

## A CRITICAL ANALYSIS OF SUITE OF MEASURES FOR OPTIMAL ENVIRONMENTAL PROSECUTION IN NIGERIA: LESSONS FROM THE UK

By

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### Abstract

*The environment include air, water land, plant and animal, their interrelationships and interdependent. The need to protect our environment has never been this urgent and our past lackadaisical attitude towards environmental concerns has resulted to massive and wanton environmental degradation leading to poor health development, and unaccountable deaths of human beings, plants and animals. Today, environmental challenges have assumed a treacherous dimension and this requires not only new legal framework and mechanism but adequate enforcement and prosecutorial powers. The existing legal and traditional regimes of law of tort - for tackling myriad environmental violations, have become obsolete and unattainable in dealing with even the established environmental cases and emerging environmental concerns such as soot, gas flaring, air pollution, hazardous and nuclear waste management. Most countries had employed both civil and criminal laws as weapon for dealing with environmental violation in addition to market-based mechanisms, including cooperation with potential environmental polluters, as ways out while some other countries still rely on the traditional common law approach, command and control legislative framework with their attendant regulatory setbacks. Nigeria falls within this latter trajectory and this approach poses great obstacles for regulators and enforces of our environmental legislation. This paper examines best practices for prosecuting environmental cases through criminal and civil, approaches. The paper will be jurisprudential in methodology, while evaluating the challenges in adopting litigious civil and criminal case; explaining their inadequacies in curbing or mitigating environmental violations in Nigeria. The paper found that civil and criminal approaches alone are not adequate given the new dimension of environmental challenges and the dynamics of environmental violators and that there are enough regulatory frameworks on the environment but sadly poorly framed and unattractive in ensuring compliance with environmental regulations. The paper thus concludes that there was the urgent need to expand the suit of regulatory and enforcement tools beyond civil cases and criminal prosecution of offenders, drawing from best practices and the recommendations made herein.*

**Keywords:** *Environmental Violations, Best Practices, Civil and Criminal cases/approaches.*

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## 1.0. Conceptual Approach

### 1.1 Who are Environmental Violators’?

Environment is the totality of physical, chemical and biological surroundings which man and other organisms live.<sup>3</sup> If this environment could no longer support live systems, it is said to have been degraded, desolated or violated.<sup>4</sup> Environmental violators are those who abuse and degrade the environment or permit the abuse or degradation of the environment. Environmental violators also include the regulators, officers or authorities who fail or neglect to prevent the violation of the environments and all its major components including the non-compliance with statutory regulation on environmental protection and control.<sup>5</sup> In this definition, environmental violators include actual violators and those, who by their actions or omissions contribute to the despoliation and pollution of the environment. This definition is a catch all phrase which envision willful conduct, recklessness, negligence on the part of individuals, corporate bodies, authorities and persons ,who by these acts or misconduct, contribute to the degradation of the various media of environment - the air, land, water, flora and fauna (plant and animals).<sup>6</sup> This is so because both natural and artificial being can be charged for violating the environment,<sup>7</sup> and in the case of artificial being , the veil can be lifted, if it becomes imperative that both the corporation and its Directors shall be charged for violating the environment.<sup>8</sup> This conceptual framework is germane in order to enable the regulators and enforcement agencies know who could be prosecuted both under the civil and criminal law.

## 1.2 Typologies of Environmental violations

### 1.2.1 Individuals

Example of individual act of environmental violations include indiscriminate dumping of refuse, or waste or other hazardous and injurious materials on land water causing land and water pollution, incomplete combustion of hydrocarbon or burning of bushes and tires leading to soot and emission, of dangerous gases; grazing of reserve land, all non-compliance with statutory legislation and regulatory framework on environmental protection and control<sup>9</sup>. Both civil and criminal prosecution can be applied simultaneously while, cautioning on the implication of double jeopardy rules.<sup>10</sup>

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<sup>3</sup> National Environmental Standards and Enforcement Regulations 2007, Section 7.

<sup>4</sup> Few examples of environmental violation is dumping of water on clean 322, spilling of oil an agricultural land, permitting the escape of gas or soot to pollute ambient air and other sundry malfeasance caused to various components of the environment by unwholesome activities

<sup>5</sup> J Omotola Environmental Laws include Compensation,(University of Lagos 1990)

<sup>6</sup> Okorodudu Fubara M.T., “Statutory Piercing of the corporate veil under Environmental Protection Laws”(1998) investment Law. pp 140- 151, especially at pp. 147 – 151.

<sup>7</sup> Shanks and Mc Ewan (Teeside) LTd Vs Environment Agency ( 1997) J EnV. LR 305

<sup>8</sup> Companies and Allied matters Act 2021, Section 316

<sup>9</sup> Eg. The provision of Harmful Waste (Special Criminal) provision Act 1988 LFN 2004.

<sup>10</sup> A person charged and liable to pay fine or whose license to operate had been withdrawn will consider it too much a punishment if he is also adjudged a prisoner over the same activity or omission

### 1.2.2 Corporation

Examples of a corporation activity that can conduce into serious environmental violation include: recklessly or negligently spilling oil on land, water causing land pollution or water pollution; dumping of all manner of wastes –(hazardous or industrial<sup>11</sup>; effluents discharge by industries flaring of gas; release of ozone depleting substances and generally. all non-compliance with environmental legislation and regulatory framework. Both civil and criminal prosecution can lie.

Corporations can be liable for breach of national legislation and international treaties that have been domesticated in Nigeria.

### 1.2.3 National Bodies & Authorities

Example of national bodies and authorities that could be culpable of environmental breaches include National Environmental Regulation Agencies; National Oil Spill Detection and Response Agency; former Department of Petroleum Resources (DPR) now Upstream Petroleum Regulatory Commission and Downstream Petroleum Regulatory Authority (permitting the despoliation of environment or failing to bring under control activities that degrade the environment; and all non -compliance with environmental legislation and control. Here mandamus, injunction and judicial review can lie against these agencies and authorities. However, subject to the provision of the 1999 Constitution (as mended), specifically section 6 (6) actions such as mandamus can lie against Local authorities, State and Federal Government for failing to regulate and control the protection of the environment.

Noteworthy to state that only civil actions can be proceeded against the state and is sub national units.

## 2.0. What are Best Practices?

Most environmental crises have become transboundary, hence a global issue.<sup>12</sup> Emission of greenhouse gases into the atmosphere; release of ozone depleting substances causing acid rain, biodiversity depletion, spilling of oil on land, and effluent discharge of harmful chemicals on territorial and international seas,<sup>13</sup>including civil and criminal liability regimes<sup>14</sup> for oil pollution cases, had been recognized as global issues beyond the carrying capacity of one nation to deal with.<sup>15</sup> Consequently, the United Nations and its

Environmental Agencies, have developed global treaties, protocols conventions and declarations for recognizing, controlling and in dealing with these global practices.<sup>16</sup> These

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<sup>11</sup> Ibid (n7)

<sup>12</sup> Air pollution leading to climate change, Nuclear waste regulation and management matters are common examples.

<sup>13</sup> United Nations Convention on Law of the Sea 1982

<sup>14</sup> Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993.

<sup>15</sup> Patricia W Birnie and Alan Boyle, Basic Document on International Law and the environment, (Oxford 1995) 1 on the codification and development of international environmental Law.

<sup>16</sup> United Nations framework Convention on Climate Change 1992

United Nations' Treaties, Conventions and Declarations, have consequently developed global norms and practices which civilized nations are to domestic or ratify in dealing with similar environmental concerns in their countries.<sup>17</sup> These global norms are regarded as best practices, which should be adopted or adapted to suit each country's socio- political, cultural and legal regimes in dealing with environmental issues<sup>18</sup>.

However, best practices in the context of this paper is not the developed countries' models or standard practices neither is it the UK, US or any other country's models and standards. Best practice in the context of this paper is what works and what does not work for our country against what works and what does not work in any developed country. It is an evaluation of the totality of solutions and framework for environmental protection in Nigeria against the success rate of the application of such solutions or similar models in other countries. It is the understanding of the Nigeria's socio-political and legal circumstances against the same scenarios in other countries, in dealing with environmental violations.

This is germane because given our socio- political, cultural and legal milieu, what works in other countries may not work in Nigeria. Nevertheless, as a civilized nation and active player in the development of the United Nations and its agencies, Nigeria should mirror global best practices in dealing with national issues such as environmental violations. The methodology of this paper is to adapt, where necessary, the global models and standards to suit the prosecution of environmental violation in Nigeria.<sup>19</sup> This paper will, accordingly, examine the civil liability regimes and criminal prosecution of offenders in US and the UK, in making appropriate recommendations for Nigerian regulators in dealing with environmental violations. The paper will evaluate existing civil and criminal provision and cases in dealing with environmental violations. This section will however examine what exist in Nigeria and how effective the civil and criminal prosecution of environmental violators before evaluating best applicable and practicable practices in other countries.

### **3.0. Civil and Criminal Prosecution of Environmental Violation in Nigeria**

The duty to enforce and prosecute environmental offenders in Nigeria resides with the National Environmental Standards and Regulation Enforcement Agency established in 2007 (NESREA) as amended in 2018, which took over the function of the Federal Environmental Protection Agency 1988 (FEPA) as amended in 1992.<sup>20</sup> By Section 2 of the Act, that a National Enforcement Agency and a legal entity was created to deal with environmental violation in Nigeria. The Agency shall have responsibility for the protection and development of environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including

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<sup>17</sup> Example is best Available Technique which was first deployed in OSPAR Convention 1990 and now globally recognized for dealing with integrated pollution control.

<sup>18</sup> Kyoto Protocol to the UNFCCC 1997.

<sup>19</sup> Jaakkes Husa, Developing Legal Transplant and Path Dependents: Reflection on the Rule of Law(2018) Chinese Journal of C0mparative Law 129-150  
<http://do.org/101093/cjc/cxy008>

<sup>20</sup> Section1 of NESREA Act -FEPA has been repealed and replaced with NESREA 2007

coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulation, rules, policies and guidelines.

According to the organograms of the Agency, the duty to enforce environmental violation fell on the Directorate of Inspection and Enforcement.<sup>21</sup> For the purpose of ensuring environmental regulation and compliance the agency shall through the Directorate of Inspection and Enforcement carry out the function stipulated in Section 7 of the Act which summarily include the enforcement, permitting, licensing, punishment of environmental regulations, standards, guidelines, policies and rules. It also includes interactions with sister agencies locally and internationally in carrying out these outlined functions. The powers of the Agency and Directorate of Inspection to prosecute environmental violation by employing civil and criminal sanction in order to bring culprits to justice is derived from Section 8 of the Act and it specifically include powers to impose civil liability and criminal sanctions as captured hereunder;

For oil and gas related environmental violation the former Department of petroleum Resources now Upstream Petroleum Regulatory Commission and Downstream Petroleum Regulatory Authority deal with the function of proceeding against environmental violators:

### **3.1. Civil Provisions Regarding Environmental Violations Under NESREA.**

The Agency shall have powers to exercise civil jurisdiction in the following areas:

- a) To purchase or take on lease any interest in land, building or property,
- b) Prohibit process and use of equipment or technology that undermine environmental quality,
- c) Subject to the provision of the 1999 Constitution, established Mobile Court in collaboration with judicial authorities.
- d) Conduct public investigation on pollution and degradation except with regard to oil spillage
- e) Make proposal for the approval of the Minister for the evolution of regulatory framework covering air quality, ozone depletion, noise control, effluent limitation, water quality, waste management, erosion and flood control, coastal zone management, dams and reservoirs, watershed, deforestation and bush burning and other forms of sanitation and control of hazardous substances. The agency is also to collaborate with relevant agencies in setting standards and in elimination of all forms of pollution and other environmental degrading agents on nation's air, land oceans, seas and water bodies. The Agency is also empowered to do all such lawful acts in furtherance with the performance of the above powers excluding oil and gas. In the case of oil and gas, the agency shall cooperate with the relevant regulatory agencies to enforce and bring to sanction violators

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<sup>21</sup> Section 10 Part 111 of the Act.

of the environment. This has been a source of conflict as the Directorate of Inspection and Enforcement is prohibited, by law establishing it from prosecuting one of the biggest sectors contributing to environmental degradation in Nigeria – oil and gas sector.<sup>22</sup>

Similarly, by Section 20 of the Act, the Agency is also empowered to make regulations and impose appropriate civil liability and criminal sanctions.

By Section 30 of NESREA ACT, 2018, an officer of the Agency could enter, arrest, seize, detain and prohibit the continuation of civil act against the environment, which is prohibited under this act and regulations. An officer can also enter into land, examine any article being used to the detriment of the environment, take samples, open and examine anything that might aid investigation, seize and detain for such time as may be necessary anything believed to contravene any provision of the regulation.<sup>23</sup>

The Agency can also through an order of court suspend seal and close down premises including land, vehicle, tent, vessel, floating craft or any inland water or other structure whatsoever. This means without an order of court, the agency cannot seal or closedown any premises where it reasonably believes, such premises had been used for the contravention of this regulation. The best practice would be to amend this section to require the agency to temporarily, by way of (*order nisi*), seal and closedown any premises where it reasonably believed, had been used for the contravention of this regulation and obtain an order absolute thereafter either to closed same down permanently or open same upon satisfaction that the contravention had been remedied.<sup>24</sup> This is a potent Administrative tool that can promote effective compliance with environmental regulations as reported by Atsegbua et al.<sup>25</sup>

Further, another clog to best applicable practice towards civil action against environmental violation, is that searches must be conducted with warrant and if there is no Magistrate to issue search warrant or warrant of arrest immediately within jurisdiction, then this may hamper the smooth operations of the work of the agency<sup>26</sup>. A person who challenges or obstructs an officer of the agency in performance of his duties under this section is liable on convictions to pay the sum of N 200,000 for individual or imprisonment or for one year or both and the sum of N20,000 daily for the commission of the offence.<sup>27</sup> In the case of body corporate, the sum of N200, 000 and additional fine of N200, 000 daily. There is also the challenge of double jeopardy if the licensee or violator is suspended or withdrawn from business, while going ahead to impose fine and imprisonment. This may contravene both the constitution and civilized practice globally. There is also the problem of pre action

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<sup>22</sup> United Nations Environment Programme: *An Environmental Assessment of Ogoni land* ( UNEP 2011) 2-15

<sup>23</sup> NESREA Act 2007, Section 30 ( a-f)

<sup>24</sup> See the case of Continental Iron and steel Company Limited and Lagos State Environmental management Agency where the factory was sealed for failing to install waste collection apparatus .After the factory was closed down just three days, the company made good the defect.

<sup>25</sup> Lawrence Atsegbua, Vincent Akpotaire and Folarin Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ambik Press 2010) 217-218.

<sup>26</sup> Ibid

<sup>27</sup> NESREA Act 2007, Section 31



notice, limitation of time and constitutional provision that limits cases of oil spill at the Federal High Court, as respective set back to the application of civil remedy.

We shall now turn to the employment of civil cases for remedying environmental breaches and the benefits to environmental development and this falls within the remit of law of tort.

The law of tort aims to determine when the law will and when it will not grant redress for damages suffered or threatened and the rules for liability whereby it does provides remedy<sup>28</sup> Thus, tortious liability arises from the breach of duty primarily fixed by law ;this duty is towards persons generally and its breach is redressable by action for unliquidated damages.<sup>29</sup> While I agree in part with this definition, it is important to the state that most environmental violation are duties owed to the state and authorities other than persons or individual in which case, may not be redressed by law of tort. While we look for other ways of redressing these breach of duty owed to the state, we begin this section by examining the traditional law of tort remedies. The main traditional cases on tortious liability are actions based on negligence, action for nuisance, trespass and damages; Rule in *Ryland Vs Fletcher*<sup>30</sup> and then statutory remedies under relevant legislation. There are also other equitable remedies of injunction for remedying environmental violation. The effectiveness of these remedies can be examined here. It is important to state that liability may be imposed by law (statute or regulations) vicariously based on fault and others, resulting from damages suffered without proof of fault.<sup>31</sup>

#### a) Negligence

Negligence results in breach of duty to take care by the defendant resulting in damage which is undesired by the plaintiff<sup>32</sup>. The main elements or ingredient for an action for negligence include i) the existence of duty of care (2) that the defendants actually owe the plaintiff the duty of care, (3) and that this duty has been breached (4) and there is a consequential damage flowing from the breach of the defendant's duty of care and the law is clear that all these elements must be proved cumulatively for one to succeed, the absence of which vitiates the tort itself. The main defenses are equally contributory negligence, assumption of risk and comparative fault<sup>33</sup>. In *Heaven Vs Pender*<sup>34</sup> *Donoghue Vs Stevenson*<sup>35</sup>, the neighborhood principle in relations to tortious acts was propounded and the categories' of negligent acts cannot be closed even in Nigerian jurisprudence.<sup>36</sup> Negligence as a common law remedy seldom avail the plaintiffs in environmental pollution cases due to several factors ranging from lack of *locus standi*<sup>37</sup> to the issue of proof of the negligent act itself,<sup>38</sup> and acts of

<sup>28</sup> W V H Rogwr, *Winfield and Jolowicz on Tort* ( Sweet & Maxwell 1979 ) 1

<sup>29</sup> Ibid.

<sup>30</sup> (1868) L.R 3H.L 330,340.

<sup>31</sup> Ibid 43

<sup>32</sup> SPDC VS Effiong Ikonta and ORS CA/C/21/2005

<sup>33</sup> Ivory Paper Mills Ltd vs Bureau Veritas ( 2002) LRCN Page 1253

<sup>34</sup> (1883)11 QBD 503,509.

<sup>35</sup> (1932) AC 562,580 Per LORD Artkin.

<sup>36</sup> Rogers ( n-26) 69-71

<sup>37</sup> Adesanya Vs President of FRN (1981) 5 S. C

<sup>38</sup> The shell petroleum Development Company of Nigeria Limited Vs elder Banigo 1 Firbe & Another ( Suit No CA/PH/168/2007,

sabotage assumed to be committed by the plaintiff. Although, the issue of *locus standi* has been relaxed following jurisprudential activism of our courts on many line of cases,<sup>39</sup> the challenge of proving negligent act of statutory corporations established and licensed by law to perform legitimate acts has never been an easy one. This is still a clog for environmental violation cases.<sup>40</sup> This is very obvious as the burden of proof in civil cases is on the balance of probability while and will tilt in favour of a more expert and on convincing proof as was held by the supreme court in the case of *Layinka Vs Makinde*.<sup>41</sup>

The employment of tort of negligence as a tool for environmental compliance in civil cases was strengthened by the development of the doctrine of *res Ipsa loquitor* and Strict liability regime for statutory breaches of environmental regulations.<sup>42</sup> The principle of *Res Ipsa loquitor* simply environ liability without proof and akin to the rule in *Ryland Vs Fletcher*.<sup>43</sup> This was given judicial stamp in the case of *Machine Umudje Vs Shell BP Nigeria Limited* (1975) 9-11 SC 115. However, the defense of non - natural user as a requirement to the application of the principle under the case is also a setback to the smooth application of the rule.<sup>44</sup> The only way out of the problem posed by the application of negligence in environmental violation cases is to prescribed that environmental violations should attract liability without fault.

#### **b) Law of Nuisance.**

Nuisance is a traditional common law remedy which relates to the protection of the environment and the enjoyment of private property. Nuisance is classified as public and private nuisance. A public nuisance affects a class or classes of persons while private nuisance affects an individual in the enjoyment of his right.<sup>45</sup> Most environmental violations that involve a class or classes of persons have come under the realms of public nuisance but the challenge is how to prove special damages. The court will usually award general damages in case of public nuisance. Since the violation involves more than one person, it was difficult see how an individual would be affected in cases of public nuisance without proof of special damage suffered.<sup>46</sup>

However, due to judicial activism, the old theory has been replaced by a more liberal and pragmatic approach and supported as the constitutional rights of Nigerans which is enshrined in the constitution to ventilate their cases against any person or authority if perceived wrong had been done against them.<sup>47</sup> Thus, a plaintiff can bring an action for public nuisance without reference to the office of the Attorney General, if he can show that he has suffered

<sup>39</sup> *Fawehinmi vs Akilu*, (1985) 18 NSCC Pt 11; See also Section 6 (6) of the 1999 Constitution

<sup>40</sup> *Seismograph Services Limited V. Benedict E. Onokpasa* (1972) 6 S C 119

<sup>41</sup> (2002) 5 S C (part 1, p109, *AG federation Vs AG Abia State and 35 Ors* (2002) 4 S C pt 1 at 20

<sup>42</sup> *Read Vs Lyon & Co Ltd* (1947) AC 156.

<sup>43</sup> (1868) UKHL 1, (1868) LR HL 330

<sup>44</sup> *Sam Ikpede Vs SPDC* (1973) ALLNLR 61

<sup>45</sup> *Rogers (n)* page 353-362

<sup>46</sup> This was the old law as can be seen in *Amos Vs SPDC* (1977) SC 109, *Dumez Nigera Limited Vs Ogboli* (1972) ALLNLR 241

<sup>47</sup> Section 6 (6) of the 1999 Constitution



some damages above members of the class.<sup>48</sup> As at today, due to the progressive realization of the pervasive impacts of massive and land pollution over a generic area, classes of persons, representatives and class action have gain momentum.<sup>49</sup>

Private nuisance involves unlawful interference with property or rights in possession of the plaintiff and such interference may not be physical. What was authorize by law cannot be public nuisance but does not affect citizens claim for damages.<sup>50</sup>

### **c) Class Action/Suits**

A class action suit can be employed to redress massive public nuisance and other environmental violation involving classes of persons or group of individuals or communities, but sadly not properly and adequately provided in most of our laws.<sup>51</sup> Thus, a potent weapon for civil proceedings for large scale environmental violation in Nigeria<sup>52</sup>

A class action, is a type of lawsuit where one of the parties is a group of people who are represented collectively by a member or members of that group. Another name for class action is mass action, class -action law suits, public interest litigation, class suits or representative action.<sup>53</sup> It is a kind of representative action because a group or classes of persons represent members of the same class or group whether named or unnamed plaintiffs. It is however different from our brand of representative actions which is provided in Order 13 of the High Court of Rivers State, but in tandem with Order 9 ( Rule 4) of the Federal High Court( Civil Procedure) Rules 2019; in the sense that both named and unnamed plaintiffs are bound under the class action suit unless the person opts out of the proceeding through an order of court or by notice given to the existing parties that they are opting out. It is also different from the typical representative action where all the named plaintiffs' parties must be present in court. Thus, through the Federal High Court Rules class action suits can be maintained. Therefore, NGOs and Communities, organized bodies such as NBA and other Environmental Rights

Group can employ class action to commence suits against perceived environmental violations without proof of special damages.<sup>54</sup>

The only snag is Order 9, Rule 4 of Rivers State High Court (Civil Procedure) Rules 2019, that is limited to trademarks copy rights claims, patent and designs and not open to redress claim on breach of environmental rights to healthy environments caused by black carbon or soot (See Order 9 Rule 4 (1) (FHCPR). Therefore, it is submitted that Order 9 of the FHC Civil Procedure Rules 2019 should be broadened to include environmental violations. In a

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<sup>48</sup> Adediran and Another Vs Interland Transport Limited (1991) 9 NWLR Part 214 at 155

<sup>49</sup> HRH S OE ARONG and 16 Ors Vs Mobil Producing Nigeria Unlimited and Another (FHC/PH/35498. ;SPDC Vs AMBAH SC103/1994.' SPDC VS Helleluja Fishermen Multi -Purpose Cooperative Society Limited CA/PH/84/96

<sup>50</sup> Urie Vs Franconia Paper Corporation ( 1966) 218 2A 360

<sup>51</sup> But see the recent Federal HIGH Court Rules 2019

<sup>52</sup> Cases where class action had been employed in Nigeran are limited to financial and economic issues.

<sup>53</sup> 'Class action' <<https://www.law.cornel.edu/wex/classaction>) Wexlegal Dictionary>accessed 4 /12/21

<sup>54</sup> See Aarhus Convention 1998, Section 9 (2) Europe which grants environmental related bodies automatic locus to commence action to redress environmental wrongs.

class action, whether named or unnamed parties are bound in the same way, but common question of law or fact may not necessarily apply as there are classes with big claims and smaller claims and all joined together in one suit. There are also classes that may be happy with injunctive reliefs, while some may go for damages or compensation order within the same class. Class action would require expert human capacity development for it to be successfully employed in Nigeria.

The major difference between class action and suit brought in a representative capacity is that while in a representative capacity, authorization to sue or defend on behalf of a community must emanate from the class members and cannot be imposed on the community by anybody, not even the court, whereas, the Plaintiff in a class action can institute the suit once he recovers certification by court and the members of the class who do not want to be bound by the outcome of the class action. ***In a class action, it is sufficient for members of the class to have common issues albeit in a representative action- persons to be represented must have the exact same interest.*** The need for individual determination of damages will not of itself destroy a class action. *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966). 110. ,

Finally, the benefits of class action in addressing environmental violation can be seen in the opinion of the U.S Advisory Council on the Deployment of Class Action thus:

*“Class-action treatment is not as clearly called for .... but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>55</sup> Class action is the most effective engine to remedy mass wrong and works well for those who cannot afford high cost of litigation. Bulk of its advantages lie in aggregation claims as Class action is an instrument for ameliorating regulatory failure seeks to alter regulatory incentives that work in favor of corporate organizations who are massive polluters.”<sup>56</sup>*

*Therefore, massive public health and nuisance committed by corporation could be addressed in Nigeria by way of class action’.*

#### **d) Action for Trespass as a Civil Remedy**

An action in trespass lies when there is an unjustifiable intrusion or interference by one person on the property in the possession of another. <sup>57</sup> In order to succeed in

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<sup>55</sup> See Class Action Fairness Act 2005.

<sup>56</sup> *ibid*

<sup>57</sup> Rogers (n-26) page 337)

actions for trespass, there must be physical and not notional interference to the property or the land of the plaintiff such as dumping of oil, waste or contaminated material on to the land possessed by another without his consent.<sup>58</sup> The major ingredient is that the interference must be unlawful but as we can see in major environmental pollution cases, the action of the defendant had always been initially approved by license granted by relevant authorities hence, lawful.<sup>59</sup> Furthermore, all lands in Nigeria belong to respective Governors of Nigeria who holds the land in trust for Nigerians.<sup>60</sup> It is the government that grant licenses to the operators, mostly, the polluters to enter into citizens land to pollute their environment and such operator could not reasonably be held liable in trespass. In Nigeria, most suit on trespass relate to damages caused to improvement on the land not the land in possession of the plaintiff because the initial entry into the land was lawful.<sup>61</sup>

However, trespass to land is actionable *per se* -without proof of damages as nominal damages must be granted by reason of the unlawful invasion of the plaintiff's land.<sup>62</sup> Where however, an action for trespass caused by oil pollution is successful, the court will most times, order for the restoration of the land to its *status quo ante*, together with the payment of damages. Besides an injunctive relief may be granted, to forestall a continuing act of trespass complained against<sup>63</sup>.

### 3.2 Criminal Provision for Environmental Violation Under NESREA

- a) The Agency shall make regulation setting specifications and standards for minimum air quality and in controlling emissions that undermines nations air quality. A person who violates any regulations made under Section 20 (1) commits an offence and shall, on conviction, be liable to a fine of N200,000 and imprisonment for a term not exceeding one year or both and additional N20,000 for each day. In the case of body corporate, a fine of N2000,000 and additional fine of 50,000 per day the offence subsists. We argue that this amount, with greatest respect, is too paltry given the dangers posed by atmospheric air pollution in parts of Nigeria, especially in Port Harcourt, Rivers State capital and its environs.<sup>64</sup> Air pollution caused by incomplete combustion of hydrocarbon has contributed to the hospitalization of many residents and indigenes of major LGA in Rivers State and air quality standards adjudged below the international standard. Thus, one would suggest no option of fine for serial offenders of this Section 20 (1), as sufficient deterrent to the fouling of the air with injurious and hazardous emission called soot. It is also our further submission, that punitive term of

<sup>58</sup> Machine Umudge and Another VS SPDC( 1975) 9-11 SC

<sup>59</sup> Example include licenses granted to operate an oil well made pursuant to the Petroleum industry Act 2021, or license granted to produce and import chemical for the use of industries in Nigeria.

<sup>60</sup> Land Use Act 1978 LFN 2004

<sup>61</sup> Williams Brothers Direct Supply Ltd Vs Rafferty (1958) 1QB 159.

<sup>62</sup> Soleh Boneh Oversees Nigeria Limited Vs Ayo dele and Another (1989 ) INWLR part99 564-575

<sup>63</sup> Mobil Producing Nigeria Unlimited vs Monokpo Suit No SC 320/2001

<sup>64</sup> S C Dike, Curbing the Menace of soot in PH from Rhetoric's to Action Being a Paper Delivered by Prof S. C. Dike to at the annual Dinner of the NBA Port Harcourt in Dec 2021, NBA House, Rivers State.

imprisonment be imposed on any corporation and its Directors for endangering our lives

through air pollution, arguing that if individual can be brought to face terms of imprisonment, the individual directing the minds and spirit of these corporations should equal be made to do so.

- b) In the case of acts that endangering the stratosphere and ozone contrary to section 21 (1) the individual is liable to a fine not exceeding N200,000 or daily fine of N 50,000 if the act subsists
- c) On minimum noise standard, contrary to Section 22 (3), a person who violates the regulation on minimum noise standard is a liable to a fine of N50,000 or imprisonment not exceeding one year or both and the sum of N5000, for each day the noise activity persists. In the case of body corporate, a fine not exceeding N500,000 and additional fine of N10,000 per day is imposed on the body corporate.
- d) In the case of violation relating to public health contrary to section 23 (1), the offender shall be liable to fine of N50,000 or to imprisonment not exceeding one year or both and the fine of N5,000 daily for continuing act. In the case of body corporate, the offender is liable to a fine not exceeding N50,000 and additional fine of N10,000 for every day the offence subsist. The parity between individual liability regime for offender and corporate offender for endangering public health is unjustified.
- e) In the case of effluent discharge by industries for existing point source contrary to section 24(1), best practicable technology shall attract a fine of N200,000 or to imprisonment for a term not exceeding 2 years or both and additional fine of N5000 per day. Where it is an offence committed by a body corporate, the body shall be liable to pay fine not exceeding N1000,000 and additional N50,000 per day for continuing offence.
- f) In relation to offences concerning quality of land resources, natural water shed and coastal zone including flood and erosion management, the contrary to Section 26 (1), the offender if individual, is liable to a fine not exceeding N200,000 or to imprisonment for a term not exceeding one year or both and additional sum of N10,000 per day. In the case of body corporate, the sum of N1,000,000 million Naira on conviction and additional fine of 50,000 per day.
- g) The discharge of harmful waste contrary to Section 27 (2) (3)(4) and (5) of on the environmental media in Nigeria attract a fine not exceeding N1,000,000 or term of imprisonment for 5years or both. Where the discharge is carried out by body corporate, it shall pay a fine not exceeding N100,000 upon conviction and additional sum of N50,000 per day. In the case of body corporate all directors and staff are equally to be liable unless they prove lack of knowledge of the existence or commission of the offence, or that the Directors or officers exercised due diligence.
- h) By virtue of Section 29 of the Act, the Agency shall cooperate with relevant bodies for removal of pollutants other than oil and gas by adopting Best Clean up Technology currently available and implementation of Best Management Practices. This cooperation should enable the Agency take over oil and gas related environmental pollution

- i) By virtue of Section 30 Part (V11), the officer of the Agency can conduct search warrant on anything or place, examine any article capable of being used to the detriment of the environment, take sample or specimen, open examine any container or package or document, seize or detain for such time as may be reasonably necessary based on the contravention of the provision of this regulation. The agency can equally obtain order of court to suspend activities pursuant to its civil jurisdiction.
- j) A person who obstructs the officer of the an agency for performing any of this stated functions is liable contrary to Section 31 (2) to a fine not exceeding N200,000 for an individual or imprisonment for one year or both with additional sum of N20,000 per day for a continuing act and if it is a body corporate, the sum of N2000,000 on conviction with payment of the sum of 200,000 per day so long as the offence persist.
- k) By virtue of section 32 (1), no suit can be commenced against the agency until after one moth notice had been given by the proposed plaintiff and subject to the powers of the Federal Attorney General to commence criminal prosecution, an officer of the agency may with the consent of the Attorney General, conduct criminal proceedings in respect of breach of any of the provisions of the Act and regulations. However, the consent of the AG is required to institute the offense, which means that there must be cooperation between the Agency and Federal Ministry of Justice. Further, in prosecution of criminal offences, the provision of the Criminal Procedure Act and Criminal Procedure Code Laws of the Federation of Nigeria LFN 2004 shall, apply *mutatis mutandis* to Section 32( 4) to the same extent as they apply to trial offences generally . That means in all cases the burden proofs for every criminal trial, under this Act lies with the prosecution and in this case the Agency.<sup>65</sup> In civil cases, the burden shifts and it is on balance of probability<sup>66</sup> or preponderance of evidence

Further, there are some regulations also made by the Former Federal Environmental protection Agency that are still operational under the present legal regime which raises red flag for civil and criminal prosecution. These are:

- 1) National Guidelines and Standards for Environmental Pollution in Nigeria 1991
- 2) National Environmental Protection( Effluent Limitation) Regulation 1991 which requires industries to install anti-pollution equipment for detoxification of effluent and

chemical discharge in line with Best Available Technology and Best Practicable Technology (BAT). This means that if best available technology in Nigeria is not good to prevent pollution enough no recourse for foreign technology as the regulation is silent on this point and the industry cannot be punished ; and if the best practicable technology cannot remedy the situation, where it has been deployed by the industry, then, it shall not be held responsible for the ensuing pollution and this becomes a defense. The best practice would be met by providing that whether or not BAT and BPT had been adopted or deployed, the industry would be made liable for any ensuing pollution not made good for any pollution not made good.

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<sup>65</sup> Ani Vs State ( 2000) 6 SCNJ 98 at107; *Ike Vs Oyagbola* (1990) 4NWLR Pt 147) 723.

<sup>66</sup> Evidence Act LFN 2004, Section 135 ( 3)



- 3) National Environmental Protection (Pollution Abatement in Industries and facilities Generating Waste) Regulation 1991 which provides for the installation of pollution and abatement facilities by industries potentially generating waste, imposing restriction the release of toxic waste.
- 4) There is also Management of (Solid and hazardous) Waste Regulation 1991, that deals with the collection, treatment, disposal of solid and hazardous waste from municipal and industrial sources, giving comprehensive list of chemical waste and categories of toxicity.
- 5) The Harmful Waste Special Criminal Provision) Act 1990, was not a regulation made by FEPA but waste has the same meaning similar to those stated in the extant regulations made by FEPA and the Agency is to regulate and enforce their compliance.<sup>67</sup> Although, this Act provides defenses for culprits, it is the Act that spells out the highest punishment for any environmental crime in Nigeria.<sup>68</sup> Only the Federal High Court has jurisdiction over crime committed under this Act, but, given the numerosity and the different categories of wastes and their of harmful and injurious impacts, one would suggest that a special Environmental Court or High Court be given jurisdiction instead of the FHC to hear cases under this Act..
- 6) NESREA equally made certain regulations such as National Environmental (Access to Genetic Resource and Benefits sharing Regulations, 2009); It provides for the payment of I million for violation and imprisonment for a term not exceeding one year or both for individuals both for corporate bodies the payment of the sum of N10M and additional NI Million for every day the offence persists. While commending the regulator for the increase in amount payable for breach of these regulations, beyond that prescribed in the main NESREA legislation, the employment of the words ‘not exceeding’ seem to tie the hand of the judge if the magnitude of the conduct merits more than One year prison terms. Further, we argue that the exclusion of the body corporate from serving prison terms, is a bad law. Others Regulations made by NESREA in 2009 include National Environmental (Chemical, Pharmaceuticals and Detergent Manufacturing Industries) Regulations 2009 and National Environmental Permitting and Licensing System) Regulation 2009, both of which attract respective payments as fines and terms of imprisonment.
- 7) Almost all the 36 States in Nigeria have enacted environmental protection Edict but only few States are serious in dealing with environmental breaches and imposing stiff administrative and criminal sanction on offenders.<sup>69</sup> The sad reality is that most of the companies that pollute local and state lands were captured in the exclusive legislative list and 251 I (n) of the 1999 Constitution, where jurisdiction alone resides with the Federal High Court, and some of the activities fall within Federal offence hence the federal Government and Federal Court have competences to deal with these matters.

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<sup>67</sup> NESREA Section 27 (1) (5) and the punishment is a payment of fine of N1M for individual and 5years imprisonment while corporate bodies pays N1M and additional sum of N50,000 every day it persist without imposition of prison terms. The offence favors corporate bodies who are the main culprit than individuals.

<sup>68</sup> Section 2 which provides for the fault of the person who suffered damage and one who voluntarily accepted the risk therefor which I submit should be jettisoned from the provision of the Act

<sup>69</sup> Atsegbua et al (no) page 222



By virtue of Section 29 of the Act, the Agency shall cooperate with other government agencies for the removal of any pollutant excluding oil and gas- related ones, discharged into the Nigerian environment, and shall enforce the application of Best Clean- up Technology, currently available and implement Best Management Practices as appropriate without stating the geographical location of the available clean up technology to be adopted and where lessons should be drawn in the applicable management practices.

Having said this, it is important to recognized the following statutes that provide criminal offences for environmental violations:

- 1) Criminal code (Fouling water and noxious acts contrary to section 243-245 and 257 of the criminal code; Section 183,192 and 198 of the penal code
- 2) Oil Navigable Water Act LFN 2004
- 3) Harmful Waste (Special Criminal Provision) Act 1988 LFN 2004
- 4) National Environmental Standards and Regulations Enforcement agency (Establishment Act 2007) LFN 2004 Sections (20-31)
- 5) Petroleum Act 1969 and Petroleum (Drilling and Production) Regulations 1991, now under the Petroleum Industry Act 2021.

#### **4.0. Matters Arising from the Exercise of Civil and Criminal Jurisdictions for Environmental Violation**

Poor penal provision and poor taxing regimes, not commensurate with the magnitude of environmental crime. A fine of an amount of fifty thousand to two million for grave public health and environmental degradation is obviously too small to serve as deterrent. This is a fortiori, when the culprit has option of payment of fine than serving prison terms. A prison term of One year is also on the low side given that the action of culprit is in the realm of manslaughter -causing death and injury unintended. Thus, the best practice in criminal prosecution of environmental violation regarding identified challenge on penal provision in the extant legislation is to elevate the amount payable and increase the prison terms for all serial environmental violation to 10years<sup>70</sup>. If this recommendation is implemented, there will be a sea change in compliance mode by persons and industries violating environmental legislation and regulation in the UK, efforts is made to bring Directors and Managers of environmental violation to face criminal trial as in Shanks and MC Ewan (Teesside) Limited Vs Environmental Agency (1977) J Env LR 3005. In Woodhouse Vs Walsall Metropolitan

Borough Council 1994, Environmental Law Review 30, the General Manager of a waste disposal site (along with his employers) were convicted of illegal storage of waste at a waste disposal site. Also in the UK, a custodial sentence of 30 months for environmental

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<sup>70</sup> NESREA 2009 Regulation tend to increase the amount payable but still retain the expression not exceeding One year'

crime has been imposed unlike in Nigeria, prison terms does not exceed two year for individual offenders.<sup>71</sup>

Similarly, the poor taxing regime for environmental violation, if ever provided under the extant regime, is never commensurate with the activity that degrade the environment.

The best practice in civil sanction is to impose heavy tax for licensing activities, adequate permits fees, registration fees, operational fees in a creative manner for all such activities that potentially degrade the environment.<sup>72</sup> It has to be creative because most of these activities are among the sectors (eg Mining, & oil and gas sector), that generate revenue for the government at all levels.

#### **a. Exclusion of the Corporate Bodies from Serving Prison Terms.**

The exclusion of corporate bodies from serving term of imprisonment for environmental violation in the extant legislation and regulation is not the best practice, given their capacity to pay any amount as fine. It is for this reason that the compliance by corporate Multinational Oil Companies with all the legislation in Nigeria, which prohibit gas flaring, had been observed in breach than in performance.<sup>73</sup> Besides, there are directing minds and spirits behind these corporate bodies that when the veil is lifted, could be charged for environmental violation as can be seen with the UK example

#### **b. Removal of Oil and Gas from The Civil and Criminal Jurisdiction of NESREA**

It is not a best practice to create an in-built barriers to an efficient enforcement and prosecution of all environmental violation in NSREA Act and its regulation.<sup>74</sup> Oil and Gas are carried out in an environment which is regulated by NEREA Agency.<sup>75</sup> The oil and gas sector, through its chains of activities, from drilling, exploration, production distribution and transportation constitute more health hazards than the rest of the sectors.<sup>76</sup> It is argued that the removal of the oil and gas sector from the jurisdictional and regulatory remit of NESREA, is tantamount to bringing a child to the world and refusing to educate him or making a law and disempowering the regulators of the law from effectively functioning and enforcing the laws made. There is therefore the urgent need to remove all the clogs on NESREA wheel, which prohibit the Agency from regulating this major environmental violator.<sup>77</sup> This view could be supported by the provision in the NESREA Act that makes for collaborating of NESREA with other regulatory agencies, including

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<sup>71</sup> R Vs Sissen (2000) Env LR 156 and R V O' Brien & Enkel {2001 } 7 WLR 902

<sup>72</sup> NESREA Act 2007 section 7 (h) through registration ,licensing and permitting system order than the oil and gas

<sup>73</sup> See Associated Gas( Re Injection ) Act 1979 as amended in1984 .

<sup>74</sup> NESREA Act Section 7 (h), Section8 XIV

<sup>75</sup> Ibid section1 (2); Section7, Section 20

<sup>76</sup> Yinka Omorogbe, *The Oil and Gas Industry : Exploration and Production Contracts* ( Florence and Lambard Lagos 1997)20

<sup>77</sup> S. C. Dike, *Energy Security: The case of Nigeria and Lessons from Brazil, Norway and the UK* ,( Pearle Publishers 2015) 58.

former Department of Petroleum Resources (DPR)<sup>78</sup> and National Oil Spill Detection and Response Agency (NOSDREA) in regulating the environment<sup>79</sup>. It is submitted that the best practice is for an application of civil sanction and criminal prosecution to expand the regulatory and enforcement scope, powers and functions of NESREA to include the oil and gas sector. The current practice with the exclusionary clause, to my mind, is generating regulatory conflict within these regulatory bodies and was so ably pointed out as a sad development and serious regulatory setback by the United Nations Environment Program Report Ogoni UNEP<sup>80</sup>.

### **c. The Clog that Prohibits NESREA from Instituting Offence/Charge.**

The clog that provides that the Agency can conduct proceeding but can only institute charges with the consent of the Federal Attorney General (FAG) pursuant to Section 32 (1) (3), does not show best practices This so because this provision, creates unnecessary bottleneck as the Agency must wait for the office of the Attorney General to give a nod before instituting a charge. A busy Attorney General, will not bother until it is convenient even if the environmental violation is imminent and there is need to bring culprit to face criminal prosecution immediately. The best practice is to allow the agency, as a body established by the parliament to institute conduct and continue any proceeding regarding environment violation, given that some of the environmental breaches require urgency and immediacy of action. In US, Environmental Agency has a prosecutorial office within the office of District Attorney, this way, prosecution of environmental violation become seamless.<sup>81</sup>

Again, where the FAG refuses to give his consent, but, in the opinion of the Agency an environmental violation or offence has been committed, it is difficult to see how the violator can be charged since no charge would be preferred if the FAG refuses to give consent and this is a regulatory conflict.

### **d. Lack of adequate laboratory for analysis**

The Agency makes law regulating both hazardous and non- hazardous chemical providing the limit of production and discharge by the concerned industries. Adequate operational laboratories are sine- qua- non to the effective discharge of the enforcement and regulatory function. The absence of a functional laboratory had meant that the Agency might seek help for analysis from the same Company that it seeks to charge or sanction, thus promoting regulatory capture.<sup>82</sup> The removal of oil and gas from the list of hazardous chemicals to be regulated and controlled by the Agency is not the best practice in regulating all chemicals

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<sup>78</sup> DPR was the sole regulatory agency for oil and gas before the emergence of petroleum Industry Act wherein this regulatory functions now to be performed by the Up stream Regulatory Commission and Down Stream Re regulatory Authority

<sup>79</sup> NESREA ACT section 7 (b); Section 7 XVII

<sup>80</sup> UNEP – *Assessment of the Ogoni Land Report* ( UNEP 2009) 139-140

<sup>81</sup> United states department of justice , Environmental Crime Section -<https://www.justice.gov> JULY 2 2021 < accessed 6 Feb ,2022>

<sup>82</sup> When the Regulator is helpless and can no longer regulate the operator or licensee due to ne form of inducement or the other, the Regulator is said to have been captured.

from industries and facilities generating them<sup>83</sup>. The same scenarios apply to effluent discharge by individuals and companies, because it is through a functional laboratory that the quantity and quality of discharge would be ascertained.<sup>84</sup> All or most discharge from the oil and gas sector are usually injurious and hazardous, yet the sector is excluded from being regulated.<sup>85</sup> The absence of a functional laboratory had meant that the prosecutor of environmental crime might not effectively discharge the burden of proof as to whether a particular chemical is a contaminant or not

**e. Lack of accountability of data on criminal prosecution and fine collected so far from the offenders.**

Keeping data of criminal offenders, number of prosecution and periodic publication of names of offenders with fines paid, would serve as serious deterrent to the commission of further violation or breaches. A situation where fine imposed and paid and the names of defendants /accused persons are held in opaque form will not promote best practices. It is the availability of this data to the regulators and the British public that it was able to promote” naming and shaming” of environmental violators.<sup>86</sup>

**f. Inadequate Training of Inspectorate and Enforcement Staff of the Agency**

Most of whom are non- lawyers. A lot of authors have linked inadequate trained personnel of the Inspectorate and Enforcement Division of NESREA to be partly responsible for the low civil and criminal prosecution of offenders.<sup>87</sup> Most of the staff of the EI division are not knowledgeable in basic environmental laws, rights and regulation, and are seldom trained to acquire skills needed to effectively function in this regard. The result is low compliance rate of environmental regulation and increase in environmental violation. The best practice thus is to adequately ensure that all Inspectorate Staff are lawyers or persons knowledgeable in law and that these staff are continuously trained to fit for the task of dealing with both traditional environmental breaches and the emerging environmental violation.<sup>88</sup>

**g. Most Breaches of Environmental Legislation and Regulation**

This arises from acts which are originally lawful and permitted by Government but later declared unlawful due to their end result- making *mens-rea* difficult to prove for criminal prosecution. One of the problems of criminal prosecution of environmental violation is the absence of *mens rea* which is one ingredients of a crime in Nigeria <sup>89</sup>. This is due to the fact that prior to the violation, these activities were licensed and permit granted by relevant authority in line with the existing law. These permits and licenses do not specify what range of activity is lawful and unlawful hence determining the threshold of liability or criminal

<sup>83</sup> NESREA Act 2007 Section 7 (g)

<sup>84</sup> Ibid, section 24 ( 3)

<sup>85</sup> ibid

<sup>86</sup> R V Camex { 2007} EWCA Crim 1759

<sup>87</sup> Taiwo Osipitan, problem of Proof in Environmental litigation in J A Omotola (ed.) *Environmental laws in Nigeria including Compensation* ( University of Lagos 1990

<sup>88</sup> Such as soot in POrtharcourt.

<sup>89</sup> Sections 4 and 24 of Criminal Code Law Of the federation 1990

violation becomes a difficult task not only for the regulators but also to the Inspectorate and Enforcement Division of NESREA. Therefore, in order to make these ordinarily lawful activities to be punishable by Law, there is the need to specify in various permits and licenses what range of activity is lawful and the activity that is unlawful which should be penalized.<sup>90</sup> Thus, the way to go is to determine the threshold of environmental violation, *mens rea* and enforce compliance and prosecute the offender for exceeding the threshold of lawful activities.<sup>91</sup> Another way is to state in the regulation that liability is strict hence no proof of *mens rea* (guilty mind) is required but *actus reus* <sup>92</sup>

#### **h. The Relationship with the Agency State Officers with State Attorney General**

In prosecution of offence against the act and regulation which are committed within the state should be made clear. The relationship between the Agency and the Federal Attorney General may be smooth in States controlled by the Federal Government in terms of political affiliation, hence speedy dispensation of justice would prevail, but, not where the state is controlled by an opposition party as noticed in River's state where the Governor has lamented that the federal controlled police shield offenders liable to face prosecution for myriad criminal and environmental offences. The best practice here is to provide and legislate that the Agency shall have powers to institute and conduct criminal cases involving breaches of environmental offences without the express consent of the Federal or State Attorney

General. Further, that the trained personnel of the Agency have the responsibility to prosecute cases of environment violation with or independent of the Nigerian police.

#### **i. Too Much Defences and Leeway for Body Corporate in Criminal Prosecution**

One of the major challenges to the prosecution of corporate bodies under the NESREA Act is the numerous defenses and escape routes that avail the world- be offenders. <sup>93</sup> Offense provided in Section 27 (1) of **NESREA Act**,<sup>1</sup> on the discharge of harmful and hazardous waste are permitted, if authorized by law, and in the case of a body corporate, if it can proven that, the offence was committed without its knowledge, or that it exercised due diligence to prevent the commission.<sup>94</sup> The same problem applies in the enforcement of the provision of Harmful Waste (Special Criminal Provision) Act 1988, in relation to hazardous chemical. This is so because, industries discharging harmful waste are originally granted license by government, and these defenses of due diligence or lack of knowledge of the discharges also avail these companies.<sup>95</sup>

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<sup>90</sup> Greg Gordon , Petroleum Licensing in G Gordon et al, Oil and Gas Law- Current Practice and Emerging Trends 2<sup>nd</sup> ed Edinburgh University press 2011) A License is an administrative authority to given by a competent authority to do an act which ordinary is unlawful . E.g permit to import chemical to produce fertilizer can cause problem is the chemical is recklessly and negligently allowed to escape to residential or agricultural lands.

<sup>91</sup> Criminal Code and Administration of Justice Act

<sup>92</sup> Ibid

<sup>93</sup> NESREA ACT, section 27 ( 4)

<sup>94</sup> NESREA Act 2007 ,Section 27 4 and 5; Harmful Waste( Special Criminal) Provision Act LFN 2004

<sup>95</sup> NESREA Act 2007, Section 27 ( 5) .

#### **j. Determination of the Extent of Liability Without Fault Especially for Corporate Bodies**

In a criminal trial, proof of conviction would be unsuccessful without fault on the part of the accused. However, Environmental violations may occur without fault of the person or operator of the activity under evaluation. This scenario makes it a herculean task for accused persons to be successfully charged to court since most escape of chemicals and other waste, were previously authorized waste. This is so because, in criminal prosecution there must be proof of guilt or blame worthiness of the accused.<sup>96</sup> Since most environmental violation stemmed from previously legitimate acts, it is submitted, that the best practice is to treat these environmental violation as strict liability offence, which require no proof of guilt.<sup>97</sup> However, section 24 of the Criminal Code provides for offence negligently or willfully committed, thus raising the case for *mens rea* to be proved. The best practice thus is to obviate the challenged posed by Section 24 of the criminal code is to declare major environmental breaches as strict offences.<sup>98</sup>

#### **n. Absence of Tax Waiver, Support Scheme, for Complaint Companies**

Voluntary compliance and absence of framework for ‘naming and shaming’ through social and public media is a concern. The best practice these days is seen by the level of voluntary compliance on the part of individual and corporate bodies to environmental regulation rather than much of “command and control” regulatory approach. This voluntary compliance may be accompanied by tax waiver or other support schemes known to the potential violators. Thus, NESREA must have an in-built mechanism that will promote voluntary compliance and reduce command and control regulatory approach.<sup>99</sup> Similarly, extolling the moral reason for compliance and the immoral reason for non-compliance will promote ‘naming and shaming’ as a powerful tool in the hands of the NESREA officials for reducing environmental breaches.<sup>100</sup>

#### **q. No Serious Economic and Market-Based Approach for Pollution Control Enshrined in the Regulations**

The employment of market based mechanism through the imposition of pollution tax, remediation and restoration taxes, and charges for removal of pollution , will reduce environmental violation and promote civil remedies and reduction in environmental- related litigation in environmental breaches.

#### **r. Both Civil and Criminal Liability Regimes do not Focus on the Restoration of the Environment**

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<sup>96</sup> S I oji , *Nigerian Criminal Law in Perspective* ( Zubic 2018) 61 .Consequently

<sup>97</sup> Pharmaceutical Society of Great Britain Vs Storkwain 1962 )NZLR , *R Vs Adjei* cited in Okonkwo and Nash, *Criminal Law in Nigeria* ( London: Sweet and Maxwell,1980)

<sup>98</sup> Oji (n60) p.126-130.

<sup>99</sup> Where a law stipulate a standard and the standard is breached with known civil or criminal sanction, it becomes a command and control legislation.

<sup>100</sup> R V Camex ( 2007) EWCA Crim 1759. On naming and shaming.



But rather more on payment of fine and imprisonment or compensation or damages, thus leaving government and the regulator to bear the burden of restoring the environment.<sup>101</sup> Since government resources are evenly distributed, more to critical sectors (electricity and roads), there is little or no budget for the restoration of damaged environment by environmental violators. The best practice is to ensure whether by the application of civil liability regime or criminals sanction a clause for the restoration and remediation of the environment through the polluter pays principles.

Similarly, criminal sanctions and imposition of terms of imprisonment do not benefit the victim of polluted lands as the fine goes to government coffers. Thus, the best practice, is to legislate that in addition to the payment of fines and or serving the prison terms, the accused should restore the environment or in alternative part of the fine paid should go to the victims of polluted land for the restoration of their loss.<sup>102</sup> The Ogoni land in Rivers State clean up as ordered by UNEP which mess was caused by one of the oil majors, s coming many years after the impacted land had diminished in value and the victims are always at the receiving end.<sup>103</sup> We submit that all of these issues are set back on the effective criminal prosecution of fenders under the act.

#### **5.0. Best Practices for the Prosecution of Environmental Violation: Civil and Criminal Cases in the United Kingdom**

Generally, the British environmental regulatory approach is characterized by flexibility - dealing with environmental breaches as they arise with new regulatory tool for emerging environmental cases.<sup>104</sup> The United Kingdom adopts mixed regulatory approaches and tools for environmental violations that is both command and control and Market- based mechanisms or economic instruments and far more results had been achieved in UK than in Nigeria.

In the UK, majority of criminal prosecutions with regard to environmental offences in England are carried out by the Environmental Agency (EA) which has a published Enforcement and Sanctions policy and the remainder are dealt with by local authorities and smaller other regulatory bodies such as Natural England. The enforcement of environmental legislation in Wales is the responsibility of Natural Resources Wales (NRW). The regulation has a broad range of enforcement options available to them which may include:

1. Issuing Warnings
2. Statutory enforcement notices and works notices
3. Suspension or revocation of environmental permits
4. Issuing a formal caution and prosecution

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<sup>101</sup> See However ,NESREA Act 2007, Section 27 (5) and 28 about regulation on methods of removal of pollution . See also Harmful Waste (Special Criminal Provision) Act 1990.

<sup>102</sup> Santa Brara oil spill fund was deployed partly to settle resident while the company engaged in the clean-up

<sup>103</sup> United Nations Environment Programme, *Environmental Assessment Ogoni land* (UNEP 2011) pp102 - 2019 on UNEP recommendations.

<sup>104</sup> Stuart Bell and Donald McGillivray, *Environmental Law* (7<sup>th</sup> ed. Oxford University Press 2008 )223.

5. Civil and financial sanctions including fixed penalty notices (FRNS) and Enforcement undertaking.

### 5.1 Carrying out remedial works at the defendant cost.

In determining whether to prosecute all, environmental regulators must consider the code for crown prosecutors, which sets down a two stage test. First, is there sufficient available evidence to raise a realistic prospect of conviction? In Nigeria, the reverse is the case due to accusatorial system of criminal jurisprudence and this does not augur well for criminal prosecution of environmental offences.

Second, is it in the public interest to bring the prosecution. Noteworthy to state that the Environment Act 1995<sup>105</sup> grants the Environment regulators specific powers to investigate and prosecute environmental crime in England. In the UK, there exist certain factors which are taken into due consideration before commencement of prosecution. There are as follows;

1. Incidents or breaches with significant environmental consequences.
2. Operating without the required license, consent or authorization, persistent or excessive breaches of statutory requirements
3. Failure to comply with formal requirement to remedy environmental harm
4. Reckless disregard of environmental management or quality standards and obstructing regulator staff in gathering information.

In UK, sentencing organization for environmental offences which covers specific guidelines for use in the magistrates' courts and crown courts in England Wales and which apply to all adult offenders.' This is in line with Section 33 of the Environmental Protection Act 1990, UK and the Environmental Permitting (England and Wales) Regulations S1 2016/ 1154. In the UK case of *R v. Thames Water*, the Court of Appeal had taken this into due consideration by the court in sentencing and the starting point for fines to be imposed on large corporation offenders once determined.

### 5.2 Civil Sanctions in the UK

New legislation has given regulation including (the Enforcement Agency and local authorities) the power to impose civil penalties on business as an alternative to prosecuting, for certain types of breaches including breaches of environmental legislation. Civil penalties include fixed monetary penalties and enforcement undertakings.

Related orders: for more serious offences, the court can make related order as sentencing in subsequent proceedings. Some of such sanctions are as follows.

1. Director's Disqualified Order – breach of directors disqualified order is a criminal offence

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<sup>105</sup> (EA1995)

2. Recovery of Assets: A prosecutor (usually the Enforcement Agency in environmental cases in England) can refer cases to the serious organized crime Agency (SOGA) after conviction assets equal to the financial benefit gained from the criminal environmental activities.
3. Serious Crime Prevention Order: The High Court and crown court can make a serious crime preventive order (SCPO) after a person has been convicted of a serious offence, including a number of environmental offences, such as disposing of waste without a permit. A serious Prevention order can be made against an individual or a business and may last for up to five years. Noteworthy is the fact that, in Magistrates' court the maximum penalty since March, 2015 usually has an unlimited fine and/ or six months' imprisonment.

Also, in crown court, the maximum penalty is usually an unlimited fine/or two years' imprisonment.

These regulatory mechanisms and some cases will be cited for possible lesson in Nigeria.

Apart from the 1) Administrative mechanism, which involves

- a) the setting general polices and standards for compliance with issuance of administrative orders permit and imposition of fines for non- compliance. See *R v. Yorshire Water Services Ltd* (2002) Env LR 18 and *R Vs Anglian Water Services Ltd* (2004 ) Env LR 10 deals with imposition of stiff fine on corporations for environmental offences in the UK also employs.
- b) Market based mechanism and economic tools which includes economic instruments such as taxes and other support schemes to accelerate compliances. OECD has identified five basic market-based instruments namely charges for administrative cost recovery, subsidy, deposit or refund scheme, market for pollution credit (emission trading) enforcement incentives,<sup>106</sup>and
- c) Self-regulation by encouraging voluntary compliance based on generally set standards minimal supervision and control.
- d) Th role of criminal and civil law. By employing civil litigation and criminal sanctions. In *R Vs Department of Trade and Industry Ex parte Green peace* (2000) Env LR 221; *R RSPB and Wild Foul and Wetlands trust Vs Secretary of state For Scotland* (2001) 2001 Env LR 19. In *Sherras Vs DeRutzen* (1895) 1QB, The commission of Environmental crime by industry operators was viewed as purely regulatory in nature and therefore not criminal in real sense.
- e) Polluter pays principle where the producer of goods would be made to pay the cost of reducing, managing pollution arising from the goods.
- f) Optimal environmental regulation' -By encouraging a suit of these regulatory approaches for optimal result bending more on the adoption of precautionary approach which aim at preventing the occurrence of environmental violation

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<sup>106</sup> *Ibid* but See OECD while paper on taxation and Environment: Complimentary policies CM1200, page 240.

## 6.0. Recommendations & Conclusions

The role of civil and criminal law in tackling environmental violation cannot be overemphasized. The criminal law is necessary to sanction violation of criminal and statutory breaches while civil law is employed to enforce regulation and bring compliance to policies and standards already in place by an agency or administrative authority. The criminal law is employed to provide direct criminal sanction or complement the civil law demand for compliances. The main role of criminal law is to punish identified wrongs. However, in environmental breaches, it is not easy to separate wrongs from lawful environmental activities. Most of the polluting industries are desirable for economic and social wellbeing of our society, but how much of their polluting activity could be tolerated by law and the society require a balancing and tradeoffs.

There is therefore, need to balance the cost benefits analysis of having these polluting companies e.g. (cement production companies and oil and gas industries) and living up with their mess. Certain cost must be borne by the society and others by the polluters themselves.

This is why any legal regime must stress on preventing pollution more than demanding sanction and punishing polluters after environmental violation. In some developed countries, government tries to adopt economic and market-based mechanism such as subsidy in favour potential polluting activities. This is aimed at reducing pollution or mitigating the impact, while also promoting voluntary compliance by these corporations. But in Nigeria, voluntary agreements and support schemes, are seldom available due to the economic benefits of the major polluting sector -Oil and Gas- to the economy -which sector will never reciprocate government gesture by voluntary compliance with Health, Safety and Environmental regulations. Although, some will parade conspicuously their Health, Safety and Environmental policies, a proper lifting of the veil, will reveal that this is, but, a window dressing and a smokescreen agenda as pollution arising from their activities are almost a daily occurrence.

Thus, we argue that criminal law might not be appropriate in balancing these rights; hence the need for civil law regimes such as injunctive remedies, damages for trespass, negligence and the imposition of charges on polluters and litigation for damages. The civil law regulatory approach set policies and standards and demands that polluters behave in a particular way to reduce pollution, hence is similar to the adoption of the principle of precautionary approach as producer would be exposed to risk of producing defective products and consumers would be mindful of consuming such product, hence acting as disincentive to environmental violation. The traditional common law remedies such as actions in Negligence, Trespass, Nuisance and Damages, have become somewhat anachronistic due to the emergence of more sophisticated and new form of environmental breaches such as massive air pollution and soot, massive oil spillage involving a larger population not anticipated by existing statutory and legal regime. A more pragmatic legal jurisprudence in the area of class action should therefore, be seen as a leeway out of the challenges posed by tackling these new forms of environmental breaches with traditional

legal method. This method is now well in use in US and UK and I call upon our legislators to amend the existing relevant statutes to accommodate class action. This way the bottlenecks posed by the employment of the traditional legal would have been addressed. The task of developing class action as a legal weapon does not only rest with the legislators but the judiciary- by developing the required capacity through training of judges and magistrates along this line. Similarly, environmental violation should fall within the realm of strict liability offence for criminal prosecutors to ensure conviction. The legal practitioners and organized private sectors, The police and indeed Government through their regulatory bodies have respective roles in developing the civil and criminal liability regime for environmental violation in Nigeria and this could be achieved by developing home grown best practices and adopting/ adapting lessons from other jurisdictions.