

INTERROGATING THE LEGAL REGIMES ON TRANS-BOUNDARY HAZARDOUS WASTE DUMPING IN NIGERIA

Enakireru Eric Omo* and U. D. Ekott**

Abstract

This article examines the efficacy of regulatory mechanisms of trans-boundary hazardous waste dumping in Nigeria, trans-boundary movement and disposal of hazardous waste is a global phenomenon which poses serious threat to both man and the environment including all the competing elements in the ecosystem. Hazardous waste is toxic in nature with the capacity to alter ecological balance to the detriment of man. The article critically interrogates the assessment of regulatory mechanisms in Nigeria, legislation on hazardous waste, common law as a regulatory mechanism, case law as a regulatory mechanism, the role of non-governmental organisation as a regulatory mechanism, and posits that environmental damage occasioned by hazardous waste could be permanent and irreversible. Nigeria was confronted with the problem of such extra-territorial disposal of hazardous waste material when in 1988; toxic was dumped in Koko, a coastal town in Delta State. This article seeks to attempt an assessment of regulatory mechanism in Nigeria. This is with a view to proffering suggestions for reform and recommendations for appropriate interpretation of relevant statutes and strict enforcement in tackling the menace of hazardous waste in Nigeria.

Keywords: Enforcement, environment, hazardous waste, regulations

* B.L, PhD, Senior Lecturer, Department of Jurisprudence and International Law, College of Law, Western Delta University, Oghara, Delta State. E-mail: ericomo61@yahoo.com, 08050617977, 07062041722

** **Lecturer**, Department of Jurisprudence and International Law, College of Law, Western Delta University, Ogharra, Delta State, Nigeria Tel: 08038180070, Email; ekott4sute@yahoo.com

Introduction

Export of toxic waste to Africa began in 1988. This was as a result of the discovery of containers of toxic waste imported by a Nigerian peasant living near the small port of Koko.¹ Koko is a coastal community located in Delta State in Nigeria. It lies close to Atlantic Ocean with a population of about 25,000 people who are predominantly farmers and fishermen. The community lacks basic social and economic infrastructure such as hospital, potable water supply, school, sewage system and good roads.²

In September 1987, an Italian businessman, based in Nigeria and acting on behalf of an Italian waste disposal company, shipped to the port of koko 4,000 tons of industrial and unclear waste over eighteen months' period. These wastes were brought into the country purportedly as industrial chemicals for a Nigerian construction company.³ It became clear that Nigeria and other African countries have been turned into worlds dumping ground. According to Astegbua quoting a Nigerian Magazine, African Concord stated that the trade in toxic wastes:

Re-echoes what Europe has always through of Africa: a wasteland and the people, who live there, waste beings. Export of toxic waste in general has become a lucrative international business. The highly developed countries in the world particularly in the west due to the growth of powerful environmental lobbies within them are finding it more and more complicated to deal with their industrial waste. The solution has been to send these wastes abroad. The main victims are the poor countries of former Eastern Europe and the third world.⁴

Since the first experience of the illegal dumping of hazardous wastes in Nigeria in 1988, there have been many attempts by Nigerian businessmen and foreign waste merchants in industrialized countries to ship waste, toxic chemicals, and contraband chlorofluorohydrocarbons into the country. Various methods were employed to commit such acts. In 1992 and 1993

¹ L.A. Atsegbua et al *Environmental Law in Nigeria Theory and Practice*, 2nd Edition, (Benin Amik Press, (2010) 63.

² Ibid

³ Ibid

⁴ Ibid

fifty alerts were received by the Nation's Dump Watch Network⁵. According to a report by the Inspectorate and Compliance Monitoring Department of NESREA, the following incidents were recorded:⁶

- a. an offer to 'dispose radioactive waste' by one Chief Kalu Ezemballa of Gopitech Waste Disposal Limited;
- b. a business proposal emanating from one Prince M. M. Ajasin to import waste through Germany;
- c. importation of 71.41 metric tons of waste to Nigeria from the United Kingdom in 1993;

In 1994 and 1995, about 15 toxic chemicals and waste alerts were received from Dump Watch Network. Out of these, twelve were purported requests by alleged Nigerian businessmen, while three were deliberate efforts by foreign companies to dump toxic wastes in the country.⁷ The latest method

⁵ M. T. Odubela, et al; "Transboundary Illegal Shipments of Hazardous Waste, Toxic Chemical (Pesticides) Contraband Chlorofluorohydrocarbons: The Nigerian Experienced" being a paper presented at the fourth international conference on Environmental Compliance and Enforcement held in Chiang Mai Thailandm (1996). 34

⁶ Ibid, a business proposal on Toxic Waste disposal in Nigeria by one Alhaji Mohammed Suleiman of Plos-Chem Limited from Germany; a request for "transportation of dangerous good" gases, poisonous substances and infectious corrosive substances and miscellaneous dangerous goods by one Anumanu O. Anumanu from Germany; Nodek Limited plan to import milk suspected to be radioactive from Baltic region; alerts from the Canadian High Commission of persistent efforts by Messrs A.C. Okasi & Associates to import hazardous wastes from Canada through letters and several phone calls; also a company called Alfa Estate solicited for hazardous wastes from Canada; alerts from one Dr. Chinendu Okafor requesting toxic waste from Canada to Nigeria; an alert on increase in the dumping of toxic wastes in Indonesia from Germany, Singapore, South Korea, USA and Netherlands; an alert from Basel Convention Secretary on an attempt to dispose of toxic waste into Nigeria by one John M. Eke; attempts to re-export twenty-two rail cars loaded with toxic waste [oil waste, chemical alkaline, used batteries] from Czech Republic by five German firms to unnamed third world countries; and alert on Australia's intention to ship toxic waste overseas.

⁷ The Federal Environmental Protection Agency then made an appeal to airlines to maintain strict compliance of International Aviation regulations and other International Conventions when asked to carry pesticides and other hazardous chemicals and substances. Similar appeal was made recently by NESREA through its Director-General, Dr. N. Benebo. In the case of contraband chlorofluorohydrocarbons, the trend in Nigeria now is the importation, at cheap prices, of second hand refrigerators, air conditioners, compressors, deep freezers and cars which contained chlorofluorohydrocarbons that are being phased out in the industrialized countries.

employed by this group of purported importers was to disguise toxic chemicals and wastes as raw materials under various false labeling. Polychlorinated Biphenyls were being labelled as vegetable oil and Poly Vinyl Chloride as artificial raisins. The most outrageous and dangerous alert was on the proposed importation of radioactive milk products from the Baltic region into Nigeria.⁸

In March, 1993, a consignment of expired chemicals labelled “ACTELLIC 25 EC”, brought in by Sud Air Transport, a chartered aircraft from Conakry, Guinea, was left unclaimed at the Murtala Mohammed International Airport. These chemicals were packed in cement bags with instructions written in French. Because of the offensive odour emanating from the consignment, officers of the Department of Customs and Excise called the attention of Federal Environmental Protection Agency inspectors. On investigation, it was discovered that the chemicals pesticides were expired. The summary of the investigations were as follows:⁹

- a. the labelling of the Conakry consignments violated the United Nations Program, World Health Organization and Food and Agriculture Organization code of conduct on the safe use and handling of pesticides, because the instructions on the consignments were not written in the language of the users;
- b. the consignment contained no radioactive element, neither did they emit radiation of any type;
- c. the chemical, however, exhibited all the characteristics of expired Actellic25;
- d. the chemicals were unsuitable for their recognized and intended use; and
- e. the chemicals contained a serious environmental health hazard if allowed in the environment.

About 25,000 units are being imported into the country annually according to Custom Department unofficial sources. These goods which have outlived their usefulness are being dumped under the pretence of being fairly used. The implication of the carbon monoxide emitted by cars is adding more carbon dioxide to the atmosphere, supercharging thereby natural greenhouse effect, causing global temperature to rise.

⁸ Ibid

⁹ Ibid

Consequently, the Federal Environmental Protection Agency (Now National Environmental Standard and Regulation Enforcement Agency (NESREA) expressed grave concern over the following:

- a. the latest increase in international chemical merchandising especially by illiterates, market traders and other people not competent to handle chemicals safely;
- b. the continuous dumping of deteriorated and inappropriately labelled agrochemicals in the country;
- c. the recent switch to air freighting of pesticides to sidetrack the effective checks and inspections of Federal Environmental Protection Agency staff at the sea ports; and
- d. the poor handling of chemicals including the use of cement sacks as substitute for safe packages.

1. Assessment of Regulatory Mechanisms in Nigeria

The dumping of toxic wastes in Koko, a small seaport town in the then Bendel State (now Delta State in 1988 necessitated the enactment of environmental regulatory mechanism. In spite of the fact that Nigeria has a plethora of regulations aimed at environmental protection, the most comprehensive of these regulations is the National Environmental Standards and Regulation Enforcement Agency Act. Nigeria is also signatory to several international conventions aimed at environmental protection. These regulatory mechanisms shall be discussed as follows: The Koko toxic waste incident seems to have awakened environmental consciousness in the country. Prior to this incident there were some enactment relating to environmental matters, but not in elaborate manner, for instance, the Petroleum Act, the Oil Mineral Act, the Factories Act and the Criminal Code. Since then there has been a steady and progressive legislative attempt to put the issues relating to environment on the front burner. Both governments that are the three tiers of government and the people are now more conscious and are actively participating in environmental matters than ever before.

2. Nigeria Perspective and Legislation on Hazardous Waste

- a.* The Constitution as a Means of Regulatory Mechanism: Nigeria is a federation consisting of states and a Federal Capital Territory.¹⁰ In a true federalism, government power and responsibilities are shared among the federating units. Nigeria is made up of 36 states and a Capital Territory. Each state in turn is divided into smaller units called the Local Government Areas of which are 768. In the allocation of responsibilities, environmental matters appear not to be specifically provided for in the constitution but there are certain portions which are relevant to environment.

Power to legislate for the federation is vested in the National Assembly.¹¹ The National Assembly has power to make laws with respect to matters in the exclusive list set out in part 1 of the schedule to the constitution and any matter in the concurrent legislative list set out in the first column and any other matter with respect to which it is empowered to make law in accordance with the constitution.¹²

This implies that the Federal Government is competent to legislate on exclusive list and the concurrent legislative list. Powers not granted in the current list and which cannot be reasonably implied from those granted, are deemed denied.¹³

Items on environment not mentioned in the two legislative lists are deemed to fall into the residual matters for the state. The omnibus provision given to the Federal Government to make laws on ‘any matter incidental or supplementary to any matter mention elsewhere’¹⁴ Thus, the Federal

¹⁰ See s. 2(2) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

¹¹ Ibid s. 4.

¹² Ibid.

¹³ Under exclusive legislative list the following are items relevant to environmental issues: Aviation, Drug and poisons, Fishing and fisheries, Maritime shipping and tidal water and river and its effluents, Meteorology, Mines, mineral including oil fields, mining and geo-logical survey and natural gas, National parks, Nuclear energy, Quarantine and Water from sources deemed by the National Assembly to affect more than one state.

Under the concurrent legislature list which both tier of governments could legislate which have environmental relevance are: Antiques, monuments and archives, Electric power, Industrial, commercial and agricultural development and Scientific and technological research.

¹⁴ Ibid, item 68 of part 1 of schedule

Government has pre-eminence in matters relating to environment.¹⁵ Section 20 of the constitution is particularly relevant to environmental provision. It provides that: ‘The state shall protect and improve the environment and safeguard the water, air, land, forest wildlife of Nigeria.’¹⁶

conversely, these laudable provisions under chapter 2 of the constitution is not justiciable in case of non-compliance¹⁷ from the above provision discussed above, the Federal Government can validly make laws on environmental matters irrespective of whether the matter is directly or indirectly in any of the legislative lists or not. The two Acts which came in the wake of Koko toxic waste incident – Federal Environmental Protection Agency Act No. 58 of 1988 and the Harmful Waste (Special Criminal Provisions) Act of 1988 were enacted pursuant to these provisions.

b. Harmful Waste (Special Criminal Provision) Act¹⁸ the Act was in a direct response to the over mentioned, Koko incident. It makes it an offence for any person to carry, deposit, dump or be in possession of any harmful waste on Nigerian soil, inland water or seas.¹⁹

The Act lists parties to the crime²⁰ and makes provisions for crimes committed in prosecution of a common purpose²¹ and accessories after the fact.²² The Act has strong sanctions against offenders. Those found guilty of offence under sections 1 to 5 of the Act shall be sentenced to imprisonment for life including forfeiture of the facilities used in the commission of the

¹⁵ s. 16(2) S. 17(3) is equally relevant

¹⁶ In addition to these provisions chapter 2 of the constitution which deals with fundamental objectives and Directive Principles of State Policy lays down policies which are expected to be pursued by the nation in order to achieve national ideals. Under this chapter, the following provisions are of overwhelming relevance: The state shall direct its policy towards: The promotion of planned and balanced economic development; That the material resources of the community are harnessed and distributed as best possible to serve the common good. That the economic system is not operated in such a manner as to permit the concentration of wealth and means of production in the hands of a few individuals or groups; and That suitable and adequate shelter and food, reasonable national minimum living wage, old age care, pensions and unemployment and sickness benefits are provided to all citizens.

¹⁷ Ibid, s. 6(6)

¹⁸ Cap. HI, LFN 2004

¹⁹ Ibid s. 1

²⁰ Ibid s. 2

²¹ Ibid s. 3

²² Ibid s. 5

crime and land in which such harmful waste was deposited to the Federal Government.²³

The Act waves diplomatic immunity.²⁴ This means that persons who enjoy diplomatic immunity will automatically lose it if they commit the crimes listed in the Act. This is a far-reaching provision which goes to show the seriousness. The Federal Government attaches to the control of toxic wastes in the country.

The power of search, seizure and arrest by the police officer is provided in the Act.²⁵ Apart from sanctions imposed on the offenders, they are to suffer civil liability as well.²⁶ It states that:

Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage except where the damage –

- (a) was due to the fault of the person who suffered; or
 - (b) was suffered by a person who voluntarily accepted the risk thereof.²⁷
- 2) In this section, “damage” includes the death of, or injury to any person (including any diseases and any impairment of physical or mental condition).²⁸

The provisions of the Act give a clear indication of the Government’s intention and determination to tackle toxic waste trade frontally. “The Federal High Court shall have exclusive jurisdiction to try the crimes specified in this Act”²⁹

²³ Ibid s. 6

²⁴ Ibid s. 9

²⁵ Ibid s. 10

²⁶ Ibid s. 12

²⁷ Ibid, s. 12(1)(a) and (b)

²⁸ Ibid, s. 12(2)

²⁹ Ibid, s. 13

c. Associated Gas Re-injection Act:³⁰

The Act places obligation on every company in the oil and gas industry to submit its preliminary programmes for gas re-injection and detailed plan for implementation of gas re-injection, to the Minister.³¹ The Act places a terminal date on gas flaring. Gas flaring was to cease on or before 1st January 1984 with a proviso which is now a loophole for unscrupulous oil and gas industry operators. It reads:

Where the Minister is satisfied after 1st January 1984, that the utilization or re-injection of the produced gas is not appropriate, he may issue a certificate in that respect to a company producing oil and gas specifying such items and conditions as he may at his discretion, choose to impose, for the continued flaring of gas on the particular field(s); or permitting the company to continue to flare gas in the particular feed(s), if the company pays a sum as the Minister may from time to time prescribe for every 28.317 standard cubic metres (SCM)³²

It is very sad to note that the very major objective of the Act that is to stop gas flaring which is the one of the major sources of air pollution particularly in Niger Delta Area has not been achieved. All over Niger Delta, it is common to sight flares. As a follow up to the Act, Nigeria Liquefied Gas Act³³ was promulgated for the utilization of Nigeria's enormous gas reserves.

d. Management of Solid and Hazardous Waste Regulations³⁴ this instrument deals essentially on the collection, treatment and disposal of solid and hazardous waste from municipal and industrial sources. It also identifies series of chemicals and chemical waste and classified their toxicity.³⁵

³⁰ Cap. 26 LFN 1990 (Cap 20, LFN 2004)

³¹ Ibid, s. 2

³² Ibid, ,3

³³ Act No. 39 of 1990

³⁴ Special Instrument No 15 of 1991 cited in Atsegbua et al Environmental Law in Nigeria supra note 25, at 29.

³⁵ Ibid

- e. Environmental Impact Assessment Act:³⁶ This law compels every major development project which might affect the environment adversely to be examined to ascertain the likely adverse impact it would have on the environment. It compels old existing projects to be audited with a view to reorganizing them to be environmental friendly. The goals and objectives of the E.I.A. Act shall be:³⁷
- i. to establish before a decision taken by any person, authority, corporate body or unincorporated body including the Government of the Federation, State or Local Government intending to undertake or authorize the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into accounts;
 - ii. to promote implementation of appropriate policy in all Federal Lands (however acquired) states and Local Government Area, consistent with all laws and decision making processes through which the goal and objective in paragraph (a) of this section may be realized;
 - iii. to encourage the development of procedure for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or trans – state or on the environment of bordering towns and villages.

There is a requirement for detail degree of environmental significant,³⁸ opportunity for public participation. This provides an opportunity for environmental experts and relevant NGOs to bring their pressure to bear on issues of environmental importance. The Act requires an assessment of public or private projects likely to have a significant adverse impact on the environment.³⁹ It requires an application in writing to the Agency before embarking on projects for their environmental assessment to determine

³⁶ No. 68 of 1992

³⁷ Ibid, s. 1 (a) (b) and (c)

³⁸ Ibid, s. 5

³⁹ Ibid, s. 2(1)

approval.⁴⁰ Spells out case where EIA is required⁴¹ and create a legal liability for contravention of any of the provisions of the Act.⁴²

f. National Environmental Standards and Regulation Enforcement Agency Act (NESREA) 2007⁴³ The Act replaced the Federal Environmental Protection Agency Act (FEPA). It is the embodiment of laws and regulations focused on the protection and sustainable development of the environment and its natural resources. The following provisions are worth noting: -

The objectives of the agency are clearly set out as follows: -

The agency, shall, subject to the provisions of this Act, have responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.⁴⁴

The functions and power of the Agency are set out in section 7 which includes: -

Enforcement of compliance with the provision of the international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation chemicals, hazardous wastes, pollution etc. and such other environmental agreements as may from time to time come into force.⁴⁵ Enforce compliance with policies, standards, legislation and guidelines on water quality, including pollution abatement.⁴⁶ Enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas and other water bodies other than in oil and gas sector.⁴⁷ The Agency has power to purchase or take on lease interest on the land build, equip and maintain the offices and

⁴⁰ Ibid, s. 2 (4)

⁴¹ Ibid, a. 13

⁴² Ibid, s. 60

⁴³ No. 25 of 2007 with commencement date of 30th July, 2007

⁴⁴ Ibid, s. 2

⁴⁵ Ibid s. 7(c)

⁴⁶ Ibid, s. 7 (b)

⁴⁷ Ibid, s. 7 (h)

premises for the performance of its functions under the Act,⁴⁸ Prohibit processes and use of equipment or technology that undermine environmental quality,⁴⁹ submit for the approval of the Minister, proposals for the evolution and review of existing guidelines, regulations and standards on environment other than in the oil and gas sector.⁵⁰

It is sad to note that, the Act, excludes the Agency regulatory power over oil and gas sector which is the major toxic waste generator in Nigeria. The Act prohibits without lawful authority, the discharge of hazardous substances into the environment. This offence is punishable under the section, with a fine not exceeding ₦1,000,000 (one million naira) and an imprisonment term of 5 years. In the case of a body corporate, every person who at the time of the offence was committed was in charge of the body corporate shall be deemed to be guilty of such offence.⁵¹

There is a provision that if the offender proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence he shall not be liable.⁵² There are various sanctions for violation of the provisions of the Act. On the whole, the Act is commendable. It is hoped that with diligent implementation and enforcement of the provisions of the Act, it will drastically reduce the hazardous waste in the country.

Some of the regulations under NESREA include:

- g. National Environmental Protection (Pollution Abatement in Industries and Facilities Producing Waste) Regulations:

This regulation prohibits the release of hazardous substances into the air, land or water of Nigeria beyond approved limits, set by the agency. It also requires industries to report a discharge if it occurs and to submit a comprehensive list of chemicals used for production to the agency.⁵³

⁴⁸ Ibid. s. 8(d)

⁴⁹ Ibid s. 8(k)

⁵⁰ Ibid s. 27 (2) and (3)

⁵¹ Ibid

⁵² National Effluent Limitation Regulations ss. 1(1), 3 (2)

⁵³ See ss. 1, 4 and 5 of National Environmental Protection (Pollution Abatement in Industries and Facilities Producing Waste) Regulation of 1991.

h. Solid and Hazardous Waste Management Regulations (1991)

The regulation requires industries to identify solid hazardous wastes which are dangerous to public health and the environment and to research into the possibility of their recycling. It makes notification of any discharge to the agency mandatory and stipulate penalties for contravening any regulation.⁵⁴ Apart from the Federal Laws on environmental matters, there are various state legislations on this score. For example, there is the Imo State law on the Pollution Prevention and Control Miscellaneous Provisions) Edit of 1985. This law makes it compulsory for industries that generate industrial waste to make arrangement for the disposal or treatment of such wastes. It makes it an offence for any industry to discharge foul water into any natural or artificial stream, water course, pond or lake until the foul water has been treated so as not to affect the purity and quality of the water in any of the said water bodies.

- i.* Environmental Sanitation Edicts.⁵⁵ These edicts exist in many states of the federation with little modifications in titles. However, they have common provisions. These include the establishment of bodies for environmental sanitation and the prescription of environmental offences and penalties. In terms of scope they cover such sanitation issues as waste disposal, industrial and commercial pollution, aesthetic quality of the environment, pest control, control of noise, production and sale of food, treatment and handling of domestic waste as well as sewage, drain and pollution or obstruction of water channels.

Consequently, these edicts are not adequately implemented.

There is some other legislation both federal and state which cannot be examined in this work due to resources and time constraint, such as Criminal Code particularly section 245 and 247 which prohibits the fouling of water and punish any vitiation of the atmosphere.

- j.* Oil Terminal Dues Act⁵⁶ This Act contains provisions designed to control or prohibit oil pollution of water and or land. Where oil or

⁵⁴ Solid and Hazardous Waste Management Regulation ss. 1, 20 and 108.

⁵⁵ See No 12 of 1985, as amended by No. 4 of 1987 (Lagos State), No. 4 of 1986 (Oyo State) and No. 8 of 1984 (Kaduna State) cited in Atsegbua et al Environmental Law in Nigeria, supra note 25 at 31.

⁵⁶ Cap 339 LFN 1990.

mixture is discharged into any part of the sea from a pipeline or vessel as a result of any operation for evacuating oil, the owner of the pipeline or vessel who is the person in charge of the oil under the oil in Navigable Waters Act, shall be liable. Furthermore, he shall be subject to the penalties provided under s. 6 of the same Act.

- k. The Rivers Basin Development Act; This Act provides for the establishment of eleven River Basin Development Authorities such as the Chad River Basin Development Authority for both surface and underground water resources for multipurpose use, with particular emphasis on the provision of irrigation infrastructure, operation construction and maintenance of dams, wells and boreholes to supply water from the authority's storage facilities for a fee to be determined by the authority with the approval of the Minister.⁵⁷

3. Common Law as a Regulatory Mechanism

The law of tort mainly prescribes the control of environmental pollution under the common law. A tort is a civil wrong, which entitles the injured party to claim damages for his loss or seek an injunction for the discontinuance or prevention of the wrong.⁵⁸

There are four specific torts directly relevant to pollution namely: Negligence, Nuisance, trespass and strict liability.

a. Negligence:

The tort arises where there is a legal duty of care and that duty has been breached which resulted in damage which though not intended by the defendant is nevertheless foreseeable.⁵⁹

In order to succeed, the plaintiff must prove that:

- i. The defendant/polluter owed him a duty of care
- ii. That the duty of care has been breached by the polluter
- iii. That the breach has caused foreseeable damage to the plaintiff.

⁵⁷ Cap. 269 LFN 1990

⁵⁸ Ibid, at 32

⁵⁹ Winfield and Jocowicz, (1998) Tort, 15th edition, (London, Sweet and Maxwell, 1998) 9 – 170 cited in Atsegbua et al supra, note 34 at 32

Where the plaintiff successfully proved his case, he can recover against the defendant in any of these remedies – damages and injunction, which could be prohibitive or mandatory. The locus classicus case is the case of *Donoghue v Stevenson*⁶⁰ In that case Lord Atkin laid down the following rules:

The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyers question, who is my neighbour? Receives a restrictive 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 seem to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being, so affected, when I am directing my mind to the act or omission which are called in question.⁶¹

These principles of law have been applied in Nigerian cases. In the case of *Atunbi v Shell BP petroleum Development Company of Nigeria Ltd*⁶² the plaintiff claimed that the defendant has cause oil, gas, and chemicals to escape from pipelines under their control thereby destroying fishes in the pound and their farmland. The court held that the plaintiff could not prove that the defendant was negligent.

According to Atsegbua, the major setback of this law is that although it protects individual against pollution, it is bedevilled with the problem of proof. Atsegbua suggested that the plaintiff can plead “*Res Ipsa Loquitor*”, that is the fact speaks for itself; by this rule the plaintiff may be relieved of the burden of proving the defendant’s negligent. Again it is not very easy as the defendant can rebut it with expert evidence to the effect that the defendant took reasonable care and acted according to the industry practice.⁶³

⁶⁰ (1932), A.C. 502

⁶¹ Ibid

⁶² Unreported Suit No UCH 48/73 of Nov. 12th, 1974, Ughelli High Court cited in Atsegbua et al Environmental Law in Nigeria supra note 34 at 186

⁶³ Ibid at 186 and 187

b. Nuisance

Nuisance arises when emission of noxious or offensive material from the defendant's premises significantly impairs the use and enjoyment by another of his property or prejudicially affects his health, comfort or convenience.²⁹⁸⁶⁴ Nuisance may be private or public. The distinction is important because public nuisance, prior to 1979 constitution. It was only Attorney – General of the Federation could militate. However, the position now is that the plaintiff can sue if he can show that he suffered more damage over and above that suffered by the public, otherwise, it would be struck out for incompetent.⁶⁵ However, based on the decision in *Adediran v. Interland Transport Limited*⁶⁶ The consent of Attorney - General is no longer necessary.

c. Trespass to Land

Another means by which a plaintiff can enforce his rights under environmental pollution law is trespass to land. This law consists of any unjustifiable intrusion by one person upon the land in possession of another.⁶⁷ In order to succeed, the act of the defendant on the land must be a physical act on the plaintiff's land. It will thus, amount to trespass if a company should dump waste or noxious material on the land of another without his consent. In *Southport Corporation v Esso Petroleum*,⁶⁸ the defendant oil tanker became stranded and the oil jettisoned. The oil was carried by tide to the plaintiff shore and caused considerable pollution. The court held that there was liability on the part of the defendant company.

Note that only person who is an owner or who is in possession of land can sue for trespass.

⁶⁴ Ibid at 32

⁶⁵ See *Amos and other v Shell BP Petroleum Development Company of Nigeria Ltd* (1977)6 S.C., 9 cited in Atsegbua et al Environmental Law in Nigeria supra note 23at 33

⁶⁶ (1986) 2 NWLR, part 20, 78 and also *Umudje v Shell BP Petroleum Development Company of Nigeria Ltd*, (1975) 9 – 11 SC. 172.

⁶⁷ Clark and Landsell on Tort 13th ed; at 1311 cited in Atsegbua et al Environmental Law in Nigeria supra note 34 at 189

⁶⁸ (1956) A.C. 218, Ibid

d. *The Rule in Rylands v Fletcher*⁶⁹

This is a strict liability tort. That is the polluter is liable irrespective of wrongful intent or negligence. The House of Lords laid down this rule thus:

We think that the rule of law that the person who brings on his land, collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, is 'prima facie', answerable for all the damage, which is the natural consequence of the escape.⁷⁰

The plaintiff in order to succeed must prove that there was a non-natural use of land by the defendant. He must also prove that there was an escape of materials or objects from the defendant's land to his property. Thus, personal injuries arising from the escape of things from land are excluded.

Despite this setback, the rule has been applied successfully in environmental litigations particularly against oil companies. The scope of this rule is not limited to inherently dangerous materials such as explosives, gas, petrol and chemicals it extends to relatively innocuous things which only become hazardous when accumulated in large quantities such as water, sewage and noxious fumes.⁷¹

4. Case Law as a Regulatory Mechanism

The fundamental duty of the courts is to interpret the law. It is therefore right to hold that the law is what the court, says it is. The role of court in the interpretation of law can play a very vital role in regulating the environment – particularly where there is judicial activism and precedent. Example of such judicial activism came to the fore in the case of *Adeduran v Interland Transport Ltd*⁷² where the court held that s. 6(6) of the 1979 Constitution of the Federal Republic of Nigeria vested in an individual, the unrestricted access to the courts for the determination of his civil rights and obligations. Consequently, any rule of common law requiring a potential plaintiff to seek and obtain the consent of the Attorney – General in public nuisance is null and void. Before this landmark decision, many people have suffered

⁶⁹ (1886) LREx 265. 268

⁷⁰ Ibid

⁷¹ Ibid.

⁷² Ibid.

injustice, occasioned by the requirement that only Attorney – General could initiate or permit such suits.

Another significant principle to be noted here is the *riparian doctrine* which is strictly speaking, has its root in common law doctrine which is applied by Nigerian Courts. The doctrine states that a landowner has a right to the water which flow across his land but his right to use the water should be reasonable. The right of reasonable use of water includes ensuring that the quality of the water is not affected.

This doctrine was applied in the case of *Braide v Adoki*⁷³ where it was held that members of communities with creeks, non-tidal rivers and bank, tidal waterways have a right to such water bodies.

Also the principle of neighbourly life was emphasized in the cases of: Trail Smelter⁷⁴ and Corfu Channel.⁷⁵ The Trail Smelter case concerned with a zinc and lead smelter on Canadian soil, which was releasing large quantities of sulphur dioxide. Residues from the clouds of smoke contaminated the air, and fell as toxic precipitation on farms in the United States of America. The matter was between Canada and the USA. It was referred to arbitrators. The decisions were stated as follows:

No state has the right to use, or permit the use of its territory in such a way as to cause injury by fumes in, or to the territory of another or the property or the person therein, when the case is of serious consequences and the injury is established with clear and convincing evidence. It provides for state sovereign right to exploit its own resources pursuant to their environmental policies, but not to the detriment of other states. States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction⁷⁶.

⁷³ (1931)10 NLR 15 and see also *Sowa v Amachree* (1933) NLR 82 cited in Atsegbua et al Environmental Law in Nigeria, supra note 34 at 34.

⁷⁴ Trial Smelter 3 R.L.A.A. (1905/41)

⁷⁵ Crufu Channel I.C.J. Reports 1949, 244

⁷⁶ See the decision of Arbitration Panel on the Trail Smelter case of *US v. Canada*.

This decision was fundamental to the declaration of principle 21 of the United Nation Conference on the Environment on June 1972 at Stockholm.

The Corfu Channel case was a decision of the International Court of Justice. It followed the principle laid down in Trail Smelter case and held that no state may use its territory for activities which violate the rights of other states.

5. The Role of Non-Governmental Organisation as a Regulatory Mechanism

NGOs are voluntary agencies or private organisations geared towards providing solution to some perceived problems in the society. Depending on their focus concern themselves with problems of the global or local environment and development on a global or regional scale.

The participation of NGOs in development and environmental matters took an upwards turn during the preparatory conference for the United Nation Conference on Environment and Development (UNCED). On that occasion they were given unprecedented opportunity, to contribute and greatly influenced the decision of the conference.

There are a number of NGOs which have influenced environmental matters in Nigeria. For example, the Greenpeace has been very outspoken about toxic, wastes and e-waste in developing countries and in Nigeria in particular as mentioned in chapter 3 of this work. The Human Rights Watch, another influential NGO, has written extensively on environmental matters in Nigeria.⁷⁷ Such writings have helped to exposed the illegal activities of oil companies as they impact on the environment adversely.

The NGOs in Nigeria have increased awareness of the need for environmental protection and sustainability among the populace and to encourage action aimed at protecting the environment. Also through the use of advocacy they have been able to present informed proposals to the government. Most of such proposals have actually been the result of researches carried out by these organisations.

⁷⁷ See one of its publications on environmental issues in Nigeria titled “The price of oil” available at <http://www.hrw.org>. Omoruyi, I.O. *The Legal Process and Environmental Protection* supra note 211 at 87 (Accessed on 20 December 2020).

6. Conclusion

The conclusion was reached after a careful analysis of existing environmental laws and regulatory mechanism in the United States and Nigeria. The recommendations made in this article will improve the Nigerian environment. It is evident that poverty and corruption is at the root of environmental law violations in Nigeria unlike the United States. Other factors accountable for this phenomenon include poor implementation of the existing environmental laws and weak enforcement mechanism. Nigerian government, apart from paying attention to legislative regulatory mechanism should equally, focus on the eradication of poverty and tackle corruption which is endemic to the country.

It is hoped that if the under mentioned recommendations are rigorously implemented together with appropriate poverty eradication program and enforcement of existing anti-corruption laws it will go a long way in protecting our environment from hazardous waste.

7. Recommendations

In spite of existing domestic legislations and international conventions rectified by Nigeria to combat trans-boundary movement of hazardous waste, the practice continues to thrive due to poor enforcement mechanism, poor implementation and poor attitude of courts towards environmental related cases. It is therefore recommended as follows:

- a. that relevant constitutional provisions relating to environmental protection, particularly section 20 of the constitution should be elevated to fundamental human rights to make it more effective
- b. All the tiers of government should be given constitutional power to legislate and enforce effectively on environmental issues within the area of their jurisdiction without the interference of the federal government.
- c. that the National Environmental Standards and Regulations Enforcement Agency Act should be reviewed to introduce the common law principle enunciated in *Donoghue v. Stevenson*⁷⁸ as done in United Kingdom⁷⁹.

⁷⁸ (1932) AC 562

⁷⁹ See s. 34 of Environmental Protection Act, 1990 (United Kingdom)

- d. National Environmental Standards and Regulation Enforcement Agency Act should be amended to bring oil and gas industry under its jurisdiction for effective protection of our environment.
- e. It is recommended that section 9 of Harmful Waste (Special Criminal Provision) Act⁸⁰ which waives diplomatic immunities be reviewed to include all persons including government and its agencies so as to make all polluters accountable for their pollution.
- f. Nigeria should initiate a special program similar to that of United States superfund⁸¹ program. In this regard, National Oil Spill Detection and Response Agency (Establishment) Act⁸² should be amended to cover all aspects of pollution and not only oil related disaster
- g. Enforcement agencies should be provided with adequate testing and monitoring facilities. These include laboratories for testing suspected hazardous substances, communication equipment for effective monitoring of the environment.

⁸⁰ Cap 165, LFN 1990

⁸¹ Comprehensive Environmental Response, compensation, and Liability Act of 1980 commonly referred to as "SUPERFUND".

⁸² Act, No. 15, 2006