



Niger Delta Oil Spill Case against the Shell Company at the Hague: The Future of Corporate Environmental Responsibility

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Abstract: It is a heinous task for plaintiffs to secure environmental justice against multinational companies' human right and environmental violation in developing countries. The objective of this paper is to appraise the current landmark case of environmental pollution by the Niger Delta farmers against the Shell Company at The Hague. It inclines on prior work relating to jurisdiction – which poses environmental justice barrier. The paper's approach is conceptual and discusses the latest decided oil spill case in the Dutch Court of Appeal, the Hague between Niger Delta farmers and the Shell Petroleum Development Company of Nigeria. It finds that the quest for environmental justice by communities can receive equitable hearing in foreign countries, which are home to the parent of polluting companies. However, this requires passage of many hurdles – the heavy cost, evidence, and time. It thus requires support of environmental advocacy groups. The paper highlights that corporate environmental responsibility may not always be escapable based on corporate economic girth and flimsy excuses of local sabotage. The paper provides an agenda for further analysis and constitutes a recent case for academic studies in corporate governance class in business schools. The paper is one of the first to analyse the future implication of corporate environmental responsibility, which relies on the recent oil spill case at the Dutch Court of Appeal, The Hague.

Keywords: corporate environmental responsibility; jurisdiction; parent company liability; oil pillage; multinational companies

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1. Introduction

The general rule in tort litigation is to make the plaintiff whole again and to compensate the plaintiff with a financial reward in order to bring the plaintiff as much as possible close to the position that the plaintiff was before the tort was caused by another party (González, 2013). Similar to a tort caused by damage to other properties, environmental tort, has often been caused by multinational oil companies in developing countries with impunity but hardly enforced legally to the point of commensurate compensation to the plaintiff due to oil companies' colossal financial girth and collusive evasion of legal responsibility (Edoho, 2008; Hilson & Haselip, 2004). This is often the case in developing countries where oil companies find a safe haven to operate with wanton disregard to the environment and neighbouring communities' welfare. The weak legal system and governance in developing countries nurture this (Eweje, 2006). Hence, the last hope for environmental tort victims is the international courts such as the Dutch Appeal Court at The Hague – where the Niger Delta farmers currently received a fair hearing with victory against the Shell Company, which affords compensation clauses on the oil spills and damage to community farmlands (Reuters, 2021). This is only one successful case of environmental tort out of dozens of torts committed by multinational oil companies in the Niger Delta worn by the plaintiff over the years. At best, what is often common (in attempt to flaunt good image) is payment of symbolic fines or pretentious green washing gestures to communities (Walker & Wan, 2012).

The handicap remains that the trampled poor communities by oil companies have little means to seek legal redress on their polluted properties (neither within nor beyond the shores of their country). This brings to the fore the extent to which poor communities can access environmental justice in a developing country (Okonkwo, 2020). The court is seen to be a fundamental institution of legal respite to the environmentally trodden communities, but a myriad of impediments obstruct access to environmental justice for oil communities in Nigeria and this obstruction orchestrates human rights violation and impasse to environmental justice to oil producing communities in Nigeria (Okonkwo, 2020).

In the absence of government assistance, the succour rendered by environmental advocacy NGOs, such as the Friends of the Earth has proven to be possible route to justice assistance in the future. However, this is only possible with funding capabilities and expansion of existing and emergence of new environmental advocacy groups. The recent support by Friends of the Earth to the Niger Delta

farmers up to victory over Shell Company is a practical proof that aside from government support, lobby groups, NGOs and environmental advocates can be a means to uproot the impediments on the way of poor communities to environmental justice.

As the struggle between multinational oil corporations and neighbourhood communities heightens, researchers, corporate leaders, environmental activists, and leaders of communities are calling for companies to be more responsible for the impact of their operations on the environment and communities. Environmental torts pervade all injuries unleashed on the plaintiff's property and on the current or future environmental, social, aesthetics, and economic value of plaintiff's property. The Niger Delta citizens are melancholic on recalling the launch of commercial oil exploration that began in 1958; back then, a deep breath of arrival of prosperity greeted the air. Disappointingly, Oil companies' environmental pollution in the Niger delta has been the order of the day, which has resulted to serious environmental damage over the years and inflicted hardship to the social and economic lives of the Niger Delta communities. Hence, with the passage of decades, pollution and the attendant environmental destruction have dampened the earlier elated citizens – causing protests and movement for human rights and environmental justice. Many of such quests have been elusive; hence, in recent times the Niger Delta environmental activists have sought legal redress beyond the borders of their country and have petitioned in the United States and the Netherlands (Akinbobola, 2013). In 2008, a group of farmers from the Niger Delta, with assistance from the Friends of the Earth (Dutch Branch) sued the Shell Nigeria in 2008 at the District Court in Hague; in 2013, the Court ruled in favour of Shell Nigeria. However, the ruling was appealed at the Hague Court of Appeal, who ruled that Shell was negligent by failing to protect its installations, which brought the current victory to the farmers in January 2021 (Akademie, 2021).

Accordingly, based on the foregoing prelude, the objective of this paper is to appraise and glean some light on the recent legal victory by the Niger Delta farmers over oil spill by Shell Company and what future the legal victory portends for corporate environmental responsibility.

2. Related Conceptual Review

Legal norms contain gaps and logics that require proper interpretation to give meaning intended by the creator for the judicial benefit of the society (Berisha & Berisha, 2019). In some instances, these gaps, and logics in legal norms creates inequity and results to an imbalance that favour the wealthy and powerful companies against the poor in seeking corporate environmental justice regarding oil extraction (Malin, Ryder & Lyra, 2019). Such inequity continues to unleash structural and social inequity with persistent poverty and exposure to toxic emissions around oil extraction sites amidst the oil-boom. It is also a common phenomenon to see that natural resource extraction is ubiquitous around communities with little voice and economic power to oppose all manner of inequity from multinational extracting companies (Malin, Ryder & Lyra, 2019)

The imbalance that defines the rapport between multinational companies and the indigenous peoples is an evident characteristic of ingrained global capitalist traits. This asymmetry is specifically entrenched within the difference between the official regulatory standards that protect multinational investors' interest and the soft laws that assist in diminishing transnational corporations' commitment to human rights responsibility to a mere voluntary practice (Aguiar, 2015). This is why Macklem (2000) argues that sovereignty in international law appears prejudiced as it excludes the indigenous people from the notion of sovereignty, which apparently encourages the multinational companies to disregard the indigenous people's welfare. Accordingly, the weakness in the laws that protect the rights of indigenes against the exploitation of multinational companies has created a systemic impunity amongst multinational companies with growing incessant violation of human rights, environmental destruction, and dispossessions (Aguiar, 2015; Aaron, 2006). For instance, the discernible recklessness of multinational oil companies in the Niger Delta negates international operating standards and has over the years continues to pose threat to the health and livelihood of indigenes, including pollution of drinking water, stunting of food crops and corrosion of rooftops (Aaron, 2006).

The above highlights from Aquiar (2015) typify the Nigerian case. Nigeria transited from a no-oil state to an oil producing country after about half a century of oil exploration (Shell Nigeria, 2010). The Nigeria's oil discovery case is a reality proof that it takes patience to discover fortune. The journey to oil discovery in Nigeria began in 1936 when the Royal Dutch/Shell Group founded the company then known as the Shell D'Arcy, which was the first Shell Company in Nigeria.

Following this, application for exploratory licence ensued, in November 1938; the Shell D'Arcy extended the licence of exploration, empowering the Company to prospect for oil in the entire Nigeria. Luck emerged on Sunday the January 15 of 1956 when the first oil appeared and the oil well drilled successfully at Oloibiri in the Niger Delta. Subsequent to the successful discovery of oil in the Niger Delta, Shell D'Arcy was renamed Shell-BP Petroleum Development Company of Nigeria Limited on April 1956 (Shell Nigeria, 2010). The seemingly satire is that the joy of oil arrival was short-lived as what was celebrated as golden became brunette. This is because it was not too long though after the elated air of prospective, the communities became the victims of attendant oil pollution. Hence, the initial celebrations of oil arrival mutated to despair with the courts being the only hope for redress. However seeking legal redress for environmental pollution against multinational oil companies can be quite expensive and often unattainable for the indigenous people without support from charity organisations (Aristova, 2017). Accordingly, the literature has accounts of myriad of cases against multinational oil companies brought by indigenous communities.

Valdivia (2007) provides an account of one of the earlier class action case against an oil company infringement on indigenous people's land and environmental damage. In the account of Valdivia (2007), on November 3, 1993, a coalition of indigenes and other inhabitants from the Ecuadoran Amazon, backed by environmentalists and human rights groups instituted a billion-dollar class-action suit against Texaco in a US government court. The plaintiffs sought compensation from Texaco for careless oil exploration that destroyed their environment with attendant risks to the health of the local community. In 2002 the US court gave a land-mark ruling that the trial can be heard in Lago Agrio (Sucumbíos territory) in Ecuador, and that the decision by Ecuadoran legal system would be legitimately binding on Texaco parent enterprise in the USA (Valdivia, 2007). This is an exceptional legal class action of environmental pollution case against a US oil company; the plaintiff's attorney argued that Texaco is responsible for the pollution because Texaco designed the exploration system, it also operated and profits from the system (Wilson, 2003).

Pigrau, Borràs, Jaria and Cardesa-Salzmann (2012) evaluates the diverse national and worldwide (legal and non-judicial) fora that are accessible to hold MNCs responsible. They approach their review from the premise of current legal advancements concerning civil claims by those who suffer casualties from the operations of MNCs in different nations. Accordingly, Pigrau et al (2012)

investigates the circumstances within which national, transnational, and universal case, either by itself or in interaction with each other, have demonstrated most successful in giving justice to those seeking legal redress from the harm suffered because of multinational companies' activities. Pigrau et al (2012) conclude that transnational cluster-litigation is the foremost proficient methodology to fix the networks of legal activity upon MNCs, consequently advancing the worldwide rule of law and contributing, though moderately, to cultivate (remedial) worldwide justice for victims of MNCs abuse.

Pigrau (2014) presents a detailed highlight of an asymmetric power in legal battle regarding the injustices by a huge multinational company in Lago Agrio Ecuador. The oil operations by Texaco in Ecuador caused serious environmental pollution, which also affected the health of indigenous people. However, the case lasted well over twenty years to secure compensation for the affected communities. Pigrau (2014) narrates that this Texaco and Lago Agrio Ecuador case typifies a case that perfectly illustrates three angles. These angles include firstly the change of the full world into a single range of debate with repercussions within the United States, Ecuador, the Netherlands, Argentina, Canada, and Brazil. Secondly, the limitations of the current worldwide legal framework to the activities of large and wealthy multinational companies; and thirdly the colossal imbalances of economic ability between parties and the determination of Chevron, no matter the cost, to require all fundamental measures not to lose an iconic case. These three dynamics contribute a setback for poor communities to received environmental justice against multinational companies in developing nations.

3. Avenue to Environmental Justice: Dutch court rules Shell Liable for Niger Delta Oil Spills

There are an expanding number of occurrences of gigantic natural harm and human rights infringement result from the operation of multinational corporations (Pigrau, Borràs, Jaria, & Cardesa-Salzman, 2012). It is evident that many developing countries have weak environmental laws as regards multinational companies; where such laws exist; political interests that align with the multinational companies' interests interfere and weaken it (Mähler, 2010). Hence, environmental justice in such case as the Niger Delta farmers and Shell oil spills can receive legal support from across the shores of the country. In this case far away in The Hague, where only few plaintiffs can afford travelling to, which therefore often

metamorphose to justice denied. Environmental justice perseverance is not for the economically frail plaintiff except with the support of international environmental advocacy groups, which reside more in developed countries. Newell (2001) investigates the conceivable outcomes and restrictions of diverse approaches to the regulation of transnational enterprises in a setting of globalization. Looking at environmental activities in specific, and contends that each of the legal approaches, has an important contribution in deterring irresponsible business investment.

Similar to the metaphorical rhymes of how difficult it is for a ‘camel to go through the eye of a needle’, it has been the case for local communities that are under the subjugation of oil companies to seek and obtain judicial redress from oil companies. Instances of communities that suffer environmental pollution from oil operations abound with similarities – from the Amazon to the Niger Delta (Gomez, 2014; Kimerling, 2013; Akinbobola, 2013). How slippery justice can be (Akinbobola, 2013) – especially if the plaintiff is economically disempowered; sadly, for the Niger Delta farmers, their quest for justice has been slippery over the years.

In 2008, four Nigerian farmers filed a suit against Shell Oil in the Netherlands, which is the headquarters of the parent company (Royal Dutch Shell) for oil spill spillage with attendant pollution of farmlands and fisheries in three villages in the Niger Delta. During the early arguments, the Shell Company delayed the case by arguing about jurisdiction. In May 2009, Shell submitted a counter motion to the court contending that the Dutch courts do not have any jurisdiction over the activities of the Nigerian subsidiary (Shell Petroleum Development Company of Nigeria). However, in December 2009, the district court in The Hague gave a landmark ruling that The Hague court has jurisdiction to hear the case brought by the Niger Delta farmers against Shell Nigeria. The first ruling was in January 2013, when the Dutch court ruling provided an order that the Shell should pay one of the farmers a compensation. However, the ruling failed to uphold the other two claims by the plaintiffs, who proceeded with appeal to the Dutch Appeal court. In the subsequent ruling, the Dutch Appeal court gave permission that the case regarding the remaining oil spill cases can proceed. In addition, the Dutch Appeal court decided that Shell has an obligation to grant the plaintiff access to certain internal documents that are crucial to the remaining oil spill claims by the plaintiffs. The case – lasting more than a decade finally came to a landmark decision, which researchers see as a precedence to corporate environmental case. This decision was delivered on the 29 January 2021, when the Dutch Court of Appeal decided that

Shell Nigeria owes responsibility for the remaining two cases of oil spills in the Niger Delta, which was earlier dismissed in previous rulings. In this Appeal Court decision, Shell is instructed to pay compensation to the farmers and villagers, adding that the parent company, the Royal Dutch Shell and its subsidiary have a joint responsibility legal responsibility to be caring to the neighbouring villagers, who are victims of oil spill. The Shell received court order to connect oil leak detectors into its oil pipelines to prevent further oil spills in the future (Business & Human Rights Resources Centre, 2021).

The foregoing ruling on the 29 of January 2021 became a reversal of earlier decision in 2013 by the District Court in The Hague, which absolved Shell of the oil spills responsibility. An important point is worth noting in this decision. The Court maintained that the Shell Nigeria did not leave up to its responsibility of due care in maintaining its equipment, which therefore constitute negligence (Peltier & Moses, 2021). This sets a corporate environmental responsibility precedence for future cases. It reminds the multinational companies that reliance on sabotage to escape environmental responsibility for oil pollution might require a heinous proof of evidence beyond doubt (de Rechtspraak, 2021). This corporate environmental responsibility case, suggests that it might not be easy in the future for parent companies to escape responsibility for its oversight failure over subsidiaries located in developing countries (Akademie, 2021). A new corporate environmental legal ground is thus set as this is a maiden corporate suit made against a Dutch company for environmental misconduct in its overseas subsidiary. Very rarely has companies been sued in European courts for their activities in developing countries, mostly because of the huge cost involved and the hurdle of evidence presentation. A parallel case was the heard in a London court, when in 2017 the London Court of Appeal decided that activities of human rights abuse of English-based multinational companies in overseas countries could be heard in the UK. Hence the case brought by Zambian villagers was allowed to proceed against Vedanta, an English-based mining corporation, and its Zambian subsidiary, KCM for copper mining environmental pollution Zambia (Aristova, 2017).

3.1. Implications of the Paper

The paper highlights the need for multinational companies to be aware that corporate environmental responsibility in the oil sector may not always be escapable as before based on corporate economic girth and flimsy excuses of local sabotage. It provides an agenda for further analysis to gather evidence of legal suits

for multinational subsidiary pollution in developing countries in the home countries of parent companies. Accordingly, this paper constitutes a recent case for academic studies in corporate governance class in business schools.

3.2. Value of Paper (Contribution)

This is the first paper to appraise the most recent case of Niger Delta oil spill claim against the Royal Dutch Shell at the Court of Appeal in The Hague, and sheds light on the future implication for corporate environmental responsibility. It thus highlights the developmental nature of corporate environmental justice. Globalisation, climate change and the attendant sustainable development advocacy have jointly triggered the growth of environmental rights NGOs, who assist the poor and downtrodden communities in seeking environmental justice in foreign courts that are home to the polluting multinational corporations. Accordingly, globalisation and sustainable development are closing the previously existing gap that created the hurdle of jurisdiction. This suggests that environmental justice jurisdictional issues have the propensity to evolve along the trajectory of globalisation, climate change, and sustainable development (Figure 1).

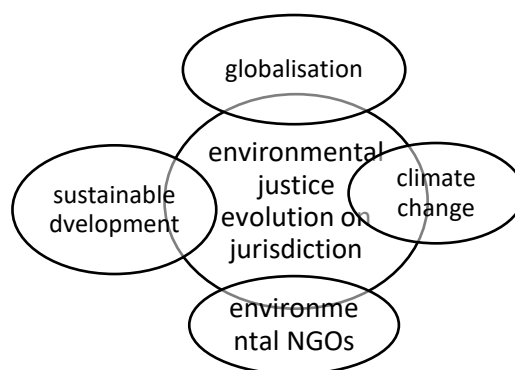


Figure 1. Factors Spurring Environmental Justice Jurisdictional Evolution

Source: Author

4. Conclusion

Through legal rights, it is possible to secure environmental justice, but very daunting for the poor against the rich multinational companies, comparable to 'a battle between elephant and the ant'. Just as hectic, it is to drill oil out of the ground, so it is to get justice from oil pollution. The foregoing analysis based the

current Niger Delta farmers' victory over Shell Oil has implication for the future of multinationals companies' environmental responsibility. Chief amongst which is that the oil companies can now draw lesson that global environmental case jurisdiction is evolving beyond the locality where environmental pollution occur and can be heard in the parent company's country. This is a favourable environmental justice development for the poor communities that suffer environmental pollution. Therefore, multinational oil companies have the opportunity to choose to be pragmatically proactive in corporate environmental responsibility. Such responsible business demeanour will save companies' image and cost rather than wait to engage in a reactive environmental responsibility often induced by court order. Furthermore, with the assistance of environmental rights groups, poor communities can receive judicial hearing with potential reparations on damages caused by oil spills. This gleans light to future brightness of environmental justice, wherein the poor communities and indigenous people can have equitable inclusion in the rule of law on environmental justice.

This paper has shed some light that one of the obstacles to indigenous communities' ability to secure environmental justice includes the colossal economic inequality that subsists between the poor communities and the rich multinational empires who have all the financial arsenal to silence the communities with the best corporate attorneys of the world. On this account lies the inequality regarding access to justice – hence the aphorism that the law is blind and equitable becomes a mere mantra, whose pragmatism is doubtful when related to poor communities. Due to little or no financial means to get environmental justice, some litigations on environmental damage between communities and rich oil companies have taken many years. This paper shows that the Niger Delta farmers' case against Shell Oil took over ten years to obtain justice. Similarly, the Texaco-Chevron Case in Ecuador took more than two decades for justice to take place. In some of the cases, the originators of environmental claim lawsuits pass away and never live to experience the justice. This paper recommends that aside from the existence of environmental justice NGOs who assist the poor communities that seek justice, the UN agency for human rights should initiate an environmental justice funding specifically for poor communities who have been under subjugation by oil companies, to be able to seek and secure justice.

Relying on the current case of Niger Delta farmers and the Shell Petroleum Development Company of Nigeria, there is the likelihood that this case will pave a way for more victims of environmental pollution by oil companies to seek legal

redress beyond national boundaries. It also implies that oil companies may draw a policy and operational lesson from this case to be proactive to avoid oil spill. In addition, this case has shown that it may not be easy for companies to prove sabotage beyond reasonable doubt as a tool of corporate environmental responsibility evasion.

Furthermore, the convergence of international environmental law to a global jurisdiction (irrespective of the country) where environmental pollution is committed becomes necessary in the current global dispensation given the urgency to tackle climate change and environmental problems. This is even more necessary as the poor communities located in the oil and other extractive industrial areas lack the economic power and voice to challenge the abuse of their natural and environmental rights. Accordingly, if environmental justice continues to elude the downtrodden, the rule of law becomes hostile to the poor. This is the reason that Kimerling (2013) opines that in order for the rule of law on global environmental issues to stand firm as an equitable instrument of environmental justice, such rule of law needs an inviolable fairness to the poor. For so long, the multinational companies have taken advantage of the jurisdiction obscurity in the rule of law on corporate environmental responsibility and often result to aggression and destruction with miniaturized development in the oil rich communities – be it in the Niger Delta (Ndu & Agbonifoh, 2014), or in the Amazon (Aguiar, 2015) and Ecuador (Gomez, 2014).

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