The Global South and Systemic Imbalances in International Energy Law

By:

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In the globalised world that we inhabit, replete with its complex private transnational institutions and multinational corporations, energy law is often far from “national”. That is to say, hard legal problems arising in relation to energy issues within a particular country will often have a remarkably international character that can substantially transcend the immediate jurisdictional confines of the country in question.

For example, Dr Eddy Wifa and Dr Titilayo Adebola have unpacked the significance and implications of a landmark ruling where a subsidiary of energy company Royal Dutch Shell was held liable for the damaging impacts of oil spills in Niger Delta villages. To me, many aspects of this case are notable, including the 13 year legal struggle that led up to the court ruling, and the agreed payout to the Claimants of $111,000,000 by Shell, which was deemed necessary in order to satisfy the court’s compensation order. But equally

notable – perhaps even more so – is the fact that this milestone "Nigerian" ruling, which involved Nigerian Claimants and engaged serious wrongs and harms done on Nigerian soil, was issued in Europe in the Netherlands, at the Hague Court of Appeal. This should tell us something.

If one really thinks about it, it is remarkable that the invisible hand of the globalised legal order can compel ordinary people to endeavour to seek a resolution to serious harms that have been suffered close to home (here, Nigeria) half a world away (in the Netherlands).

Important as the Hague ruling is, it is certainly not the first time that local communities in Nigeria have engaged in legal action in other states in order to seek redress for fundamentally local energy-related issues. The United Kingdom (UK) provides a relatively recent significant example, which involves Shell again and echoes certain issues raised in the Hague case. *Okpabi & Others v Royal Dutch Shell Plc and Another*, which came before the UK Supreme Court, involved around 40,000 individuals in Nigeria, who alleged that they had suffered damage due to oil spills arising from negligently operated energy infrastructure.

Where the convoluted multinational structures and jurisdictional boundaries at issue in the case are boiled down to their essentials, one finds that the defendant, Royal Dutch Shell Plc, is domiciled in England; and the Shell Petroleum Development Company of Nigeria Ltd, a second defendant in the case, is a Nigerian company that is a subsidiary of Royal Dutch Shell.

It was argued that both the parent and subsidiary companies had negligently failed to exercise reasonable care, and that serious oil spill damage had resulted as a consequence in Nigeria. The UK Supreme Court held that the claims against Royal Dutch Shell and its subsidiary *could* proceed in England, notwithstanding the complex multinational and jurisdictional issues that might otherwise have proved legally prohibitive. The ruling means that English-domiciled companies that operate via overseas subsidiaries in the Global South (and elsewhere) are open in principle to a broader range of potential claims in the UK than if the Supreme Court had ruled otherwise.

While this is a positive outcome, these sorts of complex legal circumstances are both internationalist and remote in character, and should be reflected upon

thoughtfully. I choose the word “remote” here with care, for it is difficult to see how a Nigerian farmer whose land has been negatively impacted by oil can feel a close personal affinity with a convoluted technical legal argument playing out in a courtroom on the other side of the world. It takes place far from where the impact occurred. And far from the realm of typical daily lived experience.

In such circumstances, then, the globalised legal system takes a very immediate, local circumstance, and repackages it as something remote, technocratic, and distant. Something that is typically distant from our lived experience can also be described as “impersonal”, which is an important observation given that deeply personal issues may lie at the heart of the facts of a Claimant’s case. Therefore, while the specific rulings in the two cases noted above are very welcome, broader systemic features that structure energy relationships within the international legal order should concern us.

Howard Zinn called out the sorts of circumstances that we can now see prevailing in this domain of energy law back in the 1970s, in his radical and thought-provoking work “The Conspiracy of Law”:

> The modern era, presumably replacing the arbitrary rule of men with the objective, impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. …*Under the rule of men, the enemy was identifiable*, and so peasant rebellions hunted out the lords, slaves killed plantation owners, and radicals assassinated monarchs. *In the era of the corporation and the representative assembly, the enemy is elusive and unidentifiable*. …In [the novel] The Grapes of Wrath [by John Steinbeck], the dispossessed farmer aims his gun confusedly at the tractor driver who is knocking down his house, learns that behind him is the banker in Oklahoma City and behind him a banker in New York, and cries out, “Then who can I shoot?”[1]

Justice is at its most meaningful when it is in close contact with everyday life, and when people perceive that they can both access justice and shape / be participant in justice. These sorts of features are intended to sit at the heart of the rule of law. To the late Lord Bingham of the UK Supreme Court, the rule of law was a metaphorical “sacred flame”[2]. Thus, in “The Rule of Law”, he

pointed out that both the lawyers who frame the technicalities of the law and the "others" alongside legal specialists who do not (i.e., the general public) collectively embody "the guardians of an all but sacred flame which animates and enlightens the society in which we live."[3]

Litigation emanating from the Global South, including the two important cases noted above, is leading on shining this sacred flame into the darker nooks and crannies of international energy law. Such cases simultaneously highlight and challenge aspects of an international legal order that tends towards the impersonal and convoluted – a legal order that has been framed largely with powerful multinational energy companies in mind.

If public interest law can continue to be mobilised strongly by activists in the Global South, it might help us move towards a world where international energy law is less "remote" from everyday people, and therefore more just.

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[1] First appearing in Robert Paul Wolff (ed.), *The Rule of Law* (Simon and Schuster, 1971). Available here: https://theanarchistlibrary.org/library/howard-zinn-the-conspiracy-of-law (emphasis added).

[2] See further Lord Bingham. "The Rule of Law", Cambridge Law Journal 66(1), March 2007 pp.67-85. Available on open access here: https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript

[3] *Ibid*.

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