AN APPRAISAL OF THE LEGAL REGIME ON THE HUMAN RIGHT TO COMPENSATION FOR ENVIRONMENTAL POLLUTION IN NIGERIA (published in Energy Law Review, Vol.1. No. 4, 2014, pages 34-61)

By

P.E. Oamen & M.I. Anushiem

Introduction

Incidents of environmental pollution are being reported every now and then in Nigeria, and in the Niger Delta in particular. Quite apart from the damage done to the environment as a result of some inevitable natural disasters, such as flood[1], earthquake and tsunami, some other man – made damage are caused to the environment wherein the activities of certain individuals or corporate bodies have negatively affected, and in most cases, absolutely destroyed the means of livelihood, houses and other valuables of some other persons. When such man – inspired damage deprives another of his rights to life[2], own and acquire property as well as live in a clean and healthy environment, what legal remedies does the Law provide against the tort – feasor, in favour of the victim of environmental pollution?

This paper examines the meaning of environment, pollution and human rights. Essentially, the paper appraises the legal remedies the Constitution of the Federal Republic of Nigeria, 1999 **(The Constitution**), Nigerian statutes and common law principles have put in place to remedy, even if palliatively, the damage done to the victim of environmental pollution. We shall contend that provided the issue of liability for environmental pollution is glaring, the Court should be disposed to awarding damages or compensation to the victims of such pollution without undue adherence to technicalities or strict requirement for scientific evidence of experts whose services the victims, more often than not, cannot afford.

Meaning of Environment

The word "environment" has been variously defined by different dictionaries, statutes and scholars. We have averted our mind only to a few of these definitions, for the purposes of this paper. The word "Environment" has its origin from the French word, "environ" or environner"

❖ Lecturer, Faculty of Law, Ambrose Alli University, Ekpoma. E – mail : philipoamen1@gmail.com

[1] Such as the one that occurred across the nation, particularly in Benue State in the year 2012.

[2] For example, national dailies reported on 25 March 2013 that three children from Lotugbene community in Bayelsa State died of cholera after drinking water from a river which was polluted by the rig operations of an oil company in the community.

which means "around" or "round about". Again the word "environ" or "environner" has its roots from the old French word "virer" or "viron" meaning "around" or "circle"[3]. Environment means "the conditions that affect the behaviour and development of somebody or something; the physical conditions that somebody or something exists in …the natural world in which people, animals and plants live[4]. According to the Black's Law Dictionary[5], environment is:

> *The totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property or which also affects the quality of people's lives.*

Statutorily, the National Environmental Standards, Regulations and Enforcement Agency Act 2007 **(NESREA Act**) defines environment to include "*water, air, land and all plants and human beings or animals living therein and the inter –relationships which exist among these or any of them* [6] ." The Canadian Environmental Protection Act, 1988 defines environment as the component of the earth, including (a) air, land and water; (b) all layers of the atmosphere; (c) all organic and inorganic matter and living organism, and (d) the interacting natural systems that include components referred to in (a) to (c)[7]. The English Environmental Protection Act 1990 defines environment as " *consisting of all, or any of the following media, namely the air, water and land; and the medium of air including the air within buildings and the air within other natural or man – made structures above or below the ground."*

In the academic circle, environment has equally been given different definitions. For instance, in the words of Agbola, environment means "*a component set of behavioural settings in which individuals within a community act with diverse consequences. It is conceived as an agglomeration of all the influences and conditions (whether internal or external) which affect the*

---

[3] Fagbohun, O., *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Lagos: Odade Publishers, 2010) p. 41

[4] Hornby, A. S., *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, 7th Ed., 2005) p.490.

[5] 6th Edition

[6] See Section 37 of the NESREA Act.

[7] See Section 3(1) of the Act, cited in Ezike, E. O., " Liabilities for Environmental Pollution Damage in Nigeria", *The Journal of Private and Property Law,* University of Lagos, 2010 Vol. 28 p.67

living conditions of an organism, in this instance, man"[8]. To Omotola, environment means "*the whole complex of physical, social, cultural, economic and aesthetic factors which affect individuals and communities and ultimately determine their form, character, relationship and survival*"[9]. In Bowen's perspective, "*Environment has a more limited meaning which is essentially physical and biological. Environment in this sense encompasses an array of ecosystem. And ecosystem consists of both living (living man) and non – living components and their physical surroundings – water, soil, air, etc*"[10]. Okorodudu – Fubara sees environment as "*the complex of physical, chemical and biological factors/processes which sustain life. Man is part of this network of natural components which make up the planetary ecosystem."*[11]

In the judicial sphere, the Court in the United States case of **U. S. v. Amadio**[12] described environment as:

> *The totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of peoples' lives. It also means the surrounding conditions, influences or forces which influence or modify the life of man.*

Meaning of Pollution

The NESREA Act in Section 37 defines pollution as *"man – made or man – aided alteration or chemical, physical, or biological quality of the environment beyond acceptable limits . . .*" Also, the European Community Council Directive of 1996 defines pollution as the *"introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological system, damage to structures or amenities or interference with*

---

[8] Agbola, T., "A review of Environmental components in Nigeria's National Development Plans (1946 – 85)", in P. O.Sada and F. O. Odemerho (eds.), *Environmental Issues and Management in Nigerian Development*, (Ibadan: Evans Brothers (Nig.) Publishers Limited, 1988) p. 47

[9] Omotola, A. O., "Nigeria's Environmental Laws – A Critical review of Main Principles, Policies and Practices", p. 2, being a paper presented at the International Conference on Environmental Law and Policy held on 19 – 21 March 1997.

[10] Bowen, O.A., The Role of Private Citizens in the enforcement of Environmental Laws, cited in Ogiribo, L.O., "The Role of Private Organisations in the Protection of the Environment", *Delsu Law Review* (Environmental Law Edition), DLR Vol.2 No. 2 , 2006 p. 288.

[11] Okorodudu – Fubara, M. T., *Law of Environmental Protection*, (Lagos: Caltop Publications, 1998) p. 56, cited in Ogiribo, L.O. , op. cit.

[12] C.A. Indiana 215 F. 2nd 605, 611 cited in Ikoni, U.D., *An Introduction to Nigerian Environmental Law,* (Lagos: Malthouse Press Limited, 2010) p.22

legitimate use of the environment."[13] The Nigerian Pollution Abatement in Industries and Facilities Generating Wastes Regulation defines pollution as *"The direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material, property or impair or interfere with amenities and other legitimate uses of the environment."*[14]. The English Environmental Protection Act of 1990 defines pollution of the environment to mean "pollution *of the environment due to the release of substances (into any environmental medium) from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment."*[15] The United Nations Convention on the Law of the Sea describes pollution as:

> *the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities*.

According to Ikoni, environmental pollution is "*the introduction by man directly or indirectly of substances onto the environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrances to marine activities, including fishing, impairment of quality for use of seawater and the general reduction of amenities."*[16] Atsegbua, Akpotaire and Dimowo define pollution as "*any undesirable change in the natural characteristic of the environment in any state of matter*"[17].

In the American case of **Boomer v. Atlantic Cement Co**.[18], the Court defined pollution as *"the contamination of the environment by a variety of sources including but not limited to hazardous substances, organic wastes and toxic chemicals."*

---

[13] Article 2 (2) of the Directive.
[14] Regulation 2
[15] Section 1 (3).
[16] Ikoni, U .D., op. cit., p.23.
[17] Atsegbua, L., Akpotaire, V. and Dimowo ,F., *Environmental Law in Nigeria : Theory and Practice*, (Lagos: Ababa Press Limited, 2004), p.70.
[18] 26 N. Y. 2nd 219, 309

Meaning of Human Right

The phrase 'human right", just like Law, defies any precise or commonly acceptable definition. Each author's definition is informed by his perspective or the school of thought he belongs to[19]. However, we shall attempt a working definition herein after reference to some existing definitions by learned authors and jurists.

According to Eze, human rights are "*Demands or claims which individuals or groups make on societies some of which are protected by law and have become part of lex lata while others remain aspiration to be attained in the future*."[20] To Ajomo, "*human rights are those rights which human beings enjoy by virtue of their humanity the deprivation of which would constitute a grave affront to one's natural sense of justice*."[21] In the words of Lien, human rights are "*universal rights or enabling qualities of human beings as human beings or as individuals of human race, attaching to the human being wherever he appears without regard to time, place, colour, sex, parentage or environment*."[22] In Onyekpere's view, "*Human right is the intrinsic worth, equal and inalienable rights of members of the human family to a dignified existence. Its observance is fundamental to the realization of social progress and better standard of life for all humanity*."[23] A learned Silk sees human right as "*a specie of legal right that pertain to mankind as a whole or all persons by virtue of their being "moral and rational creatures*."[24]

The definition of human right has over time, also agitated the minds of Jurists. For example, in **Ransome Kuti v. Attorney– General of the Federation**,[25] Kayode Eso, JSC defined human right as "*A right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence."* In our humble opinion, human rights are those rights which are inherent to man and universally recognized as precondition to a worthy living and the violation of which would render man less

---

[19] Oamen, P.E., "The Fate of Human Rights in a Period of a State of Emergency in Nigeria", Nigerian National Human Rights Commission Journal (NNHRCJ), Vol. 3 (2013).

[20] Eze, O., *Human Rights in Africa: Some Selected Problems,* (Ibadan: Macmillan Press and NIIA, 1984) p.5

[21] Ajomo, M.A., "The Development of Individual Rights in Nigeria: Constitutional History*", in M. A. Ajomo & B. Owasanoye(eds), Individual Rights under the 1989 Constitution* (Lagos: NIALS, 1993), p.1

[22] Lien, A., *Fragment of Thoughts Concerning the Nature and Fulfillment of Human Rights*, (London: Greenwood Press, 1973) p.24

[23] Onyekpere,O., "Democracy, Human Rights, Dictatorship and the Nigerian Judiciary," Vol. 3, Nos 1, 2 & 3, (1993), JHRLP, pp. 51 – 52

[24] Idigbe, A., "Overview of Human Rights and their Corresponding Duties in Contemporary Nigeria*," Badaiki, A. D. (ed.), Landmarks in Legal Developments (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State),* (Lagos: Nobility Press, 2003), p.239

[25] (1985) 2 NWLR (pt. 6) p.211 at 229

human. Thus a learned author has stated elsewhere, and rightly in our view, that without human rights, "man is nothing but a slave to his society."[26]

Classes of Human Rights

Human rights have been classified into 3 kinds. These are:

a) **Civil and political rights:** These are also known as first generation or liberty – oriented rights. They are the earliest recognized rights and they have been enshrined in the Constitutions of most countries as justiciable rights[27]. These rights are couched in such a way that they are asserted against the state and in favour of the protection of the liberty of individual members of the state.

b) **Economic, social and cultural rights:** These are also termed second generation or security – oriented rights. Most of them are generally not enforceable or justiciable. For example, these are the rights contained in Chapter II of the Constitution. They include right to work, right to fair and just condition of service, right to form and join trade unions[28],right to social security or welfare, right to protection and assistance to family, right to adequate standard of living, right to education and right to take part in the cultural life of society. It is noteworthy to state that these second generation rights only became prominent in the 20th century when many nations, including the US, Mexico, Germany and other western countries started to incorporate them into their respective Constitutions[29].

c) **Solidarity rights:** These are also known as third generation rights. They are of most recent prominence compared to the other rights explained above. These are right to development, right to self – determination, right to health, right to healthy and balanced environment[30], right to benefit from the common heritage of mankind and right to humanitarian assistance.[31]

However, it suffices to say here that, notwithstanding the above classification and the much touted superiority usually ascribed to first generation rights over the other rights, there is no set of human rights that is superior to the other. Each class should be equal to and inter – dependent

---

[26] Shikyil, S.S., "Human Rights and National Development," *Badaiki, A.D.,(ed.), Landmarks in Legal Developments (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State*), (Lagos: Nobility Press, 2003), p.180

[27] They are contained in Chapter IV of the Nigerian Constitution .

[28] This is however a justiciable right under Section 40 of Chapter IV of the Constitution.

[29] See Dakas, D., " The Implementation of the African Charter on Human and People's Rights in Nigeria," Vol.3, (1986 -1990), *UJLJ*, p. 39.

[30] Which is, as would soon be seen in our contention below, also covered by the right to life which is a justiciable first generation right.

[31] See Idigbe, A., op. cit

on the other.[32] In other words, all human rights should be treated equally as they are all indivisible, interdependent and interrelated.[33]

Legal Regime for Environmental Pollution Compensation in Nigeria

The legal regime for compensation of victims of environmental pollution evolved basically as a result of the need to balance the conflicting interests between the victims and those who are responsible for the pollution, mostly the Multi – national Companies which have been licensed to operate in the Nigerian Oil and Gas Industry[34]. In other words, whereas the Government cannot afford to stop the pollution – generating operations of those companies – in view of the huge economic fortune the Nigerian Government derives from the Petroleum Industry, the Law has however deemed it necessary to provide some legal regime under which the victims of such pollution can claim compensation for the hazardous effect of the pollution on their lives, means of living and valuables. It has been stated elsewhere, and rightly in our view, that there is no comprehensive or one – stop legislation which provides for compensation for oil spill (environmental pollution) in Nigeria.[35]Be that as it may, it is our intention to examine, below, the constitutional, statutory and common law provisions which in one way or the other touch (on) compensation claims vis- a – vis environmental pollution.

The Constitution

The Constitution is the grundnorm and yardstick against which the validity of all other laws are measured. Thus, the Constitution is superior to any other law in Nigeria and in the event of any inconsistency, the former shall prevail.[36] A victim of environmental pollution can explore the provisions of the Constitution to seek compensation. According to Section 20[37] of the Constitution, "*The State shall protect and improve the environment and safeguard the water, air and land, forest and wide life of Nigeria*." While we hasten to state here that, this section is

[32] See Vienna Declaration, 1993, World Conference on Human Rights

[33] Udombana, N. J., "Human Rights Protection and Good Governance in Nigeria", *The Justice Journal (A Journal of Contemporary Legal Issues)*, 2nd Ed., (2011), p.34 at 39

[34] Emiri, O.F., "An Economic Analysis of the Right to Compensation for Oil Pollution ", *Delsu Law Review*, (Environmental Law Edition), Vol. 2 No. 2 , 2006, p. 406

[35] Adewale, O., "Oil Spill Compensation claims in Nigeria : Principles, Guidelines and Criteria" (1989), J. A. L., p. 91

[36] Section 1 (1) & (3) of the Constitution. See also the cases of*Nafiu Rabiu v. KanoState* (1980) 2 NCLR 117 and *Agundi v. Commissioner of Police* (2013) All FWLR (pt.660) 1247 at 1321 - 1322

[37] This is an innovative section under the 1999 Constitution as previous Constitutions in Nigeria did not have similar provisions.

embedded under Chapter 11 of the Constitution thus making it a non – justiciable provision[38], we however argue that a community reading of the entire Constitution, especially when Section 20 is read alongside Section 33 of the Constitution, would reveal that the Constitution actually gives environmental pollution victims the right to live in a clean and healthy environment or otherwise claim compensation from whomsoever denies them this right. In other words, the right to live in a clean environment is subsumed in the constitutionally inhered right to life.

Right to Life

By the tenor of the provisions of the Constitution[39],

> *Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.*

The above provisions are clear enough to the effect that a person's right to life cannot be derogated from, except the derogation is pursuant to a death sentence passed on him or except in accordance with the provisions of subsection 2[40] of the section under consideration. Going by the definitions of environment as offered by various writers and statutes above, human life and the environment are almost always connected. It is impossible to enjoy the right to life as provided in the Constitution without the existence of a clean and suitable environment. It has been argued in some quarters that the fulfillment of the most fundamental human needs (that is, the exercise of the right to life) is dependent on many elements of the environment such as the air we breathe, the water we drink, the food we eat as well as our shelters and surroundings[41]. It is therefore our contention that the constitutionally enshrined right to life, which is contained under Chapter IV of the Constitution[42] is capable of being stretched to include an enforceable right to live in a clean and healthy environment[43]. An examination of some cases from other jurisdictions will help drive home the point being made.

---

[38] By virtue of Section 6 (6)(c) of the Constitution

[39] Section 33 (1) thereof

[40] Relating to death resulting from self – defence, effecting of a lawful arrest or suppression of riot, insurrection or mutiny.

[41] Atsegbua L., etal, op. cit. p. 133

[42]The rights under Chapter IV, unlike those in Chapter II, are justiciable

[43] See also Article 24 of the African Charter on Human and Peoples' Right, 1981 which has been legislatively domesticated in Nigeria pursuant to the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN), 2004. The said Article guarantees Nigerians' right to a general satisfactory environment favourable to their development. In *Abacha v. Fawehinmi* (2000) 6

In the Pakistani case of **Shela Zia v. Water and Power Development Authority**[44], some citizens instituted a Suit, by a mere letter, to prevent the municipal Water and Power Development Authority from constructing a grid station on the ground that the emissions from the said grid station would endanger the lives of the residents within the neighbourhood. The Supreme Court upheld the arguments of the petitioners/ citizens to the effect that right to life included a right to live in a clean and healthy environment. The Court stressed the point that the right to life as guaranteed under Article 9 of the Pakistani Constitution included the right to live in a hazard – free or pollution – free environment.

Also in the Indian case of **Indian Council of Enviro – Legal Action v. Union of India**[45], the Indian Supreme Court, while holding that right to life included light to a clean environment, said:

> *When certain industries by the discharge of acid producing plants cause environmental pollution, that amounts to violation of right to life in Article 21 of the Indian Constitution…. The respondents are absolutely liable to compensate for harm caused ….*

We submit that a similar liberal interpretation of Section 33 of the Nigeria's Constitution by the Court would not be out of place. After all, a right to life implies a right to live in an environment which is devoid of any injurious degradation[46].

Another constitutional right on which claim for compensation for environmental pollution could be founded is the right to own and acquire immovable property anywhere in Nigeria. This is provided for under Section 44(1) of the Constitution. The section expressly forbids the acquisition of a person's property without payment of compensation to him. It is our submission that acquisition here could be actual or constructive. Where the acts of Government or a Multinational Company results in environmental pollution on a citizen's land or property which consequently deprives him of the maximum enjoyment of the land, it can be said that such land

---

NWLR (pt 660) 228, it was held that further to the domestication of the Charter by Nigeria, its provisions have become binding and jusitciable in Nigeria.

[44] PLD 1994 SC A16

[45] (1996) All India Law Report (AIR) SC p. 1446

[46] Okukpon, A. O., "The 1999 Constitution of Nigeria and the Protection of the Right of Citizens to a Clean Environment" in Atsegbua, L. (ed.), *Selected Essays on Petroleum and Environmental Laws*, (Benin: New Era Publications, 2000) p.32

has been compulsorily or forcibly acquired, though constructively. Such a person can root his claim for compensation on Section 44(1) of the Constitution.

Statutory Provisions

Quite apart from the provisions of the Constitution as explained above, some Nigerian statutes have made provisions for compensation in the event of environmental pollution. To these statutes we now turn.

a) **Harmful Wastes (Special Criminal Provisions, etc) Act**[47]

This Act forbids the carrying, depositing and dumping of harmful waste on any land, territorial waters and matters relating thereto. Though the Act is essentially an offence – creating law, it however contains some provisions upon which a civil Suit for compensation could be founded. A section[48] in the Act states that where damage has been done as a result of the carrying, depositing or dumping of any harmful waste, any person who so carried, deposited or dumped the harmful waste to the injury or harm of another shall be liable for the damage suffered by the victim. Thus where a person has suffered loss of lives of loved one, or affliction of personal injury or disease or impairment of any physical or mental condition traceable to the dumping of harmful waste on his land by any person or company, he can legally claim for compensation in the Court of Law for environmental pollution, pursuant to the Act.

b) **The Oil Pipelines Act**[49]

A combined reading of Sections 11(5) and 20(2) of this Act would reveal that the Act has made provisions for compensation in cases of environmental pollution. By the import and purport of the Act, a holder of an oil pipeline license is statutorily obligated to pay compensation to victims of environmental pollution whose land has been, to use the wording of the Act, "injuriously affected" by exercise of his rights under the license or as a result of any negligence on his part leading to leakage or spillage. The compensation is payable for damage to economic trees, disturbance and loss of value of the land[50]. However, it should be stated here that the compensation intended by the Act is not for all comers. To successfully claim for the compensation, the Claimant must establish that the damage done to his land was not as a result of a default or fault flowing from him. Hence, a pipeline vandal or saboteur cannot turn around to

[47] Cap H1, Laws of the Federation of Nigeria, 2004.
[48] Section 12
[49] Cap O7, LFN 2004
[50] See Section 20 (2)

claim compensation under the Act for oil leakage or spill which occurred as a result of his sabotage.

c) **The Petroleum Act**[51]

According to Paragraph 36 of the Act,

> *The holder of an oil exploration license, oil prospecting license, or oil mining licence shall in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.*

Obviously, this is compensation – generating provision. Thus a victim of environmental pollution or disturbance could sue a license holder for payment of a fair and adequate compensation, pursuant to the above provisions. However, the Act fails to define what amounts to a fair and adequate compensation in this instance, thus leaving it to the discretion, caprices and idiosyncrasies of individual Judges. The view has been expressed that the concept of fair and adequate compensation as used in the Petroleum Act has its origin from section 31 of the Republican Constitution of 1963, although the concept is elusive in the Nigerian Petroleum Industry because of improper consideration of additional elements of disturbance and injurious affection[52].

d) The Petroleum (Drilling and Production) Regulations

These Regulations guarantee an adequate compensation to victims of environmental pollution in respect of disturbance to their fishing rights[53].

e) The Mining and Minerals Act

Just like the foregoing Acts, the Mining and Minerals Act[54] provides that any person who is prospecting or mining minerals in Nigeria shall pay to the owner or occupier of the land fair and reasonable compensation for any disturbance of his surface rights of such land, including

---

[51] Cap P10, LFN 2004

[52] Fekumon, J.F., "Disturbance and Injurious Affection in the Nigerian Petroleum Industry", Springfield Publishers, 1998., p. 15 cited in Awhefeada, U.V., " The Rules governing Compensation for Environmental Degradation in Nigeria: An Analysis", *Delsu Law Review*, Vol. 2 No. 2, 2006, p.419

[53] See Regulation 23 of the Regulations.

[54] Cap M12, LFN, 2004.

compensation for crops, economic trees, buildings or works damaged, removed or destroyed in the course of the prospector or miner's prospecting or mining activities[55]. Again, what amounts to a fair and reasonable compensation is not defined by this Act.

An element of similarity between the Petroleum Act compensation regime and the Mining and Minerals Act compensation regime is their provisions that the compensation is payable to the land owner or the lawful occupier of the land. It is our humble submission that this might create a problem for the compensation payer in which case he might be made to pay twice. Put simply, both Acts failed to put in place some mechanism to checkmate any fraudulent collusion between an owner of land and an occupier he has lawfully put in possession. The owner may collude with the land occupier to collect compensation on his behalf only for him to turn around and feign ignorance of the compensation transaction between the prospector or miner and the occupier who must have taken to his heels by the time the land owner comes around to collect his own compensation from the same prospector who has already paid the occupier. We canvass for an amendment of the said Acts wherein the prospector or miner would only be obligated to pay compensation to an occupier if and only if the occupier is so authorized to receive the compensation by the land owner, in writing.

Common Law Regime

The common law, especially as regards the Law of Torts has also made provisions for compensation litigation mechanism for oil pollution. According to a learned author, of all the traditional law subjects, the Law of Torts lends itself more to environmental protection than any other subject[56]. Thus a victim of environmental pollution can found his claim for compensation under the torts of nuisance, negligence, trespass or the Rule in *Rylands v. Fletcher*. These common law mechanisms are independent of the constitutional and statutory regimes examined earlier. In other words, a victim of environmental pollution can base his Suit either under the statutory regime or under the common law regime[57]. We would now examine the common law regime, though briefly, under the following headings.

Nuisance

[55] See Sections 67 and 95 of the Act respectively.
[56] Usman, A. K., *Environmental Protection Law and Practice*, (Ibadan: Ababa Press Limited, 2012) p.138
[57] *SPDC (Nig.) Ltd v. Ambah* (1993) 3 NWLR (pt. 93) 1

Nuisance is any conduct that obstructs the public or a section of it from the exercise and enjoyment of a common right[58]. Nuisance is any unreasonable interference with another person's use and enjoyment of his land or any right attaching to the land[59]. It is *"an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notion among the English people."*[60] It is "*the substantial interference with the enjoyment of land and can be relied upon by victims of environmental hazards. It covers harmful activities such as the emissions of noxious fumes from the factory, the destruction of a building through vibrations, etc"*[61].

One point that is clear from the above definitions of nuisance is that it is not every act of inconvenience that can ground an action in nuisance, contrary to the ordinary or everyday belief. To succeed in nuisance, the Claimant, in this case the victim of environmental pollution, must prove that the acts of the Defendant materially, substantially and unreasonably interfered with his (Claimant's) ordinary comfort, convenience, use and enjoyment of his land or property.

Nuisance could be public or private. It is public where the act complained of affects or interferes with the comfort or convenience of the public at large or a section of it or where it affects the enjoyment of a common right belonging to the public[62]. Before now, and as represented by the case of **Amos v. Shell – BP Nig. Ltd[63],** the position of the law was that only the Attorney General could sue for public nuisance. For a private person to have *locus standi* in public nuisance, he was required to prove that he had a special interest or he suffered a special damage or injury that was over and above the one suffered by the other members of the public. However, in **Adeniran v. Interland Transport Ltd[64],** the Supreme Court held that the common law requirement for proof of special interest or injury in respect of public nuisance was

[58] *Adediran v. Interland Transport Ltd* (1991) 9 NWLR (pt.214) 155. This definition fits into public nuisance only.
[59] *Abiola v. Ijoma* (1970) All NLR 569
[60] Per Lord Knight – Bruce in *Walter v. Selfe* (1851) 64 ER 849 at 852
[61] Awhefeada, U.V., op. cit., p.420
[62] Malemi, E., *Law of Torts* (Lagos: Princeton Publishing Co. 2013, 2nd Ed.) p.452
[63] (1974) ECSLR 486. Here , the Plaintiff sued the Defendant in a representative capacity for damages in respect of the flooding of their farmlands due to the oil exploration activities of the Defendant. The Court held that the Plaintiffs did not have any *locus* for public nuisance since they could not establish that they suffered any special loss or damage.
[64] Supra

unconstitutional, null and void as same offends the express provisions of the Constitution[65] which give citizens right to free access to Court. Hence the extant position of the law is that a Claimant has an unfettered *locus standi* to sue for public nuisance as far as civil proceedings are concerned. However, to have Judgment delivered in his favour, a private citizen would still have to prove that he has suffered a special damage, injury or loss, with a higher degree than that suffered by other members of the public, as a result of the public nuisance[66].

Private nuisance, unlike public nuisance, attaches to personal interest. In other words, it is the indirect interference with the personal convenience, comfort, use and enjoyment of one's land or rights flowing therefrom. An act need not be an unlawful act to constitute a private nuisance, provided the act amounts to a continuous and unreasonable interference with the Claimant's land or proprietary rights. Hence the victims of environmental pollution can institute an action for private nuisance where the acts of the "polluters" substantially or unreasonably affect their health, fishing rights, farmlands, houses or other means of livelihood[67].

Negligence

Negligence is another head of torts that could aid environmental pollution litigation. We shall examine it, though briefly.

In the words of Lord Wright,

> *In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty owed*[68]**.**

In **Makwe v. Nwukor[69],** Iguh, JSC defined negligence as *"the breach of a duty to take care imposed by common law or statute law; resulting in damage to the complainant…."*[70] It is needful to state here that the tort of negligence became more popular in the celebrated case of

---

[65] See Section 6(6) of the Constitution.

[66] *Nwachukwu v. Egbuchu* (1990) 3 NWLR (pt. 139) 435

[67] *Airobuyi v. Nigerian Pipeline Limited* (1976) 6 E. C. S. L .Y. 53 cited in Dimowo, F., "Enforcement of Environmental Law in Nigeria" *Nigerian Contemporary Law Journal Uniben,* Vol. 2 No. 1 May 2005, p. 128.

[68] *Lochgelly Iron & Coal Company v. McMullan* (1934) AC 1 at 25

[69] (2001) 6 M.J.S.C.179 at 191

[70] See also *Odinaka v. Moghalu* (1992) 4 NWLR (pt. 233) 1 at 15 where Akpata, JSC defined negligence as "*the omission … to do something which a reasonable man, under similar circumstances would do or, the doing of something which a reasonable and prudent man would not do."*

Donoghue v. Stevenson[71] where Lord Atkin established the "neighbour principle". For a Claimant to succeed in a claim for compensation for oil pollution under the tort of negligence, he must establish the following key elements, viz:

a) That it was the Defendant's act that caused the damaging pollution complained of.
b) That the Defendant owed him a duty of care not to pollute his land or property.
c) That the Defendant has breached the duty of care by his acts of environmental pollution.
d) That he has suffered damage or injury as a result of that breach of duty.

The above elements must be cumulatively proved if the Claimant must succeed in negligence. In other words, they are not disjunctive but conjunctive. As the Court noted in **Makwe v. Nwukor**[72],

> *In the first place, it is a basic principle of law that there can be no action in negligence unless there is damage….Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must co – exist.*
>
> *In the second place, the essential ingredients of actionable negligence are: -*
>
> *a) The existence of a duty to take care owed to the complainant by the defendant.*
> *b) Failure to attain that standard of care prescribed by the law;*
> *c) Damage suffered by the complainant, which must be connected with the breach of duty to take care.*

It has been stated that proof of negligence is an onerous task in environmental pollution litigation because the burden is on the Claimant to prove that the operator was negligent or did not adopt good oil field practice and procedure.[73] This burden almost always requires expert scientific evidence which most victims of environmental pollution cannot afford.

The Rule in Ryland v. Fletcher

---

[71] (1932) AC 562 at 619
[72] Supra, p. 190 – 191. See also *Umudje v. Shell BP*. (1975) 11 SC 155 where the Court found the Defendant liable in negligence.
[73] Awhefeada, U.D., op. cit. p. 421

A victim of environmental pollution may also rely on this rule established in the case of **Ryland v. Fletcher**[74]. This Rule states that:

> *A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape.*[75]

To successfully rely on this Rule, a Claimant for compensation for environmental pollution must prove that:

a) The oil operator or polluter has brought in and kept on the land a non – natural user;
b) The polluter has the duty to keep the non – natural user at his own peril;
c) The non – natural user has escaped; and
d) The victim has suffered some damage as a result of the natural consequence(s) of the escape of the non – natural user.

The full explanation of the above elements of the Rule is outside the scope of this paper. It however suffices to say the rule admits of strict liability which means the Defendant need not be negligent before he can be held liable under the Rule[76]. It has been held that petroleum operation or oil spill falls within the term "non – natural user" which is the fulcrum of the first element of the Rule in **Ryland v. Fletcher**[77]**.** Lastly on this point, it has been stated elsewhere, and we agree, that the Rule in **Ryland v. Fletcher** is not actionable per se. The Claimant must prove some form of damage or injury to sustain a successful claim for compensation[78]. The application of the Rule in Nigeria was confirmed in **SPDC (Nig.) Ltd v. Edamkue**[79], where the Supreme Court, per Tobi, JSC, held:

---

[74] (1866) LR 1 Exch. 265 where independent contractors engaged by the Defendant to build a reservoir on his land failed to block a shaft which failure led to the escape of water and the consequent flooding of the Plaintiff's mine. The Court held the Defendant liable.
[75] (Supra) p.279 – 280.
[76] *Umudje v. Shell* B. P. (supra)
[77] See *Otuku & Ors v. Shell BP* , BHC/12/83, Bori High Court 5/185 (Unreported), cited in Awhefeada, U.V., op. cit., p. 422. See also *Umudje v. Shell BP* (supra)
[78] Ikoni, U. D., op. cit., p. 155.
[79] (2009) All FWLR (pt. 489) 407 at 438 paras C – H where the Plaintiffs/Respondents claimed damages against the Defendant/ Appellant on the ground that they suffered as a result of a serious explosion and oil spill from the Appellant's Yorla Oil Field in Ogoniland, Rivers State. See also *SPDC v. Amaro* (2000) 10 NWLR (pt. 675) 248

I entirely agree with the submission of learned counsel for the 1st and 3rd set of Plaintiffs/ Respondents that the Court of Appeal based its findings on the Rule in Ryland v. Fletcher (1868) L.R.3 HC 330 and the maxim res ipsa loquitur…. The above is what is now regarded as the Rule in Ryland v. Fletcher, a rule that has been applied in our courts.

Trespass

Trespass to land is another tort that can aid a victim of environmental pollution in his bid to claim compensation from the polluter. Trespass to land means the direct interference by one person, with the use and enjoyment of land owned or possessed by another. According to a learned author, it is "any direct and unjustifiable interference with land in the possession of another person[80]". May we quickly add that it is the directness of the interference that distinguishes trespass from nuisance which, as would be recalled, is an indirect interference with possession of land. Another point is, trespass to land is actionable *per se*. Hence the Claimant can succeed without proof of actual damage or injury suffered[81].To succeed under this head, the Claimant must prove that:

a) He owns or possesses the land at the material point in time;
b) There was a direct interference with his land by entering, remaining, placing or projecting anything or object beneath or above the land; and
c) That the said interference was unlawful and legally unjustifiable.

The tort of trespass, if wisely exploited, is capable of bringing about compensation for environmental pollution. An action founded on it is easier to pursue or prove in Court as the Claimant need not prove any actual damage suffered as a result of the environmental pollution. This is because trespass to land is actionable *per se* and the slightest unjustifiable or un-permitted disturbance, by the Defendant, to the Claimant's exclusive possession of land can ground an action in trespass.[82]

Recommendations

[80] Malemi, E., op. cit., p. 237.
[81] See *Eze v. Obiefuna* (1995) 6 NWLR (404) 639
[82] *Foreign Finance Corporation v. LSDPC* (1991) 3 LRCN 855.

Further to the foregoing**,** we recommend a Constitution amendment process wherein the right to live in a clean and healthy environment can expressly be provided for. In this wise, the provisions of Section 20 of the Constitution should be moved from Chapter II to Chapter IV of the Constitution, thus clothing the right to a clean environment with the garment of justiciability. This will be in keeping with the protection of fundamental right to a clean environment as practised in other Jurisdictions, such as Uganda[83] and Spain whose Constitution does not only provide for right to environment but also a duty on citizens to preserve the environment[84]. Second, we urge the Nigerian Courts to be liberal – minded in their interpretation of Section 33 of the Constitution which confers right to life on citizens. They should follow their counter – parts in India and Pakistan by stretching the right to include right to live in a clean and healthy environment. Third, we recommend that the issues of *locus standi* and strict proof which are always associated with the torts of nuisance and negligence should be relaxed in environmental pollution litigation. Once there is a glaring evidence of pollution and the victim has been able to trace it to the Defendant, the Court should be minded to awarding compensation instead of allowing justice to be defeated through technicalities or requirement for scientific evidence. Fourth, mass enlightenment programmes should be organized for the residents of environmental pollution – prone areas wherein they would be sensitised on their right to a clean and healthy environment, under local statutes, international instruments and common law. Lastly, the relevant Government Agencies should put the Oil Multi – Nationals and other pollution – breeding companies on their toes vis – a – vis compliance with environmental protection laws. This would prevent, or at least minimise, incidents of environmental pollution in Nigeria.

Conclusion

In this paper, we have examined the right of Nigerians to claim compensation for environmental pollution. In doing so, we have explored the constitutional and statutory provisions as well as common law principles which would be of help to victims of environmental pollution, in their bid to seek compensation from environmental polluters. We have equally made some recommendations as regards the issue discussed.

[83] Article 39 of the Ugandan Constitution makes the right to a clean and healthy environment a fundamental right.
[84] See Article 45 of the Spanish Constitution.