AN EXAMINATION OF THE SOURCES OF NIGERIAN ENVIRONMENTAL LAW

INTRODUCTION

Although the environment is as old as nature and therefore as old as the world, the policing of the environment qua surrounding had a comparatively late beginning in the world. This is because the environment in its genesis and pre-creation voidance never attracted the law as an instrument of social control. However, with time the environment, by incessant global technological economic advancement, attracted human attention and therefore human interaction. Environmental law arose as a response to environmental problems associated with mankind exploitation of the natural resources in his environment and more recently due to the need not only to preserve but also to protect the environment for future generations.

This paper attempts to succinctly examine the sources of environmental law with particular reference to Nigeria. The term sources as used here refer to the formal source, in the sense of origin, legal procedure and method that create a legally binding rule from which the law derives its validity; and not the material or literary source which include libraries, journals, reports and other source of information such as derived through correspondence or the media. The sources examined include: the common law of England, case law, international law, the constitution, and other Nigerian statutes. Apart from the introduction, the rest of the paper is segmented consecutively in line with the sources highlighted above while the last segment deals with the conclusion and recommendations.

COMMON LAW AS A SOURCE

This is a part of the received English law made applicable by virtue of local statutes. The common law fulfils only a minor and residual role in environmental

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2 An extract from the text of the paper presented by Niki Tobi, J.C.A. (as he then was) at the Workshop and Training on the "Role of Government Policy and Decision Makers in Environmental Management" organized by Afrique Environmental Development and Education (AEDE) in collaboration with the Government of Delta State (Local Government Service Commission) at Asaba, Nigeria, on Tuesday 23 Thursday 25, August, 2000. In environmental philosophy this is referred to as "Anthropocentrism". There is a paradigm shift to "Biocentrism", and in contemporary times "Ecocentrism".

3 Otherwise known as the "Principle of Sustainable Development".

protection. It is only relevant in the control of environmental pollutions, which is covered by the law of torts. There are four specific torts directly relevant to the control of pollution, namely: negligence, nuisance, trespass and strict liability. This becomes more necessary in view of the fact that quite a number of cases on environmental pollution in the country have either been brought under the tort of negligence or tort of nuisance or both in some cases.

Negligence:

According to a commentator, negligence is the breach of duty of care imposed by common law or statute law resulting in damages to the complainant. In Donoghue v. Stevenson, Lord Atkin expounded the law, where he evolved the neighbourhood principle, to the effect that:

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 or omission which called in question.

Thus, in environmental litigation in negligence, the plaintiff, in order to succeed must prove that:

i. The polluter owed him a duty of care.

ii. The polluter is in breach of that duty of care;

iii. The breach has caused foreseeable damage to the plaintiff.

Where the plaintiff proves his case, the remedies available to him include damages and injunctions, which may be prohibitive or mandatory.

It is noteworthy that the plaintiff in an action in negligence for environmental pollution, as stated above, must prove his case. One major setback of this law is that although it protects individuals against pollution, it is however, bedeviled with the problem of proof. Our courts often insist that the plaintiff must prove the defendant's failure to take reasonable cares. For instance, in J. Chinda & 5 Ors. v. Shell BP Petroleum Company of Nigeria Ltd., the plaintiff alleged that owing to the defendant company's negligence in the control and management of their flare site which was

8 Ibid.
9 Ibid. at 186.
10 Atsegba. L. et al, Supra, note 5 at 32.
11 Ibid. at 186.
within a short distance from the plaintiff's village, a lot of damages was done to his plantiff's( trees, land and house. The court held that plaintiff has not produced any evidence of negligence in the defendant's operation of the flare site and therefore the action failed. A similar decision was reached in Atunbi v. Shell BP Petroleum Development Company of Nigeria Ltd. where the plaintiff claimed that the defendant has cause oil, gas and chemicals to escape from pipelines under their control thereby destroying fishes in the lake and their farmland. The Court held that, the plaintiff could not prove that the defendants were negligent.

Perhaps, the judgments would have tilted the other way if the plaintiff had raised the doctrine of res ipsa loquitur, or that the facts speaks for itself. But, it has been noted that the doctrine is not a watertight safety net for a plaintiff in a negligence action, since the defendant can rebut the inference of negligence by calling expert witness to prove that he took all reasonable care in his operation. Furthermore, rural plaintiffs who usually lack education and resources to hire the services of expert witness may invariably fail to discharge the burden of proof.

Thus, some writers have expressed the views that as a result of these shortcomings, the tort of negligence offers little hope to plaintiffs in cases environmental pollution.

Nuisance:

The tort of nuisance arises when the emission of noxious or offensive materials from the defendant's premises significantly impairs the use and enjoyment by another of his property or prejudicially affects his health, comfort or convenience. In Nigeria, prior to the 1979 Constitution and in keeping with the common law tradition, nuisance was divided into private and public nuisance. While a private nuisance is defined as the substantial or unreasonable interference with a person's use and enjoyment of land occupied by him, on the other hand, public or common nuisance refers to a conduct which materially affects the enjoyment of a right which members of the public have in common. Public nuisance is deemed a crime that can only be prosecuted by the Attorney-General.

However, while this distinction exist, it seems superficial, as it is possible for same conduct to amount to both private and public nuisance. But one hurdle that must be passed by an individual in order to bring an action under public nuisance is that he was expected to prove "special damages by way of personal injury, property damage or pecuniary damage over and above that suffered by members of the general public."

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14 Ibid. at 187
16 Atsegbeua, L., et al, Supra. note 5 at 187
19 Ibid.
20 Ibid.
21 Ibid. at 183.
otherwise, he lacked standing to sue the tortfeasor.

This criterion amongst others informed the decision of the Nigerian Supreme Court in *Amos v. Shell BP Petroleum Development Company Nig. Ltd.* where, the Supreme Court affirmed the holdings of the lower courts that since creek was a public water way, its blockage by the erection of a temporary dam, was a public nuisance and no individual could recover damages for a public nuisance unless there was proof that he had suffered special damage peculiar to himself from interference with a public right. Also that the Attorney Generals consent was required for the action to stand.

Unfortunately, this had led to the denial of access to judicial redress under public nuisance claim brought by many aggrieved victims of environmental pollution. According to Awa Kalu, (SAN) it took the Supreme Court seventeen years to reverse itself in *Adediran and Amor v. Interland Transport Limited.* where the Supreme Court interpreted the provisions of section 6(6)(b) of the 1979 Constitution as entitling a private citizen to sue in public nuisance without obtaining the leave of the Attorney-General or without joining him as a party.

Another drawback, which makes the tort of nuisance to be ineffective in protecting the right of the individual against pollution is the inexcusable reluctance of courts in Nigeria to grant injunction against companies, which causes the pollution. In pollution cases, our 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 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. It is hoped that, the Nigerian courts should borrow a leaf from the American courts which occasionally grant injunctions in deserving cases.

**Trespass to Land:**

A victim of pollution can also sue in trespass if he is the owner or he is in rightful possession of the land trespassed upon. This tort consists of any unjustifiable intrusion by one person upon the land in the possession of another. Environmental trespass may be said to have occurred, if for example, a company dumps waste and noxious material on the land of another without his consent. Thus, in *Southport Corporation v. Esso Petroleum,* the court found the defendants liable in trespass when oil from the defendant's tanker polluted plaintiff's shore.

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27 See the observation of the Supreme Court of America in Amoco Production Co. v. Village of Gambell, Alaska 480 U.S. 531 (1987)
29 *Clark and Landsell on Tort,* 13th ed. (1969) at p. 1311.
30 (1956) A.C. 218.
Strict Liability

This relate to the common law principle re-stated by Blackburn J. in John Rylands & Jehu Horrocks v. Thomas Fletcher, otherwise" popularly referred to as the Rule in Rylands v. Fletcher under which a defendant is held strictly liable if plaintiff proves that there was escape of something dangerous from the defendant company's land or premises to somewhere outside his occupation or control. Furthermore, the plaintiff will be required to prove that there was a "Non-Natural Use" of the land or premises. The rule has been successfully invoked in some Nigerian cases.

The efficacy of the rule has however seemed to be whittled down by the liberal defences open to the defendant. Thus, it has been stated that the victim of pollution has no watertight legal arsenal to hold the polluter fully responsible for his deleterious act or omission since a defendant faced with such a suit premised on the Rule in Ryland v. Fletcher can avail himself of any of the defences such as "Act of God", "Act or Default of Plaintiff", "Consent of Plaintiff", "Independent Act of Third Party" and "Statutory Authority".

From the above discussion on the Common Law negligence, nuisance, trespass to land, and the Rule in Rylands v. Fletcher, as a source of environmental law, it is clear that the drawbacks associated with them has reduced the effectiveness of these torts in protecting the right of the individual against industrial pollution. We are of the view that reliance be placed on the doctrine of "strict liability" under criminal law. This will encourage industries to ensure that they use the highest possible standard in their production activities and, also relieving individuals of the heavy burden of proving negligence on the part of the company which caused the pollution. Countries like USA, Germany and Australia have shown the way, Nigeria should follow suit.

CASE LAW AS A SOURCE

Case law can rightly be opined as a source of environmental law. In Nigeria, the role of case law in this regard is exemplified by such cases as Adediran v. Interland Transport Ltd., where the long standing rule for seventeen years requiring a plaintiff at Common Law in a public nuisance case to seek and obtain the consent of the Attorney-General was held null and void.

Another significant principle which case law has upheld in Nigeria is the

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31 (1866) LR 1Exch 265; (1861 - 1873) All ER 1; Affirmed in (1868) LR HL 330. It is noteworthy that the principle had earlier been applied in Tuberville v. Stamp (1697) 90 ER 846 and Tenant v. Goldwin (1704) 91 ER 20.
32 Read v. Lyons (1947) A.C. 156.
33 Richards v. Lothians (1913) A.C. 263.
35 See Ikpede v. Shell BP Development Company of Nigeria Ltd (1973) All NL 61, where defendants were held not liable under the Rule because their pipeline was laid pursuant to a license obtained under the Oil Pipeline Act, i.e., Statutory authority. See generally Ogbodo, GS. Supra, note 15 at 258.
36 Atasguba, L. et al, Supra, note 5 at 190.
37 Supra, note 24.
38 By the "Riparian Doctrine", a landowner has a right to the water which flows, across his land. And the right to use the water is one that is reasonable such as to ensure the quality of such water is not being affected.
39 193(10 NLR 15

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"Riparian Doctrine" albeit, a common law doctrine, but applied by Nigerian courts. A good example, is the case of *Braide v. Adoki*,\(^{39}\) where it was held that members of communities with creeks, non-tidal rivers and bank, tidal waterways have a right to such water bodies. Other landmark cases include *Gbemre v. Shell Petroleum and Development Company Ltd.*,\(^{40}\) wherein the court in Nigeria first declared gas flaring as illegal and as a breach of fundamental human rights; and the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*\(^{39}\) (brought on behalf of the people of Ogoni land) where the African Commission on Human and People's Rights found that the Federal Republic of Nigeria was in violation of the right to a clean environment in Nigeria so as to ensure the protection of the health and livelihood of the people of Ogoni land.

Besides, case law is also a veritable source of international environmental law,\(^{42}\) which itself is also a source of our environmental law. At the international level, the principle enunciated in the classical *Trail Smelter Arbitration*\(^{43}\) and *Corfu Channel Case*\(^{44}\) has formed the basis of treaties having effect in Nigeria, which form part of our environmental law. The principle enunciated in these two cases was that no state has the right to use or permit the use of its territory in such a way as to cause injury or damage to the environment of other states, or areas beyond the limits of national jurisdiction. Conversely, that it was the obligation of every state "not to allow knowingly its territory to be used for acts contrary to the rights of other states.

**INTERNATIONAL LAW AS A SOURCE**

International rules on the environment is traced to the early 19th century. At that time, attention centred on the exploitation of natural resources as a result of growing industrialization.\(^{45}\) The first formal international agreement on environmental issues is traced to the Convention for the Preservation of Animals, Birds and Fish in Africa, signed in London on the 19th of May, 1900.\(^{46}\) Environmental protection was however specifically recognised in 1909 in the United States - United Kingdom Boundary Waters Treaty.\(^{47}\) International law as a source of environmental law encompasses international case law, rules of customary international law, international conventions and treaties, general principles of law as well as academic commentaries.\(^{48}\)


\(^{42}\) Ibid. at 35


\(^{44}\) *(United Kingdom v. Albania)*, Merits, International Court of Justice Reports. 1949.

\(^{45}\) Thornton, J. and Beckwith, S. *Supra*, note 4 at 33.


\(^{47}\) Ibid.

\(^{48}\) See Article 38 of the Statute of International Court of Justice, April 18, 1946, which forms the bedrock of the sources of international law, ipso facto, international environmental law.
International Case Law

International case law is a veritable source of international environmental law, which itself is also a source of environmental law. It is classified as a subsidiary source. This source is resorted to where there is no treaty on the issue, no customary rule of international law or an applicable general principle. They are however important because they provide evidence of what the present international law or norm is. In 1893, the findings of the Pacific Fur Seals Arbitration, a dispute between the U.S. and Great Britain over the exploitation of seals for fur established an important principle that "states did not have the right to assert jurisdiction over natural resources which were outside their territory". In 1941, the Trail Smelter Case arose, a dispute between Canada and U.S. over the emission of sulphur fumes from a Canadian smelting works, which caused damage to crops, trees and pasture in the U.S. It was referred to arbitrators. The tribunal held that:

Under principles of international law as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

This decision has been described as "a crystallizing moment for international environmental law". The principle enunciated in the Trail Smelter Case formed the basis for the declaration of Principle 21 of the United Nations Conference on the Environment in June 1972 at Stockholm. The International Court reinforced this approach by emphasising in the Corfu Channel Case, that it was the obligation of every state not to allow knowingly its territory to be used for acts contrary to the rights of other states. In Lac Lanoux Case, the court emphasized the duty to consult and negotiate.

The International Court also noted in 1995, that its conclusion with regard to French nuclear testing in the Pacific was "without prejudice to the obligations of states to respect and protect the environment". Reiterating the point, the Court again in 1996, in its Advisory Opinion to the UN General Assembly of the Legality of the Threat or Use of Nuclear Weapons, declared that:

The existence of the general obligation of states to ensure that activities within their jurisdiction' and control respect the environment of other

49 Ibid., Article 38 (1) (d)
50 United Nations Environmental Programme (UNEP), Training Manual on International Environmental Law, 9; Damilola S. Olawuyi, Supra note 46 at 77
51 (1893) 1 Moore's International Arbitration Awards 755.
52 Supra, note 43
53 Ibid.
55 See Atseghua, L. et al, Supra note 5 at 35.
56 Supra note 44
57 (France v. Spain) (1957), 24 ILR 101
58 International Court of Justice Reports, 1995, 208, 306
states or of areas beyond national control is now part of the corpus of international law relating to the environment.\footnote{International Court of Justice Reports. 1996, Para. 29:351LM809 and 1343 (1996)}

These cases have formed the basis of several important applicable environmental norms and treaties signed by Nigeria, which form part of the sources of our environmental law.

\section*{Rules of Customary International Law}

This is the second most important source of international law. Rules of customary international law arise where there is a general recognition among states that certain practices and norms of behaviour are obligatory as distinct from obligations arising from conventions and treaties.\footnote{United Nations Environmental Programme, supra note 48 at 7.} States are bound by a rule of international customary law once it is identified.\footnote{The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.} It is known in legal terminology as \textit{ opinio juris sive necessitatis}.\footnote{Article 38 (1) (b) See the \textit{Trail Smelter Case; Corfu Channel Case; Stockholm Declaration; and International Court Justice Report of 1996 Supra.}} A key element is the belief that an action was carried out because a legal obligation existed. Another element is general practice over a significant period of time.\footnote{Norms that qualifies as jus cogens include laws abolishing slave trade, laws against genocide and laws recognising diplomatic immunity. See Damilola S. Olawuyi, supra note 46 at 70 - 73.} International customary law is as legally binding as treaty law.

In international environmental law, \textit{ opinio juris (an opinion of law) }of states are relatively few. The most clearly established and accepted environmental customary rule in the international circle is the "no-harm rule", to the effect that "states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".\footnote{See generally, Bodansky, D, \textit{The Art and Craft of International Environmental Law} (Cambridge: Harvard University Press, 2010) 94 - 102.} Today, the no-harm rule regulates state behaviour in respect of transboundary pollution.

It is noteworthy that there are higher international customary norms otherwise referred to as \textit{jus cogens}.
\textit{Jus cogens} are pre-emptory norms that cannot be overruled by another norm. They are special customary norms that prevails over general norms and have precedence over treaty law.\footnote{Article 38(1)(a) Thornton. 1. and Beckwith, S., \textit{Supra.} note 4 at 31.} For a state to avoid being bound it is expected to consistently object to the customary rule before it is well established.\footnote{Article 38(1)(a) See the \textit{Trail Smelter Case; Corfu Channel Case; Stockholm Declaration; and International Court Justice Report of 1996 Supra.}}
reached through negotiations, agreement, resolution and declarations. States are expected to comply with the terms of these obligations under a treaty or convention based on the principle of pacta sunt servanda (let the agreement be kept). We shall proceed to briefly examine some of these conventions' protocols inclusive of evolving from several conferences.

The Stockholm Conference

Held in Stockholm, Sweden from 5 to 16 June, 1972 is acclaimed to be the first international conference on the environment, tagged - the United Nations Conference on the Human Environment. The conference resulted in the creation of three instruments, to wit:

(a) a resolution on institutional financial arrangements;
(b) a declaration containing 26 principles; and
(c) an Action Plan containing 109 recommendations.

The success of the Stockholm conference also led to the creation of the United Nations Environmental Programme (UNEP). The Declaration, made by 113 states excluding the USSR, Cuba and few other socialist states consist of 26 principles. Principle 21 regarded as the cornerstone of international environmental law" states that: "states have a responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction". Principle 1 is the initial attempt to formulate the principle of sustainable development. Principle 8 serves as the first international recognition of the need to link environmental protection to economic and social development. Principle 24, require international cooperation to "effectively control, prevent reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interest of all states".

It should also be emphasised that the establishment of the United Nations Environment Programme (UNEP) proved to be strategic in the evolution of several conventions and instruments in the field of environmental protection.

The Brundtland Report

The Brundtland Commission - "The World Commission on Environment and Development") WCED (chaired by Norwegian Prime Minister, Gro Harlem Brundtland, was established in 1983 by the United Nations General Assembly. Its report "Our Common Future" in 1987 rekindled the need to foster "sustainable development", which has gradually come to underpin environmental law at the

71 Thornton, J. and Beckwith, S., Supra, note 4 at 34.
73 Published by Oxford University Press in 1987, and endorsed by the UN General Assembly Resolution 42/187.
74 The report made popular the definition of "sustainable development" as "development which meets the needs of the present without compromising the ability of future generation to meet their own needs".
international level.\textsuperscript{73} The publication of the Brundtland report led to growing pressure for further international action on the environment, and eventually the Rio Conference.\textsuperscript{76}

**The Rio Conference**

In June 1992, the United Nations Conference on Environment and Development (UNCED) met in Rio de Janeiro, Brazil (known as the Earth Summit or the Rio Conference) at the twentieth anniversary of the Stockholm Declaration. A number of documents were signed at Rio, to wit: Framework Conventions on Climate Change and Convention on Biological Diversity; Agenda 21, an 800 page document setting out global action plan for all states on development and the environment; and the "Rio Declaration"\textsuperscript{77} focused on the promotion of sustainable development.

Principle 2 of the declaration merges environment with development, that is, the duty to protect the environment in pursuing developmental goals of states. Principle 3 calls for equitable development to meet both the present and future need. Principle 7 adopts the common but differentiated responsibility. Principle 10 identifies the need for public participation in environmental decision making process. Principle 15 adopts the precautionary approach in environmental protection. Principle 16 recognise the polluter pays principle, while Principle 17 recognizes the need for environmental impact assessments for projects likely to cause adverse effect on the environment.

It is noteworthy that to mark the 10th anniversary of the Rio conference, the World Summit on Sustainable Development (WSSD) was held in 2002 in Johannesburg, South Africa which promoted "partnership" as a non-negotiated approach to sustainability. The conference agreed on the Johannesburg Plan of Implementation (JPOI) and the Johannesburg Declaration on Sustainable Development. In 2012, another Rio conference was held (referred to as Rio+20) where the "the Future We Want", a global action plan aimed at fostering a "green" world economy was adopted.

**The Kyoto Protocol**

The most significant developments since the Rio Declarations have taken place, is in the field of "climate change". First, there was the United Nations Framework Convention on Climate Change held in New York on May 9, 1992, the convention was opened for signature in Rio de Janeiro, Brazil, in June 1992 and came into force on March 21, 1994. The commitments of the nations that adopted the convention was however doubtful. Thus, the parties to it launched another round of talks aimed at producing stronger and more detailed commitments from industrialised countries in 1995, in Kyoto, Japan.

\textsuperscript{73} See Eiere, O.D. “Sustainable Development: A Panacea to Environmental Pollution” (2003) Vol. 1 NO. 2 Ambrrose Alli University Law Journal 8

\textsuperscript{74} Thornton, J. and Beckwith, S” Supra. note 4 at 35.

Intense negotiations for two and a half years gave birth to the adoption of what is now known as the Kyoto Protocol. The Kyoto Protocol commits State Parties to reduce greenhouse gas emissions, based on the scientific consensus that global warming is occurring and it is likely that it is caused by human-made Co2. It introduced the idea of a multinational carbon market - the Clean Development Mechanism and delivered new rules for reporting, accounting and verifying emissions. Its first commitment period expired December 31st, 2012, but the protocol by extension will now lapse by 2020. The extension was agreed by delegates to the 18th Conference of Parties (COP18) held in Doha, Qatar in 2012.

The Copenhagen Summit
The 2009 United Nations Climate Change Conference (COP15), commonly known as the Copenhagen Summit, was held between 7th to 18th December at the Bella Centre in Copenhagen, Denmark. The conference was held in furtherance of the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The major reason for the conference was to provide a framework for climate change mitigation beyond 2012 and the adoption of the Copenhagen Accord. Key elements of the Copenhagen Accord include: an aspirational goal of limiting global temperature increase to 2 degree Celsius; a goal of mobilizing $100 billion a year in public and private finance by 2020 to address developing countries climate mitigation needs; and the establishment of a Green Climate Fund.

The success of the summit was however marred by several protests prior to and during the summit and negotiation problems. A day after the summit it was evident that no meaningful progress had been made towards preventing dangerous climate change in the future. The failure of the summit is largely blamed on the summit inability to achieve a binding deal on the United States. It has however, been argued that the Copenhagen summit brought about massively increased public awareness on climate change and that green growth is now the prevailing economic model of our time, that with 110 world leaders present (Nigeria inclusive) and a single issue on the agenda, there has never been a meeting like this.

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78 Referred to in full as "Kyoto Protocol to the United Nations Framework Convention on Climate Change". Signed on December 11, 1997 and came into force with Russia's ratification on February 16, 2005.
Paris Climate Change Conference

The 2015 United Nations Climate Change Conference, COP21 which took place in Le Bourget, Paris in France from November 30th to December 12th, 2015 was aimed at adopting a legally binding agreement known as the Paris Climate Agreement, also referred to as the Paris Climate Accord, Paris Climate Deal or Paris Agreement, a pact sponsored by the United Nations to bring the world's countries together in the fight against climate change.

The Paris Climate Accord, a 31 page landmark agreement was finally reached on December 12th, 2015, marking a turning point in the struggle to contain global warming after decades of negotiation. It is the world's first universal climate agreement to curb the effects of climate change.86

According to the United Nations Website on climate change, the agreement has a "hybrid of legally binding and non-binding provisions".87 The key points of the agreement include: holding the increase in the global average temperature to well below 2 degree Celsius above pre-industrial levels (from the years 1850 - 1900) and to pursue efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels, recognizing that this would significantly reduce the risk and impacts of climate change; an acknowledgement of the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change; requiring all countries to submit updated plans that would ratchet up the stringency of emission by 2020 and in every five years; requiring a global "stocktake"- an overall assessment of how countries are doing in curbing their emissions compared to their national plans, starting in 2023 and in every five years; requiring countries to monitor, verify and report their greenhouse gas emissions using the same global system; calling on developed nations to give $100 billion annually to developing countries by 2020 to help these poorer countries combat climate change and foster greener economies; and setting the goal of a carbon neutral world sometime after 2050 but before 2100.88

The agreement is however criticised for imposing no sanctions on countries that fail to reduce emissions. Nevertheless, President Barrack Obama describes the accord as "the best chance to save the planet".89

It need be emphasised that the role international conventions and treaties play as

86 195 countries signed the agreement with the exception of Nicaragua and Syria. The agreement went into effect on November 4, 2016, 30 days after at least 55 countries representing at least 55 percent of the world's global emission ratified it on October 5, 2016. As of May 2017, 147 State Parties have ratified it. See "What is the Paris Climate Agreement? 9 Things You Should Know". Available at http://www.ajc.com/news/world/what-is-the-paris-climate-agreement. Accessed December 18, 2016.
89 See ""Historic" Paris Climate Deal Adopted", CBC News, December 12, 2015. A follow up conference "COP22" had been held in Marrakesh, Morocco from November 7 - 18, 2016 where State Parties agreed on a "Marrakesh Action Proclamation" collectively declaring that the "extraordinary momentum on climate change worldwide is irreversible". Future meetings of the United Nations Framework Convention on Climate Change (UNFCC), COP23 and COP24 have been set for November 6 - 17, 2017 in Bonn, Germany; and November 5 - 16, 2018 in Poland respectively. See "Outcome of the UN Climate Change Conference in Marrakesh", available at https://www.c2es.org>summary.
a source of environmental law can be gleaned from the number of conventions and treaties dealing with the environment to which Nigeria has signed or acceded to. They include: The Universal Declaration of Human Rights, 1948; Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matters, 1972; Basel Convention on the Control for Transboundary Movement Hazardous Wastes and their Disposal, 1989; Montreal Protocol on Substances that Deplete the Ozone Layer, 1987; and the Vienna Convention for the Protection of the Ozone Layer, 1985. In Nigeria, for these treaties to be strictly binding they need to be transposed domestically into national law. Section 121(1) of the 1999 Constitution provides as follows:

*No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.*

**General Principles of Law**

This comprise of principles of law recognised by civilised nations. There is no universally agreed set of principles that comprise these "general principles". Thus, they broadly include principles of international law, legal maxims, declarations of principles, analysis of principles of domestic law recognised by national legal systems. Many of these principles are imbeded in conventions and treaties including national and international case law. In general, they are said to be norms that reflect the fundamental propositions shared by legal systems around the world. Sustainable development aptly fits into this categorisation. It has been vastly recognised as the yardstick for measuring development in many countries and internationally. It is noteworthy that in furtherance of sustainable development, the United Nations General Assembly at the Sustainable Development Summit held on September 25, 2015 adopted a new agreement containing a set of 17 Sustainable Development Goals (SDGs) with 169 targets to end poverty, fight inequality and injustice, and tackle climate change with a deadline of 2030; titled "Transforming our World: The 2030 Agenda for Sustainable Development", which replaces the Millennium Development Goals (MDGs) that were adopted in September 2000 committing nations to a global partnership to reduce extreme poverty and setting out a series of time bound taregets, with a deadline of 2015.

**Academic Commentaries**

Academic commentaries) writings( are not so much source of international law per se but are means by which the existence and scope of international law may be determined. Some are evolutionary and initiative. A good example is the work of

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90 Article 38(1)(c)
91 Damiola S. Olayiwi, Supra note 46 at 72.
92 Ibid., 73
94 Damiola S. Olayiwi, Supra note 46 at 75.
Rachel Carson in 1962. Her book titled: "Silent Springs," gave a classic view of the indiscriminate use of pesticides on the environment, especially on birds. This initiated what has come to be known as the "American Environmental Revolution" and fostered the launching of a new branch of law known today as environmental law. To that extent, academic writings may play much greater role in the formulation of international rules.

THE CONSTITUTION AS A SOURCE

Our concern here is to identify specific provisions in constitutions having bearing on environmental law and policy, from which one can safely conclude that the constitution of a nation constitute a source of environmental law. Indeed, the constitution of some countries contain provisions relating to the protection and preservation of the environment. According to Fagbohun:

Section 19 number 8 of the 1980 Chilean Constitution consecrates the right to live in an environment free of contamination and the duty of the state to prevent such right from being affected; Section 225 of the 1988 Brazilian Constitution establishes the right of all individuals to live in an ecologically balanced environment, and obliges the public authorities that all inhabitants have the right to have a healthy and balanced environment, capable of allowing human development and productive activities to satisfy present needs without affecting future generations; the 1992 Paraguayan Constitution provides for the right to healthy environment and environmental protection; and finally Article 151( of the German Democratic Republic now defunct) Constitution provided that conservation of the quality of water and air, protection of the floral and landscape amenities of the homeland shall be ensured by the competent authorities and also are the responsibilities of every citizen.\(^\text{97}\)

In Nigeria, the situation can be safely said to be contrary. It was not until the Constitution of the Federal Republic of Nigeria 1999 came\(^\text{98}\) into force, that a Nigerian constitution reflected for the first time a specific provision on the environment.\(^\text{99}\) The Constitution makes environmental protection a state objective under Chapter II, titled: "Fundamental Objectives and Directive Principles of State Policy". The most relevant provision therein is section 20, which provides as follows:

The state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria.

Section 17 (2) (d) of the Constitution complements the aforesaid provision by providing that:

Exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented.

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\(^{99}\) Fagbohun, O., Supra note 97 at 25.
One fundamental drawback is that non-compliance with any of the provisions of the chapter is non-justiciable. The effect of the Fundamental Rights (Enforcement Procedure) Rules, 2009 on the justiciability of the chapter leaves much to be desired. The courts in Nigeria have however indicated interest to give effect to these objectives as fundamental rights. Nevertheless, we note with dismay that the "right to a clean environment" is not a protected right under the constitution making it difficult, if not impossible, for anyone to challenge any deleterious act on the environment.

OTHER NIGERIAN STATUTES AS SOURCE

We shall proceed to examine Nigerian specific legislations geared towards protecting, preserving and regulating the environment. Prior to 1988, several enactments dealt with matters of environmental significance, though in a not-too-explicit manner.

It was the Koko incident when 3888 tons of assorted toxic 'wastes' were dumped in the then Koko port of former Bendel State, that more conscious efforts has been made to tackle environmental problems, through specific environmental legislation. Some of the federal and state legislations include:

(a) the Oil in Navigable Waters Act, 1968, enacted as a result of the International Convention for Prevention of Pollution of the Sea in 1954, creating several anti-pollution offences;

(b) the Harmful Waste) Special Criminal Provisions Act, 1988, enacted in the wake of the Koko saga, which 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;

(c) the Associated Gas Re-Injection Act, 1979, enacted for the purpose of curbing gas flaring in Nigeria, which Act, has had its commencement severally postponed;

(d) the Federal Environmental Protection Agency Act, which perhaps, was the most comprehensive on environmental protection in Nigeria before its repeal recently in 2007;

(e) the Oil Terminal Dues Act;

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100 See section 6(6)(c) of the 1999 Constitution.
101 Which came into effect December 1, 2009.
103 Hambali, Y.D.U, Supra, note 6 at 151
105 See the Harmful Waste(Special Criminal Provision) Act, 1988 and the Federal Environmental Protection Agency Act, Cap 131 Laws of the Federation of Nigeria, 1990 (Repealed)
106 Cap. 06, LFN, 2004
107 Cap. H1, LFN, 2004
108 Cap. A25, LFN, 2004
110 Cap. 0.8, LFN, 2004
(f) the Oil Pipeline Act;\textsuperscript{111}
(g) the Petroleum Act;\textsuperscript{112}
(h) the River Basin Development Authority Act;\textsuperscript{113}
(i) the Environmental Impact Assessment Act;\textsuperscript{114}
(j) the Environmental Sanitation Edicts of some States;\textsuperscript{115} establishing bodies for environmental sanitation and proscription of environmental offences and penalties; and
(k) the Water Board/ Water Corporation Laws,\textsuperscript{116} establishing water boards or water corporations, whose duties include ensuring that water is supplied to consumers at reasonable prices, in portable quantity and in adequate quantity.\textsuperscript{117}

It is noteworthy that the National Environmental Standards and Regulations Enforcement Agency (NESREA)\textsuperscript{(Act, 2007 heralds the new law on environmental protection in Nigeria. The NESREA Act repealed the Nigerian flagship law on the environment, that is, the Federal Environmental Protection Agency Act (FEPA Act).\textsuperscript{118} It is currently the primary law on environmental protection with the new Agency established replacing the old Agency.\textsuperscript{119}

The new Act has, no doubt improved upon the shortcomings of its predecessor Act. Some of the features of the new Act absent in the predecessor legislation include:
(a) the appointment of a Director-General as the Chief Executive and Accounting Officer;
(b) the establishment of five Directorates headed by a Director;
(c) the increase of the penalties for obstruction of an officer under the Act; and
(d) the mandate for the Agency to establish offices in the six geo-political zones in the country.\textsuperscript{120}

The Agency is armed with a wide range of powers. In the sphere of environmental protection, amongst other powers, it can "prohibit processes and use of equipment or technology that undermine environmental quality".\textsuperscript{121} The Agency can conduct public investigations\textsuperscript{122} and make proposals to the minister for the review of existing guidelines, regulations and standards on environment.\textsuperscript{123} The Agency is empowered to establish mobile courts to expeditiously dispense cases of environmental infringements,\textsuperscript{124} although, to be done with "relevant judicial, authorities as well as in consonance with the Nigerian constitution".\textsuperscript{125}

Its functions are enumerated in section 7 which includes the enforcement of compliance with laws, guidelines, policies and standards on environmental matters amongst other functions. The Agency in furtherance of its functions and mandate has set short term, medium term and long term strategies, for example, renew and evaluation of

\textsuperscript{111} Cap. 07, LFN, 2004
\textsuperscript{112} Cap. P10, LFN, 2004
\textsuperscript{113} Cap. R9, LFN, 2004
\textsuperscript{114} Cap. E12, LFN, 2004
\textsuperscript{115} For example, Edict No. 4 of 1986 (Oyo State), Edict No. 12 of 985, as amended by No. 4 of 1987 (Lagos State).
\textsuperscript{116} For example, Water Corporation Laws of Oyo State. Rivers State Water Board, Water Works Laws of Lagos State.
\textsuperscript{117} See generally, Atsegbua L. et al, Supra note 5 at pp. 21-32.
\textsuperscript{118} See NESREA Act, 2007, s. 36
\textsuperscript{120} Ibid. at 154
\textsuperscript{121} NESREA Act, 2007, s. 8(d)
\textsuperscript{122} Ibid. s. 8(g)
\textsuperscript{123} Ibid. s. 8(k)
\textsuperscript{124} Ibid. s. 8(f)
\textsuperscript{125} Ibid.
environmental regulations and standards; encouragement of voluntary compliance through public enlightenment and outreach programme and the implementation of a master plan for the country.\textsuperscript{126} It is pertinent to note that one obvious drawback of the NESREA Act, is that the powers of the agency do not extend to environmental issues arising from the oil and gas sector.\textsuperscript{127} Furthermore, though the agency now has a Director-General as the Chief Executive Officer,\textsuperscript{128} it still remains like its predecessor (FEPA) a parastatal under the Federal Ministry of Environment, Housing and Urban Development.\textsuperscript{129} The Minister in charge of the ministry enjoys an overriding authority over the agency and its functions.\textsuperscript{130}

CONCLUSION AND RECOMMENDATIONS

We can conclude by observing that the English common law is outdated and does not meet up with modern technical demands as its rules require proof of damages in cases of nuisance, negligence and trespass, whereas environmental protection laws more recently is based on the doctrine of strict liability which operates without the "fault principle" in countries like USA., Germany and Australia. Nigeria should follow suit, since it operates as the only channel to save victims from environmental pollution and other hazards of the 21st century.

Case law can greatly enrich the corpus of rules geared towards protecting the environment. Therefore, one step that can greatly assist in this regard is to empower the citizens through judicial activism.

More recently, international law (international case law, rules of customary international law, conventions and protocols, general principles of law, and academic commentaries) has influenced global response to the protection of the environment (ecological! climate system) from mankind exploitation and further degradation. It is hoped that more concrete steps should be taken to ensure implementation of various commitments, agreements, protocols reached and "targets" set for member nations of various multilateral and bilateral treaties.

The place of the "grundnorm" of a nation in environmental management cannot be over-emphasised. In Nigeria, the time has come when some parts of the 1999 Constitution (Chapter II on Fundamental Objectives and Directive Principles of State Policy) especially section 20, which specifically deals with environmental protection should be made justiciable. The approach should be towards making environmental management a constitutional imperative. We therefore, recommend the amendment or repeal of section 6(6)(c) of the 1999 Constitution so as to make Chapter II enforceable by individuals in court.

The NESREA Act, 2007 looks promising as the primary legislation on environmental protection in Nigeria. However, our suggestion is that the agency established under it should be made truly independent. The present arrangement whereby the agency is made a parastatal of the Federal Ministry of Environment, Housing and Urban Development can only act as a clog in the realisation of the objectives for which the agency was established. Secondly, the agency powers should be made to extend to environmental issues arising from oil and gas sector, especially against the background that environmental issues in Nigeria are even more associated with companies under that sector. An amendment to the NESREA Act is thus advocated.

\textsuperscript{126} See Ogbodo. G.S., \textit{Supra} note 89 at pp. 154-155.
\textsuperscript{127} Ibid. s. 8(g) (k), (n) (s).
\textsuperscript{128} Ibid. s. 11(1)(2)
\textsuperscript{129} Ibid. s. 3(1(ea). 5(1)(b) etc.
\textsuperscript{130} Ibid. s. 3(1)(e). 5(3) etc; see generally Ogbodo. G.S.. \textit{Supra} note 89 at 147.
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