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CONSTRUCTION ARBITRATION AND ENVIRONMENTAL PRACTICE – A WAY FORWARD FOR THE CONSTRUCTION INDUSTRY ARBITRATORS OF NIGERIA.

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ABSTRACT : The paper views construction environmental pollution issues as one area which is apparently novel to our construction Arbitrators and which presents new challenges and requirement for additional skill. It posits that arbitrating on construction environmental issues require fundamental knowledge of the science and impacts which antrophic structures and their development pose to the environment and basic environmental law. It exposes the concept of environmental law and its historic development in Nigeria and sites a number of environmental cases in which arbitration would have been a possible option, if our arbitration practice in this area had been vibrant. It recommends greater sensitization of the construction industry on the benefits of arbitrating on construction environmental issues.
Keywords : Construction, arbitration, environment, management

1.0 Introduction

The petroleum industry which can be divided into two principal groups of activities: The UPSTREAM activities, covering oil and gas exploration and production, and the DOWNSTREAM activities covering oil refining, petrochemicals, gas development and host of other chemical activities which utilize petroleum products as raw materials, require heavy and expensive construction projects (Jibril Aminu 1991).
For examples, Oil refining and petrochemical plants entail construction of:

i. Mechanical equipment, like columns, heat exchange, compressors, reactors, pumps, pipes and control valves.
ii. Civil and structural facilities, including pipe racks, foundations, roads, drainages, water supply, jetties and rail lines.
iii. Electrical and instrumentation facilities like power generation and distribution equipment, instrument control panels and computers.
iv. Architectural facilities for administrative, technical/residential buildings and offices.

Such projects in Nigeria include the multi-billion dollar joint venture liquefied Natural Gas (LAG) Project at Bonny, the completed pipe lines and depots for Element phase II petrochemical plant all in River State, the nationwide Butanisation Programme and the construction of Export terminal at Bonny and a host of oil exploration programmes in Delta and Edo State and housing and office projects. Notwithstanding the immense benefit of these construction projects, they cause great environmental damage and generate serious environmental disputes (Ajator 1998). Most of the environmental impasse could be handled by Arbitration Tribunal for speedy resolution with less disruption of the development programme. But this is seldom the case. According to Marks (1996), the construction arbitration practitioners comprising currently of Engineers (particularly civil), Quantity Surveyors, Architects, Building, Lawyers, Estate Surveyors etc require updated training in Engineering Technology of process plant projects like refineries and petrochemical plants which are very complex. They also require basic Environmental Engineering and Environmental Management skill to serve as expert witness and provide proof of evidence on technical environmental disamenities of oil exploration, production and refining (Mark, 1996).

Construction arbitrators aspiring for service in the environmental sectors would also need to be conversant with the hazards which contaminated sites can pose such as:

- Explosions in houses and other buildings built on or close to operating or disused landfills.
- Gardens contaminated with metals and asbestos.
- Basements and under floor areas flooded with petrol from leaking underground storage tanks.
- Damage to construction materials by aggressive chemicals in the ground.
- Health risks from chemicals migrating from old chemical works to adjacent housing.
- Loss of potable ground water due to leaching from contaminated sites.
- Damage to rivers due to run-off from contaminated sites or abandoned mines, and
- Damage to ecological systems tec.

Also relevant to construction environmental arbitrators are the basic knowledge of environmental law.

2.0 Concepts of Environmental Law

Abele (1982) opined that very economy relies on signals to steer behavior. He maintained that prices are important signals but because of imperfections in market situation they have failed to convey correct information leading to a distortion of decisions and probably to a misallocation of resources. This view is correct because the drive for private profit has led to economic and development practices that are harmful to the society and degrading to the environment. In consequence, he continued, every human society tries to develop rules to govern her activities. It legislates for the citizens the right and wrong activities, with sanctions attached to wrongful acts and possible rewards for right conduct. Environmental laws are therefore part of these broad legislation. Uchegbu (1988) considers environmental law as reflecting the idea of a legislative class, on how man ought to lead his life in harmony with the natural environment. It is our view that it should embody the basic rules man has to obey in subjecting natural resources of an environment to cultural appraisal, so that his decisions and actions as an economic agent do not impose adverse effects on the well-being of other individuals. The decision of man as an economic agent is deleterious where it fails to take into account its side-effects on the society such that the cost to the economic agent differ from the costs to the society, ie the private and social costs diverge (Ajator, 1996, 2012a, 2012b, 2014).

In feudal Society (Uchegbu 1988), to which corresponds customary law, man surrenders to the dictates of nature whose natural resources he exploits in conformity with natural laws. Here the impairment of the environment is minimal and responsibility for environmental protection resides with the producer. Under capitalism, production ceases to be social and becomes privatized. Here the motive for technological assault by man on nature is private profit, while responsibility for environmental protection remains with the state.

Yet under socialism, production/development as in the feudal system is social which coincides with the responsibility for environmental protection ie the producer/developer is also the protector. Here legal management of the environment is ideologically determined. This characterization of concepts of environmental law is important as it helps us to understand the approach of the Nigerian legal order to the vexed question of environmental management.

2.1 Historical Development Of Environmental Legislation In Nigeria

Prior to the advent of statutory legislation in Nigeria, there were a number of customary environmental laws and practices employed in the management of the environment (Onyeabor 1998). This customary environmental laws were unwritten and varied from place to place. They were effective as they were accepted as obligatory by members of the community and govern a number of activities that tend to degrade the environment such as laws against hunting, poaching, forest encroachment, pollution of water resources, soil degradation etc. violation at times is considered a grievous offence against the spirit attracting serious sacrifices for pacification. However, with the advent of the colonialists some of these customary environmental laws metamorphosed into statutory environmental laws.

Onyeabor (1988) classified the development of environmental laws under four periods:

i. The colonial period spanning from the coming of the colonialist to the independence time in 1960.
ii. The independence decade 1960 – 1970
iii. The oil-boom era 1970 – 1980
iv. The environmental awareness erea 1980 – 1998.

2.1.1 The Colonial Period

The earliest appearance of statutory environmental laws in Nigeria is found especially in section 245 and 247 of the criminal code. While section 245 prohibits fouling of water and waterways, section 247 punishes the vitiation of the atmosphere. There are of course the civil laws of Negligence and Nuisance for tortuous offences.

There is also:

i. The 1915 Water Works Act which punishes the introduction of noxious/injurious matter to water works, watercourses, fountains, streams etc.
ii. The 1917 Public Health Act which criminalized introduction of deleterious matter into streams, reservoirs etc.
iii. The Minerals Act with section 46 legally protecting watercourses.

The major demerits of the above laws directed towards our health needs are lack of consideration for industrial necessities and abysmally low fines, which could not deter offenders.

2.1.2 Independence Era

In this era efforts were made by the new political state of Nigeria to encourage industrial undertakings while little or no legislation was done to specifically protect the environment. The notable laws made within the era include:

- Territorial Waters Decree 1967
- Quarries Decree 1967
- Oil in Navigable Waters regulation 1968
- Oil in Navigable Waters Act (ONWA) N0. 34 of 1968
- Petroleum regulation of 1967
- The petroleum Act of 1967 and other regulations made under it.
- Petroleum (Drilling and Production) regulations 1969 and the amendment regulations of 1973.

Various sections of petroleum regulations deal with prevention of oil pollution, well-abandonment procedures, maintenance of apparatus and conduct of operation. Section 45(1)(a)(b)(c), specifically prescribed steps the operator must take at completion of operations to leave the Land surface free from pollution. These laws fell short of enforceability because of failure to stipulate standards for protection of the environment.

2.1.3 Oil Boom Era

This era witnessed unprecedented industrial growth due to oil boom. The economic euphoria led to massive importation of goods and services. Most of which have negative environmental impacts rather than engaging in industrialization. Nigeria's problem was said to be how to spend her oil money. Hence foreign construction firms were imported and engaged to ravage and devastate the ecology of Nigeria by way of ill-articulated construction projects.

To address this issue, the federal government had to set up several coordinating committees with deliberations which gave birth to :

i. The River Basin's Development Authorities and the Environment Control Divisions of Federal Ministries of Works and Housing. The former enjoined to adopt pollution control and environmental protection measures in designing and executing their respective projects (programmes).
ii. The compilation of ill-sorted laws and regulation which have little impact in curbing growing threats to the environment; including the petroleum refining regulation of 1974.

Also following the 1972 U.N conference on Human Environment held in Stockholm Sweden, the government established in 1975, the Urban Development and Environmental Division in the Federal Ministry of Economic Development which was subsequently transferred to the Federal Ministry of Housing in the same year. The Environmental Division was later in 1978 brought under the Ministry of Industry. Also the third National Development plan initiated move to stem environmental problems and enhance quality of life and provide infrastructure for environmental assessment to curb pollution and natural disaster.

These culminated in establishment in 1980 of 1% ecological disaster fund now 13% (from the Federal account) for the production and sustenance of draft proposal for the enactment of the all-embracing environmental protection law, which was not ratified by the senate before the 2nd republic was overthrown on the 31st of December 1983.

2.1.4 The Environmental Protection Era

While efforts were being made in the turn of 1980 decade to concretize the environmental plans of the oil boom era, the dumping of toxic waste at Koko port in Delta State in 1988 exposed the ineffectiveness of Nigeria's Legislation on the issue. This compelled the promulgation of the harmful waste (Special Criminal Provisions etc) Decree number 42 of 1988 now cap 165 of the Law of Federation of Nigeria (LFB) 1990. This was quickly followed by FEPA Decree No. 58 of 1988, now cap 131 of the LFN 1990. This Decrees and the establishment of FEPA as an agency for environmental protection brought flesh on all previous skeletal environmental efforts made especially during the second republic.

However, in 1992 FEPA Decree was enlarged via FEPA (amendment) Decree No. 59 of 1992 to clear the conflict existing between FEPA and other agencies of environmental protection. The Decree enlarged FEPA as an agency and merged it with Natural Resources Conservation Council (NARESCON), Department of Land and Natural Resources, Food and erosion control department and Forestry department.

The enlarged FEPA decree 59 of 1992 embodies new section 4, which covers provisions on Biodiversity conservation and sustainable development.

Yet another fine-turning of environmental protection laws which was in keeping with the call by the 4th National Development plan for inclusion of Environmental Impact Statement EIS in the feasibility studies for all projects was the promulgation of Environmental Impact Assessment / Statement (EIA) Decree 86 of 1992. This was to guide development projects which could have significant environmental impact for which the proposer is required to provide plans for mitigation. The EIA – mandatory projects include: agriculture, airport and airstrip, drainage and irrigation, land reclamation, coastal reclamation, fisheries, forestry, housing development, industry, infrastructure, mining, petroleum pipelines, power generation and transmission, quarries, railways, transportation, resort and recreational developments, waste treatment and disposal, and water supply projects.

Also FEPA in exercise of it's powers under section 37 published in March 1991, a comprehensive guidelines and standards for monitoring and control of industrial and urban pollution. The guideline was an adoption of international standard pending the establishment of local ones, such as those of US Environmental Protection Agency (USEPA), Department of environment (DOE) UK, American public Health Association (APHA), American Society for testing and materials (ASTM) and World-Health Organization (WHO) Standards as are applicable.

3.0 Enforcement/Implementation Problems Of Environmental Legislations

Just as both the market institutions and economic theory upon which they depend have proved inadequate to deal with environmental management, so do the legal arrangements to some degree.

According to Timothy Oriordon (1990 P.214), there is the problem of dispersed non-monetary costs where individual disamenities is small but where the aggregate effects are massive, the difficulty of isolating and proving pollution effects, the cumbersomeness of the law of negligence and/or nuisance, harmful, and injurious and the question of proving special damage and legal standing.

Generally, the courts had been reluctant to set radical precedents in environmental law, for so pervasive are the problems that should they do so, they fear a subsequent inundation of complaints. In Nigeria, oil is the main stay of our national economy and

Such radical verdict on oil pollution could stifle the growth and development of oil industry. It is clearly evident that until the promulgation of the EIA decree, the existing environmental law is more retroactive than anticipatory in nature since environmental offence must have been committed before any suit can be brought before the courts.

This underlines the importance of Environmental Impact Assessment (EIA) which requires prior publication of project proposal for public inquiry and discussion of need and preferential mitigation solutions before decisions are made.

Abele (1982), observed that Sierra Club won a number of notable injunctions against US Federal agencies whose proposal had threatened a river or a park. And that the Club had in conjunction with the

Environmental Defence Fund been instrumental in establishing a number of important precedents in environmental law viz:

i. That an aggrieved or adversely affected party need not prove personal economic interest to bring suit (in other words, environmental issues can stand on their own).
ii. That the developer must prove that his proposal will have no serious environmental side-effects and also that no reasonable alternative exist (i.e. the burden of proof falls on the defendant before his action and not plaintiff after the action).
iii. That there may be a constitutional right to environmental quality; or at least that common property resource should be held in trust for the public good and not for private gain (Cahn 1969).

The law of negligence and nuisance has proved unhelpful to environmental protection. Contrary to the achievement of the environmental clubs in US, it is evident from our legal system that not all nuisance are actionable and the major issue in the law of private nuisance is where to strike the balance between the right of one person to use his land as he wishes and the right of the other to be protected from interference with his enjoyment of land.

Here it is considered necessary in establishing liability in private nuisance that:

i. The defendant's conduct is proved to have been unreasonable in the circumstances.
ii. The injury or interference complained of in the case of material damage to land is sensible, and sensible material damage refer to a damage which is not a mere trifle and which causes a reduction in the value of the affected property.
iii. The injury or interference complained of in the case of interference with the enjoyment of land is substantial.

The application of these principles has been illustrated in a number of Nigerian cases.

4.0 Some Nigerian Environmental Cases

An often cited cases of nuisance that demonstrates the principles of sensible material damage in Nigeria is Ige. V. Taylor Woodrow (NIG) Ltd. The defendant was acting as a contractor constructing a large building in the center of Lagos. In preparing the site the defendant produced vibration which damaged the structure of the plaintiff's neighbouring house. The plaintiff sued for damage for negligence and nuisance. Although the action for negligence failed, the claim for nuisance succeeded (Kodilinye 1982).

In Sismograph Services Nigeria Ltd, V. Ogboni (1976) 4 SC, 85, the plaintiff sued for nuisance caused by the defendant in the cause of carrying out of oil exploration exercise which was the explosion of oil-testing chemicals around the region of the plaintiff's building. The explosion wrongfully caused and permitted excessive noise and vibrations, which damaged Ogboni's building. The trial judge awarded $350 to the respondents / plaintiff as a result of the damages to the property but this was upturned by the Supreme Court for lack of proof of evidence.

In Shell BP V. Perecon and others 1978, 3 SC 183, the appellant dredged a stream flowing over the land of the respondents without their consent and caused the respondents loss of sand and gravel and destroyed their fishing equipment and two jujus. The Supreme Court finally awarded the sum of ₦35,000.00 to the respondent / plaintiff.

Also in Dumex Nigeria Ltd, V. Ukpeni and others 1991, 4 NWLRP. 188 art 734, the respondent/plaintiff were awarded the sum of ₦27,057.50 as damages arising from the destruction of their fishing right and cassava crops in the course of constructing the Bomadi road by the appellant / defendant.

In Shell DPC V. Fara and others 1995, the Supreme Court awarded about ₦4.6m as damages to the respondent / plaintiff as compensation for damages to their land as a result of blowout caused by the defendant / appellant.

Also in 1996, a Highcourt in Warri awarded a compensation for damages of ₦30 million in the case of SPDC V. Obotobo and others. These latter cases marked a resolve by the Nigerian courts to award exemplary damages as a means of enforcing environmental protection.

The striking issue in the decided cases is the protracted delays and the consequences of such delays on the development projects and the economy at large.

5.0 Conclusion / Recommendations

Some of the disputes cited above could have been speedly discharged through arbitration. Experience has shown the both parties to the dispute i.e. host communities and oil development firms would willingly yield to arbitration if the stimulus exist. The catalyst must come from sensitization efforts of the Construction Industry Arbitrators.

The practitioners must market their services. Also relevant to the arbitration practice in environmental field is the admission of technical experts in the hydrocarbon discipline into the arbitration body (Institute). To this end, environmental managers/engineers, chemical, mechanical, petroleum engineers etc with the requisite experience should be attracted into the Institute to handle arbitration services in the special areas requiring expert knowledge.

Additionally the training of members and the continuous professional development CPD programmes should be expanded to cover these specialist fields.

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NIGERIAN DECREES/ENVIRONMENTAL LEGISLATION

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FEPA Decree No. 59, 1992
Harmful waste (special criminal provisions etc) Decree No. 42, 1988, cap 165 LFN
Landuse Decree No. 6, 1978.
Petroleum Act 1969, cap 350 LFN.
Petroleum (Drilling and Production) Regulations 1969.
Petroleum (Drilling and Production) Amendment Regulations 1973.
Petroleum Refining Regulations 1974.