Emboldening Environmental Regulation: Judicial Independence and Adjudication of Disputes in Nigeria

Olanrewaju A. Aladeitan and Chidinma T. Odaghara*[1]

Abstract
The essay attempts to analyse judicial independence in adjudication of environmental matters, particularly in Nigeria. It suggests that following the trend in judicial decisions reached by Nigerian courts, in the absence of an explicit constitutional provision on right to the environment; matters relating to the environment have often been determined on legal technicalities and tend to place overt emphasis on economic rationale that jeopardise the meeting of environmental needs. The essay maintains that to embolden environmental regulation in Nigeria, the capacity of Nigerian courts to determine disputes relating to the environment, must be improved upon. However, the capacity of courts to exercise judicial independence in the adjudication of environmental disputes is largely dependent on the imperative will of the Nigerian State to incorporate explicit provisions on the environment and environmental rights into the main body of the Constitution, signalling the onset of a bias for environmental protection in the entire polity.

Keywords: Judicial independence; adjudication; environmental disputes

Introduction

Owing to novel knowledge on environmental issues generated by research and shared experience of pollution in the environment, activities that were previously considered irrelevant have now metamorphosed into monumental issues sufficient enough to engage the attention of policy makers and scholars in environmental studies at national and international level. In Nigeria, the enactment of environmental protection laws and establishment of specialized environmental regulatory framework and institutions to curb challenges posed to the environment such as Green House Gas (GHG) emissions, environmental pollution and degradation is yet to make impact that culminates into environmental sustainability. The persistence and continuing effect of both human and natural activities on the environment thus raises critical questions on the effectiveness of existing laws, as well as the judicial attitude towards implementation of the environmental regulations in existence.

Against the background that the Nigerian environmental law realm is inundated with a significant number of institutions legally vested with capacity to regulate matters on environmental management and protection, in order to achieve maximum compliance and effectively implement environmental laws, the issue of environmental enforcement mechanism becomes apt in this discourse. Perhaps more compelling is the general judicial attitude to the interpretation and implementation of environmental law in Nigeria. This raises the question on whether the Nigerian judiciary as the adjudicatory body in the country has the expertise and wherewithal to resolve environmental disputes, as well as the preparedness to exercise its judicial powers independently for the protection of the environment even where there is conflict with the preservation and promotion of State economic interest.

The important role of the judiciary in environmental governance underscores the collaboration of the United Nations Conference on Sustainable Development, Rio+20, and the United Nations Environment Programme (UNEP) in organizing the World Congress on Justice, Governance and Law for Environmental Sustainability which was held in 2012. Through the World Congress, over

[1]***Olanrewaju A. Aladeitan*** *(PhD) is a Senior lecturer (Energy, Oil and Gas and Environmental Law) in the Department of Public and International Law, Faculty of Law, University of Abuja, Nigeria;*
Chidinma Therese Odaghara *B.L.; LLM (Kent, UK) is a Doctoral Candidate and Lecturer in the Department of Public and International Law, Faculty of Law, University of Abuja, Nigeria. (chidinma.odaghara@uniabuja.edu.ng)*

250 of the world's Chief Justices, Attorneys General and Auditors General contributed to the debate on the environment and the way forward for States, particularly in the exercise of judicial independence in environmental matters. Therein, it was declared that diplomatic outcomes related to the environment and sustainable development, including from Rio+20, will remain unimplemented without adherence to the rule of law, and an open, just and dependable legal order at national level.[2] To this end, this essay examines judicial independence in the adjudication of environmental matters and considers whether judicial independence is a matter of urgent priority for development in Nigeria in view of the econocentric perspective on the significance of corporate activities that perpetuate environmental harm.

The paper is divided into five parts; the first part provides a general overview of the concept of judicial independence in the adjudication of environmental matters. The second part examines judicial independence and the adjudication of environmental related disputes by Nigerian courts. It examines selected legal challenges in the Nigerian legal framework, and questions the feasibility of judicial independence in adjudication of environmental matters in Nigerian court. The third part analyses international adjudication of environmental disputes in light of the discourse on judicial independence. The fourth section examines the chances of proper exercise of judicial independence in light of the general reasoning that recognition of environmental concerns is antithetical to development. In other words, the section seeks to determine whether judicial independence in environmental matters is a realizable objective within current contemporary economic realities. The essay concludes with suggestions on how judicial independence in the adjudication of environmental matters can be improved upon in Nigeria. Though economic interest may inhibit the exercise of judicial independence in environmental matters; the court is an arbiter of what the law is.[3] Therefore, it is possible to foster the ideals of environmental sustainability through the platform created for courts in Nigeria.

Though limited in scope as it focuses on principles of tort as the underlying law for environmental dispute resolution in Nigeria, the essay submits that judicial independence will develop with the extension of the sources of Nigerian environmental law to include a constitutional provision on environmental rights. Fairness, openness, and immunity from improper influence which are synonymous with judicial independence, are characteristics imbued into the court which will effectively.

Judicial Independence, Conceptualized

The term "judicial" means something "belonging or relating to the office and functions of a judge; pertaining or appropriate to the administration of justice; the exercise of judgement or discretion, as opposed to a ministerial exercise of power."[4] "Independence" on the other hand refers to the state of not being subject to the control or influence of another.[5] Whereas this may be the ordinary meaning and understanding of the word independence, it is important to state that the actual meaning of the word is contextual and depends primarily on the subject of discussion. To this effect, the word, "independence" in the context of this discourse appears to have at least two meanings. The first meaning is commonly invoked when considering the circumstances of the individual sitting as a judge in a court. Such an individual is adjudged independent if he is able to reach a judicial decision without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before him without fear or anticipation of (illegitimate) punishments or rewards.[6]

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[2] See Rio+20Declaration on Justice, Governance and Law for Environmental Sustainability < http://www.unep.org/delc/Portals/24151/UNEPGC.27-13-English.pdf> accessed 20.07.18

[3] McGuire .C. (2014) Environmental Law from The Policy Perspectives: Understanding How Legal Frameworks Influence Environmental Problem Solving (CRC Press) p. 180.

[4] Suleiman .I.N, The Nigerian Law Dictionary (Zaria, 2000), P.173

[5] Garner .B.A, Black's Law Dictionary (9th Edition)

[6] Burbank .S., What do we Mean by "Judicial Independence" 64 OSLJ (2003) P. 323

The other meaning, which is perhaps less common in discussions surrounding individuals as judges, but applies naturally to courts and to the judicial system as a whole is the perception of a person or an institution as being dependent on another if the person or entity is unable to do its job without relying on some other institution or group. In this context, the judiciary is institutionally dependent on the legislature and executive for jurisdiction, rules, and execution of judicial orders. In this second meaning however, it is worthy to point out that judicial independence is not necessarily pejorative and whether legislative or executive "interference" with the judiciary is normatively deplorable depends on the form it takes.[7] With the understanding of what the words "judicial" and "independence" means, it is imperative to now consider what the concept "judicial independence" means. As a concept, judicial independence especially in the light of the divergent perception of the words, 'judicial' and 'independence' would appear to lack a precise definition. This ambiguity in the meaning of judicial independence has compounded already existing controversies and confusions regarding its proper definition, leading some scholars to question whether the concept serves any useful analytical purpose.[8]

The paper concedes that judicial independence is difficult to achieve because the other branches of government ordinarily possess the power to disobey or thwart the enforcement of judicial decisions, if not also to retaliate against the courts for decisions that they oppose.[9] However, in this discourse, judicial independence implies the ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private. The term in a normative sense, refer to independence that the court and judges ought to possess in environmental matters. It implies that at both individual and institutional level, there are a number of judges in Nigeria that are willing and able to rule against powerful state and non-state actors in an environmental dispute involving private actors, government actors, or a mix of both parties where either of the parties are vested with potential or actual power over the court.

In conceptualizing judicial independence, the essay acknowledges the difficulty, if not impossibility, in creating an ideal judiciary that is completely insulated from external influence. Indeed, this is not the forum to pursue a discussion on the concept of judicial independence, which resonates with the larger debate about the possibility of having a society truly governed by the rule of law, but it helps explain why the authors of this essay are of the opinion that successful exercise of judicial independence in the adjudication of environmental disputes by Nigerian courts rest to an extent with the inclusion of an explicit constitutional provision on the right to the environment. Notwithstanding, there are limits to what can be accomplished by adjusting the institutional characteristics of the judiciary or by enacting laws that strengthen environmental rights and the inviolability of judicial independence in environmental adjudication, in simple terminology, judicial independence can be defined as the ability to arrive at a judicial decision without bias due to undue pressure or inducements. It refers to the ability of the Judiciary to be independent by being distinct from the executive and legislative arm of government and other concentrations of power[10] and according to *Ibrahim Abdullahi*, "the principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law.[11] Judicial independence also implies the adjudicative independence of judges as well as the institutional independence of the judiciary as a whole.[12]

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[7] J.F. John, ' Independent Judges, Dependent Judiciary:Explaining Judicial Independence' 72 SCLR (1999) P. 356. <http://www-bcf.usc.edu/~usclrev/pdf/072303.pdf> Accessed 12.08.2018

[8] Encyclopaedia Britannica, https://www.britannica.com/topic/judicial-independence accessed 12. 01.18

[9] ibid

[10] Daudu J.B. "The Independence of the Nigeria Judiciary in the light of Emerging Socio-Political and Security Challenges". A key note speech accessed online

[11] Abdullahi, I. "Independence of the Judiciary in Nigeria: A Myth or Reality?" International Journal of Public Administration and Management Research (IJPAMR), Vol.2. No.2, August , 2004 http://www.rcmss.com accessed online 22.01.2018

[12] Canadian Judicial Council Publication on Judicial Independence in Canada (2016) <https://www.cjc-ccm.gc.ca/cmslib/general/Why%20is%20Judicial%20Independence%20Important%20to%20You.pdf> accessed 05.08.2018

Discussing judicial independence further, Ibrahim Abdullahi expressed the view that:

> The concept of judicial independence has many elements which can broadly fall under the headings of: (i) Appointment and removal of judicial officers and judicial staff; (ii) Security of tenure and remuneration of judges and supporting staff; (iii) Budgetary provisions (process); (iv) Individual and institutional freedom from unwarranted interference with the judicial process by the executive arm of government and politicians.[13]

From the working definition of judicial independence, and the broad categories of its elements as outlined above, it is trite that of the three arms of government, the judiciary is the branch of government that enables decisions reached to translate into a living law. Institutionally therefore, the judicial process is in a sense, the heart of any political system in any given society. The exercise of judicial adjudicatory powers over environmental matters is part of the State's effort to secure a relatively healthy environment through the regulation of human activities that poses harm to the environment and, are largely, economic. Law and the judiciary are viable instruments for construction and implementation of social order. Judicial independence is by implication, a guarantee by the state that in determining issues relating to the environment, the court and its officers will for the sake of justice, be granted the prerogative to make honest and impartial decisions in accordance with the rules of environmental law and evidence without fear of interference, control, or improper external influence.

Judicial Independence and Adjudication of Environmental Matters in the Nigerian Court

As environmental pollution and issues emanating from climate change assume new dimensions and become increasingly controversial, stakeholders look to courts to provide direction and guidance through its application and interpretation of the law. States are increasingly interested in judicial intervention on environmental issues. For instance, more than three hundred and eighty jurisdictions in scores of nations have independently established special environmental courts and streamlined judicial practices to promote the application and implementation of environmental law by providing courts with access to judicial independence in matters relating to the environment.[14]

The Nigerian state is no novice to this trend as the government has consistently declared its commitment to the pursuit of sustainable development through environmental governance.[15] Regrettably, however, the attributes of administrative, adjudicative, and financial freedom which is synonymous with an independent judicial adjudication is lacking in the Nigerian environmental governance regime. What is presently tenable is a rich rhetoric of environmental laws and regulation that yield minimum result because the legal solutions and strategies embedded in the judicial system is polarized and weakened by a governance system that de-emphasises enforcement and regulation of environmental law for the benefit of economic interests, which are yet to metamorphose into national development. To appreciate the significant role of judicial independence in adjudication of environmental disputes it is imperative to understand that the judiciary is a significant catalyst for the advancement of environmental law in Nigeria. In other words, for remarkable progression in Nigeria's environmental governance, the court must be vested with the ability and capacity to assess facts presented in an environmental dispute, apply

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[13] *Id*

[14] Shelton .D.,and Kiss .A., *UNEP Judicial Handbook on Environmental Law* (UNEP: 2005)

[15] See President Muhammadu Buhari's Address at the launch of the clean-up of Ogoni land and other oil impacted communities in the Niger Delta at Bodo, Rivers State on 2nd June, 2016 where-in the President made reference to the lack of will and willful non-compliance with environmental laws and regulations as an underlying cause of pollution in the Niger-Delta.
<http://www.statehouse.gov.ng/index.php/news/speeches/2292-president-buhari-s-address-at-the-launch-of-the-clean-up-of-ogoniland-and-other-oil-impacted-communities-in-the-niger-delta-at-bodo-rivers-state> accessed 01.10.2018

relevant law to those facts, as well as determine the defaulter and the appropriate relief or punishment for the default.

In light of the foregoing, twin issues have emerged. First is the feasibility of judicial independence in adjudication of environmental matters in the absence of an explicit constitutional provision on environmental right, while the second issue relates to the legal gaps in the extant legal framework which limits the impact of adjudication in the quest to secure environmental sustainability for the Nation's current and future generations.

Feasibility of Judicial Independence and the Adjudication of Environmental Matters in Nigeria

From technicalities that create legal loopholes, to corruption, inefficiency, and poverty, the Nigerian court is besotted with severe constraints that hinder the effective exercise of judicial independence in environmental disputes relating to the harmful impact of extractive activities. As regards legal loopholes, the 1999 Constitution of the Federal Republic of Nigeria (as amended) is the grundnorm. As the grundnorm, the constitution does not make any explicit provisions for or references to environmental protection as a fundamental human right for the benefit of its citizens.[16] Therefore, for the legal resolution of dispute relating to environmental claims, the starting point for litigants seeking remedies is not the Constitution, but the common law provision on tort.

Thus, matters relating to the environment are mostly embedded in the precincts of private law. In most cases, such disputes are not directly concerned with environmental protection or preservation of the ecosystem; rather, they deal with injuries to persons and to property. It is only with respect to cases where damage to the environment is incidental to personal and property damage that common law liability rules on private remedies become relevant in the discourse on judicial independence in the adjudication of environmental matters. Using such tort remedies as negligence, strict liability, nuisance and trespass, private remedies are sought to address environmental harm, cleanup of the environment, as well as prevention of further damage on the environment. The role of the court in the adjudication of environmental matters is to a large extent limited in terms of interpreting the law and the exercise of jurisdiction over matters relating to the environment. In addition to the constraints imposed by limited jurisdiction, Nigerian courts encounter difficulties because of technicalities emanating from the use of private law in making decisions on environmental matters. For instance, the issue of attributing causality and assessing the consequential damages in matters relating to the environmental impact of extractive activities are technicalities that limit the courts in deciding disputes and, ultimately, limit the exercise of judicial independence.[17]

A selected number of cases justify the foregoing assertion. In *Chinda* v. *Shell-BP,*[18] a local community in Rivers State instituted action against Shell-BP for damage 'from the heat, noise and vibration resulting from a flare' (all of which are environmental harm). The plaintiffs affirmed/claimed that gas flaring destroyed trees in their environment and damaged some homes. However, the court on the basis of evidence adduced from its visit to the *locus inquo*, held that it could not identify any material damage caused by gas flare on the environment in question. In the court's opinion, the trees and crops close to the site of the gas flare were 'perfectly healthy'. Therefore, it held that even if such damages can be claimed through the action before it, the claims in the case would fail for lack of evidence. In other words, the plaintiff's claim on environmental damage failed because the court encountered difficulty in establishing causality.

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[16] The only provision which makes explicit reference to the environment is s.20 of the 1999 Constitution of the Federal Republic of Nigeria (As amended) which provides that the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. However, the provision is non-justiciable.

[17] Frynas .J.G, (1999) Oil in Nigeria: Conflict & Litigation between Oil Companies and Village Communities (Transaction Publishers) p.165

[18] (1974) 2 RSLR 1.

Similarly, in *Seismograph Service* v. *Onokpasa,*[19]following the plaintiff's claim for compensation on account of damage from seismic operations, the trial court visited the scene of the seismic activity and on account of physical observation, awarded judgement in favour of the plaintiff. The trial court's decision was however quashed on appeal as the Supreme Court held that the trial court's observation at the scene did not suffice as factual evidence. It thus dismissed the plaintiff's claim on account of the court's failure to attribute causality to the defendant's activities. The given cases illustrate how technicality poses frustration to the judicial effort of the court to exercise independence in the adjudication of disputes relating to the environment.

Scholars in common law jurisdiction have in the past suggested that courts, should, in the absence of appropriate applicable statutory provisions (such as a constitutional provision on the environment); address the challenges of judicial independence posed by technicalities in private law by innovatively widening the ambit of the common law remedies beyond their traditional and conventional sphere of operation.[20] The general attitudes of the court in previous decisions relating to environmental law in Nigeria however, demonstrate a divergent position.[21] It appears that the courts in Nigeria are inclined towards the strict interpretation of the law of tort and in the absence of a Constitutional provision on the environment and environmental rights; do not attach much significance to the limitations on judicial independence posed by technicalities. Consequently, courts are reluctant to widen the ambit of common law remedies through judicial interpretation. Alfred Denning asserts that 'in theory, the court does not make law but only expound it, but as no one knows what the law is until the judges expounds it, it follows that they make it.'[22] However, it is our contention that the environmental legal framework of Nigeria as currently constituted is a clog in the advancement of judicial independence in environmental disputes because of the absence of a right to the environment in the Constitution which is the state's grundnorm. It is practically impossible for the court to interpret non-existent laws in adjudication of environmental disputes. Nigerian courts do not merely interpret the law in environmental matters literally. Rather, in the exercise of its role as the arbiter in environmental related disputes, the court is expected to explore the law as a vehicle for promoting the regulation, management and protection of the environment where there exists a thorough and cogent justification (in this case, a right to the environment) for its decision. In the absence of a constitutional provision on a right to the environment, the courts capacity to expound environmental law as well as sustain judicial independence in the determination of disputes is constrained.

Judicial Independence in International Adjudication of Environmental Matters

Basically at international level, controversy surrounds the issue of judicial independence in the adjudication of disputes relating to the environment; that the current international environmental

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[19] (1972) 1 ANLR (Pt.1) p.347

[20] See generally, Frynas .J.G., 'Social and Environmental Litigation Against Transnational Firms in Africa' *JMAS* 42, 3(2004) Cambridge University Press, Wolf .S., White .A., and Stanley .N., P*rinciples of Environmental Law* Cavendish, London, (3rd ed.) (2002); Richardson G., Ogus .A., and Burrows .P., Policing Pollution: A Study of Regulation and Enforcement, (Oxford: Clarendon Press, 1982); Hawkins .K., Environmental and Enforcement: Regulations and the Social Definition of Pollution, (Oxford: Clarendon Press, 1984); Bell .S. and McGillivray .D., Environmental Law (Oxford: University Press, 8th ed. 2010); Fagbohun .O., 'The Emergence and Development of Environmental Law in Nigeria (1960 – 2010)', in Azinge .E., and Aduba .N., (eds.) *Law and Development in Nigeria: 50 Years of Nationhood* (Nigerian Institute of Advanced Legal Studies 2010); Fagbohun .O., *The Law of Oil Pollution and Environmental Restoration, A Comparative Review* (Odade Publishers, Lagos, Nigeria, 2010).

[21] Except for the decision in *Jonah Gbemre* v. *Shell PDC Ltd and Ors* (2005) Suit No. FHC/B/CS/53/05 where the Federal High Court Benin, Nigeria which is a court of superior record declared that the Applicants as bonafide citizens and residents of the Federal Republic of Nigeria were entitled to make environmental claims pursuant to their fundamental right to life and dignity of the human persons as guaranteed by the Constitution of the Federal Republic of Nigeria, 1999. Courts are generally reluctant to expand the frontiers of private law to include environmental protection as of right.

[22] Alfred Denning .T. (2005) The Changing Law, (Delhi: Universal Law Publishing Co), p. vii.

law regime presents a mismatch between global interdependence and global inter-governance.[23] Proponents of this position suggest that what is lacking is a specialized international judicial body that draws its moral and legal strength not from “States”, but from mankind as a united community of human beings and from the environment.[24] They make reference to a central independent judicial tribunal with legally binding enforcement authority and overall mandatory jurisdiction over State and non-state actors, capable of delivering significant decisions that provide clear guidance on decision making in international environmental law as the precursor for judicial independence.[25] The international realm is saturated with a significant number of international institutions that adjudicate in environmental disputes. These institutions include but are not limited to the International Court of Justice (ICJ), the World Trade *Organisation (*WTO), International Tribunal for the Law of the Sea and other institutional framework created by Multi-lateral Environmental Agreements (MEAs) as mediums to resolve environmental disputes among state actors.

However, given the polycentric nature of legal disputes in the domain of international law, it is very difficult, if not, impossible, to find legal disputes in international law that are not multi-dimensional. In most cases, an environmental issue which is subject of a dispute in international law will involve arguments about other substantive areas of international law. Aspects of international law such as trade agreements in the World Trade Organisation (WTO), Human Right issues, Intellectual Property Rights (IPRs), State sovereignty over natural resources, and the law of State responsibility are examples of other issues that may feature in an environmental matter. In such instance, the combination of issues implies that the environmental matter is likely to be adjudicated upon by judges with expertise in areas of international law that are not strictly international environmental law and this affect the quality of judicial independence exercised.[26] For instance, African Commission on Human Rights (ACHR) is a regional body for Africa that has incorporated environmental rights into the African Charter on Human and Peoples’ Rights. It utilized the provisions of the Charter to review the *Ogoni land case* in Nigeria during the 30th session of the Commission. Communication relating to the violation of human rights and international environmental law concerns for the environment and public health, contamination of water, soil and air resulting in long term health problems for most of the indigenous people was considered by the Commission. The commission found the government of Nigeria was in violation of fundamental human rights and the right to a general satisfactory environment as set down in the African Charter.[27]

The *Ogoni land case* is significant in the present discourse on judicial independence in the adjudication of environmental matters at international level on two issues. Firstly is the question of how judicial independence can be applied by an international body considering that such bodies are the creation of States and are therefore, subject to State control and manipulation. The second issue of fundamental significance in the debate on judicial adjudication is the issue of the exclusion of non-state actors in the resolution of dispute at international level. The *Ogoni land* case is one that was reviewed from a human rights perspective and aspects of environmental law such as environmental justice and pollution was addressed. Nonetheless, it is safe to assert that the issues relating to environmental law were addressed in a non-decisive manner due to the absence of a truly independent international judicial forum for proper adjudication of all the environmental

[23]Lord Anthony Giddens, International Court for the Environment presentation at the London School of Economics (Press Release, 24 November 2009 <http://www.environmentcourt.com/siteimg/1260458555LSE_Nov_09_release.pdf)>Accessed 20.09.18

[24]Postiglione A.O, ‘A More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations’ 20 EL (1990) 321

[25]Carroll .M, (2013) It’s High Time for an International Environmental Court http://www.carnegiecouncil.org/publications/policyinnovations/index.html;http://www.policyinnovations.org/ideas/innovations/data/000240, accessed 21.09.2018

[26]Sands .P., ‘Litigating Environmental Disputes: Courts, Tribunals And The Progressive Development Of International Environmental Law’ (Paper Presentation 2008) <www.oecd.org/investment/gfi-7> Accessed 29.09.2018

[27] Malone L. & Pasternack .S., *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (Island Press: 2006) p.47

problems raised in the case. Because of the absence of an independent judicial forum to adequately address the environmental issues flowing from the case, environmental matters relating to ecological damage and the administration of environmental restorative justice in the region could not be subject to adjudication, which could have laid all the issues to rest.

Perhaps the lack of judicial independence at international level explains why non-state parties in the *Ogoni land* case by their human rights claims sought redress before a Federal Court in New York and have received compensation and the establishment of a trust fund for the indigenous people of Ogoni land from Shell as a means of out of court settlement. Drawing from experience in the *Ogoni land case*, it can be argued that environmental restorative justice issues that arose in the case were not decisively addressed due to the absence of an international adjudicatory body vested with sole jurisdiction over issues relating to the environment. Therefore, the question of judicial independence cannot arise in the absence of such judicial body. Of course, the inability of the ACHPR to exercise judicial independence in the adjudication of the *Ogoni land* case robbed Africa and indeed the entire international community of a significant opportunity to create innovative rules on international environmental law and expand the frontiers of international environmental dispute resolution to encompass pragmatic approaches outside the use of economic instruments as monetary compensation. Similarly, with respect to judicial independence in the adjudication of environmental matters at international level, the International Court of Justice (ICJ) is originally a court for the adjudication of all matters including international environmental law, because of the peculiar technicalities in environmental related disputes. Article 92 of the UN Charter prescribes that the ICJ shall be the principal judicial organ of the United Nation. Therefore, theoretically the ICJ has jurisdiction over all matters of international concern. In exercise of this jurisdiction and in response to calls for an international judicial body for adjudication of environmental disputes, it established a Chamber for Environmental Matters in 1993 which was periodically reconstituted until 2006. In the Chamber's 13 years of existence, however, no State ever requested that a case be dealt with by it. The Court consequently decided in 2006 not to hold elections for a Bench for the said Chamber.[28] Thus, till date, no environmental dispute has been adjudicated by the Chambers.

Although the ICJ is competent to hear cases involving the environment, it has heard very few and perhaps only one case that can be completely considered as an environmental dispute; that is, the *Gabcikovo- Nagymaros Project case.*[29]In the case, environmental protection, law of Treaties, water resources Law, State succession, sustainable development, state sovereignty and state responsibility were all issues in question. However, in the case, the ICJ grounded its decision more on the law of treaties. As such, the issues in contention cut across diverse aspects of international law rather than on the applicable rules of international environmental law. The case is one of the rationale put forward by opponents of the debate on judicial independence over international environmental disputes brought before the international fora as they argue that most matters involve an issue in international environmental law, but in most cases, are not environmental disputes in the strict sense of the word.[30] International environmental adjudication by the ICJ, unlike the European Court of Justice (ECJ) is mostly dependent on the consent and good faith of the state parties concerned. In other words, the resolution of environmental dispute by the ICJ is essentially dependent on community pressure.[31] Consequently, there are instances of state parties refusing to comply with the decisions of the ICJ. Of particular interest is the non-compliance of the Unites States (US) in the case of *Nicaragua* v. *The US,*[32] there, the US refused to acknowledge the jurisdiction of the ICJ or accept its decision. Furthermore, when the matter was referred to the Security Council, the negative vote by the US in that case prevented the adoption of any resolution by the Security Council. Accordingly, even though a decision by the

[28] See ICJ website <http://www.icj-cij.org/court/index.php?p1=1&p2=4> accessed on 29.07.2018
[29] Gabcikovo- Nagymaros Project (*Hungary* v. *Slovakia*); 1997, ICJ .7.(Sept.25)
[30]Boyle .A., and Harrison .J., 'Judicial Settlement of International Environmental Disputes: Current Problems' Vol. 4 *JIDS*. 2 (2013) p. 243-276.
[31] Ibid
[32]1986 ICJ Rep.14(Judgment,1986)

ICJ is binding, a state may avoid compliance and if it is a world power like the US, it can simply vote against it in the Security Council.[33] Furthermore, there are many political and procedural impediments to the use of ICJ in international environmental disputes.[34] For instance non-state actors such as Non-governmental Organisations (NGOs), Multinational corporations and private parties lack access to the ICJ. Consequently, the international environmental regime is deprived of the benefits in taking a central multi-dimensional and decisive stance on the various environmental issues that cut across States and non-state actors.

Also, many States are not willing to submit to the jurisdiction of the ICJ in the event of an environmental dispute because many states are unfamiliar with the law on international environmental dispute resolution by the ICJ. Due to the inadequacy of judicial precedents, States are cautious to avoid pursuing cases for which the outcome is perceived as unpredictable. Hence, they consider the use of National law or tactful exploration of the diplomatic process as pragmatic and useful for the resolution of disputes relating to environmental law. Basically, litigation before the ICJ is not designed to produce a mutually acceptable solution to the parties; consequently, states prefer diplomacy as it often generates more alternative solutions. Diplomatic mechanisms such as good offices, mediation or conciliation for states is perceived as an appealing form of dispute resolution as states explore many alternatives in the settlement of environmental disputes.

The use of World Trade Organisation (WTO) in the adjudication of disputes on environmental law arises from the WTOs' institutional ability to determine trade relations and develop international trade law as a result of its quasi- mandatory dispute settlement mechanism.[35] However with reference to its expertise, the WTO, as per its mandate considers non trade issues exclusively from a trade perspective.[36] For instance, the *Shrimp/Sea Turtle case* decided by the WTO's appellate body illustrate the limitations in the use of WTO as an adjudicatory body for disputes that revolve around environmental issues. The case dealt with the extra territorial application of the United States Endangered species Act of 1973 which required US shrimp traders to use approved Turtle Excluder Devices (TEDs). The US congress required the Secretary of State to initiate negotiations with all foreign governments' whose nationals engaged in fishing procedures likely to adversely affect sea turtles. Subsequently, Congress imposed a ban on the importation of shrimps harvested without being certified by the Secretary of State as using "sea turtle friendly" technologies. However, the WTO by its ruling invalidated the US import ban of shrimp from various states because according to it, the US made no effort to negotiate with those countries and the US only negotiated with states that had similar regulatory programs as its own; amounting to unjustifiable discrimination. The WTO failed to take into consideration, different conditions that may have occurred in the territories of other states or the specific measures and policies which exporting countries that complied may have adopted for the purpose of protecting and conserving the sea turtles. In this case, the WTO failed to consider factors such as the environmental measures and policies taken by complying states which would have expanded the rules of international environmental law on nature conservation.

Ultimately, judicial independence and the question of an international judicial body for the environment is interwoven and both issues appear to be wrapped around the economic and political interests of States. Perhaps, it is these interests that inhibit the promotion of judicial independence at state level, create lack of coordination, duplication of efforts, overlap in

[33] Ferrante .A.R., (1996) 'The Dolphin /Tuna Controversy and Environmental Issues : Will the World Trade Organisation's Court "Arbitration Court" And the International Court of Justice's Chambers for Environmental Matters assist the US and the World in Furthering Environmental Goals ?' 5.J*T'IL& P* Vol. 5, no. 279, 1996, p.311

[34] Dunoff J.L., (1999) Institutional Misfits: the GATT, the ICJ&Trade-environment Disputes' *MJIL,* Vol.15,.1043 in Malone .L.A,& Pasternack .S., op.cit p.223

[35] Pfahl .S., 'Is the WTO the only Way? Safeguarding Multilateral Environmental Agreements from International Trade Rules and Settling Trade and Environmental Disputes Outside the WTO' (Greenpeace, Adelphi Research, Friends of the Earth Europe Briefing paper 2005)<http://iceac.savenet.es/wto.pdf> accessed 21.09.2018

[36] Ibid

regulation and even conflict of action in environmental governance.[37]Since international environmental institutions as currently constituted lack coherence due to fragmentation of roles,[38]judicial independence in international adjudication of environmental disputes is yet to be tenable.

Findings: Examining Economic Interest in the Context of Judicial Independence

A fundamental challenge to judicial independence in environmental matters lies in the significant role played by underlying economic interests. Environmentalists advocate for the judiciary to exercise independence and serve as an effective means of control rampant consumerism and the generation of a range of significant environmental pollutants such as GHGs, noise and waste by manufacturing firms and businesses through adjudication. The corporate sector, on the other hand repeatedly reiterate that increase in commercial activities through natural resources extraction, production and delivery of varied services is the only way forward for human development. Though not completely opposed to regulation of the environment, the corporate sector is concerned about excessive regulation with its attendant cost implication which detracts from the net benefits potentially available.[39] The State on its part admits the risks but vehemently maintains that every prerequisite of environmental regulation has been met and to go any further would ultimately result in a downturn for the economy. In other words, in most cases, States accept the ideals that the independence of the regulatory and institutional framework is fundamental for the efficient management of resources and protection of the environment; but are reluctant to adhere to the principles of judicial independence in environmental matters. Ultimately, the general attitude of the state to environmental matters renders judicial independence in the adjudication of environmental disputes an illusion.

State's interest in the promotion of industrial development as encapsulated by neo-liberalism has made it virtually impossible for courts to decisively handle environmental issues in a manner that ensures environmental justice is not only done but seen to have been done. The Nigerian State by tactfully inserting enforcement and fierce implementation of the environmental regulatory framework, provides support for the extractive industry to the detriment of environmental issues. Therefore, the exercise of judicial independence in environmental matters is yet to be tenable because at the moment, it is incompatible with the State’s economic interest. The need for economic revenue generated from extractive activities still outweighs the interest of the Nigerian State in matters relating to environmental management and protection. With respect to independent adjudication, ordinarily, the court is expected to employ its judicial power of interpretation and consider environmental disputes relating to the harmful impact of extractive activities in such a way that based on the rules of environmental law, protection from environmental harm and environmental management is prioritised over and above economic interests that flow from production due to extractive activities. Courts in Nigeria with jurisdiction over environmental matters are generally inhibited by the reluctance of the state to expand the frontiers of environmental law such that environmental harms posed by extractive and other economic related activities are subject to due enforcement and implementation. Thus, the seeming absence of judicial independence in the adjudication of environmental matters is an extension of the lukewarm attitude of the state towards enforcement of environmental law.[40]

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[37]Bodansky .D., (2010). The Art and Craft of International Environmental Law (Harvard Univ. Press, Cambridge) p.117

[38]Boyle .A.and Harrison .J., (2013) ‘Judicial Settlement of International Environmental Disputes: Current Problems’ 4 JIDS. 2 (2013) p. 243-276

[39] Fagbohun O., (2012) Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria’s Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability NIALS Press, P.57

[40] Emmanuel E. Okon, The Legal Status Of Sustainable Development In The Nigerian Environmental Law, The Journal of Sustainable Development Law and Policy 7 (2) 2016. P. 105

Another case which is of interest in the current discourse is that of *Shell Petroleum Development Company (Nig) Ltd. v Abel Isaiah & Other.,*[41] The facts of the case are that in July, 1988, a tree fell on the appellant's pipeline and indented it. The pipeline was carrying crude oil from the production head to the flow station, and it belonged to Shell. The oil pipeline was owned and controlled by the appellant and ran across the respondents swamp land and surrounding farmlands.Shell employed a Contractor to repair the pipeline. However, during the repairs and in the attempt to replace the portion of the pipeline which was dented in the incident, noxious crude oil freely spilled and quickly spread over the respondents' communally owned "Miniabia" land and swampland at Omuada Aluu, as well as polluted the surrounding farmlands, streams and fish ponds; causing environmental damage. The respondents averred that the appellant did not construct an "oil trap" to contain the spillage and that no other precautions were taken by the appellant. As a result of the spillage all the uses to which they put the land, swamps and streams were permanently disrupted. The respondents sued the appellant in Rivers State High Court claiming compensation for damages and losses suffered by them and damages for negligence against the appellant. In his judgement, the trial judge found for the respondents and made an award of twenty-two Million naira (₦22,000,000) in their favour. On appeal, the Court of Appeal dismissed the appeal by the appellants against the judgement of the High Court and reaffirmed the trial court's judgement. The appellant appealed further to the Supreme Court which allowed the appeal, set aside the judgement of the lower courts and struck out the claim of the respondents for lack of jurisdiction by the court to entertain the suit. One of the questions for appeal was whether or not a case that raises a federal question ought to be filed in a federal court.

The court held that in establishing whether the construction and maintenance of an oil pipeline is part of mining operations, it was relevant to refer to the practice of the oil prospecting license holders during mining operations and that the practice had been laid down in the Petroleum Act and Oil Pipe Lines Act. According to the Supreme Court, from the pleadings and the relevant statutory laws cited and relied upon, the High Court lacked jurisdiction to entertain the case as it was a matter covered by the Petroleum Act 1960 and the Pipe Lines Act 1956.The Supreme Court considered the provisions of various enactments including the Constitution of the Federal Republic of Nigeria 1999 dealing with the jurisdiction of the Federal High Court. They are the Federal High Court Act, Cap. 134 Laws of the Federation of Nigeria, 1990 which, is the Principal Act. Decree No. 60 of 1991, Decree No. 16 of 1992, Statutory Instrument No. 9 of 1993, Decree No. 107 of 1993 and the Constitution of the Federal Republic of Nigeria, 1999.The Constitution (Suspension and Modification) Decree 1993, (Decree No. 107 of 1993) in its First Schedule substituted a new subsection 1 of section 230 to section 230(1) of the 1979 Constitution thus:

> Section 230(1) Notwithstanding anything to the contrary contained in the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil Causes and matters arising from – (o) mines and minerals (including oil fields, mining, geological surveys and natural gas."[42]

Considering that the matter before the court was one revolving around the question of the impact of environmental harm due to the extractive activities of a corporate firm in a local community, would a case involving a company perceived as a harbinger of environmental harm in the Nigerian oil extractive industry not have been a perfect opportunity for the Nigerian court to show solidarity with the quest for the development of environmental law in Nigeria if it had effectively

[41](2003) 11 NWLR (Pt.723) 168

[42] Compendium of Judicial Decision on Matters Related to Environment (National Decisions) v.IV (2005) <http://www.unep.org/delc/Portals/119/publications/compendium-national-judicial-decisions.pdf> Accessed on 25.09.18

laid out a procedure for judicial review of pending cases considering that the plaintiffs suffered untold hardship due to the effect of pollution on their environment as well as delay in justice delivery? It appears that the Supreme Court judges also thought through these considerations especially since there was no denial as to the fact of the environmental damage claimed.

However the issue remains that the court in this case strictly concerned itself with its duty of interpreting the law and applying it. Hence its position that the subject matter of the plaintiffs' claim fell within the exclusive jurisdiction of the Federal High Court as provided for under section 230(1)(a) of Constitution (suspension and Modification) Decree No. 107, and from that moment when the Decree was signed into law the jurisdiction of the State High Court to determine any matter connected with or pertaining to mining and minerals, including oil fields, oil mining, geological surveys and natural gas had been ousted, and any further hearing in the matter was indeed null and void because any decision made amounts to nothing. Unfortunately, the decision of the Supreme Court has remained the judicial position till date. This work submits that by virtue of the standard created by the Supreme court in *SPDC* v. *Isaiah* standard, many aggrieved victims of environmental pollution have been denied access to justice and will remain unable to seek redress under the law unless the judiciary takes up the challenge of exercising its right to judicial independence in the adjudication of environmental disputes.

This essay finds that the effectiveness of any court or tribunal is correlated with its independence. A distinctive feature of an independent court lies in its delineation and distinct separation from politics. While not completely immune to political influence, an independent court is less prone to manipulation by the executive than are ordinary government institutions. Due to the absence of a coherent national environmental governance regime, concerned private parties explore the legal avenues provided by private law to bring litigations relating to the environment before the courts in Nigeria. With respect to issues relating to environmental damage, the way the common law developed is such that its rules relating to liability are not directly concerned with environmental management and preservation of the ecosystem; they deal with injuries to private individuals and property. Consequently, it is only where damage to the environment is incidental to personal and property damage that common law liability rules are relevant to environmental protection.[43] Notwithstanding the limitations created by technical issues such as legal standing, redressability and causation in private law liability, private parties (these includes non-state actors like civil societies, corporate persons and private individuals) in Nigeria still explore private law liability claims embedded in statutory provisions and rules of common law to confront environmental challenges that affect them. Such mechanisms include breach of statutory duty, strict liability tort, trespass, negligence and nuisance.[44]

Recommendations

In a transitional State as Nigeria where rapid change is the vogue, courts cannot avoid adoption of an active role in emboldening environmental regulations through an articulate and decisive approach in the adjudication of environmental matters. Judicial independence is however at the heart of whatever stance courts choose to take toward the resolution of environmental disputes in Nigeria. Judicial independence determines how much the judiciary can be utilised to ensure that a pragmatic environmental governance regime is achieved. In other words, it is possible to achieve an effective environmental governance regime where courts are able to make judicial decisions that balance both economic and environmental interests, provided that as an adjudicatory body, the Nigerian court is vested with a mandate it can exercise without undue interference. Driven by the conviction that environmental protection is key to sustainable development in Nigeria; this

[43] ibid

[44] Schatz J. (2009), 'Climate Change Litigation in Canada and the USA' 18 *RECIEL*<http://www.climatelaw.org/articles/grossman-cjel-article.pdf> accessed 20.09.2018. It is useful to note that private liability claimants usually resort to negligence and strict tort liability as means of obtaining redress damages for personal injury caused by environmental pollution, and adopt trespass, strict liability and nuisance to redress invasion and environmental harm to propriety interests.

work suggests that judicial independence is tenable for courts in Nigeria if the Constitution can be amended to include an explicit reference to right to the environment as one of provisions in the fundamental human rights chapter. In order to herald a positive change in the state of judicial attitude towards environmental matters, there has to be a shift in perspectives on what matters' relating to the environment entails through the constitution.
Generally, an examination of majority of cases relating to the environment reveal that large number of victims of environmental degradation in search of environmental justice in Nigeria do not have access to the justice desired. To avoid a descent to the Hobbesian State, irrespective of the daunting challenges the court faces, the Nigerian court must live up to its role as the final arbiter and explore radical means in the adjudication of environmental matters relating to the harmful impact of extractive activities. The decision lacks the force of *stare decisis,* but it is a landmark judgement that is of immense significance to the debate on judicial independence in Nigeria.

Also the judiciary requires capacity building to enhance its effectiveness, maintain judicial independence and obtain recognition for its expertise and professionalism in the adjudication of environmental matters. However, this feat can only be achieved when the human resources is effectively trained and provided with relevant skills. The National Judicial Institute (NJI) has to incorporate environmental adjudication program into its curriculum for training and providing continuous education for judicial staff. At the moment, the United Nations Environment Program (UNEP) is at the forefront of these initiatives and is conducting activities in various countries to ensure that Training Manuals on Environmental Law for Judicial Officers are developed and implemented and that judicial officers are abreast with sentencing guidelines, investigation and prosecution guidelines for the purpose of effective adjudication of environmental matters. To achieve this feat however, the judiciary must be financially empowered. Where the judiciary is afforded the necessary fiscal flexibility required in order to exercise adjudicatory powers over environmental matters, it will be better prepared to correct deficiencies and to a large extent, provide protection for the environment against the adverse impacts placed upon it by a growing economy.

It is equally fundamental that the judiciary should be distinguished from the other arms of government with respect to matters relating to its finance. This is necessary because the court must exercise its powers to deliver decisions against corporate disputants in matters relating to health, safety and environmental protection. Without the ability to make such decision, when environmental rules are violated, enforcement becomes impossible and the pollution creating action will persist. The court must not be seen as overly dependent on a National budget that is narrowly based on estimated earnings from natural resources exploited by the corporate sector alone. If the judiciary is seen to be dependent on revenue derived from the corporate sector in any way, situations will arise where the court itself would be reluctant to judiciously reach a decision for a corporate party before it because of the economic implication of such decision.[45] A judicial exercise of independence by the court may well require the defaulting party to suspend the action that caused the environmental harm in question, or provide clean up to the affected environment, or adopt the use of greener technology; but if the court is seen to be dependent on the revenue generated from the corporate party, it may be prejudiced in its decision.

Notwithstanding, the adjudicatory challenge posed by the fact that the Nigerian Constitution does not explicitly provide for the right to environment in the Chapter on Fundamental Human Rights, this work suggest that the judiciary in Nigeria can follow the lead of the European Court of Human Rights (ECHR) to innovatively construe provisions of law in ways that will deliver effective adjudication of environmental matters. The function of the judiciary is to enhance rule of

[45] Stakeholder Democracy Network, C.Cragg, J.Croft and I. Samiama, 'Facilitating Community Empowerment Environmental Regulation and Pollution Control in the global oil industry in relation to reform in Nigeria' <file:///C:/Users/User/AppData/Local/Temp/Temp2_attachments_2015_01_12-EGASPIN.zip/egaspin.pdf> Accessed 20.09.2018

law, promote the fundamental rights, and administer the law impartially between between each party before it. The judiciary can mold principles of law and give them a sense of coherence and direction. Although the role of the court is basically to interpret or expound and not make the law, judges can, and do, greatly shape the law in the administration of their interpretative role.

Environmental disputes which arise from harmful environmental impact of extractive activities is a controversial aspect of environmental law enforcement and implementation in Nigeria because of the divergent interest of all parties. The stakes are high, with overwhelming sums of money in play over many years, often many decades, and there are multiple players with varying interests competing over these resources.[46] As the frontiers between public and private sometimes become blurred and judicial independence weakens; and as the State appears to support the extractive companies in pursuit of 'national self-interest', it is necessary to identify the role of poverty in restricting the exercise of judicial independence by the courts. Issues such as the inefficiency in the judicial system, high cost of legal action and overload of cases are indicators of poverty.

Conclusion

The judiciary plays a pivotal role in the enforcement of environmental law because it is the arm of government charged with the duty to supervise the exercise of administrative powers through judicial review, issuance of sanctions for pollution offences, and the adjudication of environmental disputes.[47] It is therefore, important to stress that environmental sustainability cannot be achieved in Nigeria without a pragmatic environmental governance regime that supports the independence of the judiciary in the resolution of environmental disputes. The provision in the Constitution presupposes that necessary precautions are to be taken to protect the environmental rights of the people in all policies formulated to exploit natural and human resources of the state.[48] These precautions include but are not limited to the exercise of judicial independence by the court in the adjudication of environmental disputes. However, the frontiers of the court with respect to the exercise of its adjudicatory powers remain limited by the absence of explicit constitutional provisions on the environment and the rights flowing therein.

It behoves on the State to control human and corporate activities that have significant impact on the environment. Therefore, it is imperative for the State to elevate environmental considerations to a priority through the incorporation of explicit provisions on the environment and environmental rights in the Constitution. That way, courts in Nigeria can be emboldened to exercise adjudicatory powers over all aspects of an environmental dispute, including those relating to public law, even where the provisions of extant environmental laws are inadequate to address an issue at hand. Where there exist a legal framework that presents courts with a wide array of law which is grounded in the Constitution, courts will be prone to the promotion of environmental interest without losing sight of economic interests.

[46] UNDP Strategy for Supporting Sustainable and Equitable Management of the Extractive Sector for Human Development (2012)
[47] Bell S., and Mc Gillivray D, Environmental Law, (OUP 2008,7th Ed) p. 127.
[48] Okonkwo .T. (2015) Environmental Constitutionalism In Nigeria: Are We There Yet? 13 Nigerian Juridical Review