[50] CJ Okeke, 'The Challenges of the Nigerian Arbitration and Conciliation Act', (2015) 3(1) *JCINL*, p. 110.
[51] *MW Kemmer & Ors v Nigerian Agip Oil Company Ltd* (Unreported) Judgment in Suit No. FHC/PH/CP/27/99 delivered by the Federal High Court, Port Harcourt Judicial Division on March 31, 2001.
[52] DK Derri, *op. cit*, p. 44.
[53] EG Oturu, 'Law and Practice in Settlement of Disputes Arising from Petroleum Operations', (2005) 3(4) *Nigerian Bar Journal*, p. 41.