

LEGAL APPRAISAL OF MEDIATION IN OIL POLLUTION DISPUTES BETWEEN HOST COMMUNITIES AND COMPANIES IN NIGERIA

By

Igbikikonte Samuel Suku*

Abstract

Every civilized nation requires a system of justice in which aggrieved parties can obtain redress through the legal enforcement of their rights. Traditionally, litigation has served this purpose. This historical bias towards litigation is now giving way to consensual processes, principally mediation, as the first recourse in the settlement of these disputes. In the field of environmental law, mediation is emerging on a global scale as a new approach towards the collaborative resolution of disputes over developments that have environmental effects. This paper therefore aims at expounding on the gains of mediation in resolving oil pollution disputes in Nigeria. The objectives of this dissertation amongst others is to identify the community relations and mediation strategies used by the oil companies in conflict resolution in the communities and evaluate the impact of mediation in resolving conflicts between host communities and multinational corporations in the Niger Delta region of Nigeria. This paper found amongst others that irrespective of the present emergence of mediation, environmental litigation is, to a large extent, still a structurally inadequate option in Nigeria. If properly utilised in settling oil pollution disputes, mediation is bound to reduce the adverse impacts of exploitation of these resources on the human and natural environment of Nigeria. The finding in this paper is that there is need for mediation to be accorded unified legal framework. Such a move will not only bolster the practice and integrity of oil pollution mediation, but will also guard the key premise upon which it is founded, and avoid the likely incessant court interference from impeding the growth and viability of the promising new sector.

* LL.B (RSUST), BL, MNIM

Introduction

The Niger Delta Region of Nigeria has attracted a great deal of attention over the years. Among the major reasons for this is the rich natural endowment of the region. The Niger Delta is reputed to be one of the world's largest wetlands, having ecosystems comparable to the Sundarbans in Bangladesh, Malaysia, and India.¹ More importantly, it is also rich in crude oil, which has become the mainstay of Nigeria's economy.

Environmental conflict is an unavoidable aspect of oil and gas development for the simple reason that the industry's activities are intrinsically linked with impacts on the human and natural environment.² The adverse effects of exploitation tend to increase with the progress of development operations,³ often impacting upon a large group of people, and sometimes lasting for a long time after the end of production activities.⁴

The oil-bearing regions in Nigeria⁵ present the classical case of oil industry-related environmental despoliation. Most of the country's oilfields are located in the sedimentary basins offshore and onshore the Niger River delta.⁶ Like most other resource-rich parts of the developing world, the Niger delta is characterized by gross underdevelopment and acute poverty. Decades of incessant oil spills have damaged the means of subsistence of the communities and the people have had to contend with acid deposits from continuous gas flaring. Alternative dispute resolution techniques, particularly mediation, have attracted global attention as a cheaper, faster and more satisfying way of reconciling and managing environmental conflict situations.⁷

¹ S O Osagie, and Others, 'Introduction: Reflections on the Nigerian State, Oil Industry and the Niger Delta' (2009) 11(2) *Journal of African Development*, 13.

² Z Gao, 'Environmental Regulation of the Oil and Gas Industries' (1998) 2-11 *CEPMLP Journal*, 48.

³ *Ibid.*

⁴ O Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria' (2000) *Environmental change and Security Project Report*, 6, 23.

⁵ With proven reserves of 22.5 billion barrels of crude oil and 124 tcf of natural gas, Nigeria is recorded as the world's tenth largest producer of oil and gas. Available at <<http://www.mbendi.co.za/indy/oilg/af/ng/p0005.htm>> accessed 12 July 2020.

⁶ I L Worika, *Environmental Law and Policy of Petroleum Development* (Port Harcourt: Anpez Centre for Environment and Development, 2002) 78.

⁷ P I Azubuike, 'Comingling of Arbitration and Litigation in Dispute Resolution: A Worthy Trend or Regrettable Experience' (2019) *SLP Law Journal*, 45.

Nevertheless, law and policy makers, as well as governments in general, are increasingly turning away from adversarial dispute settlement methods in order to embrace mediation,⁸ finding in its consensual approach, better opportunities for ensuring integrative environmental decision-making that attains sustainable development while maintaining “best conservation practice”.⁹ States have found that they can engineer and supervise environmental protection systems without jeopardising attractiveness to foreign investment;¹⁰ but most importantly, communities and individuals can have their environmental needs met without compromising justice.

Analysis of Communities and Oil Companies Dispute Settlement Mechanism in Oil Pollution Cases in Nigeria

History of Alternative Dispute Resolution

The modern ADR movement, which was born in the United States during the 1970s, originated amidst criticism of the adversarial nature of litigation, aided and abetted perhaps by a loss of faith in adjudication as well as a decline in confidence in the competence and professionalism of lawyers.

Further to this argument, over three decades ago, Professor Frank Sander of Harvard University pleaded with American lawyers and judges during the Pound Conference to re-envisage the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system. In line with Sander’s vision, the American Bar Association took a proactive role in the process and created the Centre for Public Resources (CPR) which was set up specifically for the provision of ADR services. ADR blossomed from a desire for greater judicial harmony, efficiency, and access to justice. Subsequently, ADR was codified in 1990, when the U.S. Congress enacted the Administrative Dispute Resolution Act. The passage of this Act, perhaps more than any other event, signalled the Federal Government’s general acceptance of, and preference for the use of ADR methods to settle contract disputes. This action was followed by an Act of Congress in 1990 which compelled federal agencies to use mediation in certain civil cases before going to

⁸ E Clark, ‘The Role of Non-Litigious Dispute Resolution Methods in Environmental Disputes’ (1995) 2 *The Australian Journal of Natural Resources Law and Policy*, 1.

⁹ D E Fisher, *Environmental Law* (Sydney: Law Book Company 1993) 76.

¹⁰ Clark (n 8), 7.

court. Many states passed laws making mediation a mandatory requirement under certain circumstances. In the private sector, many large US and multinational companies signed a mediation pledge to settle disputes via mediation before resorting to the courts. The Administrative Disputes Resolution Act of 1990 briefly lapsed in 1995, but was permanently reauthorized as the Alternative Dispute Resolution Act of 1996. The surge in popularity and support for ADR was not confined solely to the US; several other countries had similar experiences while continuing to develop new and creative ADR processes and applications. Canada, New Zealand, Australia and the United Kingdom have become pioneers in the field.

The rise of the ADR movement in Australia is a reflection of increasing consumer rights consciousness in various areas of society and the questioning of traditional forms of conflict management overseen by a justice system which was considered over-burdened, costly and inaccessible. The ADR movement has been gaining popularity, and a movement that started as a means of addressing some of the perceived shortcomings of the judicial system has generated interest in a variety of fields (such as education, society, environment, international, and gender concerns). The use of ADR in a range of dispute settling has grown swiftly in contemporary times and has been institutionalised to a great extent through the introduction of legislative schemes, as well as through the development of professional bodies which have fostered the use of ADR processes. There are three main areas of focus for modern ADR - interests, rights, and power. Power based ADR was considered most costly, followed by rights; interest based ADR was thought to result in lower monetary and relational costs, higher satisfaction with outcomes and less frequent reoccurrence of disputes.¹¹ Deutsch's seminal discussion on the alternatives to litigation in two-and multi-party conflicts gave rise to a body of literature primarily in the field of law which explored different facets of ADR.¹² Though theories, approaches and outcomes vary greatly, there is a consensus that conflict is everywhere, that it is not necessarily bad, and that it is important to attend to it in some manner.¹³

¹¹ W L Ury, and Others, *Getting Disputes Resolved: Designing Systems To Cut The Costs Of Conflict* (San Francisco: Jossey-Bass 1988).

¹² *Ibid.*

¹³ J Chicanot & S Gordon, *The Practice of Negotiation: Exploring Attitude, Process and Skills* (Victoria: BC. 2003)

ADR in Oil Pollution Cases

Oil pollution is one of the major aspects of concern in Environmental Law. The importance of oil pollution arose due to the commercial and utilitarian significance oil has assumed both in the domestic and global markets.¹⁴ADR today is considered a more potent tool in environmental cases than the confrontational and adversarial-based system of adjudication. In South Africa, for instance, the South African Environmental Protection Agency published a policy in 1978 to use ADR methods in the resolution of disputes arising from the enforcement of environmental laws.¹⁵ The Agency funded the training of some of its officials in the acquisition of ADR skills to enhance the settlement of disputes between the oil companies and the victims of pollution. Advocates of ADR are unanimous in their passion and support for its application to environmental cases with the following reasons:

a. Speed

Expeditious determination of cases remains one of the attributes of ADR which is unlikely to be available in the courtroom. In Nigeria particularly, litigation is extremely time consuming. It has become a culture that cases must last several years in the courts before they are determined. Even when a case has lasted up to ten years in the court and the judge handling the matter is transferred or retired, the case has to start de novo.

Ogungbe¹⁶ rightly noted that some cases have been pending in our courts for more than ten years as a result of certain constraints like retirement or transfer of judges handling the cases which have been opened and evidence had been taken. Such cases have to start de novo. The devastation, frustration, and economic stress which litigants undergo are better imagined than experienced. The celebrated case of *Ariori and others v Elemo and Ors*,¹⁷ for instance, was first instituted in the Court in the month of October, 1960 thereby coinciding with the month and year Nigeria got its independence and took twenty three years to reach the Supreme Court which nevertheless remitted it to the trial court for a retrial de novo. Other

¹⁴ Ebirim Okechukwu and Ndukwe Charles Ndukwe, *Nigerian Law on Oil Pollution* (Ibadan: Spectrum Books Limited 2008) 1.

¹⁵ A T Tropill, *Alternative Dispute Resolution in a Contemporary South African Context* (Johannesburg: RT Jones Publishers 1991) 260.

¹⁶ M O Ogungbe, 'Arbitration & Mediation: When is either Best Suited for Dispute Resolution?' (2003) *Nigerian Law: Contemporary Issues, Essays in Honour of Sir. G. O. Igbinedion*, 319.

¹⁷ (1983)1 SC NLR 1.

cases like *Atanda v Ajani*¹⁸ took 10 years to reach the apex court which ordered a trial de novo, and *Ugo v Chukwu Obikwe*¹⁹ took 18 years to get to the Supreme Court which ordered a trial de novo.²⁰

Nwauzi,²¹ noted that sometimes, the victims of environmental damage are discouraged from litigation due to unnecessary delays and the consequent overstay of their cases in the courts. Sometimes, for undisclosed reasons, case files are alleged lost, while transfer of officers handling certain cases may result in the cases being lost sight of or even neglected. Sometimes, the oil companies which cause almost 90% of the environmental damage in the Niger Delta region of Nigeria employ delay tactics deliberately to frustrate the victims of pollution when a court action is pending between them especially now that the reputation of the judiciary in Nigeria has been tainted with corruption. The case of *Ambah v SPDC*,²² for instance, lasted for 19 years in the courts that before its final determination, two thirds of the litigants had died. Other instances abound.

According to Ako,²³ the case of *SPDC v Tiebo VII and four others*,²⁴ a matter of oil spill that occurred in Peremabiri, Bayelsa State, Nigeria in January 1987, got to the High Court in 1992, and to the Court of Appeal in 1996. The case of *SPDC v Chief George Uzoaru and three others*²⁵ was heard in the High Court in 1985 in relation to damage suffered on a continuous basis since 1972 was heard in the Court of Appeal in 1979, while *Elf Nig. Ltd v Opere Sillo and Daniel Etsem*²⁶ was heard in the High Court in 1987 in relation to damage suffered in 1967, was heard in the Court of Appeal in 1990, and in the Supreme Court in 1994. The case of *John Eboigbe v NNPC*²⁷ involved damage caused in 1979 and was first heard in 1987, appealed against in 1989 and heard in the Supreme Court in 1994.²⁸

¹⁸ (1989) 3 NWLR (Pt. 511) 103.

¹⁹ *Ibid.*

²⁰ A Oyesola and O O Kola, 'Industrial Conflict Resolution using Court Connected Alternative Dispute Resolution' (2014) 5 *Mediterranean J. Soc. Sci.* 684.

²¹ J Nwauzi, 'A Critique of the Court's Insistence on the Operation of the Regular Standard of Proof in Oil Related Litigations between Two Unequal Parties' (2007) 2 *Ikeja Bar Rev.* 88.

²² (1999) 3 NWLR (Pt. 593) SC 1.

²³ R T Ako, 'Mediation as a Conflict Settlement Mechanism in the Niger Delta Region of Nigeria' (2006) 3 *Ife Juris Review.* 73.

²⁴ (2005) 4 FWLR (pt. 283) 674.

²⁵ (1994) 9 NWLR (pt. 366) 51.

²⁶ (1994) 6 NWLR (pt.350) 258.

²⁷ (1994) 5 NWLR (pt.347) 649.

²⁸ Ako (n 23), 47

The after effect is that sometimes, the citizens will forgo their rights or resort to self-help. This not only undermines the very existence of the courts but also inconsistent with the constitutional provisions on speedy trials. Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, (as amended) provides that “in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time....” A prompt and speedy trial is a first condition of fair trial which involves the element of time”.²⁹ Because ADR speeds up the process, justice is served more effectively because, as earlier noted, justice delayed is justice denied.

In the US, the use of mediation in a class action employment discrimination case in 2004 saved 1,500 hours of discovery time and two years of litigation time. The compelling need for the time consciousness is obvious because environmental issues are very sensitive and delicate and a good number of them concern survival of species and properties that may be permanently destroyed with the lapse of time. Pollution is intrinsically linked with adverse impacts on human and natural environment.

b. Cost effective

No doubt, ADR mechanism is less expensive than litigation. This is an invaluable advantage especially today that the cost of litigation in Nigeria has soared to the extent that many litigants can no longer pursue their cases.³⁰ Oyesola and Odeku rightly observed that; Many poor people cannot access the formal legal system because they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. This is because payment of legal fees is probably the largest barrier to formal dispute resolutions for many people in developing countries and in particular by the poor in Nigeria.³¹

It is worse on the Niger Delta region of Nigeria where almost 80% of the litigants live in abject poverty consequent upon loss of means of livelihood to pollution food, water and money. The UN Development Programme described the region as suffering from “administrative

²⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 36; J O Akande, *Introduction to the Nigerian Constitution* (Lagos: Capitol Publishers 1999).

³⁰ O Chukwudifu, *Human Rights in the Political and Legal Culture of Nigeria* (Lagos: Nigerian Law Publications 1989) 75.

³¹ Oyesola and Kola (n 20).

neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth, squalor and endemic conflict". Many can hardly afford adequate legal representations when they fall victims of pollution rather they go cap in hand asking for paltry sums from these multinational oil companies which requests are turned down in most cases. These companies prefer litigation because of its frustrating attributes, especially in view of the astronomical increase in the filing fees in the courts in Nigeria. Order 55(1) and Appendix 2 of the Federal High Court Civil Procedure Rules, 2019 provides that for a claim of ten million naira and above, the litigant must pay a filing fee of over fifty thousand naira which is a precondition for the filing of the suit.³²

The filing fees in the Magistrates and High Courts in Nigeria range from three to ten thousand naira. The discouraging aspect of it is that the payment of the filing fees or lawyer's fees is never a guarantee that the judgment will favour the litigant. The celebrated cases of *SPDC v. Ambah*³³ and *SPDC v Tiebo VII*³⁴ are instances. Ambah's case lasted 19 years in the Courts and at the end, the Supreme Court reduced N297,000.00 already awarded to him by the two courts below as damages to N27,000.00 only being the value of the property calculated at the time of its destruction despite all the expenses in the 19 year litigation. The latter case also crumbled after many years of litigation because "the respondents could not put their case across properly". Consequently, the poor litigants went home without redress even when the courts acknowledged that their means of livelihood have been lost to oil spillage.

When this is considered against the background that a particular case could last up to four or five years, then the enormity of the financial burden on litigants can be better appreciated. It is unlike the ADR process where cases can be conducted effectively within weeks without the involvement of lawyers, and the money which would have ordinarily been spent on the lawyers in a protracted litigation is saved. Some cost millions of naira to procure and the poor victims of pollution have no option than to concede their rights. It gives these companies edge over the victims. In *George Ngbor v Compagnie General De Geophysique (Nig.) Ltd. & Anor*,³⁵ the plaintiff victim lost his case because he could not afford the

³² N S Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems & Prospects' (2005) 3 *Benin Journal of Public Law*, 43.

³³ (n 23).

³⁴ (n 25).

³⁵ Suit No.BHC/30/93.

cost of an expert witness at the cost of one million naira (N1m) to testify that the dynamite shot which allegedly caused the damage to his factory was fired at a distance which was not safe. The company was able to call such a witness who testified that the dynamite was shot at a distance considered safe by seismic standard. Such evidence was not contradicted and the Court relied on it.

In contrast, ADR promotes the settlement of disputes in a manner that avoids many of the transactional costs associated with litigation. In fact, the monetary savings achieved through ADR processes and the results have been acknowledged in a lot of jurisdictions. In some cases, the cost may be borne either by the government or the multinational companies desirous of sustaining its relationship with the host communities, and not the poor victims of pollution as in litigation.

c. Equality in the bargaining power

No doubt, one of the factors that undermine the efficacy of the judicial system in Nigeria is the perceived and real inequality in the bargaining power between the parties to oil pollution claims. This is more common in the Niger Delta region of Nigeria where the parties are most often the poverty-stricken villagers against the multinational oil companies like Shell, Mobil, Chevron, etc. that cause the most serious forms of oil pollution.

The severely malnourished resources of these victims make them susceptible to the whims and caprices of these companies. These companies are elusive to deal with through legal mechanisms. This is largely due to the abundant resources at their disposal to neutralize attempts to control their behaviour. They do everything possible to influence and obstruct the institution of legal proceedings against them. That has led to the victims' distrust of the legal system which they regard as biased and favourable to these companies.³⁶

In some cases, when such companies are asked to pay fine as punishment, they pay it with ease while in other cases, they may decline. The case of *Shell Pet. Dev. Co. (Nig.) Ltd. v Anaro*³⁷ illustrates where the advantaged position of these multinational oil companies, perhaps due to the abundant resources and connections at their disposal, has subjected the wretched victims of pollution to a disadvantage. In this case, the victims

³⁶ Tropill (n 15), 78.

³⁷ (2001) FWLR (Pt. 50) 181.

whose means of survival have been spoilt by the activities of the oil companies have already obtained the judgment against the companies with N30.5m damages already awarded them by the Courts but backed by the then military government of Nigeria, the appellants nevertheless refused to pay the damages thereby leaving the victims without redress. The primary interest of the Federal Government of Nigeria is the flow of its equity shares in these companies which it relies on mainly to finance its budget and meet its foreign exchange needs while the priority of these companies, on the other hand, is to maximize profits for their shareholders.³⁸ Any other interest is subsidiary.

The case of *Ogiale v Shell Pet. Dev. Co. (Nig.) Co. Ltd*,³⁹ is also instructive. Here the respondent's oil exploration and exploitation have led to the impoverishment of the plaintiffs' land which resulted in its infertility and low yields of crops such as maize, yam, cassava, etc. The court nevertheless dismissed their claim not because they could not call expert witnesses to establish their case but because such experts were not specifically skilled in the particular field in question. The plaintiffs' inability to procure the services of experts does not mean that such crops, obviously spoilt by the companies' activities, did not have economic value.

Nevertheless, the plaintiffs went home without redress. Today, Nigerians have little faith in the government as an agent of conflict resolution. Today, the ADR has become the weapon for not only enhancing the equality effects of bargaining but also assuaging the feelings of these indigent victims of pollution. This involves equalizing the power imbalances inherent in a dispute between an oil company and the victims of pollution by the greater participant and more consensual modes of conflict resolution. This may include:

- (1) Granting the parties to the ADR independent choice of representation, not strictly lawyers;
- (2) Ensuring that the adopted procedures are targeted at achieving fairness and equity rather than strict adherence to an unduly burdensome or technical procedure, and

³⁸ Ako (n 23).

³⁹ (1997) 1 NWLR (Pt. 480) 148.

- (3) Continuing its role through the process of supervising implementation of any outcomes.⁴⁰

With the ADR, an independent third party acceptable to both parties is engaged. This may involve pecuniary cost but offers the greatest assurance that the third party is impartial, skilled and best fit for that purpose. The ADR mechanisms are unique that they may be tailored to suit individual preferences. For the process to be successful, it has to involve all the principal stakeholders and not solely institutions that are established and controlled by the government.

d. Jurisdictional Convenience

With the ADR dispensation, the jurisdictional problems of litigation which especially frustrates environmental litigants are tackled. Access to justice is impaired where the courts are located far from the homes of those who need them.

Today, about 80% of oil pollution cases in Nigerian courts are lost particularly on appeal for want of courts' jurisdiction, the reason being that only the Federal High Courts, as against the State High Courts, have the exclusive jurisdiction to try almost all the oil pollution cases,⁴¹ whereas the Federal High Courts are not enough to contain the number of oil pollution litigants vying for their attention.

The after effect is the accumulation of cases which last for years in those courts without being determined. It is unlike the state High Courts that are scattered everywhere in the states and so more proximate and accessible to these litigants than the Federal High Courts. Cases like *Shell Pet. Dev. Co. v Isaiah*,⁴² *C.G.G. (Nig) Ltd v Asaagbara*,⁴³ *C.G.G. (Nig) Ltd v Amaewhile*,⁴⁴ and *C.G.G. (Nig.) Ltd v Ogu*⁴⁵ are a few of those cases where the litigants instituted actions at the State High Courts instead of the Federal High Courts as courts of first instance only to be frustrated on appeal for want of jurisdiction after many years of litigation. In *Shell Pet. Dev. Co. v Isaiah*, the Supreme Court stated unequivocally that only the Federal High Court has jurisdiction on the matter once it is connected with mines, minerals, including oil fields, oil mining, geological surveys and natural gas.

⁴⁰ A Maitland & M Chapman, 'Oil Spills in the Niger Delta: Remedy & Recovery' (2004) *Oil Spill in the Delta: Proposals for an Effective Non-Judicial Grievance Mechanism*, 14.

⁴¹ CFRN (n 29), s 251(1) (n) and Second sch, pt 1; Federal High Court Act, Cap F12 LFN 2004, s 7.

⁴² (1997) 6 NWLR (Pt. 508) 238.

⁴³ (2001) 1 NWLR (Pt. 693) 156.

⁴⁴ (2006) 3 NWLR (Pt. 967) 284

⁴⁵ (2005) 8 NWLR (Pt. 927) 367.

Why Oil Pollution Disputes between Oil Companies and Host Communities Better Resolved through Mediation?

In most developing countries, the major concern of government is to provide essential amenities. Until the post-Rio wave of environmental awareness, environmental protection was tantamount to conservation of natural resources, while concerns over hazardous waste management or control of industrial pollution were treated as obscure and an attempt to retard the speed of industrialization.⁴⁶ This blasé attitude to environmental protection often requires a strong catalyst to jolt governments and the populace to their responsibilities, such as the illegal dumping in 1988, of toxic wastes originating from Italy, in the small port of Koko, in Nigeria.⁴⁷

The parties enter into the process voluntarily. The mediator manages the negotiations without taking over,⁴⁸ and all parties have equal opportunity to make their input or to negotiate certain cherished values.⁴⁹ Mediation depends on the principles of reciprocity- ensuring open exchange of information between the parties, and rectification- undoing past wrongs by compensating parties for losses suffered.⁵⁰ Decision-making and fact-finding are jointly done,⁵¹ turning the outcome into a future-oriented pact of compromises.

The relationship-preserving function of mediation however requires engineering by the mediator. He must first establish his trustworthiness beyond doubt before parties can trust him, and then one another, thus approaching the dispute with a truly co-operative, problem solving frame of mind.⁵²

⁴⁶ A Adegoke, 'The Challenges of Environmental Enforcement in Africa: The Nigerian Experience' (Paper delivered at the third International Conference on Environmental Enforcement, held in Oaxaca, México on 25-28 April, 1994) 43-44.

⁴⁷ *Ibid*, 43.

⁴⁸ M Stone, *Representing Clients in Mediation* (London: Butterworths 1998) 24.

⁴⁹ J Girard, 'Dispute Resolution in Environmental Conflict: Panacea or Placebo?' (1999) <<http://www.cfcj-fcjc.org/full-text/girard.htm>> accessed 12 July 2020.

⁵⁰ S A Moore and S Bache, 'Spatial Scale and Environmental Justice in Australian Environmental Dispute Resolution: Does it Matter and to Whom?' (2003) *School of Environmental Law Murdoch* <<http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/bache/home.htm>,> accessed 12 May 2020.

⁵¹ K L Leipmann, 'Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?' (1986-1986) 14 *B.C. Env'tl. Aff. L. Rev.*, 97.

⁵² *Ibid*.

Mediation is generally cheaper than litigation.⁵³ With increasing sophistication of environmental laws and litigation practice, ordinary members of society can hardly afford to litigate their oil pollution cases.⁵⁴ In Nigeria, the situation is aggravated by the fact that oil and gas pollution cases have been transferred from the State to the Federal High Courts. Worse still, there is evidence to suggest that the OGCs resort to delay tactics to even lengthen such periods or frustrate the case.

Access to environmental litigation remains a major problem in most developing countries. The enormity of this inadequacy is underscored by the provisions of Principles 10 and 26 of the Rio Declaration⁵⁵ which require states to provide effective access to judicial and administrative processes including remedy and redress. Parties seeking to litigate oil pollution matters are often saddled with the odious task of proving requisite standing to sue or *locus standi*, to be heard.⁵⁶

The South African courts for instance, have traditionally adopted a narrow approach towards *locus standi*. A plaintiff who wishes to sue for oil pollution must prove the existence of a right or a recognized interest that is direct and personal to him.⁵⁷ However, the need to protect a person's dignity⁵⁸ or to avoid potential threat to a person's health⁵⁹ has been held to satisfy this requirement.

There is a general assumption that justice is not factored into mediation's equation, and is therefore not attainable therein. This assumption is false and deserves detailed scrutiny. Strict adherence to unbendable laws is a

⁵³ J G Martin, and M S Anshan, *Alternative Dispute Resolution for Oil and Gas Practitioners* (Chicago Illinois: American Bar Association 2001) 5.

⁵⁴ M L Uwais, 'Recent Developments in Nigeria: Strengthening Legal and Institutional Framework for Promoting Environmental Management' (Paper delivered at the Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, South Africa in 2002), 18-20, where he noted that "...apart from environmental agencies, the rest of the machinery needed to deliver "environmental justice" in the new context, have yet to be created, in both human and material dimensions." 2.

⁵⁵ Z Gao, 'Environmental Regulation of the Oil and Gas Industries' (2012) 2(11) *CEPMLP Journal*, 9.

⁵⁶ R Sanford, 'The Politics of Agreement: Local Governments as Innovators in Environmental Management Conflicts' (2000) 4(7) *Journal of Law and Policy*, 122.

⁵⁷ B Milton, 'Procedural Rights' in V. Wyk (ed.) *Rights and Constitutionalism* (Capetown: Kenwyn Publications 1994) 421.

⁵⁸ *Jacobs & Ors v Waks & Ors* [1993] 91 SA 521 (A) 534-535; *Wood v Ondangwa Tribal Authority* [1975] (2) SA 294 (A), 310; where the right to personal liberty was used successfully to establish *locus standi*.

⁵⁹ *Dell v Town Council of Cape Town* [1879] (9) Vol. 2.

method of achieving justice in litigation. Environmental disputes are often suffused with grey areas, and the appropriate solution is rarely “black or white”. Litigation is a rigid process that emphasises form over substance. Parties are forced to formulate their cases to fit narrow legal definitions, dispensing with “frills” like the historical, social, political and even economic circumstances which place their dispute in its appropriate context. Clearly, this approach does not serve the ends of justice and must be avoided where it can be helped. Mediation, not only considers parties’ rights and interests, but is also sympathetic to other concerns and individual needs, giving a customised quality to every agreement.

Another way in which the litigation model aims to achieve justice is through consistency, which is by applying the same treatment to the same problem across time and space- the doctrine of precedents. While the use of precedents may be suitable for predicting the outcome of cases, and perhaps limiting the time that would have, otherwise, been applied to devising new solutions, the fast pace of development of environmental law and the uniqueness of environmental disputes to their locality mean that what’s good for the goose may not necessarily be good for the gander. Besides, many declarations on the environment are not binding in nature but are simply “soft law”.⁶⁰ They are therefore rarely applied by national courts.

Oil pollution disputes are often fraught with diverse technical dimensions for which judges possess little training.⁶¹ As a result, courts tend to avoid delving into substantive technical areas, and end up delivering judgements, the equitable nature of which may be questionable.⁶² Where parties hire their separate technical experts, the burden is even greater as the courts are saddled with the odious task of wading through a maze of technical jargon to determine which of the experts to believe.⁶³ But in mediation, technical details are hardly a problem for a number of interrelated reasons.

⁶⁰ E Reh binder and D Loperena, ‘Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation’ <http://iceac.sarenet.es/acad_forumenglish/dlrandrehbinder.htm> accessed 10 September 2020.

⁶¹ J Girard, ‘Dispute Resolution in Environmental Conflict: Panacea or Placebo?’ (1999) <<http://www.cfcj-fcjc.org/full-text/girard.htm>> accessed 13 July 2020.

⁶² Leipmann (n 51), 102.

⁶³ *Ibid*, 103.

First, the mediator plays a neutral role, and the parties “own their case”. This implies that the parties become the ultimate fact finders and adjudicators, who themselves, more than the mediator, must firmly grasp the technical nitty gritty of their dispute. Through mutual co-operation and exchange of valid information, the parties are able to educate each other regarding their respective positions, each becoming better acquainted with the legitimacy of the other’s stance, and therefore more likely and willing to compromise.⁶⁴

Nevertheless, where they opt to hire technical expertise for clarification of factual issues mediation offers the advantage that only a single source, to be agreed between the parties, is acceptable. This dispenses with the need for separately hired experts,⁶⁵ entailing lesser costs and avoiding possible conflict of findings. Additionally, studies have found that in pollution cases, agreements reached by reliance on jointly obtained expert evidence, prove more acceptable to the wider community who may have been represented at mediation sessions by spokespersons.⁶⁶

Meetings in mediation are informal, conducted in simple, everyday language. Parties are rarely inconvenienced since proceedings are generally organised at reasonably convenient times and places, and within conducive settings.⁶⁷ The outcome of mediation is not the ideal but the practical. According to Colman J. in *Dunnet v Railtrack*,⁶⁸ “mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually, commercially acceptable at the time of the mediation.”⁶⁹ The psychology of mediation is that a third party will be able to change the social and power dynamics of the conflict situation between the parties by providing information and knowledge, influencing their differing beliefs and behaviours during negotiations, a process which conquers the communication barriers between them, and ultimately paves the way to resolving the parties’ problem.⁷⁰ The essence of mediation is

⁶⁴ *Ibid*, 102.

⁶⁵ *Ibid*, 103.

⁶⁶ *Ibid*.

⁶⁷ E P Fiske, ‘Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach’(1998) <<http://www.montana.edu/wwwcommd/reconc.html>> accessed 12 May 2020.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ G Goodpaster, *A Guide to Negotiation and Mediation* (New York: Transnational Publishers, 1997) 204.

the focus on the interests of parties. Parties are challenged to consider whether they are aggrieved over the apparent subject matter or whether the persisting conflict is in fact, about control, power or authority.⁷¹ The mediation model emphasises the possibility of reconfiguring apparently intractable issues in a manner that permits resolution.⁷² The process provides a less traumatic approach to conflict resolution⁷³ in sharp contrast with the psychological brutality of adversarial litigation.

Limitations of Oil Pollution Mediation

In spite of the above account, the statistics show that only about 10% of oil pollution disputes are actually successfully mediated.⁷⁴ In general terms, mediation is a better choice when the issues are clearly defined and the disputants perceive that there is a balance of power between them, which demands that the parties negotiate.⁷⁵ Sometimes, matters involved in an oil pollution dispute may be so complex, bearing on broad policy decisions or ideological undertones. In such cases, the principles to be mediated upon might be so crucial that the parties would obviously not compromise them.⁷⁶ It may not be wise to mediate such disputes.⁷⁷ There are some other circumstances generally recognised as foreclosing the successful use of mediation, for instance where one party wishes to set a precedent in the matter, or where the parties cannot make a long-term commitment.⁷⁸

Host Communities and Oil Company's Conflicts

Crisis in the Niger Delta has increased in recent times. The key features of these crises as Anikpo⁷⁹ observed can solely be attributed to oil explorations and unequal appropriation of what accrues from oil. It could

⁷¹ V Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 *Journal of Conflict Resolution*, 26.

⁷² M D Bennett and M S G Hermann, *The Art of Mediation* (Notre Dame: National Institute for Trial Advocacy, 1996) 87.

⁷³ A Milne, 'Mediation – A Promising Alternative for Family Courts' (1991) 42 *Juv. Fam. Ct. J.*, 63.

⁷⁴ A R Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (Washington, D.C: The Conservation Foundation 1983) 8.

⁷⁵ Leipmann (n 51), 104

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 105.

⁷⁹ M Anikpo, 'Communal Conflicts in the East Niger Delta: A Cultural Matrix' (1998) 3 *Pan African Social Review*, 112.

further involve the acquisition of vast acreage, clearing of sites, and introduction of new cultural patterns into host communities, which go against the traditions of the community. According to Frynas, village host community conflicts with the IOCs are important outside academic interest because the Nigerian State is the most densely inhabited and biggest country in Africa. Over half of the government revenue and 95 % the country's dollar proceeds come from oil production.⁸⁰

By interrupting oil operations, the host communities make oil production in Nigeria more difficult and decrease the value of gas and oil investment in Nigeria. Frynas stated categorically that the Nigerian government is facing a major challenge of resolving community violence in Nigeria. The conflict continued even when the leader of the Ogoni people was brutally killed by the Nigerian state. The Ogoni struggle reduced but different tribes in the host communities stepped up their protests from 1995 and disrupted oil production with new dimensions in oil facility abduction and kidnapping of oil company personnel and some company staff deaths resulted. Despite the increase in protest and abduction of company facilities, the causes of violence such as host community neglect by oil companies and bad company operating principles were not effectively deal with by the IOCs and the Nigerian government.

Frynas⁸¹ stated that there were strong suggestions that Shell Oil Company refused to pay for damages in the past with the excuses of sabotage. Frynas⁸² also stated that there were valid suggestions that the damage oil companies made to the environment in host communities was the major reason why the host communities protested. Shell stated in a reply to Frynas⁸³ that it will not go back to Ogoni land to produce oil except the people of Ogoni land approve of such intension.

Litigations against Oil Companies

Frynas⁸⁴ (2000) cited many host communities court cases against the international oil companies, among such cases were: *Geosource v Biragbara*,⁸⁵*Shell v Tiebo VII*,⁸⁶*Shell v Farah*,⁸⁷*Chinda v Shell-BP*.⁸⁸ Frynas⁸⁹

⁸⁰ *Ibid.*

⁸¹ J G Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (2000) 1 LIT Verlag Minister.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ (1997) 5 NWLR (Pt. 506) 607.

stated that the host communities or their representatives sued the oil companies in all these cases and not folks. The communities had difficulties in accessing the courts; poverty was the major problem of community access to courts in Nigeria. Frynas noted that oil related cases in Nigerian courts do not qualify for any lawful support like other civil or criminal cases. Host communities struggle to hire the required experts and attorney which is expensive and taxing, most times village communities lack money to offset the court bills while the oil companies easily hire the best experts in Nigeria. The low income of the local people is a major problem of community access to the court and this may be one of the reasons why the communities resort to violence as the cheapest option.⁹⁰

Environmental Mediation as a Workable Option in Nigeria

There is no one formula for predetermining whether any mediation will be successful but some guidance may be had from experiences of environmental mediation professionals.

The idea that mediation is African in concept and origin is substantially widespread in the continent.⁹¹ Apart from historical accounts which are replete with mediation activity in many regions of Nigeria,⁹² recent empirical research has shown that Nigerians prefer to resolve conflicts by informal modes, particularly mediation,⁹³ and would more readily submit to chiefs, headmen, elders or even religious leaders as appropriate neutrals.⁹⁴

More importantly, Nigeria has recently benefited from the global campaign of the United States in advocating structured mediation/ADR⁹⁵

⁸⁶ (1996) 4 NWLR (Pt. 445) 657.

⁸⁷ (1995) 3 NWLR (Pt. 382)148.

⁸⁸ (1974) 2 RSLRT.

⁸⁹ Frynas (n 81).

⁹⁰ *Ibid.*

⁹¹ B Kiplagat, *Africa and Mediation: Is mediation Alien to Africa?* (1998) Ploughshares Monitor.

⁹² K Belmont and A Reynolds, *The Use of Institutions in the Management of Conflict in Religiously Plural Societies* (University of Notre Dame, Department of Government and International Studies Working Paper, Paper presented at the American Political Science Association, September 4 1999, Atlanta Georgia) 98.

⁹³ A. Khaminwa, *Peace Building and Co-existence in Nigeria*, in *The Afrobarometer - Violent Social Conflict Resolution in Nigeria*, Briefing Paper No.2, August 2002.

⁹⁴ *Ibid.*

⁹⁵ But ADR is not entirely a new concept in Nigeria. The Arbitration and Conciliation Decree (1988), contains broad outlines that are similar to those of ADR; see A. Aku, *Dispensing Justice through Mediation*, *The Daily Trust Newspaper*, Tuesday, October 7, 2003.

Mediation is anticipated to be a kinder, more flexibility and more confidential system than litigation, which will ultimately enhance understanding and communication between disputing parties. This development is seen as long overdue judging by the gross inadequacies of the country's judicial system.

What is easily noticeable is the intricate manner in which mediation introduced in Nigeria's depends entirely on the judiciary. The pioneer Lagos Multi-Door Court house (LMDC) established in 2002 is a first fully fledged court-annexed mediation endeavour, first of its kind in Africa. It adopts an all-inclusive approach to ADR in general, comprising three "doors"- ENE, mediation and arbitration. The multi-door concept provides litigants with alternative "doors" for the resolution of their disputes, leaving "door of litigation" as the last resort.⁹⁶ Under the Nigeria Ruleof Law Assistance Project, which is being funded by the United States Agency for International Development (USAID) the Nigerian government is working to establish three pilot courts the Abuja, Kaduna and Lagos specifically for providing ADR services in those parts of the country.⁹⁷

Conclusion

Mediation, though an imperfect art, is a better option for resolving oil pollution, and related disputes between foreign oil companies and host communities in Nigeria because it seeks amicable agreement, where courts seek verdicts, thereby preserving the relationship between these parties. Even without the emergence of mediation in preference to litigation in the field of environmental dispute resolution, the likely danger exists that these disputes may not be accurately and fairly resolved, owing to the numerous administrative loopholes which attend the judicial settlement of these disputes.

Through mediation, the OGCs can acquire, and continuously renew their social license to operate. This would be evident in a reduction in the incidents of staff kidnapping and incessant disruptions of operations. The mediation of disputes with host communities will also provide the much-needed global image laundering, particularly in the cases of Shell and Chevron in Nigeria.

⁹⁶ K M O Kekere-Ekun, *Promoting the Use of ADR Processes: The Role of Magistrates in Nigeria*; Paper delivered at an Abuja workshop for magistrates, organised by the National Judicial Institute (NJI) on 26 December, 2003.<<http://www.vanguardngr.com/articles/2002/features/fe226122003.htm>> accessed 19 June 2020.

⁹⁷ Ako (n 23)

Mediation can occur unless the parties to the dispute desire or at least acquiesce in the involvement of a mediator. The varying degrees, to which potential disputants may be motivated to settle a dispute or restructure/manage the terms of an agreement, may explain the difference in the use of mediation and other non-adversarial means of dispute resolution in any setting. While OGCs in Nigeria may be motivated to mediate oil pollution disputes because of expectations of profit, community members may have a strong incentive to use mediators in order to be compensated for environmental damage, and to achieve their empowerment goals, and these two would not necessarily coincide in every case.

To be effective, mediators in the oil and gas industry, like in other domain, must be substantially skilled and experienced. The essence of this requirement stems from their recognized ability to influence the parties to reach an agreement. These mediators generally have no coercive power. The basis of their influence essentially resides in the relationships they create with the disputants and their expertise.

Confidentiality is the key to the success of oil pollution mediation because, to a large extent, it guarantees the frankness of the negotiating parties and the sincerity of communications they exchange during the mediation process. Emphasis has been made on the point that mediation is not an information gathering exercise. Various mechanisms abound which are particularly aimed at obtaining environmental information.

Certain distinguishing qualities of environmental disputes justify the granting of professional privilege to environmental mediators over and above other mediators. These include the potential of permanent impact which pollution may have on the human and natural environment, the tendency of these dispute to involve government and public agencies, as well as the tremendous expenses and time required to litigate them.

In future, it is expected that the practice of mediating oil pollution disputes will continue to grow in the oil and gas industry, and we are likely to witness statutory protection granted to mediators to accord them limited protection which would necessitate that they always act in good faith. This may have implications for the continued informal and flexible nature of mediation, as it presently exists. However, with increased recourse to the option will come increased testing of its potentials. It is important for members of the legal profession to join forces with environmental mediation advocates to bolster the fledgling field, because ultimately, mediation would always be subject to the law, and the law courts.

Recommendations

Based on the findings, the following recommendations are hereby suggested:

1. The National Assembly should amend the Arbitration and Conciliation Act 1988 to give mediation a unified legal framework in view of its importance to dispute settlement. Mediation should therefore be made an option under the ACA for settling disputes in addition to Arbitration and Conciliation.
2. Mediation as a means of resolving oil pollution disputes should be embedded in every Memorandum of Understanding between companies and host communities. The National Oil Spill Response Governing Board established under the NOSDRA Act should be empowered by the Act to appoint mediators where parties to oil pollution cases opt for dispute settlement.
3. There should be an amendment to Chapter 3 of the Petroleum Industry Act; the host communities' development to include mediation as a means of settling disputes in furtherance to achieving the objectives of the Chapter. Sections 234-257 (chapter 3) of the PIA did not make provision for dispute settlement. Mediation should therefore serve as an option where there are disputes between the operators of the licenses and host communities. The Board of Trustees appointed pursuant to the Act should also be charged with the role of mediators in deserving situations.