ENHANCING ENVIRONMENTAL LITIGATION: THE KEY TO SUSTAINABLE ENVIRONMENTAL PROTECTION IN NIGERIA *

Abstract
Several laws have been enacted by the Federal and State Governments in Nigeria with a view to enhancing environmental protection and sustainable development. Implementation and enforcement of these laws by the relevant government agencies have been lacking. This has resulted in huge environmental problems in the country, such as flooding, oil spillage, deforestation, spread of diseases etc., therefore there is the need to strengthen the citizen's right to enforcement of environmental protection rights. Environmental litigation is therefore, a means by which this can be achieved. It is the means by which environmental laws are brought to live, invested with teeth not only to bark but also to bite offenders. The government agencies cannot cover every nook and cranny on Nigeria in terms of protecting the environment but the citizens live there. If they are empowered to protect their environment, then, the dream of Nigeria for sustainable development through environmental protection will be guaranteed. This paper therefore, seeks to examine the various challenges which citizens face with respect to the enforcement of their environmental rights. The Nigerian Constitution, 1999 (as amended) does not guarantee environmental protection rights as fundamental rights. This paper seeks to make a case for its amendment to include environmental protection rights under the fundamental rights provisions. It also makes a case for the enhancement of the judicial procedures to ensure that environmental protection suits are not hindered by the technicalities and judicial shortcomings which are commonly employed to frustrate citizens who attempt to enforce their environmental right. The paper therefore recommends judicial activism by the Nigerian Courts.

Keywords: Environmental litigation, Environmental protection, Sustainable, Nigeria

1. Introduction

The need for man to protect the environment cannot be over-emphasized. Firstly, man must protect the environment for his own benefit and for the benefit of generations yet unborn. Secondly, man must protect his environment in obedience to Almighty God's injunctions as contained in the Holy Bible.[1]One of the means by which man can ensure the protection of the environment is through litigation or institution of lawsuits in court. Environmental litigation serves to enforce environmental laws to the benefit of the environment.[2]However, in doing so, litigants in this area of law would come across some constraints in the enforcement of their right. The remedies available are as developed by common law and statutes. The common law principles in this regard became part of the Nigerian Laws by virtue of section 45 of the Miscellaneous Provisions Act.[3] The remedies available are in the torts of nuisance, negligence, trespass and the rule in Ryland v Fletcher[4]; as they relate to the enforcement of rights under Environmental Protection law. The Nigerian experience in the sphere of environmental litigations reveal that apart from the different tort law remedies, there are several legislations aimed at ensuring environmental quality.[5]One striking feature of these domestic environmental legislation, aside their criminal sanctions, is that they also impose statutory duties on certain persons or organizations.[6] Suffice to say, that the violation of these duties become actionable at the instance of persons legally affected or aggrieved by their violations.[7]There is a relationship between Environmental Law and Human rights which is traceable to the 1972 Stockholm Declaration which was adopted at the United Nations conference on the Human Environment, when it stated as follows: 'Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well beings, and he bears a solemn responsibility to protect and improve the environment for present and future

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[1]Genesis 1:26 (King James)
[2]Adamu Kyuka Usman, *Environmental Protection Law and Practice* (1st ed., Ababa Press,Ibadan, 2012) 211
[3]Miscellaneous Provisions Act CAP 192 LFN 1990, s 45(formally called the Interpretation Act Cap 89 LFN 1958)
[4][1866] LR 1 Exch [265], [277],[280]
[5]J A Omotola,'Problems of Proof in Environmental Litigations' in JA Omotola (ed), *Environmental Laws in Nigeria Including Compensation* (UNILAG Press 1988) 113
[6] ibid
[7] ibid

generations'.[8]Significantly, there has been more of non-realization of these legally protected rights in the various environmental lawsuits.[9]

The aim of this paper is to examine the constraints or reasons for the non-realization of these legally protected rights. The paper also advocates for the inclusion of environmental protection rights as fundamental rights in the Constitution of Nigeria, 1999 (as amended).The aforementioned Common law principles shall be examined shortly.

2. Negligence

At common law, the tort of negligence is the 'breach of a legal duty to take care, which results in damages undesired by the defendant to the Plaintiff'.[10] The term has been described as the breach of care imposed by common law or statute and resulting in damage to the complainant.[11] In Donohue v. Stevenson[12] Lord Atkin evolved this principle thus:

> The rule that you are to love your neighbour in law, you must not injure your neighbour and the lawyers question, who is my neighbour?, receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee would injure your neighbour, who then is my neighbour? The answer seems to be, persons who are so closely and directly affected my act that I ought reasonably you have them in contemplation as being so affected when I am directing my mind to the act omission which are called in question.

The major constraint in this area with respect to environmental cases is the requirement of proof by the Plaintiff for liability to ensue. The Plaintiff in an action for negligence is required to prove that the defendant owes him a duty of care, that the duty of care has been breached by the defendant and that the injury or damage suffered by the Plaintiff is foreseeable. Failure of the Plaintiff to prove the three principles stated above could be fatal to his case. This is because the evidential burden of proof is placed on the Plaintiff. It is trite law that he who alleges must prove.[13] This requirement of proof by the Plaintiff is near impossibility because the Plaintiff or victim has no knowledge of the operation in the case of oil spill or pollution for example. Thus for one to say that a duty of care was breached, such a person must possess sufficient knowledge of the acceptable care required in the first place. Most of the operations that lead to environmental hazards are mostly expert operations, which only the operators can understand. Thus in the case of *Seismograph Services Ltd v Onokpasa*[14]*;* the Respondent claimed damages for the destruction of his house during the Appellant's Seismic operation, the Supreme Court held: 'The contention of each party is of a technical nature and therefore such evidence as could support it must necessarily be that of people especially which in this case comprised of the knowledge and practice of Seismology and Civil engineering.

The difficulty here for a victim of pollution or Plaintiff is that in such litigation as this, the courts are bound to act on the evidence of the expert, which is neither challenged nor contradicted.'[15]Although a Plaintiff is at liberty to call experts to prove the negligence, it should be noted that the high cost of procuring such experts witnesses is on the high side and a majority of victims who are as it were already licking their wounds of destruction caused to their property by the defendants, finds it difficult to procure these experts. These victims are heavily impoverished and most of them live in the creeks. At best, unqualified persons with hazy knowledge either because they are not so trained or are trained but have lost touch with the practice as a result of redundancy or long absence from practice are the ones readily available and within the reach of victims. Such unqualified persons easily cave in when tested under the fire of cross-examination and often end up doing more damage to the case as was observed in the *Onokpasa's case*. On the other hand, operators (or defendants) especially where they are corporate bodies, easily afford the employment or engagement of qualified experts to give evidence for them, because of their financial strength. Some of these experts are even in the employment of some of these corporate bodies especially the multinational company. In the case of *Onokpasa* earlier cited, the defendant company got judgment on the strength

[8]*Jonah Gbemre v SPDC &Ors* (FHCB, 10 April 2006)[26]
[9]Omotola (n 5) 113
[10] ibid
[11]Lawrence Atsegbua, Vincent Akpotaire, Folarin Dimowo, *Environmental Law in Nigeria Theory and Practice*(2nd edn, Ambik Press Benin City 2010) 258
[12][1932] AC 502
[13] Evidence Act Cap 112 LFN 1990, s 135 (1)(2)
[14][1972] All NLR 347
[15]*Seismograph Service Limited v Kwarbi Ogbeni* [1976] 4 SC [85]

of the evidence given by their expert witness, Mr. Alan Berger, who was an employee of the defendant. In that case, the Plaintiff's claim at the High Court against the defendant was for the sum of $40,000 {Fourty Thousand Pounds} being special and general damages for damage caused by the defendant to the Plaintiff's eighty college buildings, namely; one block of 12 classrooms, one block of 4 classrooms, one dormitory, one assembly hall, 1 dining hall and kitchen block, the principal's house, the principal's house, the Principal's kitchen, latrine building and one piggery house at Okwidiemo within the Sapele Judicial Division, when between May and June 1968, the defendant carried out Seismic operations near the Plaintiff's college buildings at Okwidiemo which shook the said buildings to their very foundations and caused the said damage. Ekeruche J on 29 October, 1969, gave judgment in favour of the Plaintiff in the sum $24,212, 175 as special damages. The defendant appealed to the Supreme Court. The Supreme Court in allowing the appeal, Sowemimo SCJ held as follows: 'The correct test of the relevance of witness's opinion as that of an expert is whether he is specially skilled in that particular field in question; and if, applying that test, the only expert opinions before the court are those of one party's witnesses the trial, unless or good reasons otherwise, should accept them'.[16]

Another case in point is that of *Seismograph Service v Esiso Akpouovo*.[17] This was an appeal from the Ughelli High Court of Nigeria. It was an action for damages for buildings and household good allegedly destroyed as a result of seismic operations of the Defendant/Appellant. The Appellant Company's witnesses maintained that they had visited the site of the incidence or the locus in quo and that none of the buildings were damaged as alleged by the Plaintiff. Plaintiff had averred that an expert valuer had estimated the cost of the damaged buildings but gave no evidence in support of the averment. The Supreme Court held that the Plaintiff/Respondent's evidence did not establish liability on the part of the Defendant Company.

In our humble view, we do not agree with this judgment reached by the Supreme Court of Nigeria in Akporuovo's case. The Supreme Court ought to have ordered a retrial of this case. In the case under review, there was conflict in the evidence of the parties. The Supreme Court held that the trial Judge ought to have visited the locus in quo and that failure to do so on the part of the trial judge has left undecided the issue as to whether the buildings in issue were damaged at all. A Plaintiff who is unable to prove how the damage resulting in the injury was caused by the defendant in law can plead *res ipsa loquitor*. It is not a valid Assurance Policy for the success of the Plaintiff's case.[18]Reliance on this principle is a confession by the Plaintiff that he has no direct and affirmative evidence of the negligence complained of against the defendant but that the surrounding circumstances amply establish such negligence.[19]Two conditions must be proved by the Plaintiff for him to successfully take advantage of the maxim of the *res ipsa loquitor*;

1. The thing that inflicted the damage must be under the sole management and control of the defendant or of someone for whom he is responsible or when he has a right to control.
2. The occurrence must be such that would not have occurred without the negligence of the defendant (i.e. want of care).

This maxim merely raises a *prima facie* presumption of negligence against the defendant, thus shifting the onus of establishing lack of negligence to the defendant.[20]Also, the defendants from available records, always have the financial muscle to call expert witnesses to show that there was no negligence that the defendant took all reasonable care and acted according to standard industrial practice[21]; it could be seen that the doctrine of the *res ipsa loquitor* offers little or no assistance to a plaintiff whose right has been violated;[22] under environmental law.

3. Nuisance

There is a general rule of common law that no one may use his property to impair the right of another person, i.e. no one may create a nuisance.[23]There are two kinds of nuisance; private and public. A private nuisance is the unreasonable interference with the use and enjoyment of one's land while public nuisance is an activity that

[16]Ibid 347
[17] [1974] ANLR [95]
[18]Omotola (n 5) 113
[19]*Adeyemi v Olaleya&Anor* [1987] 7 SC Pt 1, [111], [118] – [120]
[20]Omotola (n 5) 113
[21]Lawrence Atsegbua, Vincent Akpotaire, Folarin Dimowo, *Environmental Law in Nigeria Theory and Practice* (1st edn,Abba Press Ltd 2004) 187
[22]Ibid 187
[23]Susan J. Buck, *Understanding Environmental Administration and Law* (Island Press 1991) 61.

adversely affects the health, morals, safety, welfare, comfort or convenience of the public in general.[24] Unlike trespass, nuisance does not depend on a physical invasion or interference with exclusive possession of land. It is important to note that while public nuisance is usually considered as a crime; private nuisance is always a tort. Under public nuisance, the proper person to sue is the Attorney General. But where a private individual can show that he has suffered some particular, direct and substantial damages to his person or property over and above that sustained by the community at large, he has a right of action in private nuisance. The problems experienced by victims of environmental pollution with respect to the distinction between private and public nuisance in instituting actions for nuisance were settled by the Supreme Court in the case of *Adediran v Interland Transport Limited*.[25] In that case, the Supreme Court held:

> 'The general rule is that a private individual has a right of action and can take proceedings in his own name in respect of he can establish that he has sustained or suffered some particular damage direct and by public at large or when the interference with the public right involves a violation of some private right of his own, threat of damage to his property. He can also exercise such right of action if conferred on him by Statute. In all other cases, known as relation actions proceedings must be brought with the sanction and in the name of the Attorney General. In such a case also, a private individual who has sustained some special injury, and consequently has a valid right of action on his own account, joins the proceedings of the Attorney General and claims in respect of that injury.[26]

The Supreme Court held further that in the light of section 6 (6)(b) of the 1979 Constitution, a private person can commence an action in public nuisance without obtaining the consent of the Attorney-General. Recently, a Federal High Court sitting in Benin City, presided over by Nwokorie J has held in the case of Jonah *Gbemre v SPDC &*2ors[27]; that a private citizen could commence an action in public nuisance. Under Public Nuisance, a Plaintiff is required to prove the damages he has suffered over and above other members of the public. Most of the victims of oil pollution and other dangerous activities of the multinational companies are largely illiterates and cannot meet the requirements of proof by the courts. The courts are therefore reluctant to award damages. In the case under review, a Federal High Court sitting in Benin City, Edo State of Nigeria was called upon to determine the validity or otherwise of the Associated Gas Re-injection Act[28]; and the Associate Gas Re-injection Regulation;[29] which permitted gas flaring. The court held that the Act was inconsistent with the 1999 constitution and therefore declared it null and void.

Under Private Nuisance, the Plaintiff has the burden of showing that the activities of the defendant interfered with his property rights.[30] According to Omotola, 'the material question which has to be affirmatively answered in favour of the Plaintiff is, '- - - was the Defendant's activity reasonable according to ordinary usages of want and living in a particular society?' The Plaintiff must however have a legal interest (e.g. possession) in the land for him to be able to sue in private nuisance.

Another constraint that litigants may like face while prosecuting a claim under the tort of nuisance is the requirement that the nuisance must be continuing. Thus where the nuisance ceases, invariably the suit dies as the substratum of the suit is gone. Under the tort of nuisance, the victim must have suffered damages for him to be able to maintain a suit. These damages must be proved by the Plaintiff. The same problem of poverty rears its head in this area, as most of the victims of pollution, oil spillage and other forms of nuisance are committed mostly in the villages where most of the inhabitants are poor. They cannot therefore procure the services of experts to prove such damage. Furthermore, a Plaintiff under the tort of nuisance has a right to abate the nuisance. This right in Nigeria is highly non-justifiable especially when much of the nuisances are emitted from heavy equipment manned by corporate bodies and such equipment are often marked 'Danger, Keep Off'.[31] It is only an insane victim who will overlook such signs in the exercise of the right of abatement.

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[24]*Adeyemi v. Olaleya &Ano*r (1987) 7 S.C. (Part 1) 111 at 118 – 120.
[25](1991) 9 NWLR 157.
[26]Ibid 164 r 10.
[27]*Jonah Gbemre v. SPDC & 2 ors* (FHCB, 14 November 2005)
[28]Associated Gas Re-injection Act Cap. A 25 Vol. 1 LFN, 2004.
[29]Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1984, s 1
[30]Omotola (n 5) 121
[31]Theresa Oby Ilegbune. Lecture notes for Environmental Law students of faculty of Laws, University of Nigeria, Nsukka

Another relief available to a victim or a plaintiff under the tort of nuisance is an injunction. The Nigerian experience has shown that obtaining an injunction in this regard is very difficult. This is because of the difficulty of victims to prove that the balance of convenience is in their favour. It is important to note here that an injunction does not lie against an act already committed. It is a known fact that most of the damages complained of occur or are known only when the operation is completed. This has led many victims completely helpless with no redress in nuisance. Further, in measuring the balance of convenience the Nigerian courts over time tend to tilt the balance of convenience in favour of the multinational company who are responsible for the nuisance. This is because, the Nigerian Courts often examine the likely effect of its judgment on the defendant's company and the need for continuous production by such a company and the country and consequently, place the pecuniary benefits to the defendant's company and the country above the need for the protection of the environment, individual health and property.[32]

The American Courts also has similar experience with the Nigerian court and in deserving cases it has granted injunctions. In the case of *Boomer v Atlantic Cement Co*.;[33] a large cement plant was spewing dirt and smoke into the surrounding neighbourhood and vibrating the ground. The neighbours claimed that this was a nuisance and went to court to seek an injunction to halt it. Unfortunately, since the plant was already using the best available technology, the only way to stop the nuisance was to shut the plant. This plant cost about $45 million to build and employed 300 local residents. The Court weighed the hardship to the community if the Plant was shut against the hardship if the nuisance continued. The court decided to allow the Plant to continue its operations, but it ordered the operators to pay damages to the victims. One of the Judges dissented, saying that to allow the nuisance to continue was the equivalent of giving the power of eminent domain to any private company that chose to pollute. However, in the case of *Spur Industries v Del Webb Development*[34], the American Supreme Court granted an injunction to stop the nuisance. In that case, a suburban phoenix development industry catering for retirees was established in the West of Phoenix, Arizona in 1954. Two years later the feedlot was sold to Spur Industries which started about two miles south of the development. In May 1959 Del Webb began to develop Sun City, building south from the first retirement community. As Sun City grew, so did the feedlot, and by December 1976, the two were only five hundred feet apart. Although Webb had chosen to develop south and at least in the early years, he did not consider Spur to be a problem. But by 1967, he was having trouble selling residential lots near Spur. Webb sued Spur, alleging the Spur was both a private and public nuisance. Spur contested the action with the defense of *'*coming to the nuisance*.'* The court was sympathetic to the plight of the people living in Sun City and ordered Spur to move, but the court also ordered Webb to pay for the cost of Spur's movement. The American Court reasoned that in the interest of public health and enjoyment of property, Spur must relocate but since Webb had put himself and his clients in the predicament, he must pay to extricate them. It is strongly suggested that the Nigerian Courts should borrow a leaf from the American experience and grant injunction where it is desirable. Our courts must balance the benefits of allowing a nuisance to continue against the cost of the nuisance. The view of the American Supreme Court in the case of *Amoco Production Co. v Village of Gambrel, Alaska*[35]*;* is instructive in this regard. In that case the American Supreme Court observed further as follows:

> Environmental injury by its nature can seldom be adequately remedied by money damage and is often permanent or at least of long duration, that is irreparable if such injury is sufficiently likely, therefore the balance of harm will usually favour the issuance of an injunction to protect the environment.

Nuisance claims should be evaluated from an objective point of view. I rely on the decision of the court in the case of *Lunda v Matthews*[36], where a cement plant was held liable for emitting debris, dust, and fumes that encompassed a land owner's house and aggravated his bronchitis and emphysema. The court reached this determination despite arguments that the land owner's illness made live more vulnerable to debris and dust than could be persons of ordinary health. The court also held that the cement plant could not escape liability merely because it was complying with state pollution standards. The issue of title or other interest in the land is another major drew back in environmental litigation. Here the plaintiff is expected to first of all establish his title to the land or interest in the

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[32]Atsegbua (n 21) 185

[33]*Boomer v. Atlantic Cement Co.* (1970) reported in Understanding Environmental Administration and Law by Susan J. Buck (Island Press 1991) 63

[34] Ibid 62

[35] [1987] 480 US 531

[36]'Environmental Law' http://legal – dictionary .the free dictionary.com/environmental law.accessed 19 March 2014.

land. The theory is mainly to protect title, ownership and possession rights in land. In the case of *Hunter v Canary Waharf Ltd* [1972] 2 NWLR 684, the English Court of Appeal had allow certain persons who did not have any legal interest in land to maintain a suit under the tort of nuisance. The House of Lords up turned this decision on the grounds that the occupation of land was not enough to confer standing right to sue for nuisance. It held further that evidence of exclusive possession was essential.

4. Trespass

The tort of trespass is another means that could be employed by a plaintiff to enforce his environmental rights under common law. Trespass involves an intentional interference with the property interest of an owner or occupier of land for a plaintiff to succeed, the injury alleged must result from the deliberate misconduct of the defendant.[37] The interference must also be unauthorized[38]. The damage complained of must be the direct consequence of the defendant's activities. The tort of trespass is actionable without the need for plaintiff to show evidence of damage suffered unlike nuisance. Therefore a plaintiff could easily obtain an injunction. However, it is only an individual who is an owner or one who is in possession of the land can sue for trespass.[39]It is important to emphasize the point the tort of trespass is of little importance or utility in environmental protection because of the requirement of 'directness' i.e. the act must have been done by the defendant directly on the plaintiff's land. However, in the case of *Umudje v Shell BP* [1975] 9-11SC 1555, the court held that where a Plaintiff has proved that a particular pollutant has spread all over the respondents' farms and into the ponds and lakes, destroyed crops and killed fishes in the pond, a clear case of trespass to land had been established. It is my humble view that a plaintiff in such a situation should be entitled to the award of special damages or general damages as the courts have held that 'the law presumes nominal damages'[40]

5. The Rule in *Ryland v Fletcher*[41]

This rule was propounded by Blackburn J in the case of Ryland v Fletcher where the learned Judge stated as follows: 'The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in his peril, and if he does not do so, is prima facie, answerable for all the damage which is the natural consequence of its escape.'[42]This rule has provided a lot of relief to victims or claimants, since it is one of the strict liabilities and does not require proof of negligence on the part of the defendants. Under this rule also, the Plaintiff does not have to show or prove lack of reasonable care on the part of the defendant as required under the tort of negligence.

All that the court will require the Plaintiff to do is to prove the following;

(i) That there was an escape of something dangerous from the defendant company's land;[43] likely to do mischief;

(ii) That there are a non-natural user, and;

(iii) That the Plaintiff suffered damages as a result of the 'Escape'

The major problem in the application of this rule is the determination of what amounts to a non-natural user in the sense of contemporary Nigeria in the area of Environmental Protection. For example, oil spillage has been the commonest affected by this rule in Nigeria but it cannot be termed non-natural in the light of the fact that Nigeria is an oil producing Nation. However, non-natural user has been interpreted by the court to mean usage of land in an extra ordinary way.[44]However, this rule has been successfully pleaded in some Nigerian cases while in others it was unsuccessful. In *Umudje v Shell B P Nig Ltd*[45]*;* the Plaintiff/Respondent claimed damages from the Defendant/Appellants for the 'Escape' of oil-waste, which the respondents alleged, had damages their ponds, lakes and farm lands. The findings of the learned trial Judge were the crude oil-waste previously collected in a pit burrowed by, and in control of the Appellants escaped into the adjoining lands of the Respondents where it damaged the ponds and lakes in Unenurhe land and killed the fishes therein. On these facts, the Supreme Court held the defendant company liable for the damage done to the Plaintiff's property under the rule in Ryland v. Fletcher.

[37] ibid
[38]*Eutick v Carrying ton* (1765) 19St Tr 1030
[39]Atsegbua (n 21) 253
[40]*Baytide (Nig) Limited v Aderinokun & 2 Ors* [2014] 4 NWLR Pt 1396, [164],[182] r 19
[41] [1866] LR Ex 265
[42] ibid 279
[43]Atsegbua (n 21) 188
[44][1866] LR Ex 265
[45][1975] 9 – 11 SC 115

Another difficulty that litigants may face applying this rule is the fact that rule provides for some liberal defences, which have whittled down the efficacy of the rule. These defences are: Act of God; Consent of the Plaintiff ; Default of the Plaintiff; Act of a Stranger; and Statutory Authority. The defence of statutory authority acts as a complete defence to a claim made pursuant to the rule in *Ryland v Fletcher*. In the case of *Ikpede v Shell BP Dev.* Co Ltd[46]*;* there was a leakage of crude oil from the defendant's oil pipelines which caused damage to the Plaintiff's fish swamp. The court held that even though all the requirements of the rule in Ryland v Fletcher's case were met, the defendant could not be held liable under the rule since the laying of its pipelines was done pursuant to a licence issued under the Oil Pipelines Act. Even the repealed Federal Environmental Protection Agency Act[47]; which attempted to solve this problem in Nigeria by criminalizing violation and provisions of stiff penalties did not cure the difficulty experienced in this regard. Section 20(1) of the Act provides: 'The discharge in such quantities of any hazardous substances into the air or upon the land and the waters of Nigeria or at the joining shorelines is prohibited, except where such discharge is permitted or authorized under any law in force in Nigeria'. However, the Oil Pipelines Act[48] has brought a lot of relief to victims by curing the problem of proof by making liability strict. Section 11 (5)(a)(b) (c) thereof provides: The holder of a licence shall pay compensation:-

(a) To any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection or otherwise made good; and

(b) To any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good; and

(c) To any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

6. Comparative Analysis

It is important at this stage to consider the experience of other jurisdictions.

India

The development of environmental rights in India can be traced to their ancient religions scriptures. The Scriptures ordained 'It was the *dharma* of each individual in society to protect nature.[49] Therefore the average citizen of India has a major role to play in environmental protection, It is not therefore surprising that the modern bases of environmental rights in India are founded in the common law principle of 'nuisance'. In the words of Josh Gellers, public nuisance has been utilized by Indian Courts to determine that public health cannot be jeopardized by private business.[50]Article 21 of the Indian Constitution reads; 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. This provision was expanded by the Indian Supreme Court to include the right to a 'wholesome environment'. It has been held for example by the Courts in India that the right to life includes the right to enjoy unpolluted air and water. The landscape of environmental rights in India have been sharpened by the events which happened in India i.e. the Emergency rule, the Bhopal disaster and judicial activism of the Indian Supreme Court. In India, Environmental rights are considered fundamental rights. In the case of M C Mehta v Union of India[51] there was a claim for compensation for damages resulting from a gas leakage. The application for compensation was based on the enforcement of the fundamental right to life enshrined in Article 21 of the Indian Constitution. The defendants tried to hide under the exceptions of the Rule in Ryland and Fletcher but the court boldly exposed them and held that;

> where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity, the enterprise is strictly and absolutely liable to compensate

[46][1973] All NLR 61

[47]CAP 131 LFN 1990 (now repealed by NESREA ACT Cap F 10 LFN 2004)

[48]Oil Pipelines Act Cap 338 LFN 1990

[49]Josh Gellers,'Righting Environmental Wrongs: Assessing the Role of Legal Systems in Redressing Environmental Grievances'(2014) 26 Journal of Environmental Law and Litigation 477, 478

[50] ibid

[51][1987] All Indian Report 1086 SC

> all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in Ryland v Fletcher.

In that case, the Supreme Court of India decided that effective steps must be taken for the preservation and protection of the *Taj Mahal* at Agra, an internationally famous monument and one of the Seven Wonders of the World. There was danger that pollution caused by emissions from coal-using industries in the neighbouring areas would damage the environment. The court issued directions to 292 industries located and operating in Agra to switch to natural gas as in industrial fuel. It decided that these industries were to be relocated to other towns and locations far from the *Taj*.

Bangladesh

In Bangladesh, a writ petition to pay compensation to people affected by the Flood Action Plan – 20 (FAP 20) (Writ Petition No. 998 of 1994) was filed in 1994 in the High Court by Dr. Mohuidd in Farooque, Secretary General, Bangladesh Environmental Lawyers Association (BELA) against the unlawful design and implementation of the FAP – 20 in the District of Tangail. The Petitioner claimed that the implementation of the project had subjected the lives and property of the inhabitants of Tangail to an unfair experiment, which was contrary to the constitutional spirit of equality as those affected by the project were not adequately compensated. The Petition was first rejected by the High Court on the ground of lack of standing on the part of the Petitioner, but was subsequently sent back for hearing on merit to the High Court after the Appellate Division granted BELA standing on the ground that by working in the field of environmental law, it has acquired sufficient interest to be recognized legally as upholding the progressive values of mankind. The Petition was brought against the Secretary, Ministry of Irrigation, water resources and flood control; the Chief Engineer, Flood Plan Co-ordination Organization; the Chairman, Bangladesh Water Development Board; the Project Director FAP – 20; the Secretary, Ministry of Land Revenue and Land Reform; and the Deputy Commissioner,Tang Ail.The Petitioner complained of the violation of a number of laws by the Respondents, namely, the Bangladesh Water and Power Development Board Order, 1972, the embankment and Drainage Act, 1952, and the Acquisition and Requisition of Immovable Property Ordinance, 1982. The last status provides for compensating affected people for all kinds of loss and for protecting national heritage. The High Court observed that 'in implementing the project the respondents cannot with impurity violate the provisions of law …. We are of the view that the FAP – 20 Project work should be executed in complying with the requirement of law.' In 1952, about 4,000 persons were said to have died from air smog in London. Also in 1956, the London Parliament enacted the Clean Air Act. This was the first Statute entirely devoted to clean air. America also enacted the Clean Air Act in 1977.

7. Constraints in the Enforcement of Environmental Standards

Apart from the constraints inherent in the enforcement of the citizens' rights under common law and statutes, there are some others which may also hinder a successful litigation in the area of environmental protection. These problems are:

Lack of Trained Practitioners: -There is a dearth of qualified trained practitioners in the field of Environmental Law. Most practitioners who handle cases in this area always have difficulty in appreciating the technicalities involved in this area of law. Furthermore, most Judges and Lawyer are ill equipped to appreciate the scientific issues at stake.[52]According to Armstrong;

> … There is no obvious answer to the question of how courts resolve scientific disputes … Judges are often too busy to wait to get into the business of sorting out whether a preferred expert is really an expert. Even if they are not busy, many Judges (and lawyers) probably considered and reject a career in science at some point because they do not like it and are not good for it.[53]

In addition, many Lawyers and Judges lack appropriate information on the destructive and harmful potentials of industrial emissions and other wastes. For example in *Allar Iroh v Shell BP*[54] the learned Judge of a High Court sitting in Warri, Delta State of Nigeria, refused to grant an injunction in favour of the Plaintiff whose land and

[52]Omotola (n) 116
[53] ibid
[54](WHC, 26 November 1973)

fishpond had been polluted by the defendant's operations for socio-economic reasons. It was clear the Judge least understood the import of sustainable development. Whereas in *Olutemehin & Ors. v Lagos City Council*[55], which was a simple case involving, the unreasonable disposal of human defaces near a church premises, the trial Judge understood clearly the case of the Plaintiffs and granted not just injunction for nuisance but also found the defendant negligent. However, the recent judgment of the Federal High Court Sitting in Benin City, Edo State of Nigeria, is a welcomed development. Mr Justice Nwokorie has demonstrated by the judgment in the case of Jonah *Gbemre v SPDC & 20 ors*[56], a good understanding of the principles of environmental law. The Court did not only declare gas flaring illegal but also called for an immediate amendment of the laws regulating gas flaring to bring it in line with Chapter 4 of our constitution. I commend that courage of the court in this regard. Nwokorie J also while delivering a ruling dated 10 April, 2006 in the same case, on a Motion for stay of execution of the Judgment earlier mentioned held while granting partial stay of execution as follows: 'However in view of the very peculiar and sensitive nature of the subject matter of these proceedings i.e. Gas flaring, and there being no judicial authority in Nigeria on the issue, I have to resort to a Plethora of authorities in other jurisdictions which have made specific findings on the operations of oil and gas companies in those countries'.[57]The court held further;

> In the final analysis I hold, declare as follows: A conditional stay of execution of this court's order stopping gas flaring in the Iwherkan Community is hereby granted. The Shell Petroleum Development Company and its Joint Venture Partner, the NNPC are allowed a period of one-year from today to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of this Honourable Court.[58]

SPDC has however filed an appeal against the judgment already mentioned. Lord Uwais P, has commented on the need for Judges in Nigeria to acquire basic knowledge in Environmental Law, stated while presenting a recent International Seminar Paper on Environmental Law, that:

> It is a truism that environment sustains life and that it is the foundation on which socio-economic development is based. It follows then that Judges ought to have adequate understanding of the law relating to environment. In Nigeria, the number of disputes arising from pollution and environmental degradation is ever increasing. Therefore, it has become necessary for our Judges to be trained on the intricacies of environmental law so that their task in adjudication could be made easy and proficient.[59]

Mr Justice Oyeyipo, Administrator of the National Judicial Institute, Nigeria, also stated as follows:

> It is essential and pivotal to creatively provide truly learned judicial officers who will exude intellectual confidence to keep ahead of counsel and parties appearing before them. Since the Stockholm conference on the Human Environment (June 1972) and for over 30 years, Environmental Law and Policy at the global, regional and national levels, have increased tremendously. To keep up with the evolution of environmental law, the judiciary needs to be fully involved in the process of both taking bold decisions for the development of environment law and regulations where there are gaps, and the enforcement of existing legislation. The judiciary is an important partner in environmental management as it balances environmental social and development consideration in judicial decisions. Hence continued judicial training is not only essential, but also a critical element necessary for capacity building and sensitization which is requisite for the positive interpretation of environmental law, and evolving the law of sustainable development. This cannot be over-emphasized, especially with the current globalization trends and the inherent impact on the environment.[60]

Delay of Cases: - Environmental Protection cases compete for hearing alongside the innumerable other cases also assigned to the same court. Court congestion and very long adjournments would invariably affect the authenticity of evidence and prolong the suffering of the victims. Also, frequent transfer of Judges or death of Judges would result in the case starting afresh and this often poses a lot of problems to victims.

[55][1968] ANLR 114
[56] (FHCB) (n 27)
[57]*Jonah Gbemre v. SPDC & Ors* (n 8)
[58]ibid [29]
[59]ibid[29]
[60]Ibid [29],[30]

Problem of Proof

In Environmental litigation, expert evidence may be necessary to prove highly professional and technical matters to assists the court in carrying of a fair and just decision.[61] Environmental harm may not manifest itself immediately. It is so technical in nature in terms of proof. The judicial authorities of *Seismograph Services Ltd. v Akpruoyo*[62]; and *Dumez Nig. Ltd. v Ogboli*[63]; are examples.

Ignorance

There is a high level of ignorance in respect of environmental rights in Nigeria. Many citizens still do not know about their rights. This is common even among the elites such as lawyers. Therefore there is need for continuing legal education in this respect to equip lawyers with knowledge of environmental protection rights and how to fight for them on behalf of their clients. This is necessary as majority of the victims are usually illiterate; for example, the Niger Delta region of Nigeria.

Distant Courts

There is also the problem of distant courts. The locations of courts where citizens can enforce their environmental protection rights are normally far from the communities where such violations occur. The courts are usually located in the cities. This is a discouraging factor for intending litigants.

8. Conclusion

From the foregoing, it is clear that one of the major constraints in environmental litigation is the problem of proof with respect of negligence. The burden placed on the Plaintiff is too Herculean. As already identified, most of the victims do not have the money to hire the services of experts. There is also the problem of ignorance on the part of the people. There is the erroneous feeling that litigation is an expensive venture. They feel hiring lawyers is expensive. So they shy away and live with the nuisance. There also lack of adequate sensitization of the populace. A major limitation of the common law of Tort in the area of environmental protection is that it focuses on the protection of private interest in land. Also under the law of tort, a victim cannot sue until damage occurs. Therefore it is submitted that the common law Tort is not helping to protect the environment in that it is not preventive. It does not also have the capacity to restrain the occurrence of the damage. It only allowed for the payment of compensation. Liability under common law is based on fault. From the experience of other jurisdiction like India, it is clear that there is the need for Nigeria to enact more laws to protect the environment and also make liability strict. In Nigeria, the attention of government seems to be only on the oil industry. Hence, litigants who are affected by other forms of environmental problems are only left to rely on common law tort.[64] It is therefore submitted that judicial activism is necessary at this time to develop the environmental protection rights of the Nigerian citizens.[65] Furthermore, there is the need for amendment of the current Constitution to include environmental rights as fundamental rights. Reforms are also advocated in the judicial process and for the creation of special environmental protection courts as is the case in Edo State.[66]Environmental law is the most challenging area of law facing the world's judiciary today. It is one of the areas of the administration of justice where the judiciary is least familiar and least equipped to handle.[67]

[61]Niki Tobi, 'Judicial Enforcement of Environmental laws in Nigeria' (2005) 2 no. 1 *Environmental & Planning Law Review* 90, 99

[62][1974] 6 SC 119

[63][1972] All NLR 241

[64] See Ikenga K.E.Oraegbunam; MVC Ozioko & Chukwubuikem J. Azoro, 'Remedies for Breach of Environmental Standards in Nigeria', *International Journal of Innovative Legal & Political Studies*, 7(2):13-21, April-June, 2019

[65]See Ikenga K.E.Oraegbunam, MVC Ozioko & Chukwubuikem J. Azoro, 'Mechanisms for Enforcement of Environmental Standards in Nigeria,' *International Journal of Innovative Development and Policy Studies*, 7(2):129-134, April-June, 2019

[66]Edo State Sanitation and Pollution Management Law 2010, s 59

[67]*Jonah Gbemre v SPDC &Ors* (n 8)