AN APPRAISAL OF THE SCOPE OF PROVISIONS UNDER THE 1999 NIGERIAN CONSTITUTION FOR THE CONTROL OF POLLUTION ARISING FROM THE OIL AND GAS INDUSTRY[1]

Abstract

Environmental issues came to the front burner in Nigeria in the 1980s upon the advent of the dumping of toxic waste by an Italian businessman at a farm in the port town of Koko in the Delta State of Nigeria. Again, oil exploration and exploitation in Nigeria leaves on its trail a catalogue of environmental devastation and degradation. This has occasioned a wave of militancy and unrest in the Niger delta area of Nigeria. The situation is worsened by the paucity of the legal framework for environmental protection in Nigeria. This paper appraises the provisions for environmental protection under the 1999 Nigerian Constitution with a view to ascertaining the extent of protection they afford environmental rights. It examines the provisions for environment protection in the constitution of some selected countries in order to engender a comparative insight. The paper makes a case for the entrenchment of environmental rights as enforceable rights under the Nigerian Constitution.

Key words: *Constitution, control, pollution, oil and gas*

1. Introduction

The Constitution of the Federal Republic of Nigeria (CFRN), 1999 is designated as Cap C23, LFN, 2004. The Constitution of the Federal Republic of Nigeria is the apex law of Nigeria. It does not contain any express provision for environment regulation. The Nigerian Constitution does not also provide for the enforcement of any international environmental treaty that has not been domesticated as an Act of the National Assembly, Section 12 (1) of the Constitution provides that; "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by any law made by the National Assembly."

By implication, any international treaty on the environment to which Nigeria is a signatory can be enacted into law in Nigeria. There are so many of such treaties and some have become the basis of several environmental enactments relevant to the oil and gas industry in Nigeria. Such legislation which owe their root to international treaties include the Oil in Navigable Waters Act which was enacted as part of the international action to domesticate the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1972; and the National Oil Spill Detection and Response Agency Act which was enacted in compliance with the terms of the International Convention on Oil Pollution Preparedness, Response and Co-operation, (OPRC) 1990. Nigeria is a signatory to both Conventions and by virtue of Section 12 of the Constitution, the terms of the two Conventions have become part of *Nigerian*. Section 12 can in this manner be said to have made implied provisions for environmental management in the oil and gas sector.

Chapter II of the 1999 Constitution which is christened "Fundamental Objectives and Directive Principles of State Policy" is however a non-justiciable part of the 1999 Nigerian Constitution. In other words, it does not provide for rights that can be enforced by Nigerian citizens but is stated to be a policy guide for the policymakers in the sovereign state of Nigeria. Being a mere guide, it does not create enforceable rights and whatever is found therein is a lofty dream which the Nigerian State is supposed to be aiming at achieving. The 1999 CFRN has twelve of such

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provisions in sections 13-24. Section 20 of the CFRN, 1999 provides as follows: "The State shall protect and improve the environment and safeguard the waters, air and land, forest and wild life of Nigeria." The construction of the above provision is indisputably broad. This fact notwithstanding, the observance of the above principle by the state is not mandatory but merely directory. The implication of this is that there is an immutable limitation on the enforcement of this provision.

The Nigerian State appreciates the need to make environmental protection a constitutional right but does not want issues of environmental protection to disturb its economic strategies with respect to the oil industry. It is also possible to infer that the Nigerian government had non-interference with oil and gas exploration and production at the back of its mind when it decided to take such a middle ground provision on the environment in the 1999 Constitution. This is understandable given the mono-crop nature of its economy which is heavily dependent on oil. This attitude would however appear to be begging the question in view of the violent agitations currently raging in the Niger-Delta as a result of the pollution of the environment by oil and gas exploration and production activities.

It is therefore suggested that the section should be made justicable so that operators or owners of facilities in the oil and gas sector and Nigerian citizens in general will eschew acts that are capable of degrading, destroying or contaminating the environment in the course of oil production. This will give more bite to the anti-pollution provisions of the proposed "Natural Oil Pollution Management Agency" Act as well as the provisions of the Oil Spills and Oily Waste Management Regulations and the "Oil Spill Recovery, Clean-up Remediation and Damage Assessment Regulations" of 2011. By making section 20 justicable, the duties and rights contained in these sensitive legislation can then be enforced by the extant Fundamental Rights Enforcement Procedure Rules, made pursuant to the 1999 Constitution.

2. The Experience of other Countries

It is important to note that India, a developing country like Nigeria, has made environmental issues to come under constitutional duties and rights by providing that "The State shall endeavour to improve and protect the environment and to safeguard the forest and wild life of the country"[2] including forests, lakes, rivers, and wild life and to have compassion on living creatures"[3]. The same provision can be found in the constitution of some other developing countries. The Malian Constitution provides that "every person has a right to a healthy environment. The protection and defence of the environment and promotion of the quality of life are a duty for all and for the state".[4]

The Indonesian Constitution enacts that "protecting the Environment in which the present generation lives and in which the future generation will develop socially" is a public responsibility. Accordingly "economic activities and other activities which may pollute the environment or destroy it irreversibly shall be forbidden".[5] In the same vein, the Constitution of the Lao Peoples Democratic Republic,[6] provides that "All organizations and citizens must protect the environment and natural resources; land, underground, forest, fauna, water sources

2. Art 48A Indian Constitution, 52nd Amendment Act, 1985.
3. Art 51A (g), *ibid.*
4. Art. 50, Ch. IV Constitution of the Federal Republic of Indonesia, 1989.
5. *Ibid.*
6. Constitution of the Lao Peoples Democratic Republic, 1991.

and atmosphere.[7] Nigeria will therefore be doing the needful by making its constitutional provisions on the environment to be in line with global trends.

3. The Position in Nigeria

Environmental regulation does not appear in the exclusive legislative list or in the concurrent legislative list.[8] By implication, it is a matter for the residuary list for which both the National Assembly and the State Houses of Assembly can make laws. In practical terms however, pollution in the oil and gas sector appears to be a matter incidental to item 39 of the second Schedule to the 1999 Constitution. By virtue of item 68, in the second schedule, environmental pollution in the oil and gas sector is supposed to be a matter for the exclusive legislative list being a "… matter incidental or supplementary" [9] to the matter mentioned in item 39, to wit, mines and minerals, including oil fields, oil mining in geological surveys and natural gas". [10] In the spirit of the Constitution, State Houses of Assembly may however venture to legislate on general environmental matters but not such as are "incidental or supplementary" to "oil fields" and "oil mining". This is the reason why the State Governments are able to establish sanitation authorities or Sanitation and Environmental Protection Authorities drawing on their residuary legislative competence impliedly provided for under the Constitution. However, where any of the provisions of the State Sanitation and Environmental Protection Laws conflict with any federal legislation on the environment, the law made by the National Assembly will prevail and that other law shall be void to the extent of the inconsistency.[11]

The implication of the above provision is that no federating state in Nigeria could enact laws for the control of oil and gas pollution. This is strictly within the legislative competence of the National Assembly by virtue of items 39 and 68 of the second schedule and section 4(5) of the 1999 Constitution. Some people have clamoured for a change of this position contending that the State Governments are closer to the people and are in a better position to make laws for the prevention, control and remediation of environmental pollution caused by oil and gas exploration and production activities.[12] Granted that this position is desirable, it is submitted that the position is not practicable in view of the ownership and control structure of oil and gas resources in Nigeria. The position can only become plausible when the Constitution is radically amended to include the state and local communities where minerals are found in the ownership structure and they are given a role in the exploration and production process.

The ownership structure of mineral resources in Nigeria as currently constituted will make any environmental control of the sector by any tier of Government other than the Federal Government difficult. It is bound to create confusion in the environmental regulatory regime thereby worsening the problem of oil and gas pollution. Furthermore, the provisions of the Constitution which declares any State law that is inconsistent with a law enacted by the National Assembly will make legislative control of environmental issues in the oil and gas sector by State Governments a child's play. It could lead to clashes and endless litigation which has the potentials of inflaming an already heated up system.

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7. *Ibid.*
8. This is in the words of Item 68, 2nd Schedule to the 1999 Constitution**.**
9. The exact words of Item 39 *ibid.*
10. *Ibid.*
11. Section 4(5) CFRN, 1999, as amended.
12 Fagbohun, *op. cit.* at pp. 314 - 315.

4. Conclusion and Recommendations

The fact that oil is the major revenue source is not a sufficient reason to treat environmental issues with levity. This is because in trying not to let environmental protection come in the way of oil production, the country may actually end up destroying its oil industry owing to violent agitations and sabotage of oil facilities occasioned by the destruction of the environment of the oil producing communities by environment unfriendly practices in the oil fields.

Sections 33 and 34 of the CFRN, 1999 (as amended) guarantees the right to life and the dignity of the human person to all citizens as a fundamental right. It may seem proper to imply that rights to life and the dignity of the human person presuppose the right to a clean and healthy environment. This ought to be so under a proper construction of the constitutional provision on the right to life. The judicial attitude on this manner of interpretation has rather been lacklustre and inconsistent. However, in a historic judgment, a Federal High Court sitting in Benin-City and presided over by Nwokorie J, held that continued gas flaring by Shell Petroleum Development Company in Iwerekan Community was a breach of the right to life of the applicants, more so when gas flaring had been declared illegal. This was in the case of *Jonah Gbemre and ors. v Shell Petroleum Development Company and ors.*[13] The action was instituted by one Jonah Gbemre for himself and on behalf of his community. This was a rare case of judicial activism. It is however unfortunate that this historic decision is alleged to have been reversed by the Court of Appeal [14]

As a way out, the state and local governments of oil producing communities should be given a stronger representation in the National Oil Pollution Agency proposed by the 2012 Bill currently before the National Assembly for the amendment of the National Oil Spill Detection and Response Agency Act, 2006. This will enable the Agency avail itself with first-hand information about the extent of pollution in the oil producing communities. The state governments should continue to focus on their urban and human waste management activities which are even becoming more daunting with the increased population in most of the growing urban centres. To further want to saddle them with oil and gas pollution management may be counterproductive.

[13.] Suit No. FHC/CS/B/153/2005, Judgment delivered on 14 November 2005

[14] *Shell Niger-Delta Global Insight,*" Court of Appeal Overturns Shell's Gas Flaring Verdict" in Issue No. 26 May, 2006, p. 1.