

## **CHAPTER SEVEN**

### **SUMMARY AND CONCLUSIONS**

#### **7.1 Summary of General Conclusions**

The aim of this study is to proffer a human rights approach as an option open to victims for seeking redress for injuries suffered as a result of oil pollution in the Niger Delta. The specific element of the human rights law is the ‘right to a clean environment’, provided by Nigerian law, the remedies of which have the potential of addressing some of the shortcomings in common law tort actions, which in over 50 years of use, have not succeeded in curbing the incidents of oil pollution or providing effective relief to victims.

The thesis commenced in Chapter One with an introduction, setting out such matters as the background to and justification for the study, the methodology, the overall structure of the thesis and a brief outline of the focus of each of the succeeding six chapters.

Chapter Two provides the background and context to the study with an overview of the current regulatory framework of Nigeria’s oil industry, including environmental regulation by setting out the historical antecedents and influences that produced the current system. The aim of this was to demonstrate that the colonial policies by which the right to explore for oil in Nigeria was vested exclusively on British subjects or companies, in order to foster British colonial and economic interests in Nigeria, was inherited undiluted by the Federal Government of Nigeria at independence, without consideration for the federal system of government which Nigeria

purports to operate. As a result successive indigenous legislation in the oil industry followed the pattern of the colonial philosophy without adapting them to the exigencies of a modern federal state. Whilst the objective of setting up a state oil corporation is lofty, vesting NNPC (initially through the Inspectorate Division) or the DPR (as now constituted) with powers to enforce environmental regulations against entities of which it is directly or indirectly a part, is flawed. As a result, the NNPC as a joint venture partner in the operations of all the IOCs and the DPR as regulator, failed to regulate adequately or properly enforce existing environmental protection measures against the IOCs, let alone itself.

Government, apparently in an attempt to address these issues, set up two environmental protection agencies, NESREA and NOSDRA. NESREA is tasked with responsibility for enforcing environmental standards throughout the country (except the petroleum sector), while NOSDRA is primarily responsible for coordinating and implementing the National Oil Spill Contingency Plan. Since both Agencies remain under the supervision of another department of Government - Federal Ministry of Environment - very little is expected to change, as a result of their proximity to Government, and government's direct involvement and interference in the oil industry.

Nor would the current Petroleum Industry Bill or the unbundling and restructuring of the NNPC have significant a impact on environmental protection. Whilst the current reforms may bring changes in nomenclature and structure, unless the new agencies to be created are given financial autonomy and independence to operate as truly commercial entities, it is feared that the effort may go the way of previous attempts, especially as every Nigerian Government spares no effort

to exert its influence over the oil industry as a conduit for dispensing political patronage. At the moment, the NNPC operates as a department of government under the Ministry of Petroleum resources, instead of as a commercial entity, as is the case with other State-owned oil corporations such as Saudi Aramco, Petronas, China National Petroleum Corporation or India Oil Company Limited. The PIB is intended not only to unbundle the NNPC, but also make the new agencies to be created run as commercial entities. If they do, they would, as commercial entities, be liable to the full rigour of all environmental protection rules and regulations, and pay compensation as other commercial entities without the protection of Government.

The convoluted constitutional and statutory arrangement (by which ownership of petroleum resources are vested in the central government while proprietary rights over land is vested in the State government, leaving the former “owners” of land as mere occupiers), brings to the fore the conflicting interests and parties involved in the politics of oil in Nigerian. While it allows the central government to maintain and garner considerable revenue and influence over oil, it attenuates the economic base of the state governments and diminishes their sphere of influence. At the same time, it exposes the people of oil-producing communities to serious environmental degradation.

More importantly, the colonial legacy alluded to also gave rise to the introduction and application of English laws and common law principles in Nigeria, and are the current methods by which victims of oil pollution may seek redress for any injuries suffered. Government’s direct involvement and interference in the oil sector, no doubt influences the types of laws and regulations that are enacted and invariably affects their implementation, not only by officials, but also the courts.

Following from the discussions in chapter two, Chapter Three discussed the current common law methods of seeking redress in the event of pollution. The reason for discussing these common law principles is to expose their inadequacies for seeking redress for all the injuries suffered as a result of oil pollution, and in over 50 years have failed to assist in curbing the menace of oil pollution in the Niger Delta, justifying the need to seek an alternative mechanism in human rights law. The chapter commenced with discussions on common law remedies provided by actions in trespass, negligence, nuisance and the rule in *Rylands v. Fletcher*. It was shown that these causes of action are not only difficult to prove, but also the damages awarded are insufficient or inadequate to assuage all the injuries suffered by victims. Although these torts remain the only viable options open to victims, it was only recently that the courts began to award damages which could be interpreted as meeting financially some of the injuries suffered. But many victims remain marginalised from the judicial process as litigation in Nigeria is particularly tedious and expensive and takes an awfully long time to resolve. Besides, the majority of victims are among the poorest members of the community who may not afford the cost of litigation, a factor which is exacerbated by the time it takes for these matters to reach and be resolved in court. This means that a good number of cases which should come to court do not, these injuries are not redressed or remedied, and pollution continues unabated.

The chapter also discussed other civil remedies available to victims who may wish to bring an action in the home countries of the IOCs operating in Nigeria. It was shown that this type of action is difficult, not only in terms of the inconvenience of bringing a civil action in a foreign land, but also takes time and considerable expense, which the victims of oil pollution could not

afford while the defendants are usually big and powerful corporations with the finance and ability to fight such legal battles. The US remains the most viable jurisdiction for such suits as a result of the jurisdiction provided under the Alien Tort Claims Act, 1789, which enables aliens to bring civil actions against US companies operating in foreign countries for torts committed there. However, such suits are extremely difficult to prove as a result of the many hurdles on the path of the plaintiff, and often the claimants are unable to overcome most of the procedural hurdles, leading to failure of such cases. This is demonstrated in the two Nigerian cases recently fought in US courts, and without the assistance of NGOs, no victim of oil pollution in the Niger Delta could afford to undertake such litigation in the US. .

Human rights actions offer faster and cheaper proceedings, and could be brought in a representative capacity. They have established and straight-forward procedures, and may be brought under one cause of action for all the remedies sought, including monetary awards, declarations, injunctions, and consequential orders and order for remediation of the impacted areas, as against common law remedies which are mainly compensatory. Human right actions could provide a platform for suing the Government for failure to perform its duty to protect, to investigate and prevent third parties from interfering with the enjoyment of the rights of its citizens. Also there is no statute of limitation in human rights actions, and the remedies benefit the wider community as against common law remedies which mainly compensate those who can afford to sue and are successful. But victims of oil pollution in the Niger Delta are not necessarily pre-occupied or principally motivated by monetary awards, as the desire to live in an environment, free from unwarranted pollution.

Having determined the weaknesses and inadequacies of common law tort actions for redressing injuries suffered from oil pollution, and the need for an alternative mechanism in human rights, Chapter Four commenced with the conceptual framework of human rights generally, and progressed with discussions on the origin and development of human rights from the early writings of Stoic philosophers and naturalists, through the events leading to the founding of the League of Nations and (later, the United Nations), and the subsequent adoption by the General Assembly of the Universal Declaration of Human Rights in 1948. This discussion was to reflect the evolution of human rights through and in response to prevailing philosophical, political and socio-economic developments, which existing human rights at the time could not adequately address, requiring the adoption of new rights. This discussion led to the demarcation of human rights in terms of 'generations,' and locating the 'right to a clean environment' within the so-called 'third generation' rights. Some scholars have flayed this right to a clean environment as not fitting into any of the recognizable mould of international human rights. This is due in part, to the fact that the instruments recognizing this right are 'soft-law' instruments, which are neither legally binding nor matured into 'hard-law'. Other concerns, include the fact that the right is said to be vague, uncertain and not given to precise definition, nor could the nature, content or scope, be easily discernible. While these concerns are not unfounded, they appear somewhat over-stated, as the increasing body of human rights instruments even at the international, but particularly at regional and national levels, appear to recognize the right to a clean environment. The Chapter examined in detail the meaning, nature and scope of this right in international law, and established the intrinsic linkage between the environment and human rights in international legal instruments. Whilst admitting that these instruments may not be individually binding,

together they appear to enunciate if not customary international law, at least a move in the international community towards the way the law is likely to go in the future.

This is particularly so as there exists at the regional and national level, legally binding human rights instruments, which expressly recognize in some form the right to a clean environment. The Chapter examined both the Inter-American and African human rights systems, which have legally binding human rights instruments and which expressly provide for the right to a clean environment in Article 11 of the Additional Protocol to the American Convention on Human Rights, 1988 and Article 24 of the African Charter on Human and Peoples' Rights, 1981, respectively. How the regional human rights courts have interpreted this right was also examined. The chapter also examined the European Convention on Human Rights, adopted in 1950, which did not have any express provision for environmental right, in part due to the fact that environmental issues had not assumed the same concerns at the time as they do now, yet the European Court of Human Rights is prepared to interpret existing convention rights such as the right to life, property, privacy and family life, using environmental rights approach. Indeed, the Aarhus Convention, which is a legally binding instrument and adopted by the European Union in 1998, recognizes the procedural aspects of this right. Some of the jurisprudence of the European Court both in its application of the substantive and procedural aspects of the right to a clean environment were examined to see how this right has been applied by the court.

Finally, the chapter examined the constitutional provisions of certain countries which provide for the substantive right to a clean environment and the way some national courts have interpreted those provisions. The discussions in this chapter was not only to provide a conceptual

framework of human rights, but also to establish that there is a basis for a human rights approach and specifically the right to a clean environment as a means of redressing environmental concerns. It remained then to explore this within the Nigerian context.

How this right could be used as a possible option open to victims for addressing the oil pollution problems in the Nigerian Delta, was discussed in Chapter Five. The chapter first examined the existence or otherwise of a substantive right to a clean environment under the Nigerian Constitution, 1999. As Section 20, falls under the Chapter II provisions - Fundamental Objectives and Directive Principles of State Policy - which by section 6(6)(c) of the same Constitution are not justiciable, it became necessary to examine the origin of these constitutional provisions. The thesis traced their origin to the Irish Constitution, 1937, which influenced the drafters of the Indian Constitution, 1949, provisions of which were apposite for the time, but now seat inelegantly in modern constitutions. The Indians have by judicial creativity and activism subordinated the non-justiciability of these provisions to the Fundamental Human Rights provisions of their constitution. This creativity was commended to the Nigerian courts.

In Article 24 of the African Charter can be found a more potent and less controversial arsenal for the realization of the right to a clean environment, more-so since the African Charter has been incorporated into Nigerian law and can be relied upon directly to enforce this right. This was discussed in the second section of Part I. The jurisprudence which evolved from reliance on this Charter is phenomenal, not only in the African regional human rights, but also the municipal court systems.



In the third section of Part I, the thesis suggested how the right to a clean environment could be achieved through existing civil and political rights, expressly provided under Chapter IV of the Nigerian Constitution, 1999. While the right to a clean environment is being advocated as a substantive right, the thesis posited that with robust interpretation, these civil and political rights could be interpreted expansively and purposively to cover environmental rights, since it is the environment which gives life and therefore expression to other rights, and a distorted environment would not guarantee the enjoyment of other fundamental rights enumerated in the said Chapter IV of the Nigerian constitution. The Indian, and to a lesser extent Pakistani and Bangladeshi, Supreme Courts have held in some of the cases discussed, that the right to life includes the right to a clean environment and that life and other fundamental rights are meaningless without a wholesome environment.

The chapter in Part II discussed the procedural aspects of the right to a clean environment, including the rights to information, participation and access to justice or to the courts. In discussing these procedural rights, the thesis showed that while the right to information is provided under the Nigerian constitution, the centralized nature of the oil industry and dominated by the Federal Government, makes it difficult for information regarding where and why exploration activities occur in particular areas of the Niger Delta. Perhaps, the situation would change with the newly enacted Freedom of Information, Act 2011, which obliges government institutions and agencies to provide information regarding any aspect of their activities, with the right of challenge in the event of failure to do so. With regard to the right to participate, it was shown that the people who are impacted by oil industry activities do not participate or have the opportunity to participate fully in discussing matters relating to the industry. While the EIA Act,

1992 mandates EIA in all projects which may have environmental impact, the level of participation is impeded by the lack of professional assistance for the local people, in an industry that is so technical and sophisticated. The Chapter concluded with discussions on the right of access to court (or justice), which is recognized under Nigerian law, but in practice is impeded by several factors, not least the cost of litigation in Nigeria, which is prohibitive and beyond the purse of many victims of oil pollution. It was shown in this chapter that the right to a clean environment exists and is recognized under Nigerian law both in its substantive and procedural aspects, the later being the mechanisms through which the right may be enforced.

But these procedural rights are not robustly implemented in Nigeria, even though they are provided for both by the constitution as well as statute law. The right of access to court (and therefore, of justice), important as it is has a number of challenges or factors which may affect its realization, some of which are judicial or institutional, while others are extra-legal. These factors and the opportunities for ameliorating them were discussed in Chapter Six, which was divided into three main sections. The first section, discussed some of the challenges facing enforcement, some of which are judicial or institutional. Particular attention was paid to the controversy relating to standing to sue in Nigeria, created largely by the courts through their rather strict and conservative interpretation of section 6(6)(b) of the 1999 Constitution and its 1979 predecessor. It was posited that English law from where this doctrine was initially developed has since departed from a restrictive, to a more liberal interpretation of this doctrine, yet Nigerian judges, even the supreme court, continued to give differing and confusing interpretation of this provision and by so doing effectively shut the doors against many litigants. However, the new Fundamental Rights Enforcement Procedure Rules, 2009 have now put this controversy to rest

by expressly providing that no human rights case should be dismissed or struck out on the basis of standing. Other challenges included procedural impediments, judicial timidity, corruption, incompetence and executive lawlessness. The second section discussed other extra-legal factors which may affect the enforcement mechanisms, including lack of judicial instruments, authority and infrastructure for enforcing court judgments, which ultimately denies litigants the fruits of their victory. While the new rules have the potential to open the floodgates of human rights litigation in Nigeria, these lofty ideals will be limited without improvement and upgrade of existing judicial infrastructures, particularly the instrumentality for enforcement. An effective judicial system (with all the powers and authority to enforce its judgment) should compel obedience and respect for the law. Respect for the law can only be achieved if courts and their officials as well as the police are equipped to enforce the law against individuals, corporate entities and the government, without any fear or favour or else court orders would remain paper-tigers, worth less than the parchment on which they are promulgated.

In the third section, the opportunities presented by the new Fundamental Human Rights Enforcement Rules which came into force in December 2009 to mitigate some of these judicial or institutional challenges, were discussed, as the new Rules introduced many novel provisions, which if properly followed will help in the realization and actualization of environmental and other human rights in Nigeria. The new Rules also take on board most of the criticisms levelled against the old Rules, particularly and most importantly, the fact that it applied only to the 1979 constitution and was never amended to include the Africa Charter when it was ratified in 1983. Whereas the new rules expressly provide that they not only apply for the enforcement of Chapter

IV provisions of the 1999 Constitution but also the African Charter, which expressly provides in Article 24 for the right to a clean and healthy or satisfactory environment.

In concluding the thesis, it was posited that the nascent right to a clean environment was still in its formative years, but holds great promise to people of oil producing communities in the Nigerian Delta as could be seen from the case of *Gbemre v. Shell*. In spite of its recognition at the international and regional levels, the remedies which this right provides are best attained in domestic court and before judges who have the courage to declare and enforce it. The reaction of the Nigerian Government and the levity with which Shell treated the outcome, was evidence that challenges exist, not only for the judiciary which must declare and uphold this right, but also for the advocates who would bring these matters to court. While challenges remain in terms of speed and the implementation of the remedies which it provides, the human rights regime was far more practicable than the current common law tort actions. Besides, it would enable victims of oil pollution to join the Nigerian Government, which has the ultimate duty and responsibility to protect its citizens from harm, but appears to value the economic benefits of oil exploitation above the protection of the people of the oil producing areas and the natural environment.

## **7.2 Findings of the Research**

A number of findings were made in the course of this research and will be highlighted as follows:

- (1) The nature, scope and recognition of the right to a clean environment. The nature of this right indicates that a) the preservation of the environment is a pre-condition or a prerequisite for the existence of man and the enjoyment of other basic rights such as the rights to life, health, property and others; and therefore b) life will be meaningless unless

the environment itself is protected, nurtured and maintained; and c) as human rights abuses often lead to environmental harm, environmental degradation often results in human rights violations. Therefore, maintaining a separate right to a clean environment was necessary not only for the enjoyment of this right, but also the protection of the environment of which man is a part. On the scope, different nations are at different levels of economic and political development, and therefore, have different priorities and perceptions which influence their relationship with the environment. While developed countries with robust environmental regimes may not see the need to have a right to a clean environment, developing countries with less robust regulatory regimes, may wish to depend on the emotive language of right to secure an environment fit for habitation. This is true of the Inter-American and the African regional systems with indigenous peoples and for whom the environment is more than a geographical expression.

(2) Although skepticisms still exist at international law as to the recognition of the right to a clean environment, this is no longer the case at regional or domestic levels. Both the Inter-American and African human rights systems expressly recognize the right to a clean environment. The African Charter has enforced this right in the *SERAC case*. While the European Convention on Human Rights does not expressly provide for this right, judicial interpretation of articles 2 and 8 have been used to recognize this right, quite apart from the fact that the Aarhus Convention expressly recognize the procedural aspect of this right.

(3) Recognition of the right to clean environment under Nigerian law. Nigeria is not only a member of the international community, some of which declarations and other instruments provide for the right, but also signatory to the African Charter, Article 24 of

which provides expressly for the right to a clean environment. In addition, Nigeria has not only incorporated the African Charter into its domestic laws, but has constitutional provisions, both in section 20, (providing for a duty on the part of the government to protect and promote the Nigerian environment) as well as Chapter IV provisions, which may be interpreted to recognize the right to a clean environment both in its substantive and procedural aspects.

- (4) Whatever doubt may have existed on the recognition of the right to a clean environment was put to rest by the decision of the Federal High Court in *Gbemre's case*, where the court held that that right was violated, and provided remedies, including: a declaration that the right to a clean environment was violated by the continued flaring of gas, which not only abridge the people's right to health and life, but also their dignity; a decree of perpetual injunction restraining the respondents from continuing gas flaring; ordering the Attorney General of the Federation in consultation with the Federal Executive Council to set the machinery into motion for the repeal or amendment of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, 1984, by which gas flaring was allowed in Nigeria; ordering the first two respondents to present to the court plans for discontinuing their gas flaring programmes. While the decisions of the regional human rights system is important and would continue to have a place, the remedy provided by the local court appears more effective.
- (5) Nigeria's implementation of procedural rights is not as robust as it should be. While the constitution provides for the right to information and access to court, and the Environmental Impacts Assessment, Act 1992 provides for the right of participation, difficulties still exist in their implementation. In the case of the right to information, with

the new Freedom of Information Act, 2011 past into law, an aspect of this problem may be ameliorated in that victims of oil pollution, in indeed any other Nigerian maybe able to apply for disclosure of information held by government, institutions and agencies. On the question of access to court, difficulties still exist not only in the judicial system itself, but also in the wider Nigerian society. While the judicial challenges, such as the standing to sue and other procedural impediments could be mitigated by the robust and liberal contents of the new Fundamental Rights Enforcement Procedure Rules, 2009, others, such as judicial timidity, corruption or lack of judicial infrastructure may take sanctions and persuasion to achieve.

- (6) With the new Fundamental Rights Enforcement Rules which came into force in December 2009, it is expected that more environmental cases will come to court. The human rights route offers a munificent and far-reaching remedy for environmental pollution from the oil industry, as it is more straight-forward and less complicated than common law tort actions, perhaps, faster and cheaper. Under the new rules, suits may be brought not only by those who are directly affected, but others with interest, including NGOs and public-spirited persons, as the rules of standing have now been liberated from the shackles to which the old rules and the Nigerian courts had subjected it.

### **7.3 Specific Recommendations**

- (1) The Nigerian judiciary requires overhauling to meet the challenges of the twenty-first century. The judiciary is currently steeped in twentieth century laws and infrastructures, which have become obsolete.<sup>1</sup> With the new Fundamental Rights Enforcement and

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<sup>1</sup> The Nigerian economy is said to surpass that of France by 2050 if it continues to grow at current rates. This level of growth cannot be sustained under an anachronistic legal system, which is no longer fit for purpose. See

Procedure Rules, the courts would become quite busy, and may not cope unless modern facilities such as electronic recording systems, electronic journals, books and other internet-based facilities are provided for fast and efficient delivery of judicial services.

- (2) While the new fundamental rights enforcement rules will expand access for the ventilation of environmental grievances in human rights courts, Government should establish more courts and provide them with the infrastructures required to meet these challenges. Not only in employing judges with expertise in environmental and human rights law, but also in providing the court with the power and facilities to enforce its judgments. A judgment is not worth the paper it is written on without the force of enforcement: only then would individuals, corporate entities and even government against whom a judgment is made will respect the law.
- (3) There should be expansion of the Bailiffs' office in all the courts to facilitate enforcement of judgments, with more powers to deal with difficult and or powerful individuals and corporations, including government. The current situation by which government and some corporations or individuals operate as if the law does not also apply to them is unacceptable.
- (4) The Legal Aid system should be expanded and properly funded to provide legal assistance to all those who would require it in human rights cases, especially in oil pollution cases, which would require experienced practitioners and advocates. This assistance should extend to carrying out investigations and other scientific tests to determine the extent of damage.

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Goldman Sachs Economic Research, Global Economics Paper, *The N-11: More than an Acronym*, Issue No. 153, 28 March, 2007, 9. See also 'Changing Continent: A fresh chapter is opening in Africa's History', *The Observer*, 20 February, 2011, 28. For discussions on globalisation and the law, see L. Boule, *The Law of Globalization: An Introduction*, (Kluwer Law International; The Netherlands, 2009); A. Halpin and V. Roeben, (eds.), *Theorising the Global Legal Order*, (Hart Publishing; Oxford, 2009).



(5) While justice moves too slowly in Nigerian courts, which is due in part to the lack of judicial infrastructures and other facilities, there is need to increase the number of judges by creating more courts, including an environmental court to cater specifically for such cases. This will obviate delays as well as the costs of bringing these actions to court.

#### **7.4 General Recommendation**

- (1) The regulatory framework of Nigeria's oil industry needs strengthening, with the DPR given the independence, powers and funding to regulate the industry properly pending the full implementation of the proposed Petroleum Industry Bill, when it is hoped the agency to be set up will be given the autonomy and financial independence required to carry out their functions.
- (2) Existing environmental protection legislation need to be properly enforced and implemented, including the need for adequate consultation with communities in relation to development projects which may have adverse effect on their livelihood and standard of living. Also financial provisions should be made for the local people to be represented by professionals, not only in perusing documents, but also during implementation of the projects to ensure that they are carried out in the manner envisaged. And where there are issues, adequate financial provisions should be made for professional assistance to challenge such issues. The consultations with the community should be transparent and reflect the principles of free and prior informed consent.
- (4) It is important for agencies such as NOSDRA and NESREA to be given autonomy and adequate funding as well as provision of the necessary equipment to carry out their functions professionally and independently without government interference.

## **7.5 Future Research**

This research only focused on the possibilities of using human rights and reliance on the right to a clean environment as an alternative cause of action for redressing oil pollution injuries in the Niger Delta area. Although this right may be interpreted to encompass other rights such as life, dignity of the human person, property, family life and home, there would be a need to deepen research into the specific area of how violation of this right, with respect to property may be used to challenge the ownership right of the Nigerian Government of petroleum resources.