

Imposition of Fines by Regulatory Agencies: A Review of **NOSDRA Vs Exxon Mobil Producing Nigeria Unlimited.**

BACKGROUND

"I must here underline the fact that awarding a fine is a judicial act and it is the sole prerogative of a court of law under Section 6 of the 1999 Constitution of the Federal Republic of Nigeria 1999 (as amended). No other organizations or bodies can usurp that power. Any law that would consign to anybody other than the courts the power to award fine is unconstitutional."

The above are the exact words of Justice Chioma Nwosu-Iheme of the Court of Appeal, Calabar Division, whilst delivering the lead judgement in the case of National Oil Spill Detection and Response Agency (NOSDRA) Vs. ExxonMobil Producing Nigeria Unlimited. The extant judgement, once more, brings to fore the lingering judicial and academic debates on the power of an Agency of Government to impose fines and penalties on persons and entities subject to their regulatory powers and the extent to which the exercise of such purely administrative prerogatives infringes on the judicial powers of the Courts as enshrined in Section 6(6) of the 1999 Nigerian Constitution, as amended.

FACTS OF THE CASE

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NOSDRA had instituted a suit (FHC/UJ/CS/1623/2016) against Mobil Producing Nigeria Unlimited ("MPN" or "Exon Mobil") at the Federal High Court, Uyo, seeking the order of the court to compel Exxon Mobil to pay the cumulative sum of N10,000,000 (ten million Naira) as penalty for the alleged contravention of the NOSDRA Act and the Regulations issued pursuant to the Act, amongst other reliefs. On Tuesday, May 16,

2017, the Court, presided by Honourable Justice Ijeoma Ojukwu, whilst delivering a Ruling on a motion by Exxon Mobil challenging the right of NOSDRA to impose fines on it, declared that the imposition of fines by Regulatory Agencies was illegal and that NOSDRA acted outside its powers by imposing fines on Exxon Mobil without first approaching the Courts. The Court further held that the power to impose fines is a judicial or quasi-judicial power, which a regulatory body cannot exercise without recourse to a competent Court. Dissatisfied, NOSDRA appealed this decision at the Court of Appeal, Calabar.

JUDGEMENT OF THE COURT OF APPEAL

Affirming the decision of the Federal High Court, the Court of Appeal in the lead judgment delivered by Justice Chioma Nwosu-Iheme, held that by fining Mobil, NOSDRA constituted itself into a court with judicial or quasi-judicial powers, when in fact the law creating it did not donate such powers to it. The Court noted that by the imposition of the fine, the federal agency acted in a judicial capacity which it is not imbued with under the constitution, and by so doing, it became a judge in its cause as well as the complainant.

The Court particularly noted that a fine is a criminal sanction and thus cannot be effectively imposed without recourse to the court. Justice Nwosu-Iheme noted the decision of learned Justice Abba Aji of the Court of Appeal in the case of **Abdullahi vs. Kano State (2015) LPELR - 25928 (CA)** wherein the Honorable Justice had defined a "fine" as payment of money ordered by a court from a person who has been found guilty of violating a law. The learned Justice had further noted that a fine may be specified as the punishment for an offender, usually for a minor offence, but could also be specified and used as an option to imprisonment for major crimes or a complement to other punishments specified for such crimes.

Quote

There have always been different opinions on some elements of our sanction policy. It will probably stay that way. What is important is that we keep this unity and decide together."
- Federica Mogherini.

A DIVERGENT VIEW

The NOSDRA case is certainly not the first in the judicial review of executive prerogative to impose penalties. In an earlier case, the Markurdi Division of the same Court had examined the powers of Federal Agencies to impose fines and had upheld the authority of such agencies to impose fines whilst acting within the limit of the enabling laws.

In the matter between **Barrister Moses Ediru and Federal Road Safety Commission & 2 Others (2016) 4 NWLR (Part 1502) page 220**, the Court of Appeal, Markurdi Division held that **"the fines which the law gives the Federal Roads Safety Commission the nod to enforce as enshrined in section 10 (7)-(9) of the FRSC Act and paragraph 113 of the National Road Traffic Regulations, do not derogate from the juridical powers of the courts. There is no confluence point where the powers of the FRSC and the courts meet. The powers of both are not coterminous. They are mutually exclusive such that the respondents' power of enforcement is not a usurpation of the judicial power of the court".** The Court stated further that **"the notice of offence issued by FRSC is a mere notice to bring matters to a person's knowledge or attention. It is not on all fours with a charge or information. It is a forerunner to either."**

THE LAW AS IT STANDS TODAY

Pending a conclusive pronouncement by the Supreme Court, it suffices to note that the extant decision of the Court Appeal, Uyo, could be relied upon as the most recent in time on the subject.. The court held in the case of *Ojugbele v. Lamidi* [1999] 10 NWLR [Pt. 621] 167 at 171, para. E., that where there are two conflicting judgments of the Court of Appeal on a point of law, the later in time is taken to be the current decision of the Court of Appeal.

It has been argued that the implication of the NOSDRA decision is an inadvertent attempt to generalize the issues as the Court failed to take cognizance of the difference between a "criminal penalty or fine imposed in the course of a penal process" and a "civil fine or penalty". A civil penalty or fine is a financial penalty imposed by a

government agency as restitution for wrongdoing. The wrongdoing is typically defined by a legislation, regulation or decree. Flowing from the above therefore, it is important to note that a civil fine is not considered to be a criminal punishment, as civil fines are imposed in order to compensate the State for harm done to it, rather than to punish the wrongful conduct. As such, civil penalties do not necessarily prescribe jail terms like the other class reference above.

A review of the position in other jurisdictions indicate that, for ease of administration, certain conventional requirements are often side-stepped in the interest of efficiency. The use of infringement offence notices ('instant fines') without the need for a criminal procedure is becoming popular in New Zealand while County Councils in the UK are empowered to impose fines on offenders for parking violations without recourse to court.

The US Supreme Court in *Ocean Steam Navigation Co Vs Stranahan*, 214 U.S 320 (1909) held that giving federal officials the power to enforce penalties without recourse to the courts was acceptable. As far back as 1909, the Supreme Court sustained the administrative imposition of fines upon ship owners whose vessels had brought diseased aliens to the United States. Years the Court maintained the position that "due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends" (*Lloyd Sabaudo Societa v Elting*, 287 U.S. 329 (1932).

Another school of thought argues that the regulations that are released in furtherance of implementing the enabling law and which set out sanctions for non-compliance, combine to repose far reaching powers on government agencies. More often than not, this breeds arbitrariness and runs contrary to the principles of natural justice, equity and good conscience.

IMPLICATIONS OF THE DECISION

One implication of the decision is that it could engender confusion as to the authority of regulators to impose fines and penalties for infringement of enabling laws and regulations made pursuant thereto, given the conflicting decisions of the Court of Appeal. The effectiveness of regulators of strategic sectors of the economy lies in their ability to impose fines and penalties in the face of infractions without recourse to the courts. Given the notoriety of the slow grinding wheels of the justice system in Nigeria, the resultant frustration and the effect of regulatory incapacity can best be imagined.

END NOTES

The efficacy of conventional penal processes is far from being universally acknowledged. The need for expediency in the execution of administrative functions, naturally requires the conferment of the power of sanction. An inter-play of the benefits of executive power of sanctions and the need to curtail arbitrariness would go a long way in determining the extent of power to be left in the hands of regulators. In all, the objective should be to serve the cause of justice. Some will argue that only the courts are better suited to do this. Others will insist that the exigencies underlying the regulations, require swifter action. To secure some finality on the matter, it is hoped that the NOSDRA matter goes to the Supreme Court which will finally settle the lingering confusion on the powers of Government Agencies to impose fines and penalties.



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Witty Corner

A lawyer runs a stop sign and gets pulled over by a sheriff. He thinks he's smarter being a big shot lawyer from New York and has better education than a sheriff from West Virginia. The sheriff asks for license and registration. The lawyer asks, "What for?" The sheriff responds, "You didn't come to a complete stop at the stop sign." The lawyer says, "I slowed down and no one was coming." "You still didn't come to a complete stop. License and registration please," says the sheriff impatiently. The lawyer says, "If you can show me the legal difference between slow down and stop, I'll give you my license and registration and you can give me the ticket. If not, you let me go and don't give me the ticket." The sheriff says, "That sounds fair, please exit your vehicle." The lawyer steps out and the sheriff takes out his nightstick and starts beating the lawyer with it. The sheriff says, "Do you want me to stop or just slow down?"



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