

THE ENVIRONMENT, OIL AND HUMAN RIGHTS IN NIGERIA*

Abstract

The objectives of this article are two-fold: to present a critical view of the relationship between fundamental human rights, social rights, the oil and gas industry in Nigeria and the environment. In so doing, regard will be had to some international conventions, the Constitution of the Federal Republic of Nigeria, various literature on the subject and decided cases. The reason for picking this topic is not far-fetched. No discussion on development and the well being of human beings can take place without regard to the right to life, the natural capital called land, natural resources which includes oil and gas and the environment in which life itself must flourish. All human activities must take place in the environment in which humans have found themselves. This article is in four parts, the first part attempts to define 'environment' and introduces efforts to care for or protect the environment. The second presents human rights and its relationship to the environment or environmental rights. The third discusses the protection of the environment through legislation and the fourth analyses the possible effect that direct legislation can have on the oil industry activities and the possible effects for future environmental rights and issues. The work concludes by way of some pieces of advice and recommendations on environmental protection in the oil industry.

Introduction

The environment can be defined as the whole complex of physical, social, cultural, economic, and aesthetic factors which affect individuals and communities and ultimately determine their form, character, relationship and survival¹. This definition remains true today and will be sufficient for the purpose of this article. However, the environment can be defined as our surroundings, especially material and spiritual influences which affect the growth, development and existence of a living being². Since June 1972 when the United Nations made a declaration on the human environment at Stockholm, the international community has appreciated environmental rights. By 1992 at the Rio De Janeiro Conference the full import of a healthy environment as an issue of classification of human rights gained ground on a global pedestal³. Human rights drive has remained a good idea of civilization, everywhere acknowledged as good⁴. It's classes are diverse and still emerging. In relation to rights generally, environmental rights are posited to belong to the third generation of rights⁵. Interestingly, all generations of rights are seen to be interconnected, interrelated, inter-dependent indivisible, inalienable and fundamental. It must then be a paradoxical world we live in for man to be free and happy when his

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¹ John G. Rau and David Wooten (eds.) '**Environmental Impact Analysis Handbook**', McGraw-Hill, New York, 1980, pg 12.

² **Lawrence T; Lorimer (ed), The New Lexicon Webster's Dictionary of The English Language**, Lexicon Inc. New York, 1996, **The Concise Oxford Dictionary**. Clarendon press, 1995, A Oludayo Amokaye: 'Human Rights and Environmental Protection' in **UNILAG Journal of Human Rights Law** vol 1, no 1, 200, p.94

³ At the 1992 United Nations Conference on Environment and Development, Rio De Janeiro June 3-14, 1992. Declaration on Environment and Development.

⁴ L. Henkin, **Introduction in the Rights of Man Today** Agenda for the 21st century, Stevenson Publishers 1979

⁵ Oludayo Amokaye: 'Human Rights and Environmental Protection' in **UNILAG Journal of Human Rights law** vol. 1, No 1 2007, p93

environment is abused and degraded. When the quality of air he breathes is fouled and unhealthy. The water he drinks is impure and contaminated by chemicals, toxic and hazardous substances that decrease its volume and quality daily. The food he eats is contaminated with toxic, hazardous and carcinogenic substances. Above all, he is every day confronted with the threat of environmentally-related diseases among other things. This is the picture of the world in which humankind by its self-induced activities especially in the oil and gas industry has undertaken a voyage of self-destruction of the environment in the guise of development and the sourcing of energy.

It is trite that while important genetic determinants of disease exert their effects irrespective of exposure from outside the body, these do not contribute as much to the overall public health burden of disease as that associated with poor environment.

Relativity of Human Rights

Human rights have been described as the rights that exist for every human being for the simple fact of humanity. It is also widely understood that generally, the environment has a role to play in public health concerns, community development and preservation of human populations.

It is on record that over sixty-two (62) Conventions have been passed by the International Community on environmental protection so as to save humanity. To mention but a few of those Conventions:

- a. International Convention on Civil Liability for Oil Pollution Damage 1969 (1969 CLC), Brussels, 1969, 1976 and 1984
- b. International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), London, 1990.
- c. Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 1981.

Nigeria has some domestic Laws protecting the environment and humanity as well and these include:

- i. 1999 Constitution of the Federal Republic of Nigeria; Cap C 23 LFN 2004.
- ii. Environmental Impact Assessment Act Cap E12 LFN 2004
- iii. National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act, CAP N164 LFN. 25, 2007 (this Act repealed the Federal Environmental protection Agency Act Cap F10 2004 by the Provisions of its S. 36)
- iv. National Oil Spill Detection and Response Agency (Establishment) Act, CAP N157 LFN 2006
- v. Harmful Waste(Special Criminal Provisions) Act Cap H1 LFN2004
- vi. Land Use Act Cap L5 LFN 2004
- vii. Oil in Navigable Waters Act, Cap O6 LFN 2004
- viii. Oil Pipelines Act Cap O8 LFN 2004
- ix. Petroleum Control Act Cap P8 LFN 2004
- x. Petroleum Act Cap P5 LFN 2004

- xi. West African Gas Pipeline Project (Special Provisions etc) Act Cap W8 LFN 2004

The Role of Human Rights in Environmental Protection

The environment can be best described as the immediate physical surroundings and natural habitat in which an individual exists. Against the backdrop of the calamities which have arisen as a result of industrialization and particularly the exploration and exploitation of oil and gas resources, Human rights laws have a place to prevent, reduce or eliminate self-destructive human activities against the environment. There are linkages between human rights and environment, and such linkages can assist to protect human rights and environment

The linkages are better analyzed from the provisions of the 1972 Stockholm Declaration that:

Man has the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears solemn responsibility to protect and improve the environment for present and future generations....⁶

While the Principle 1 of the 1992 Rio Declaration on Environment and Development provides that:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature⁷.

However, the fact that environmental rights ordinarily do not belong to the first generation of rights, sometimes make its enforcement difficult. In Nigeria, it is provided for in the Constitution in Chapter II under the Fundamental Objectives and Directive Principles of State Policy⁸ which is not justiceable *per se*.

The question arises as to what happens to the non-justiceable rights⁹ including the environmental objective provisions that:

The State shall protect and improve the environment and safeguard the water air and land, forest and wildlife of Nigeria¹⁰.

Indigenous Nigerian Constitutions since inception have contained the International Covenant on Civil and Political Rights (ICCPR). Human Rights provisions are justiciable by the courts with the power to wide interpretation. In **Okogie v Attorney General Lagos State**¹¹ Aguda J. opined that:

⁶ It must be noted that there are 26 Principles contained in the Stockholm Declarations .

⁷ The 2 Declarations definitely positively impacted on the environmental rights provisions in municipal laws of many nations of the world.

⁸ Sections 13- 24 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

⁹ By section 6 (6) (c) of the CFRN, (1999) (as amended in 2011).

¹⁰ Section 20 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

¹¹ [1981] 1 NCLR 218

Section 36 of the 1999 constitution, as well as other provisions under chapter IV of same constitution should be broadly and generously interpreted in order to give full recognition and effect to those Fundamental Rights and Freedoms.

It is expected that the Courts must be liberal and proactive particularly where acts are carried out that resulted in environmental degradation or pollution as decided in **Shell Petroleum Development Co. Ltd v Farah**¹² where Onalaja JCA as then was opined what is today referred to as a land mark decision on Oil pollution as follows:

There is a universal phenomenon of Oil blow-out in Oil industry as recorded in Alaska, United States of America over the EXXON Oil spillage saga and more recently in the Republic of Russia. The judgment of learned brother is a guide and an appraisal of the law about Oil Spillage or blow-out in Nigeria now. It will serve as beacon of light to Oil Mineral Producing areas of Nigeria as to the certainty of the legal rights of the citizens in claims for compensation arising from oil spillage or blow out.

It is also a guide to the oil companies in settlement of compensation arising from oil spillage or blow-out. Very impressive is the emphasis on legal rights of citizens in relation to negative effects on their immediate environment as well as the caution on companies involved in what can lead to environmental pollution.

The Rights in the Nigerian Constitution

Though in the 1990s, the courts seemed to have made even the non-justiciable rights justiciable by relying on the domestication of the African Charter, a regional instrument on Human Rights. In **Uzoukwu v Ezeonu II**¹³, the Court Appeal held inter alia that:

There are other rights which may pertain to a person which are neither fundamental nor justiciable in the Court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution.

The judicial pronouncement on the rights under the Directive Principles provisions was re-echoed in **Abacha v Fawehinmi**¹⁴ where the Supreme Court, relied on the domestication of the African Charter in Nigeria and upheld the decision of the Court of Appeal.

¹². [1995] 3 NWLR (pt. 382) 148

¹³. [1991] 6 NWLR (pt.200) p.708

¹⁴ [1994] NWLR (pt. 306) p.1

The Right to a Healthy Environment and Oil Discovery

The African Charter recognizes the right of all people to a generally satisfactory environment favourable to their development¹⁵. The state parties to the Charter are therefore under a legal obligation to adopt legislative and other measures to give effect to this right¹⁶. The Nigerian Supreme Court has, in **Abacha v. Fawehinmi**¹⁷ held that the Nigerian Government is obliged to respect its obligations under the Charter, which has been incorporated into domestic law through legislation¹⁸. The 1999 Nigerian Constitution also imposes a duty on the State to “protect and improve the environment and safeguard the Water, Air and Land, Forest and Wild Life of the country”¹⁹. However, just like the Indian Constitution, this provision of the Nigerian Constitution is placed in Chapter 2 of the Constitution, which is non-justiciable. This should not detract from the obligation on the part of the state to protect and improve the environment²⁰. It is instructive that the Indian Supreme Court has, through an expansive policy of constitutional interpretation, maintained that the right to life, and enforceable civil and political right includes the right to a healthy environment²¹. In my view, the establishment by the government of National Environmental Standards and Regulations Enforcement Agency (NESREA) is a step towards fulfilling its obligation as described above.

Although the right to a healthy environment belongs to the contested category of ‘third generation’²² or ‘solidarity rights’, there is wide consensus that ‘human rights’, an ecologically sound environment, sustainable development and peace are interdependent and indivisible. Accordingly, all persons shall have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threatening life, health, livelihood, well-being or sustainable development within, across or outside national boundaries²³.

In the exercise of adjudicatory functions, the Supreme Court and Court of Appeal in Nigeria have given full support to the justiciability of some rights in chapter 2 of the Constitution.²⁴ This is thus a stepping stone in the pursuit of justiciability of environmental rights which are inseparable from human rights generally. The combined effect of the ratification of the African Charter on Human Rights by the

¹⁵. Article 24 African Charter on Human and Peoples’ Rights

¹⁶. Article 1 African Charter on Human and Peoples’ Rights

¹⁷ *Supra*

¹⁸. African Charter Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004

¹⁹ S. 20 1999 Constitution of Federal Republic of Nigeria, (as Amended)

²⁰. *Ibid.*

²¹. See generally Michael Anderson, “Individual Rights to Environmental Protection in India”, in Human Right Approaches to Environmental Protection, Peggy Rodgers Kalas, Environmental Justice in India, **Asia-Pacific Journal on Human Rights and the Law** 1:97 — 116, 2000.

²². See D Harris, **Cases and Materials on International Law**, (5th ed.) London: Sweet & Maxwell, pg. 624.

²³. See Articles I and 5 of the Draft Declaration of Principles on Human Rights and the Environment. The Draft Declaration is the first international document that comprehensively addresses the linkage between human rights and the environment

²⁴ Constitution of the Federal Republic of Nigeria 1999

Federal Republic of Nigeria²⁵ and the existing judicial pronouncements in **Abacha v. Fawehinmi**²⁶ is that Nigeria should now move towards justiciability for some of the rights provided for in chapter II of the Constitution.²⁷

This is more easily attainable because such rights as in Chapter II of the Nigerian Constitution cannot easily be separated from the justiciable rights enshrined in chapter IV of the same constitution as fundamental rights.²⁸

Therefore in the enforcement of fundamental rights, attention must be paid to the social rights without which certain fundamental rights will at best only be partially secured. The question may be asked, of what use is the right to life when the environment which guarantees life itself is polluted, damaged and unprotected? Of course the obvious answer will be that there will be no use for life without any attendant environmental safeguards.

Protecting Environmental Rights by Legislations

The existing legal regime for the management of the petroleum industry has been overtaken by realities and leaves a lot to be desired. It may not be enough to merely amend the relevant laws without fully revisiting the entire regime to take into account the needs of the day.

Now that the failure of the regulatory framework is a glaring fact, there is need for legislation that goes way beyond regulating exploration and upstream production operations, to cover more satisfactorily the full range of challenges that arise in an oil driven economy.

Policy Recommendations

A creative oil governance mechanism for Nigeria should be underlined by the following considerations:

- i. The overall strategic role of oil in the economic development of the country especially its contribution to economic transformation and the utilization of specific percentage of the oil revenue to fund environmental protection agencies and ensure environmental protection and sustainability.
- ii. Building the requisite local technical expertise for responsible management of the environment in the oil industry and thus making it easier to combat the incidents that may have negative effect on the environment as they occur.
- iii. Direct linkage between oil revenues and raising the standard of living of ordinary Nigerians and poverty eradication. A percentage of the oil revenues should go directly to poverty eradication, stipulating what percentage for which areas (e.g. education, agriculture, health, rural development) and this should be more than the 13% derivation formula currently in place
- iv. Mitigating and remediating the damages to the environment attendant from oil exploration, production and distribution activities.

²⁵ African Charter Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004

²⁶ *Supra*

²⁷ Constitution of the Federal Republic of Nigeria 1999

²⁸ *Ibid*

Control and Monitoring of Oil Revenues

Given Africa and indeed the Nigerian experience with mismanagement of oil revenues, it is important from the outset to put in place a joint government-civil society Petroleum Oversight Committee (P.O.C) comprising government officials and people from civil society. All oil revenues must fall within the scope of this committee.

In Chad for example there is a committee known as: *College de Controle et de Surveillance des Ressources Petrolieres*.²⁹ It is composed of: Representatives of government, Parliament, Supreme Court and civil society. Direct oil revenues can neither be allocated or disbursed toward specific programs without the approval of the oversight committee.

Chad has another regulatory agency known as: *Comite Technique National de Suivi et de Controle* (CTNSC). This committee is Chad's inter-ministerial committee responsible for monitoring and following up on the environmental and social impacts of projects. It was created in July 1997. It is also responsible for overseeing the implementation of World Bank's Petroleum sector Capacity Building Project³⁰

Other Measures of Improving the Environment

- a. **Capacity Building:** In order to strengthen the government's capacity to negotiate with oil companies, capacity building of the state institutions concerned with oil must not lag behind oil operations. For instance, institutions tasked with supervising the social and environmental impacts of oil activities must have the capacity to do so from the start of oil operations.
- b. **Ethical conduct for security firms in oil areas:** The government should ensure that the employment of local people to provide security at oil facilities does not result in abuses by those hired or in violent conflict between and within communities for the right to the contracts. All security firms engaged must be held to ethical conduct and respect for human rights and must act in a lawful manner.
- d. **Engendering the oil industry activities:** The policy must pronounce itself on the strategies to be adopted to mitigate the adverse effects of oil exploration and production on the economic livelihoods of women and communities in which oil exploration and production activities exist or are carried out in.
- e. **Oil as an agent for economic transformation:** The policy should be clear on the overall strategic role of oil in the economic development of the country, especially its contribution to economic transformation.

Conclusion

The Federal Government of Nigeria should be mindful of maintaining clean and healthy environment as key issues to sustainable development and happiness of the citizens of the nation in accordance with International best practices as provided in various Conventions.

²⁹ http://web.worldbank.org/archive/website01210/WEB/0_CON-4.HTM last accessed 19/9/2011

³⁰ <http://go.worldbank.org/5MGHQ1ZQ01> last accessed 19/9/2011.

It is obvious that the solution to healthy environment will never be realized by formation of Commissions, for example the Oil Mineral Production Areas Development Commission (OMPADEC), which has been scrapped, or the Niger Delta Development Commission (NDDC) which is currently experiencing financial set backs or more recently, the (National Environmental Standards and Regulations Enforcement Agency (NESREA) and the National Oil Spill Detection and Response Agency (NOSDRA) established before it. But in protective MOUs and in educating the people on the importance of maintaining sustainable environment. Suffice it to state that in event of any environmental pollution and degradation that adequate compensation as of right must be paid to the affected people as well as effective machinery being put in place to restore the affected environment back to its prior condition as much as practicable. This will arrest complaints and the effects of oil industry activities particularly in the Niger Delta areas.

Unfortunately the provision on environment in the Nigerian Constitution³¹ is not yet generally accepted as justiceable obviously because of conflicting constitutional provisions. Therefore, in order to align with the Supreme Court judgement in **Abacha v. Fawehinmi**³², there is need for immediate amendment of the Nigerian Constitution to make the provisions for environmental protection justiceable so as to provide easy access to justice on environmental and social issues by citizens and communities negatively affected by oil industry activities.

³¹ S.20 Constitution of the Federal Republic of Nigeria, 1999 as amended

³² *Supra.*