

Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle

Chizoba I. Okpara

LI.M.Lecturer

Faculty of Law, Abia State University

P.M.B. 2000, Uturu, Nigeria

Tel: 23-480-3342-2001 E-mail: xobiokpara@gmail.com

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Abstract

Even with the Amnesty Package and the United Nations Report on the Clean-up of Ogoniland, the environmental and developmental challenges of the Niger Delta still remain daunting. The militant youths have continued with the kidnap and hostage taking of oil workers which has more recently spread to other states and regions, for a ransom. Worse, environmental laws and legislations are still being churned out. Having taken an international comparative analysis, this paper proposes a declaration of the Right to the environment as a sustainable solution to the Niger Delta crisis.

Keywords: Niger delta, Amnesty package, Environment, Oil spills

1. Introduction

“Our forests, our trees, our rivers and lakes are not commodities we can abuse. We do not own the land; we hold it in trust for generations yet unborn”... John Kufor

In the past few decades, awareness of the effects of environmental pollution on human beings and their quality of life has increased dramatically. Before then, environmental matters were left for experts in geography; countries focused their energies rather on relentless industrial development with little or no attention to its impact on the environment. By many accounts, the environmental problems in the African continent in the last decades have been exacerbated by reckless exploitation of natural resources, improperly planned urbanization and industrialization.

Nigeria is not left out of this environmental despoliation. The extent of environmental pollution and degradation in the Niger Delta Region due to oil and gas exploration have become a cause for great concern to all stakeholders; no clean water, decades of oil spills, acid rains from gas flare, idle fishing nets and adults. The people who were predominantly farmers and fishermen before the oil boom have been left with no farmlands and fishes to sustain life.

Having taken an in-depth study of the existing laws and legislations in Nigeria which have not recorded significant success, the writer recommends a pragmatic and sustainable solution: a constitutional amendment that includes the right to a clean and healthy environment (Article 39, Ugandan Constitution) as one of the fundamental rights and freedoms under Chapter Four of the Nigerian Constitution. This right has surprisingly taken its rightful place in various constitutions in the world. This work therefore x-rays the attendant possibilities and problems associated with this desired goal.

2. The Niger Delta

The Niger Delta area is located in the Southern part of Nigeria namely the South-South and some parts of the South-East and South-West zones. A geopolitical framework mainly populated by the ‘Ijaw’ ethnic group, the Niger Delta spreads over a total landmass of about 112,110 square kilometers, and makes up over 12 percent of Nigeria landmass (NDRDMP, 2006). The region is inhabited by an estimated population of twenty-eight (28) million people, and more than forty (40) ethnic groups consisting of 185 out of the 774 Local Government Areas in Nigeria (NDRDMP, 2006).

Historically and cartographically, the Niger Delta consists of the present day Bayelsa, Delta, Rivers, Akwa-Ibom,

Cross River and Edo States, thus covering the six (6) States in the South-South.

However, the legislation of the then Niger Delta Development Commission (NDDC) Bill 1999 further extended the frontiers of the Niger Delta to include Ondo, Imo and Abia States, thus increasing the political map of Niger Delta to nine states (Ogbuigwe, 1999).

The Niger Delta area is characterized by wetlands - one of the largest in the world - and water bodies, consisting of an extensive fresh water swamp forest, rich fisheries deposits and tropical rain forest of great biological diversity. Alongside these immense agricultural potentials, the Niger Delta is blessed with abundant natural resources particularly hydrocarbon deposits on oil and gas. The area accounts for Nigeria's oil reserves (6th largest in the world), which was put at 40 billion barrels as at 2010, and natural gas reserves of 159 trillion square cubic feet - 9th largest in the world (Ladan, 2009).

Today, oil mineral resources account for over 80% of Nigeria's GDP, 95% of its national budget, 90% foreign exchange earnings for which 65%, 75% and 70% are respectively derived from within the Ijaw region (Nwaiwu, 2010). Despite the above huge contributions, the people of the Niger Delta area have suffered deaths, economic losses and bad health due to exploration and exploitation of crude oil and natural gas which has led to numerous oil spillages, uncontrolled gas flaring, and degradation of the natural environment.

3. Environmental Pollution and Degradation in the Niger Delta Area

"Oil fouls everything in Southern Nigeria. It spills from the pipelines, poisoning soil and water. It stains the hands of politician and generals who siphon off its profits. It taints the ambitions of the young, who will try anything to scoop up a share of the liquid riches, fire a gun, sabotage a pipeline, kidnap a foreigner" (Thisday, 2007).

The abundant oil and gas deposits which should have been a blessing in the Niger Delta region is now termed the "oil curse". The reason is simply because the process of harnessing these resources is done without due consideration to the environment.

It is mild to say that there is at least one oil spill a day in the Niger Delta. Studies reveal that between 1976 and 1990, 3,000 oil spill incidents were reported by the oil companies (Badmus, 2010; Nwangwu and Okoye, 1981). In 1998 alone, 40,000 barrels of oil from Mobil platform off the Akwa-Ibom Coast was spilled into the environment (Badeyo and Nwilo, 2004). A 2009 report by Amnesty International calculated that at least nine million barrels of oil had been spilled that year. On May 1, 2010, a ruptured Exxon Mobil pipeline spilled more than a million gallons into the Delta over seven days before the leak was stopped.

With spilled oil becoming the order of the day, the three (3) major components of the environment - land, water and air have been dangerously altered.

Farmlands: Spilled oil makes land unfit for any agricultural purpose. Most times, the oil gets ignited by some accident, ending up consuming plants, human beings and properties in its wake. Major cases of fire disaster include the Idjerhe, Ekakpamre, Amukpe, Adeyie-Egborode and Elume River fire disasters.

Water: The oil clogs and contaminates the waters leaving it very unsafe for drinking and for other domestic purposes. The stagnant waters apart from resulting in the death of fishes and general aquatic life, also favours the growth of infectious micro-organisms, making water-borne diseases a pattern of life for the people. A research concluded by the Faculty of Pharmacy, University of Lagos, Nigeria, found a chemical - benzoic pyrene, an alternate poly nuclear hydrocarbon - in water samples taken from 18 different sites (boreholes, wells, lagoons and beaches inclusive) in Niger Delta (Udok, 2007)

The report confirmed that the chemical threatened the lives of the people through exposure to various kinds of cancer.

Atmosphere: Gas flaring activities have continued to contribute to the already devastated environment. Much of the natural gas extracted from the oil wells in the Niger Delta region is immediately burned and flared into the air at a rate of approximately 70 million cm³ per day (Ladan, 2009). This makes it the single largest source of green house gas emission in the world (Omorogbe, 2001). In 2000, 95% of the extracted natural gas was flared in Ogoniland, a community in the Niger Delta compared to the 0.4% flared in all of the United States of America.

Consequently, communities witness a continuously glaring light, making it impossible to discern night from day, dehydration, constant deafening noises caused by flares and machinery on site and the corrosive effect of acid rain exacerbates this situation.

As at 2002, Agip, an Italian firm, had flared gas in the small fishing village of Akaraolu in the Niger Delta region for about 30 years (Udok, 2007).

The extent of human damage attributable to gas flaring is unclear, but doctors have found an unusually high incidence of respiratory diseases such as asthma, chronic bronchitis, eye and skin problems as well as premature and still births (Okorodudu-Fubara, 1998).

4. Oil and Gas Regulations in Nigeria and the Gap

There are a number of laws and regulations aimed at regulating such activities of the oil companies and protecting the environment generally.

Table 1 summarizes most of these laws and legislations as they relate to Nigeria (Ladan, 2009).

Nigeria has also domesticated the International Convention For The Prevention Of Pollution From Ships, 1973 and the 1978 Protocol, by (a Ratification and Enforcement) Act No. 15, 2007. The major objectives of incorporating this treaty include to protect the human and marine environment in particular from pollution by ships particularly oil tankers, and to minimize deliberate negligent or accidental release of oil and other harmful substances from ships into the seas and coastal environment (Ladan, 2009).

Apart from these, the 1999 constitution of Nigeria, Section 20, provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigerian.

The African Charter on Human and Peoples Rights (Umzurike, 1997) also provides under its Articles 24 that all peoples shall have the right to a satisfactory environment favourable to their development.

Also, more general provisions such as those empowering both the Federal and State Governments to make laws for ... peace, order and good government, and maintenance and securing of public safety and public order (Nigerian Constitution, 1999) can be used as the basis for environmental legislations.

However, a detailed examination of these various statutes and the entire environmental regulatory process in Nigeria generally reveals that these regulations are mere idle threats due to the absence of effective sanctions. Where they exist, there is no will to enforce them because of government's vested interest in oil. Most companies exploiting oil are either partly owned by the Federal Government or are in partnership with it. There is therefore bias for development at the expense of environmental protection. This reason alone makes one to conclude that these laws can hardly save the Niger Delta from these *black days*.

5. The Right to a Clean and Healthy Environment

The right to a clean and healthy environment, as is with all environmental rights, is grouped under the third generational rights or solidarity rights. This right requires a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.

Although there were attempts to develop international environmental law in the nineteenth century (focused on the conservation of wild life), it was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972). Since then a plethora of instruments has followed, each couching this right in a way that best suits it, all pointing to a clean and healthy environment.

The right to a clean and healthy environment is a right to which individuals, communities and the public at large can be beneficiaries of. From the individual perspective, it refers to the right of a victim or a potential victim of an environmentally damaging activity to obtain reparation for harm suffered. From the collective perspective it involves the duty of the state to assist in co-operating internationally to resolve environmental problems. States are under further obligations to progressively realize and fulfill this right which would include conservation, environmentally sound management, as well as attempts at improving the natural environment (Linde and Louw, 2003).

Prior to this era of providing explicitly for a right to the environment, most courts which had respect for the environment had to interpret some fundamental rights (such as right to life, health) enshrined in their Constitution broadly to incorporate environmental rights. The argument is usually the fact that abuses against the environment generally affect the human rights of people living in that environment.

While some countries had recorded enormous success through such purposeful judicial activism, others have not, as the courts in these countries had insisted that the Constitution did not provide for a right to the environment. Among very successful countries in this light have been the South Asian countries (Razzaque, 2002) of India, Bangladesh, and Pakistan (M.C. Mehta v. Union of India; Dr. M. Faroque v. Bangladesh).

In Nigeria, the problems of locus standi, expert opinion and exclusive jurisdiction of the Federal High Courts in respect of mines and minerals, have continued to haunt our courts in respect of environmental problems. A litigant

has to travel to the nearest Federal High Court to institute actions in respect of oil pollution matters (Impidi Barry & Ors v Eric & Ors; SPDC Nigeria Ltd v Abel Isaiah). And where he has travelled to such a Federal High Court, he also has to prove that he has an interest which is sufficiently affected by the action (Oronto Douglas v Shell & Ors.). Yet, the issue of expert opinion where environmental pollution victims, most times, require the services of a professional to prove the link between the act and the damage remains herculean (Ibeh, 2007). This is because of the high charges required in hiring the services of these experts, which is usually not a problem for the violators (most times, the oil companies) whose enormous resources afford these experts.

The truth however remains that using human rights machinery to address environmental harm is problematic, as such actions will fail if the plaintiffs/claimants cannot prove that the environmental issues in question has violated one of their human rights. Furthermore, cataclysmic environmental destruction must occur before the claimants can effectively argue on the basis of right to life.

Today, positive steps have been taken by many countries to circumvent these problems. Various constitutions have been amended or re-enacted in order to provide specifically for the environment. In 1995, the Republic of Uganda enacted a new constitution with novel provisions not found in the rest of East Africa. One of the pioneering provisions is Article 39 of the constitution which declares that *every person has a right to a clean and healthy environment* as a fundamental human right. This right is further buttressed by the National Environment Statute of 1995 which puts forth a mechanism for establishing and implementing environmental standards.

South Africa followed suit. Section 24 of its Constitution (Act 108 of 1996) passed by the Constitutional Court on 4th December 1996 which took effect on 4th February 1997 provides that *everyone has the right ... to an environment that is not harmful to health or well being (South African Constitution)*.

The government passed the National Environmental Management Act 1998 (No 17 of 1998) to protect this right effectively. Other countries that have devoted constitutional provisions to an enforceable right to the environment include South Korea, Congo, Philippine, Ecuador, Hungary, Portugal, Argentina (Okorodudu-Fubara, 1998). Countries such as Mexico and Indonesia recognize the right to healthy environments in national legislations. These provisions however mean little, because they cannot be enforced in the courts, which regard them as insufficient to provide legal standing to any one who cannot give evidence of personal and direct environmental harm.

5.1 Envisaged Problems in Declaring a Right to the Environment

The problem in declaring a right to a clean and healthy environment as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated. Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?

This was the problem the court had to deal with in the Ugandan case of Byabazaire V. Mukwano Industries (Twinomugisha, 2007). Here a plaintiff residing in the vicinity of a factory allegedly producing obnoxious gases brought an action under Section 4 of the National Environment Statute 1995. Unexpectedly, however, the court despite finding that the statute gave every Ugandan the right to a clean and healthy environment dismissed the suit. The court stated that the National Environment Management Authority (NEMA) had to establish air quality standard before the totality of the right to a healthy environment could be ascertained.

In some other Constitutions, the wordings in providing for the environment are couched in very broad terms leaving the whole phrase with little meaning. For instance, the provision in the African Charter on Human and Peoples Rights stipulates that:

“All people shall have the right to a general satisfactory environment favourable to their development”.

This provision is ambiguous especially as the Charter did not give any indications as to what the terms *“general satisfactory environment”* entail. This lack of clarity has allowed for different interpretations as to the exact meaning of this right.

Again, most of these instruments merely declare this right without creating binding obligations on states. States on their part usually declare this right without ensuring that enforcement mechanisms are put in place. The real effect of this right will not be appreciated if it is not accompanied by the availability of means to implement as well as adequacy of mechanisms to enforce.

6. Recommendations and Conclusion

There is every need to review and/or reform the existing Nigerian Constitution to provide for an explicit right to a

clean and healthy environment as a fundamental human right available to all persons Using human rights machinery is usually problematic because such action as stated earlier will fail if the plaintiff cannot prove that the environmental issue in question has violated one of their human rights, and moreover cataclysmic environmental destruction must occur before the claimants can effectively argue especially on the basis of right to life.

In declaring this right, the wordings implored must be definite, precise and clear and must create an enabling statute which must provide meaningful redress and penalties. By meaningful, the writer implies that the laws must have force, and serve as a form of deterrence, different from the present scenario in Nigeria where oil companies continue to flare gas mainly because the cost of turning off the flares far exceeds the fine for keeping them on. Immediate clean up of the environment using the best technology available must always be a part of the package.

And when this right is finally declared; the courts must not let it remain a futile provision bound within the realm of academic theory, but must through well and reasoned/decisions, give this right the life and attention it truly deserves.

This is a more pragmatic way of ending the Niger Delta struggle.

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Table 1. Relevant Statutory Instruments on Environment and Their Objectives

1	Petroleum (Act Cap P10 LFN 2004)	The principal law on oil and Gas in Nigeria. Section 1(1) vests in the state the entire ownership and control of all petroleum in, under or upon any lands. Provides encompassing framework for the regulation of upstream and downstream activities so as to protect the environment. The main provision on pollution control is Regulation 25 of the 1969 Petroleum (Drilling and Production) Regulation, which requests all licensees and leasees to adopt all precautions to prevent pollution of the environment. It also prescribes sanctions for the enforcement of all obligations.
2.	Oil Pipelines (Act Cap 07 LFN 2004) and the Oil and Gas Pipeline Regulations of 1995	Governs pipelines operations in Nigeria. It regulates the survey of routes for oil pipelines and the grant of licences to construct, maintain and operate the pipelines. Application for the grant of an oil pipeline licence is made to the Minister through the Department of Petroleum Resources (DPR). The 1995 Oil and Gas Pipelines Regulations generally provide for standards for pipeline design, construction, inspection and testing, environmental protection, operation and maintenance guidelines, among others. The Oil Pipeline Act further imposes a number of restrictions on the operation of a licensee holder.
3	Oil in Navigable Waters Act 1968 (Cap 06 LFN 2004)	Section 3 of the Act makes it an offence to discharge any oil or mixture containing oil into navigable water courses and other areas. This prohibition clearly covers the operation of petroleum producing companies in Nigeria and inter alia deals with the escape of crude oil from storage facilities or from apparatuses for pumping the crude into ocean tankers at oil terminal.
4.	Environmental Impact Assessment Act 1992 (Cap E. 12 LFN 2004)	Provides statutory basis for EIAs as part of project development authorization process. Sets out a list of activities on which EIA must be carried out.
5.	Criminal Code Act (Cap C 38 LFN 2004).	Provides legal framework for seeking redress from environmental diseconomies. Section 234 provides that any person, who violates the atmosphere in any place so as to make it noxious is guilty of a misdemeanor and liable to imprisonment for six months.
6.	The Associated Gas Re-Injection Act (Cap A 25 LFN 2004).	Provides statutory basis for the regulation of gas flaring in Nigeria.
7.	Petroleum Profits Tax (Amendment) Act (Cap P13 LFN 2004).	Aims at ensuring the collection of tax imposed upon the profit made from the winning petroleum.
8.	National Environmental Standards Regulatory and Enforcement Agency Act (Established to replace the defunct FEPA)	Responsible for the protection and development of the environment, biodiversity conservation and development of Nigeria's natural resources as well as environmental technology.