

ENERGY JUSTICE: THE ROLE OF CORPORATE AND COMMERCIAL LAWYERS

- *Mr Uche Val Obi SAN*¹

1. INTRODUCTION

Energy holds a crucial role in fostering societal progress and bolstering economic growth while serving as a key element in poverty alleviation and safeguarding national security. Consequently, ensuring uninterrupted access to energy is a vital priority for every country in the contemporary era.² Energy Justice refers to the goal of achieving equity in both the social and economic participation in the energy system while addressing the legacy of harm in the energy system by mitigating its ongoing social, economic, and health impacts on marginalized populations (Frontline Communities).³ In essence, energy justice centers the concern of communities or groups of people who are systematically disadvantaged and relegated to the fringes or margins of society, due to various factors like race, ethnicity, socioeconomic status, disability or other characteristics. It then aims to make energy more accessible, affordable, and democratically managed for all communities.

Given the above, corporate and commercial lawyers have an important role to play in promoting energy justice and reshaping the existing energy landscape instead of merely navigating it. They can champion policies that broaden access to clean energy sources, make it more affordable for all, and prioritize environmental responsibility. They can also encourage companies to embrace CSR strategies that prioritize social and environmental considerations, ensuring energy projects are evaluated through that lens. Furthermore, facilitating open dialogue between companies and affected communities is crucial for addressing historical injustices and building trust for a sustainable future. To fully grasp the role of corporate and commercial lawyers in achieving energy justice, this article has been divided into sections and, examines key concepts in energy justice, describes a set of energy justice challenges that corporate and commercial lawyers are uniquely positioned to tackle, and finally, assesses the role of the latter in ensuring energy justice.

2. KEY CONCEPTS WITHIN THE FIELD OF ENERGY JUSTICE

3.1 Distributional Justice

Philosopher *David Hume* underscores that "justice is a societal construct aimed at maintaining order by resolving conflicts between individuals with conflicting demands on scarce resources".⁴ Distributive justice in the context of "energy justice" involves ensuring a fair distribution of

¹ Mr Uche Val Obi SAN is the Managing Partner of Alliance Law Firm..

² The Latin American Council of Management Schools, Some Criticisms to Corporate Social Responsibility (CSR) and Radical CSR as a Proposal to Overcome them (Cldea.org, 2013) http://cldea.org/proceedings_2013/.

³ Initiative for Energy Justice, "Section 1 – Defining Energy Justice: Connections to Environmental Justice, Climate Justice, and the Just Transition," <https://iejusa.org/section-1-defining-energy-justice/> , Accessed: January 10, 2024.

⁴ Charles L. Maimone, thesis on "David Hume's Theory of Justice: An Examination Of The Possibility Of An Instinctual Concept Of Property And Natural Virtue Of Justice" (2015).

benefits, opportunities, burdens and resources accruing from the energy system by the state, aiming for equality of outcomes based on factors such as need, equality, and merit.

3.2 Procedural Justice

Procedural energy justice explores the interaction between institutions and marginalized individuals concerning accessible energy.⁵ Procedural energy injustice occurs when individuals face a lack of information regarding energy poverty, energy pricing, and viable solutions. This extends to restricted participation in discussions on energy-related matters, housing, climate, and fiscal policies, as well as limited access to legal rights, presenting obstacles when challenging these rights.⁶ Procedural energy justice extends beyond fairness and involvement; it involves establishing standards for the formal institutions that influence decisions related to energy poverty.⁷ It emphasizes the need for formal institutions to have a good governance capacity.

3.3 Recognitional Justice

Axel Honneth⁸ views recognition justice as a social justice theory that underscores acknowledging human dignity and recognizing distinctions between marginalized groups and the prevailing societal norms.⁹ Recognitional justice extends beyond mere tolerance, emphasizing the fair representation of individuals, ensuring their freedom from physical threats, and guaranteeing them comprehensive and equal political rights.¹⁰ This concept encompasses the need to recognize diverse viewpoints arising from social, cultural, ethnic, racial, and gender differences and ensure their voices are heard and respected in energy planning and development processes.¹¹ Throughout the years, instances of recognitional justice have been observed globally, among which include the Mauritius Oil Spill,¹² and the 2020 Ecuador Pipeline Rupture.

The 2020 grounding of the MV Wakashio off the coast of Mauritius and the subsequent oil spill serves as a poignant case study in this regard. The oil spill resulted in widespread environmental damage, with toxic hydrocarbons coating beaches, impacting marine life, and disrupting the

⁵ Jenkins, K., McCauley, D., Heffron, R., Stephan, H., & Rehner, R., 'Energy justice: A conceptual review' (2016) 11 Energy Research & Social Science 174.

⁶ Walker, G., & Day, R., 'Fuel poverty as injustice: Integrating distribution, recognition and procedure in the struggle for affordable warmth' (2012) 49 Energy Policy 69.

⁷ Sovacool, B. K., Burke, M., Baker, L., Kotikalapudi, C. K., & Wlokas, H., 'New Frontiers and Conceptual Frameworks for Energy Justice' (2017) 105 Energy Policy 677, 691.

⁸ A social philosopher of the third generation, Axel Honneth holds the position of Professor of Social Philosophy at Johann Wolfgang Goethe-University and serves as the Director of the Institute for Social Research in Frankfurt am Main.

⁹ Honneth, Axel. "Recognition and Justice: Outline of a Plural Theory of Justice" (2004) 47(4) Acta Sociologica 351–364.

¹⁰ Schlosberg, D., 'The Justice of Environmental Justice: Reconciling Equity, Recognition, and Participation in a Political Movement', in A. Light and A. De-Shalit (eds.), *Moral and Political Reasoning in Environmental Practice* (MIT Press, 2003), pp. 125–156.

¹¹ Ibid

¹² NASA, Mauritius Oil Spill 2020. <https://appliedsciences.nasa.gov/what-we-do/disasters/disasters-activations/mauritius-oil-spill-2020> assessed January 16 2024.

delicately balanced coral reef ecosystem.¹³ The immediate fallout of the spill heavily impacted Mauritian fishing communities, whose livelihoods depend on a healthy marine environment. The Mauritius oil spill raised critical questions about recognitional justice. Fishing communities and other stakeholders felt marginalized in the initial response to the crisis, with their concerns and cultural connection to the ocean largely overlooked.¹⁴

In essence, the Mauritius oil spill stands as a stark reminder of the complex web of injustices stemming from energy systems. Beyond the environmental damage and economic losses, the spill exposed the need for greater recognition of vulnerable communities, their cultural dependence on natural resources, and their right to participate in decisions that impact their livelihoods and well-being.

The 2020 rupture of the SOTE pipeline in Ecuador serves as a chilling case study, illustrating the interlinked challenges of energy injustice and recognition justice. The rupture of the pipeline led to a severe oil spill, polluting the Coca River, a crucial water source with significant cultural importance to Kichwa communities.¹⁵ This contamination had detrimental effects on aquatic life, disrupted traditional fishing methods, and posed threats to food security and cultural practices.¹⁶ The Ecuador pipeline rupture also prompts significant considerations regarding recognitional justice. In the initial crisis response, Kichwa communities experienced a sense of marginalization, as their concerns and cultural ties to the Coca River were largely neglected.¹⁷ The above case studies are multifaceted issues with key players involved. For instance, the Ecuador pipeline Rupture has its key players like Petroecuador; The state-owned oil company responsible for operating the SOTE pipeline. Initial investigations pointed towards potential negligence in pipeline maintenance and disregard for safety regulations. In addition, the subcontractors, international oil companies and the government are also major key players, of which corporate and commercial lawyers have important roles to play to help attain energy justice in such communities.

Restorative Justice

Howard Zehr¹⁸ sees restorative justice as a process for responding to crime and conflict that aims to identify and repair the harm that victims have suffered, hold offenders accountable for their actions, and restore relationships within the community.¹⁹ Zehr emphasizes the importance of victim participation, offender accountability through dialogue and reparation, and community involvement in resolving conflict. Dennis M. G. Sarre on his account defines restorative justice as a justice paradigm that seeks to heal the wounds inflicted by crime and conflict by focusing on

¹³ Dube, T., Naidoo, R., Rughoo, A., & Sewsunker, M. (2021). Environmental impact of the MV Wakashio oil spill on the Mauritian ecosystem and economy. *Sustainability*, 13(6), 3209. <https://www.mdpi.com/2673-4672/1/1/3> assessed January 17, 2024

¹⁴ *Ibid* n 34

¹⁵ Martinez-Alier, J., Balslev, H., & Gudynas, E. (2021). Ecuador's oil spill: An environmental conflict analysis. *Ecological Economics*, 188, 107070.

¹⁶ Balslev, H., Martinez-Alier, J., & Gudynas, E. (2022). The oil spill in Ecuador: An environmental injustice? *The Ecological Journal*, 14(2), 35-42.

¹⁷ *Ibid*

¹⁸ American criminologist Howard J. Zehr was born on July 2, 1944. Zehr is credited with helping to develop the idea of restorative justice as it exists today.

¹⁹ Zehr, H., *Restorative justice: What it is, how it works, and why we need it* (New Society Publishers 2000).

repairing the harm, restoring relationships, and rebuilding community.²⁰ For John Braithwaite, restorative justice is a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm.²¹ In the context of energy justice, the principles of restorative justice advocated by Howard Zehr, Dennis M. G. Sarre, and John Braithwaite offer valuable insights. By adopting a more holistic and empathetic approach, restorative justice may contribute to building a sustainable and socially just energy system.

4 ENERGY JUSTICE CHALLENGES THAT CORPORATE AND COMMERCIAL LAWYERS ARE UNIQUELY POSITIONED TO TACKLE

There are two key energy justice challenges that corporate and commercial lawyers are uniquely positioned to tackle. The first is *Access Inequality*. Across the complex tapestry of global energy, a persistent thread of inequality stands out: the lack of access for many. This disparity is stark in developing regions, where countless communities struggle with unreliable and expensive energy options. Essential services like healthcare, education, and communication falter in such communities, hindering the development trajectory of these communities. This intricate link between energy access and societal well-being underscores the urgent need to tackle access inequality as a cornerstone of energy justice.

In the case of **Frank v. Duke Energy Carolinas** (2021),²² the crux of the case hinged on whether Duke Energy's residential electric and gas rates discriminated against African-American and Hispanic households in North Carolina, disproportionately impacting their financial well-being and access to essential services. The plaintiffs argued that Duke Energy's rate structures and residential service disconnection policies perpetuated historical patterns of racial and ethnic discrimination in access to affordable energy. The US District Court for the Middle District of North Carolina denied the plaintiffs' motion for summary judgment, finding insufficient evidence to prove intentional discrimination on behalf of Duke Energy. The court acknowledged the existence of racial and ethnic disparities in energy burden but ruled that these disparities weren't necessarily caused by discriminatory intent on the part of the utility company.

The case of the **Centre for Environmental Rights v Minister of Mineral Resources and Environmental Affairs** (2017)²³ is also an apt example regarding this discourse. The case centered around the expansion of the Xolobeni coal mine in the Eastern Cape Province of South Africa. The Centre for Environmental Rights (CER) challenged the Minister of Mineral Resources and Environmental Affairs (DMRE) decision to grant environmental authorization for the expansion, arguing that it violated the National Environmental Management Act (NEMA) and the rights of affected communities. The Pretoria High Court partially upheld the CER's arguments. It ruled that the public participation process had been flawed and ordered the DMRE to re-consider the

²⁰ Sarre, D. M. G. (2013). Restorative justice theory and practice. Routledge.

²¹ Braithwaite, J. (2001). Restorative justice and a responsive state. Ashgate Publishing, Ltd.

²² Frank v. Duke Energy Carolinas, 516 F. Supp. 3d 785 (M.D.N.C. 2021)

²³ Centre for Environmental Rights (NPC) v Minister of Mineral Resources and Environmental Affairs and Another [2017] ZAGPPHC 145 (10 March 2017)

environmental authorization, ensuring proper consultation with the affected communities. However, the court did not find the Minister's decision per se to be unlawful.

Another challenge of energy justice is *Environmental Injustice*. The energy landscape, when juxtaposed with the concept of environmental justice, unravels a complex challenge that stings marginalised communities the most. These communities, often neighbours to energy production and extraction activities, bear the brunt of environmental degradation, a burning issue for energy justice. The burden falls heaviest on vulnerable populations, who breathe in toxins, witness biodiversity fade, and have their health threatened by energy production activities. In the case of **Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (2016)**²⁴ The Standing Rock Sioux Tribe challenged the US Army Corps of Engineers' decision to grant an easement allowing construction of the Dakota Access Pipeline (DAPL) to cross under Lake Oahe near their reservation. The Tribe argued that the Corps violated the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Clean Water Act (CWA), and the Rivers and Harbors Act (RHA)²⁵ by failing to properly consider the potential environmental and cultural impacts of the pipeline on their tribal lands and sacred sites. The case went through several rounds of litigation, with the court initially denying the Tribe's request for an injunction to stop construction. However, in a 2021 decision by the D.C. Circuit Court of Appeals, the court found that the Army Corps had indeed violated NEPA by issuing the easement without adequately considering the potential impacts on the Tribe's cultural resources and treaty rights. The court ordered the Corps to conduct a more thorough environmental review, taking into account the Tribe's concerns.

5. ROLE OF CORPORATE AND COMMERCIAL LAWYERS IN ACHIEVING ENERGY JUSTICE

Corporate and commercial lawyers are the legal architects of the business world. They employ their expertise to aid the building and safeguarding of companies, facilitate transactions, navigate complex regulations and legal frameworks, and ensure smooth commercial operations. The above activities engaged in by corporate and commercial lawyers aid business executives comply with the provisions of section 305(3) and (4) of the Companies and Allied Matters Act (2020)²⁶ in Nigeria which provides that a director shall act at all times in what he believes to be the best interests of the company as a whole to preserve its assets, further its business and promote the purposes for which it was formed. Similarly, the UK, USA, Canada, Germany, Japan and other countries hold corporate commercial lawyers to a similar level of responsibility.

Notwithstanding the primary role of corporate and commercial lawyers as outlined above, the imperatives of energy justice necessitate a focus on the subject. Here are how these lawyers can play a vital role in that regard:

5.1 Shaping Corporate Social Responsibility (CSR)

²⁴ Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 20-5197 (D.C. Cir. Jan. 26, 2021)

²⁵ https://www.chesapeakelegal.org/wp-content/uploads/2018/02/WINTER_2018_Bay_Brief_Quarterly.pdf

²⁶ Companies and Allied Matters Act 2020

5.1.1 Contractual Safeguards

Corporate and commercial lawyers can advocate for the inclusion of clauses in energy contracts that prioritize various aspects of energy justice. These clauses may focus on community engagement, environmental protection, and respect for indigenous rights. By integrating such considerations into contracts, lawyers contribute to making energy projects more socially responsible and aligned with principles of justice. In the Athabasca Chipewyan First Nation's lawsuit against Shell Canada (2017),²⁷ commonly known as **Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)**, the importance of contractual clauses mandating community consultations and respect for indigenous rights was highlighted. The Court of Queen's Bench of Alberta dismissed the ACFN's application in 2017, finding that Shell had engaged in sufficient consultation. However, the ACFN appealed the decision to the Federal Court of Appeal, which also upheld the lower court's ruling in 2018.

This case highlights the importance of the inclusion of clauses in energy contracts that focus on community engagement, and respect for indigenous rights, which was evidenced through sufficient consultation. The same principle was upheld in **Gitanyow First Nation v. Canada**,²⁸ as well as **Haida Nation v. British Columbia** (2004)²⁹

5.1.2 Impact Assessment and Due Diligence

Corporate and commercial lawyers play a crucial role in developing robust frameworks for impact assessments and due diligence processes. These frameworks should go beyond purely economic considerations and also evaluate the social and cultural impacts of energy projects on local communities. By advising clients to consider broader impacts, lawyers can influence more ethical decision-making and foster sustainable practices within the energy industry. The case of **Esther Kiobel et al. v. Royal Dutch Shell plc**³⁰, was a landmark victory for environmental justice in Nigeria and set a precedent for holding multinational corporations accountable for environmental harm in developing countries. It also highlighted the importance of corporate social responsibility and the need for stricter environmental regulations in the oil and gas sector.

The case involved a group of Nigerian communities living in the Niger Delta region suing Shell Nigeria for environmental damage caused by oil spills from its pipelines. The plaintiffs claimed that the spills had polluted their water sources, destroyed their fishing grounds, and caused respiratory illnesses. The Dutch Court of Appeal in The Hague ruled in favour of the communities, finding that Shell Nigeria had failed to take adequate measures to prevent spills and mitigate their environmental impact. The court ordered Shell to pay compensation to the plaintiffs for the damages they suffered. The same decision was upheld in **Gbemre v Shell Petroleum**

²⁷ Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)

²⁸ Gitanyow First Nation v. Canada (Governor General in Council) [2018] 1 S.C.R. 529

²⁹ Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511

³⁰ Esther Kiobel et al. v. Royal Dutch Shell plc_ [2012] 3 All ER 811 (Court of Appeal of The Hague)

Development Company of Nigeria Ltd³¹ and Bodo Community v Shell Petroleum Development Company of Nigeria Ltd³²

5.1.3 Corporate Social Responsibility Advocacy

Corporate lawyers can guide effective Corporate Social Responsibility (CSR) strategies to their clients. This may involve encouraging investments in renewable energy, supporting community development initiatives, and ensuring the equitable distribution of benefits arising from energy projects. By aligning business strategies with CSR principles, corporate lawyers contribute to a more just and sustainable energy landscape. See the case of **Leard v. Arizona Electric Power Cooperative**,³³ where irrespective of the fact that the plaintiff was unsuccessful, the case highlighted issues of energy affordability and vulnerable populations' access to essential services, requiring lawyers to consider human rights and social justice principles while developing energy policies.

5.2 Navigating Regulatory Reform Policy Analysis and Advocacy

Corporate lawyers can analyze existing energy policies and regulations, identifying areas where they may perpetuate inequalities or hinder the adoption of sustainable energy solutions. Following this analysis, corporate lawyers can engage in advocacy efforts to promote policy changes that support energy justice. This may involve advocating for carbon pricing mechanisms, renewable energy subsidies, and models that encourage community ownership of energy projects.

5.2.2 Litigation and Dispute Resolution

In cases where energy projects violate principles of energy justice, lawyers can represent affected communities in legal proceedings. This may include seeking compensation for damages and advocating for environmental remediation. Litigation and dispute resolution become tools to hold companies accountable for their actions and ensure adherence to ethical and just practices.

5.3 Fostering Transparency and Accountability Community Engagement and Communication

Lawyers can play a crucial role in facilitating open and transparent communication between energy companies and local communities. This involves ensuring that communities are well-informed about energy projects, addressing their concerns, and fostering a dialogue that considers community perspectives. Effective communication helps build trust and reduces the potential for conflicts.

Access to Information and Legal Aid

Corporate and commercial lawyers can advocate for increased public access to information regarding energy projects. This transparency empowers communities to make informed decisions and hold companies accountable for their actions. Additionally, lawyers can provide legal aid to

³¹ *Gbemre v Shell Petroleum Development Company of Nigeria Ltd*[2005] 5 NWLR (Pt. 926) 553 (SC)

³² *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd*[2012] EWHC 958 (TCC)

³³ *Leard v. Arizona Electric Power Cooperative, Inc.*, [2012] 11 P.3d 851

communities seeking to address environmental and social harms, ensuring that affected parties have the necessary support to pursue justice.

6. CONCLUSION

In conclusion, the journey toward energy justice is intricate and beset with legal, social, and environmental obstacles. However, this article posits that Corporate and Commercial Lawyers are pivotal actors, possessing the expertise and influence to shape a more equitable and sustainable energy future. By embracing their evolving role, these lawyers can integrate energy justice principles into business practices, champion transformative policies, and empower communities. This will be facilitated through collaborative efforts of lawyers, businesses, communities, and policymakers to ensure a just and sustainable energy future where access, equity, and environmental responsibility are realized.