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Prosecuting environmental crimes in Nigeria

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Abstract
Environmental crimes in Nigeria, like other climes, are offences against the environment, particularly the contravention of legislation, codes, guidelines, standards and regulations enacted to prevent pollution of land, air, water, biodiversity degradation and the ecosystem as well as the deleterious consequences on the environment, rights holders and victims of violation. Violators or offenders are either humans or corporate beings, who interfere with nature's order of the environment, the intervention may be by exploitation of the natural resources for development or industrial activities. This article examines the effectiveness of prosecution of such environmental offenders in Nigeria in line with existing legislation, National Environmental Standards, Regulation and Enforcement Agency (NESREA) Act, 2007. The research concludes that there has been no successful prosecution of environmental offenders in Nigeria since the inception of the array of legislation enacted for the protection of the Nigerian environment. There is no gain saying that environmental crime is very specialised specie of the Nigerian Jurisprudence. Though the two elements of environmental crime ie mens rea, actus reus, and standard of proof – beyond reasonable doubt remain the same as any traditional crime, the standard of proof and the proof of evidence, material or substantial, are way beyond the reach of an average legal practitioner. Prosecution is therefore frustrating and unaffordable for victims. The work recommends that Courts with special jurisdiction on environmental issues be created. And further that, intensive capacity building of relevant stakeholders built on environmental criminal jurisprudence; adequate public enlightenment program embarked upon to create awareness on the right of citizens to seek redress in case of violation.

Keywords: prosecuting environmental crimes, Nigeria

Introduction

Evolution of environmental jurisprudence, in Nigeria is rather slow and characterised by non- deliberateness in addressing issues of environmental protection. It is doubtful if Nigeria or any sub-Saharan developing country has the political will to properly enforce compliance with environmental laws, where such laws exist against the quest for development. This may be because most developing countries see development in all its angles as a necessary priority and may therefore be unwilling to compromise strict compliance with environmental policy over the use of the natural resources abounding in her domain for its growth. Exploitation of these natural resources result in environmental degradation. When development and environmental protection of Nigeria as other climes is placed on the scale, the tilt is towards development.

For decades in Nigeria, oil exploration has dehumanized the people, particularly in the Niger Delta [1] while annihilating the environment [2]. Inspite of the number of environmental regulatory laws in Nigeria, administrative and enforcement agencies, environmental crime remains a prevalent phenomenon. A million and more reasons may be adduced for this ineptitude: it is either due to the lack of public awareness of private citizens' right to bring an action for environmental crimes or the fact that our criminal jurisprudence saddles only the Attorney-General of the federation with the power to initiate criminal prosecution at the federal or the state [3]. It is also a fact that private persons must otherwise obtain the fiat of the Attorney-General to initiate criminal prosecution. Thecourts are not sufficiently specialized to handle environmental crime cases which require expertise in weight and measurement. It must also be noted that not many lawyers in Nigeria possess the requisite knowledge of environmental criminal prosecution, whether as state or private prosecutors. Some investigators and compliance officers of the agencies created by legislation are easily overwhelmed by the quantum of bribe offered by Multinational Oil Companies. Corporate violators of environmental regulations have enormous capacity to influence institutions with much more fine than what the law provides. Private persons lack capacity to withstand them. Financial, scientific and technical requirement to prepare and lead evidence is beyond the reach of private persons. Fines provided by law are usually very minimal compared to the effect to environmental pollution. Corruption is therefore a major set-back and bottleneck in the enforcement of environmental criminal regime.

This work argues, strongly, the need to empower private persons to commence environmental criminal prosecution without fiatof the Attorney – General of the federation. It is further suggested that public interest litigation should be promoted to allow intervention by environmental rights advocates in environmental violation. The paper proposes adequate public enlightenment on the right of citizens in environmental crimes, training of state prosecutors on the elements of proving environmental crimes, establishment of special courts, Environmental Courts, and appointment of environmental lawyers as adjudicators. Environmental crime investigators should be equipped with requisite skills, technological and scientific capacities to function effectively.

Environmental Criminal Litigation in Nigeria

Prior to June 1988, Nigeria responded to most environmental problems on an *ad hoc* basis. Although the Nigerian Criminal Code contained some provisions with respect to certain environmental infringements, such as the pollution of water sources, the burial of corpses within a hundred yards of residential home, and the sale, possession or manufacture of matches with white phosphorus, the code lacked any concrete national legislation dealing specifically with the ever-increasing pollution caused specifically by hazardous waste. Environmental legislative provisions in existence at the time were enacted in direct response to problems associated with the newly industrializing economy and the discovery and processing of oil [4]. However, it must be noted that the discovery of toxic waste dumped in Koko, in the remote part of the old Bendel State and the attendant media and public outcry geared up the government to a swift reaction. The Harmful Waste (Special Criminal Provisions) Act, 1988 was the product of the incident.

Legal Order Prior the Koko Incident

Historically, environmental violation was pursued from a civil liability perspective when attempts at negotiation for compensation fails. The Common Law Tort has been the respite for victims of environmental pollution [5]. This has provided the principal means, over the years by which persons whose private rights are violated claim compensation.

The main cause of action for environmental pollution can be found in the traditional common law tort of nuisance, trespass, negligence and the Rule in Ryland v Fletcher [6]. The rule in Ryland v Fletcher, which is one of strict liability, has been used in cases of environmental pollution [7]. Under this rule, defendant is held strictly liable if plaintiff proves that there was accumulation and escape of something dangerous from the defendant's custody, land or premises to somewhere outside his occupation or control [8]. Also, the plaintiff will be required to provethat there was a non – natural use of the land or premises [9]. Sanctions available under these rules are mainly compensation for damages, injunction and restitution.

The determination of non-natural user and what constitutes a mischievous thing that must have been brought and accumulated on the land has been considered in environmental litigation in Nigeria.

The hazards of pollution associated with the oil industry and the rapid growth of manufacturing activity in Nigeria since the late 60s would seem to have ensured an important role for the Ryland v Fletcher principle. Surprisingly, however, there appears so far to be very few cases in which the principle has been invoked or discussed and applied. Perhaps the most significant instance where the Nigerian Supreme Court applied this rule is Umudjev Shell BP Nig. Limited [10].

A defendant faced with a suit premised on the Rule in Ryland v Fletcher can avail himself of any of the defenses such as; act of God, act or default of plaintiff, consent of plaintiff, independent act of third party and statutory authority [11]. Hence, a victim of environmental pollution has no water-tight legal arsenal to hold the polluter fully responsible for his deleterious act or omission. In Otukuv Shell BP [12], oil from the defendant's manifold escaped into the plain tiffs fishpond and onto some of his land. In awarding the plaintiff damages, the Judge held that the manifold that was placed on the land constituted a non-natural use of land. The main defect of the rule, however, comes from the numerous exceptions contained in it, which have reduced its utility as a strict liability rule.

Trespass on the other hand is the unauthorised intrusion on or invasion of property. The intruder or invader does not have to be a natural or artificial person; it may be a substance from another property. Thus, in Gregory vPiper [13], garbage from the defendant's property was blown by the wind onto the plaintiffs property. It was held that the defendant had trespassed on the land of the plaintiff. This common law rule aims to protect the welfare, health and safety of citizens. Every person has a right to quietly and comfortably enjoy his or her property.

Tort of negligence has also been relied upon by victims of environmental damage. The burden of proof is always onerous, and in most cases insurmountable. The plaintiff must establish that there exists a duty to conform to the required legal standard. There must also be a proven failure to conform to the standard. And then a causal link between the breach and the harm done must be established. In Simon Onajokev Seismograph Services Ltd [14] the plaintiff's building was damaged during the blasting operations of the defendant. The Judge held that the defendant owed to anyone whose house was likely to be damaged by the blasting operations a duty to take steps to avoid such damage by moving to an area where the operations would not cause damage. Damages were awarded to the plaintiff for the injury done. This to my mind is a commendable judicial activism and revolution necessary for a turnaround in our environmental criminal jurisprudence.

In some cases, the maxim *res ipsa loquitur* (the fact speaks for itself) had been relied upon to relieve the plaintiff from the onerous task of proving negligence [15]. Thus, in Victor Elem v Shell BP [16], oil escaped from the defendant's oil site onto the plaintiff's property, causing damage. The Judge evoked the principle of *res ipsa loquitur* and awarded damages to the plaintiff. This again, is the judicial courage required in the 21st century Nigerian environmental criminal jurisprudence.

Unlawful interference with a person's enjoyment of his or her land has led to successful environmental litigation under the tort of nuisance, although success is usually limited to cases of private nuisance. A successful action in public nuisance requires the plaintiff to prove that the magnitude of injury he/she suffered differs (more severe) from that suffered by other members of the community. Thus, in Amos &Ors. v Shell BP [17], the plaintiff's action for public nuisance failed because he could not produce evidence to show that the damage to the waterway affected him in a manner different (much more serious) from other members of the public. Although public nuisance is a crime actionable by the state, the Office of the Attorney-General has never given it reasonable consideration and it is rarely used. However, the law has changed in this regard. The Attorney-General can now give fiat to private lawyer or firm to prosecute public nuisance.

The principle in negligence, nuisance, trespass, and the Rule in Ryland v Fletcher highlight the inadequacy of the application of existing civil remedies to environmental criminal jurisprudence. It must be noted, however that common law remedies do not really have a valid role to play in the protection of the environment [18].

Rule of procedure for environmental crime in Nigeria

There are no special procedural principles that apply only to environmental crimes. In such litigation the issue of standard of proof could, however, be the problem. The prosecution is required to establish its case and proof beyond reasonable doubts that the act complained of did occur and that it is worth the quantum of damages claimed. Apart from environmental sanitation offences, which are relatively simple, environmental cases that are of a technical nature-for example, pollution as a result of an oil well blow-out may present the difficulty of establishing the burden of proof, especially if the prosecution does not possess the wherewithal to examine or cross examine witness to elicit fact in issue or facts related to facts in issue or may not have the expertise to understand the technicalities and complexities of causation or the impacts or consequences the issues involved or expert witnesses to prosecute the case.

The Harmful Waste Act [19] has made some slight changes in relation to the burden of proof to the extent that where damage has been caused as a result of harmful waste having been dumped, the person who dumped the waste shall be liable in all circumstances but two: if it can be shown that the damage was wholly the fault of the person who suffered it; or that the person who suffered the damage had voluntarily accepted the risk.

Most large-scale polluters are multi-national corporations or manufacturing industries, many of which can afford to pay fines and continue their environmentally unsound operations. Other sanctions such as plant closure or licence forfeiture should serve as sufficient deterrent to such polluters, but they are not being used. Recent enactments provide for the punishment of both corporate bodies and officers of those bodies.

Early enactments such as the Criminal Code Act prescribe only a term of imprisonment for environmental offenders. This is of course problematic if the offender is a corporate body. The more recent Harmful Waste Act provides that if a crime has been committed under the Act by a body corporate and it is proven that the crime was committed with the consent or connivance of or is attributable to any neglect on the part of:

a. a director, manager, secretary or other similar officer of the body corporate; or
b. any other person purporting to act in the capacity of a director, manager, secretary or other similar officer that person as well as the body corporate shall be guilty of the crime and shall be liable to prosecution and punishment [20].

The National Environmental Standards and Regulations Enforcement Agency Act (NESREA), as an enforcer of environmental regulations and standards, lacks prosecutorial powers. The Agency may only institute criminal proceedings with the consent of the Attorney –General of the Federation [21]. In addition, the Act does not empower private persons to legally enforce its provisions under citizen's suit programme [22].

It is observed that the effectiveness of enforcement of the relevant regulations has been significantly hindered by the absence of statutory provisions empowering this regulatory agency to bring actions against violators. In fact, the position of the Agency in this regard is akin to one with responsibility without authority. It is therefore advocated that this trend should change in line with current trends across the globe [23].

The standard of proof in environmental crime, like other crimes, is 'beyond reasonable doubt'. The burden of proof of environmental crime is on the person who alleges the existence of an environmental crime. The proof must be based on credible evidence; documentary, real evidence, sample of the polluted specimen of the environment or the polluted part of the environment such as soil, water, report of the sample analysis or scientific study, product of forensic investigation. Proof of evidence may be difficult to procure or may require huge sums of money to achieve or worse still, facilities needed for the analysis may only be possible outside the country or may require a lot of time. Many are the travails and hurdles required to be surmounted to achieve a successful prosecution of environmental crime in Nigeria either by the prosecutor, victim or the witnesses. In fact, it can be compared to the Biblical camel and the eye of the needle. Investigation of environmental crimes require expertise in the field of environmental science and specifically expertise in the particular field of pollution. The investigator also needs to be expert in criminal investigation to be able to present facts in court. Prosecution of environmental crime requires testimony of an expert witness; expert in the field of violation.

Essential elements that require proof in environmental crimes are; causation of pollution; extent of environmental harm; knowingly permitting pollution; breach of licence conditions and terms; failure to comply with notices; breach of statutory duty; and contravention of prohibitions [24]. Unfortunately the statute makes no provision for the rule of procedure; what to do and how to do what in court. It is left for the prosecutor to irk out ways and manner in which this can be achieved and most prosecutors grope in the dark until failure is achieved. In essence, environmental victims in Nigeria are faced with the unenviable option of choosing between a deep sea and a deep valley in the wilderness of environmental redress in Nigeria [25].

Conclusion

Human activities have altered the environment greatly and have put present and future generations in danger, both actual and potential. A huge many activities are carried out by man individually as private persons or by a group of persons. However, activities of corporate persons ie blue chip companies and multinational corporations largely affect the environment and constitute nuisance to man. The trend that can be discerned in efforts to secure compliance with environmental laws has two elements. First, the law now imposes stringent penalties on environmental offenders. Second, enforcement agencies are moving to ensure that industries install pollution-abatement equipment. In practice, the emphasis has moved towards trying to persuade potential polluters to comply with environmental standards, although in theory the emphasis remains on stringent penalties. Environmental lawshave attempted to move the claims on environmental crimes away from the common law tort remedies to criminal prosecution for violation. It is however pertinent to forestall the occurrence of environmental crimes than prosecuting same. The NESREA Act, for example, has created relevant departments for compliance monitoring. It is however recommended that environmental laws, regulations, standards and guidelines scattered in our various statute books, made in such disjointed and discordant manner be gathered and codified intoa single legislation. Otherwise, environmental crimes and their punishment be incorporated in the Administration of Criminal Justice Act (ACJI) and Administration of Criminal Justice Law in all the states in a section entitled; 'Environmental

Crimes'. This section should be explicit and deal with environmental crimes that are common. This is necessary because of Nigeria's rapid development and industrialisation. There is urgent need for the harmonisation of environmental laws in the light of Nigeria's federal nature; the need to establish a legal framework for the enforcement of environmental laws; and the need to domesticate and enforce all treaties and conventions relating to the environment that Nigeria has ratified does not need over amplification, and the time to do so is yesterday. Since most of the activities of environmental degradation in the country occurs in the rural areas, the federating units are, therefore, the main theatres where the environmental consequences of toxic exposures are most felt. They must, consequentially, be equipped to react legislatively and swiftly in order to protect the environmental sphere under their control. The Nigerian Constitution, the chief source of the laws of the country, lacks the requisite provision desperately needed in environmental protection. The only section [26] dealing with the environment falls under the non-justiciable umbrella of the Fundamental Objectives and Directive Principles. In light of this limitation, other persons and groups that are in the vanguard of environmental protection are denied the critical constitutional weapon in their armory [27]. Constitutional amendment is therefore absolutely necessary to allow the federating units of this country legislate and legally enforce environmental violations and prosecute environmental crime. The only section in the Constitution that provides for the environment should be made justiciable and enforceable.

Investigating Agencies must be specially trained on the technicalities of investigating environmental violation; prosecutors must also be trained. Inspectorate units of all agencies must be well equipped with necessary facilities and equipment for their work as well and must not be allowed at the whims and caprices of the corporate organisations. It is recommended that special court, to be known as, 'Environmental Court' should be established to hear and determine all environmental violation matters. Capacity building training should be massively organised for legal practitioners on how to prosecute and defend environmental crimes and other environmental infractions. Massive public enlightenment and awareness creation on environmental rights bearers and the general public to raise the consciousness of environmental right and steps to take to enforce same. Experts should encourage the formation of environmental rights advocacy group to engage and promote prosecution of environmental violation and report non-compliance when necessary. In the centre of the prosecution of environmental crime in Nigeria is the criminal justice system which has not been effective in responding to the challenges of environmental abuses in Nigeria.

Though the Nigerian criminal justice is relatively visible in the fight against some categories of environmental abuses, relatively dangerous human practices such as sound pollution, air pollution among others are de-emphasized. Judicial activism may be the devil's alternative if all other options fail.

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10. [1975] 9-11 S.C. 115.This action arose out of certain activities of the defendants carried out in the course of oil exploration in the Mid-Western States (now Edo and Delta). The plaintiffs, who owned land adjacent to the area of exploration complained: that in the course of road-building, the defendants had blocked and diverted a natural stream, thus interfering seriously with the plaintiff's fishing rights, and that the defendants had accumulated oil waste on land under their control and that this oil had escaped on to the plaintiff's land and caused damage there. The Supreme Court, relying on the principle in Ryland V. Fletcher, held the defendants/ appellants liable for the damage to the ponds and lakes of the plaintiffs/ respondents.
11. See *Ikpede v Shell BP Development Company of Nigeria Limited* [1973] A. U. N.L.R. 61, where defendants were held not liable under the Rule because their pipeline was laid pursuant to a license obtained under the Oil Pipeline Act; that is statutory authority.
12. BHC/2/1983, delivered 5 January 1985; see also Nwata&OrsvShell BP AHC/7/1973,John &Ors v. Shell BP A/63/1974.
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19. Section 12
20. Section 7
21. Section 32 (3).
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to be emitted, may be higher than the permissible noise levels under the Regulations and that such complainant need not show or prove personal loss or injury or discomfort caused by the emission of the alleged noise.

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