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ENVIRONMENTAL PROTECTION IN NIGERIA: TWO DECADES AFTER THE KOKO INCIDENT

DR. S. GOZIE OGBODO*

I. INTRODUCTION

Prior to June 1988, Nigeria responded to most environmental problems on an *ad hoc* basis.[1] Although the Nigerian Criminal Code[2] contained some provisions in the with respect to certain environmental infringements, such as the pollution of water sources, the burial of corpses within a hundred yards of residential home, and the sale, possession or manufacture of matches with white phosphorus,[3] the code lacked any concrete national legislation dealing specifically with the ever-increasing pollution caused specifically by hazardous waste.[4] Environmental legislative provisions in existence at the time were enacted in direct response to problems associated with the newly industrializing economy and the discovery and processing of oil.[5]

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1. Ikhariale, M. "The Koko Incident, the Environment and the Law", in The Law and the Environment in Nigeria, Shyllon, F., ed. (Ibadan, Vintage Publishers, 1989), pp. 73-75.
2. Cap 77 Laws of the Federation of Nigeria, 1990. See Atsegbua, L, *et al.*, Environmental Law in Nigeria: Theory and Practice, Ababa Press 2004, 4.
3. Nigeria Criminal Code, sections pp. 245 – 248.
4. Ola, C. S., Town and Country Planning and Environmental Laws in Nigeria, 2nd ed. (Ibadan, University Press, 1984), p. 165, cited in Atsegbua, L, *et al*, *supra*, p 5.
5. *Ibid*, p. 56: Such environmental laws included the Oil in Navigable Waters Act 1968, Oil in Navigable Waters Regulation 1968, Petroleum Act 1969, Petroleum (Drilling and Production) Regulation 1969, Petroleum Drilling and Production (Amendment) Regulation 1973, Petroleum Refining Regulation 1974, the Oil Pipeline Act 1956, the Factories Act.

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The discovery of toxic waste dumped in Koko, at remote part of southern Nigeria, in June 1988, and the attendant media and public outcry prompted the government to react swiftly. Through diplomatic channels, the Nigerian government succeeded in getting the Italian government and the Italian company that was the culprit to lift the toxic waste out of the country. The Nigerian government followed this action by organizing an international workshop[6] on the environment. The result was the formulation of a national policy on the environment.[7] Consequently, the Federal Environmental Protection Agency 1988 (FEPA) was created and charged with the administration and enforcement of the environmental law.[8] In addition, the government enacted the Harmful Waste (Special Criminal Provisions) Act, 1988, to deal specifically with illegal dumping of harmful waste.[9]

This article appraises the post-Koko environmental protection laws in Nigeria, with a view to assessing environmental protection mechanisms in the country. In particular, the focus is on hazardous waste[10] protection under the current dispensation.

Part II will examine the relevant conceptual/definitional issues. Part III will review the existing legal regimes in the country, including applicable national, regional, and international laws, as well as the common[11] and case laws[12] applicable in the country. Part IV will review the enforcement agencies and provisions and enforcement challenges. Part V will proffer recommendations in light of recent developments in the field of environmental law.

II. CONCEPTUAL/DEFINITIONAL ISSUES

In the aftermath of the 1988 Koko incident, Nigeria developed a comprehensive national policy on the environment. Prior to this incident, environmental legislation was covered under unrelated laws on distinct

6. The Nigerian government in collaboration with the United Nations Environmental Program (UNEP) organized the workshop from September 12 – 16, 1988. See also Aina, E. D. A and Adedipe, N. O. ed., the Making of the Nigeria Environmental Policy (Ibadan, University Press, 1991), p. 311, cited in Atsegbua, L, *et al.*, *supra*, p. 57.

7. *Ibid.*, p. 7.

8. *Ibid.*, p. 8. See also the Federal Environmental Protection Act, 1988. It is noteworthy that the FEPA Act has been repealed by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.

9. *Ibid.*, p. 8.

10. Hazardous Waste is the class of waste that is dangerous to treat, keep or dispose of. It is intrinsically dangerous to human life swallowed, inhaled or if it contacts the skin.

11. These are sources derivable from the law of torts, specifically; actions in negligence, actions in nuisance, actions in trespass and strict liability.

12. These are sources derivable from the interpretative functions of the court. .

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topics, for example, "wild animals," "sanitation," "National Parks," and "domestic personal hygiene."[13]

A. DEFINITION OF ENVIRONMENT

The term "Environment" has been given different definitions. Black's Law Dictionary[14] defines it 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." The English Dictionary[15] defines the word as "the conditions under which any person or thing lives or is developed; the subtotal (I think it says sum-total) of influences which modify and determine the development of life or character." Under one Nigerian law,[16] environment is defined as "the components of the earth," and includes:

(a) land, water and air, including all layers of the atmosphere,

(b) all organic and inorganic matter and living organisms and,

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

The first two definitions cover broad concept of "environment." In that respect, they embrace "everything within and around man that may have effect on or be affected by man; in other words, human environment as contrasted with physical environment."[17] This more expansive concept of environment is synonymous with the human environment.[18]

The definition under Nigerian law covers a narrower concept of "environment." This concept restricts the meaning "to the physical or natural environment, comprising God given natural resources, natural elements and natural environment whether or not modified by man."[19]

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13. Atsegbua, L, *et al.*, note 2, *supra* . See also Ajai, O Law, Judiciary and the Environment in Nigeria, Perspectives in Law and Justice, Umezuilke I. A. and Nweze, C. C. ed. (Fourth Dimension Publishers), p. 240.
14. 6th edition, cited in Atsegbua, L, *et al.*, *supra*.
15. Cited in Ajai, O, *supra*.
16. Environmental Impact Assessment Decree of Nigeria No. 86 of 1992.
17. Ajai, O., Law, Judiciary and the Environment in Nigeria, *supra*.
18. *Ibid.*
19. *Ibid.*

This narrower concept of environment is, therefore, synonymous with the physical or natural environment.[20]

B. ENVIRONMENTAL LAW

The concept of environmental law refers to the integrated rules and principles; i.e., legal norms, the purpose of which is to achieve environmental conservation.[21]

Under Nigerian law, environmental law includes all the sources of Nigerian law that impact the environment. As a federation, there are numerous sources of environmental law including the Constitution,[22] International treaties, state laws, local government laws, and common law. These sources shall be more closely examined in Part III.

C. ENVIRONMENTAL PROTECTION

The chief beneficiary of environmental law is mankind since the law is designed to "improve mankind's living conditions."[23] Generally speaking, mankind benefits because environmental protection aims to saving mankind from itself. Unless legal checks and balances are imposed on mankind's present activities, future generations may unduly suffer for present generation's reckless environmentally damaging activity.

Another goal of environmental protection is anchored on the principle that the "polluter pays."[24] Under this principle, the polluter must be held liable for the consequences of his actions. This principle involves holding the polluter liable for compensatory damages to all the victims of his deleterious activities in the environment.[25]

D. WASTE

The generation and disposal of waste is an intrinsic consequence of life. The amount and nature of waste generated depends on the level of social, economic, scientific and technological development of the community or

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20. *Ibid.*
21. *Ibid.*
22. Constitution of the Federal Republic of Nigeria 1999, section 2 (2). There are currently 36 States and a Federal Capital Territory (FCT), as well as 768 local governments.
23. Ikharaile, M., "A Constitutional Imperative on the Environment: A Programme of Action for Nigeria" in Simpson & Fagbolun, ed, cited in Atsegbua, L, *et al.*, *supra*, p. 150.
24. This is a European ideology on the environment that insists that the producer of waste is responsible for its proper disposal. See Malcolm, R., *A Guidebook to Environmental Law*, 1994, p. 204.
25. *Ibid.*

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society. Highly developed countries, such as the United States of America, generate more waste per capita. In contrast, less developed countries, including Nigeria, generate less waste per capita.

Waste has been defined as something that is no longer useful and is to be thrown away, or disposed.[26] The World Health Organization (WHO)[27] defines waste as something that the owner no longer wants at a given place and time and that has no current or perceived market value. The foregoing definitions miss a critical component of waste by depicting (or describing) waste as "no longer useful" or lacking "current or perceived market value". Indeed, waste can be an economic good that is bought and sold on the international market,[28] hence the saying that "one man's waste is another man's raw material."[29]

Waste is generated at different stages manufacturers, retailers, and consumers.[30] Consequently, waste can be classified as industrial waste if it emanates from factories, commercial waste if it emanates from retailers, and as household waste if it emanates from homes.[31] Waste may be categorized as organic or inorganic/non – organic.[32] Organic waste can decay or decompose, e.g., most household waste. Inorganic/non – organic waste, does not easily decay or is incapable of decay, e.g., tin cans and plastic products. Waste can also be in solid, liquid, or gaseous form.[33]

E. FURTHER CLASSIFICATION OF WASTE

Waste can be further classified into two categories: (a) controlled waste and (b) dangerous/toxic/harmful/special waste.[34]

Controlled waste is the class of waste that can be easily managed, treated and disposed. Examples include paper, newsprint, wood chips, food remains. Dangerous waste on the contrary, is the class of waste that is dangerous to treat, keep or dispose. Examples include acid, alkalis lead,

26. Oxford Advanced Learner's Dictionary, 4th ed., cited in Atsegbua, L, *et al.*, *supra*, p. 101.
27. WHO is an agency of the United Nations charged with health related matters.
28. Malcolm, R., A Guidebook to Environmental Law, *supra*, p. 194 – 195. .
29. Berridge Incinerators Ltd. v. Nottinghamshire County Council, unreported, but cited in the D.O.E Circular 13/88 on the "Control of Pollution Act 1974, The Collection and Disposal of Waste Regulations." See Malcolm, R., *supra*, where the case was cited.
30. *Ibid.*
31. *Ibid.*
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*

mercury, and methyl. This waste is dangerous to human life if it is swallowed, inhaled, or if it contacts the skin.

One may wonder, why bother to classify waste? The simple answer is that the classification ensures that appropriate care is taken in the handling of any type of waste. Consequently, the degree of care employed in the handling of controlled waste may be grossly inadequate in the handling of dangerous waste.

F. SOURCES AND TYPES OF TOXIC WASTE

There are two main sources[35] of toxic waste – human and nature.

1) Human toxic waste[36] connotes all the toxic waste produced as a consequence of human activities including household activities but inparticular, commercial and industrial activities. Toxic wastes are typically the by-products of businesses.[37] Such wastes include the following:[38]

(a) Cosmetic – manufacturing industries produce ignitable waste, flammable solvents strong acids and bases;

(b) Printing industry produces heavy metal solutions, waste ink, solvents, spent electroplating wastes;

(c) Furniture and wood manufacturing and refinishing plants produce ignitable wastes and spent solvents;

(d) Metal manufacturing industries produce waste containing heavy metals, strong acids and bases;

(e) Leather products manufacturing plants produce benzene and toluene wastes;

(f) Paper manufacturing industry produces print wastes containing ignitable solvents, strong acid, and bases; and

35. See Ademoroti, C. M. A., Environmental Chemistry and Toxicology, Ibadan, Foludex Pres, 1996, 186; referenced by Kalu, V. E., Toxic Wastes and the Nigerian Environment: An Appraisal, 2006, 9 (1) UBLJ, 55.
36. *Ibid.*
37. *Ibid.*
38. Atsegbua, L., *et al.*, *supra*, 105.

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(g) Vehicle manufacturing plants, which produce heavy metal wastes, ignitable wastes and spent solvents.

2) Natural toxic waste[39] connotes all the toxic waste produced as a consequence of natural forces or disasters. One example is volcanoes, which generate toxic wastes upon eruption.

G. HAZARDOUS WASTE MANAGEMENT

Waste management has been defined as:

> "*The collection, keeping, treatment and disposal of waste in such a way as to render them harmless to human life, animal life, the ecology and the environment in general.*"[40]

The goal of waste management is to achieve conservation by the efficient management of the environment. Hazardous waste management is critical to efficient environmental management.

In light of their intrinsic potential to adversely affect the environment, hazardous waste certainly deserves greater attention by all those concerned about the environment's future. In the same vein, given the intrinsically dangerous nature of hazardous waste, it demands a higher degree of care in contrast to controlled waste.[41] But for the Koko incident, Nigeria might still be ill equipped to manage the consequences of hazardous waste in the country. Because of Koko, there has been two decades of hazardous waste awareness and legislation in the country.[42] This article will examine the current legislation and enforcement tools with respect to toxic waste management in Nigeria with a view to assessing their adequacy or otherwise.

III. LEGAL REGIMES

Laws regulating toxic waste in Nigeria run the gamut of the scope of laws applicable in the federation. Such laws include the constitution of the country, all the international and regional treaties in force in the country, all the laws made by the government of the federating states the local governments, as well as the common laws and case laws.

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39. *Ibid.*
40. Atsegbua, L., *et al.*, *supra*, 105
41. Note 34, *supra*.
42. The Koko incident and the resultant laws occurred in 1988.

A. THE CONSTITUTION

Like most constitutions, the Nigerian Constitution[43] contains the supreme law of the land. However, until the ratification of the 1999 Constitution, the document lacked a specific provision on the environment.[44] Section 20 of the 1999 Constitution blazed the trail with the following provision:

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

As heartwarming as the aforestated provision may appear, it has been described as having serious defects. As discussed by Fagbohun,[45] one defect is the fact that the wording of the section is very broad. More importantly, the relevant provision falls under chapter II of the Constitution, which is non-justiciable; consequently the provision lacks judicial enforcement. Further, Fagbohun criticizes that the provision attempts a "*middle-ground between two extremes formulated by a system that is not desirous of initiating any serious environmental change the thrust of which may disturb its economic direction and strategies.*"[46]

Thus, the legal watershed heralded by Section 20 has disappointingly resulted in a legal mirage.

B. REGIONAL/INTERNATIONAL TREATIES

International treaties are subject to two limitations. Under the supremacy of laws principle,[47] constitutional provisions shall supersede any contradiction occasioned by a treaty with the provisions of the Constitution. Further, the constitutional provision under Section 12[48] conditions the applicability of any Treaty in the country to the ratification of the National Assembly, imposes another legal hurdle to enforcement of any treaty.

Most of the international treaties regulating toxic waste management are applicable in Nigeria by virtue of the consent and ratification of such treaty by the National Assembly.[49] Such treaties include, but are not

43. The 1999 Constitution of the Federal Republic of Nigeria.
44. Fagbohun, O., "Reappraising the Nigerian Constitution for Environmental Management," *AAU Law Journal*, Vol. 1, 2002, No. 1, 44.
45. *Ibid.*
46. *Ibid.*, italics added for emphasis.
47. Section 1 (1) & (3) of the 1999 Constitution.
48. Section 12 of the 1999 Constitution. See also note 46, *Supra.*
49. See section 12 of the 1999 Constitution. Fagbohun justifies this provision, and I agree, that it provides the National Assembly the opportunity to examine the 'bona fides' of any treaty before its applicability in the country. He further cited the classic case of *Commonwealth v Tasmania*

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limited to, the Basel Convention on the Control of Trans-boundary Movement of Hazardous Matter and their Disposal; the Bamako Convention on the Trans-shipment of Waste in Africa; the Vienna Convention on the Protection of the Ozone Layer; and the Montreal Protocol on Substances that deplete the Ozone Layer.

Despite these limitations, treaties have received favorable enforcement in the country. Since, as mentioned earlier,[50] there are scant environmental provisions in the Constitution, this renders the possibility of contradiction with the treaty provisions negligible. Moreover, the National Assembly has generally given its legislative blessings to the treaties most generously thereby minimizing the possibility of rendering some treaties unenforceable in the country.

C. STATE LAWS

Under the Nigeria federation, the state components are permitted to enact laws under the concurrent and residual legislative lists, subject to federal law.[51] In the exercise of such power, the Houses of Assembly[52] of the respective states have enacted legislation with respect to the management of the environment, by establishing complementary enforcement agencies,[53] popularly called State Environmental Protection Agencies (SEPAs).[54] Fagbohun justifies this practice when he reminded us, most convincingly, "to realize that the substantial degree of activities touching the use of these natural resources and the negative environmental fall outs take place in the States and localities."[55]

Despite the wisdom of empowering States to pass the necessary environmental laws, in the aforestated need, such exercise of State legislative power is greatly limited by the Constitution in the following ways:

1) The Constitution expressly claims supremacy over all authorities and persons under the federation and any inconsistent law shall be rendered void to the extent of the inconsistency.[56]

(1983) 158 CLR 1, 121 – 2 (Mason J) 219 (Brennan, J.) which developed the "bona fides" test in treaties.

51. Section 4(5) of the 1999 Constitution.
52. These are the legislative organs of the federating states. See S. 90 of the 1999 Constitution.
53. Fagbohun, O., Note 44, *supra*.
54. See, for example, The Enugu State Waste Management Authority Law of 29th July, 2004.
55. *Ibid.*
56. Note 47, *supra*.

2) The laws made by the National Assembly enjoy superiority over the laws made by the State Houses of Assembly, consequently; the inconsistent law of the State Assembly shall be rendered void to the extent of the inconsistency.[57]

3) The legislative powers of the State House of Assembly is permanently barred from any item on the exclusive legislative list of the Constitution.[58]

Consequently, although the majority of environmental activities occur at the state level of the federation, warranting immediate and realistic legislative responses, the States suffer from constitutional constraints in their legislative competence.

D. LOCAL GOVERNMENT LAWS

Local governments can, and do make laws, precisely called by-laws, with respect to environmental management. Under the constitution, their legislative sphere is limited to only items on the residual legislative list.[59]

Although most of the activities damaging to the environmental occur in the remote parts of the country, in the local government areas, the local governments suffer legislative constraints similar to those impacting the States.[60] These limitations apply with equal force to the local governments.[61]

E. COMMON LAW

Prior to 1988, most private legal actions involving environmental protection were pursued under the English tort laws applicable in Nigeria. The four major torts include nuisance, trespass, negligence, and the doctrine of strict liability developed from the case of *Rylands v Fletcher*.[62]

According to Atsegbua, L. *et al*,[63] "a tort is a civil wrong which entitles the injured party to claim damages for his loss or seek an injunction for the discontinuance or prevention of the wrong." Thus, in order to succeed, a claimant must prove damages under tort law. The peculiar

57. Note 50, *supra*.
58. *Ibid*
59. *Ibid*.
60. Notes 53, 54 and JJ, *supra*.
61. *Ibid*.
62. (1866) L.R. 1 Ex. 265.
63. Atsegbua, L. *et al*., *supra*, note 2

status and non-sophistication of the Nigerian victim of environmental degradation makes the legal hurdle almost insurmountable. Further, in the rare instances where the victims succeed, the remedies available are negligible in contrast to the damages suffered.

Standard negligence law, therefore, is not the most suitable source for the effective protection of the Nigerian environment in light of the trend in most developed countries where environmental laws are based on strict liability.[64]

F. CASE LAW

Under the Nigerian federal system, the judiciary interprets the law. In exercise of their interpretative function, the judiciary, no doubt, has the power to breathe life into the law. Lord Denning succinctly captured the reality when he said[65]:

> "*In theory the judges do not make law, they merely expound it. But as no one knows what the law is until the judges expound it, it follows that they make it.*"

In the protection of the Nigerian environment, there are few cases where the judges have boldly lent their heavy judicial weight in this important task. Yet, the case of *Adediran v Interland Transport Ltd.*,[66] gives a glimmer of hope in this direction.

Also, recent strong sentiments expressed by the members of the judiciary[67] reinforces the hope that, perhaps, the Nigerian judiciary is anxious to join the ranks of other progressive judiciaries in the world.[68]

IV. ENFORCEMENT AGENCIES/PROVISIONS/CHALLENGES

A. DEFINITION OF ENFORCEMENT

The enumerated legislation on protection from the dangerous consequences of exposure to toxic waste are meaningless without effective enforcement agencies and mechanisms.

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64. For example in the USA, UK, Germany.

65. Cited in Chianu, E., "The Horse and Ass Yoked: Legal Principles to Aid the Weak in a World of Unequals", *Inaugural Lectures Series* 91, University of Benin, 2007, p. 11.

66. (1991) 9 NWLR (Pt. 214) 155 (holding that a citizen has a right to bring a case against the government when they fail to address a public nuisance).

67. Justice C. C. Nweze, "Book Review: Selected Essays of Hon. Justice Karibi-Whyte on Jurisprudence," *Nigerian Bar Journal*, Vol. 2, No. 3, July 2004.

68. For example the Indian courts, the Ghanaian courts and the South African courts.

According to Atsegbua, enforcement is "the application of a set of legal tools both formal and informal, designed to impose legal sanctions or penalties to ensure that a defined set of requirement is complied with. Compliance is, therefore, the ultimate goal of any enforcement program."[69] This definition accurately captures the essence of any enforcement program, i.e.; to ensure compliance with the applicable laws.

The FEPA Act empowers its officials in exercise of their enforcement functions to arrest, inspect, search, seize. The Act also provides penalties for anyone obstructing their efforts.[70]

B. AGENCIES

1) National Environmental Standards and Regulation Enforcement Agency (NESREA)[71]

The aforementioned FEPA was the primary environmental protection law in Nigeria until it was repealed on July 30, 2007, by the NESREA Act.[72] Thus, the NESREA Act effectively assumed the status of Nigeria's flagship environmental law.[73]

The NESREA Act established an entity known as the National Environmental Standards and Regulations Enforcement Agency.[74] The Act also charged the Agency with the enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[75]

The Agency is headed by a Director-General who serves as both the Chief Executive and Chief Accounting Officer.[76] There are five (5) Departments headed by a Director.[77] They are the Directorate of Legal Services;[78] Administration and Finance;[79] Planning and Policy Analysis;[80]

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69. Atsegbua, L., "A Critical Appraisal of Environmental legislation in Edo State" (1996/99) Vol. 3, U.B.L.J, p. 19.
70. Ilebgune, T. O., "Environmental Law and Enforcement" in Environmental Law and Policy, Simpson and Fagbohun, (Lagos Law Centre, LASU, 1998), pp. 205 – 210 referenced in Atsegbua, L, *supra*.
71. S.I. (1) of National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.
72. S. 36 of NESREA Act.
73. *Ibid.*
74. Note 60(a), *supra*.
75. S. 12.1(a) of NESREA Act.
76. S. 11(2)(a) of NESREA Act.
77. S. 10 (1) and (2).
78. S.10 (1)(e), *ibid.*
79. S. 10 (1)(a), *ibid.*
80. S. 10 (1)(b), *ibid*

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Inspection and Enforcement;[81] and the Environmental Quality Control.[82] In addition, there is a Governing Council which is the supreme organ of the Agency and headed by a Chairman.[83] The agency is armed with wide enforcement powers. These include the ability to prohibit of processes and use of equipment or technology that undermine environmental quality,[84] the establishment of mobile courts to expeditiously dispense cases of environmental infringements,[85] and the power to compel public investigations.[86]

An Officer of the Agency, with a court warrant, can enter and search any premises he reasonably believes is being used to contravene environmental standards or legislation.[87] In effecting the search warrant, the Officer is authorized to examine any article, take a sample or specimen, open and examine any container or package, and examine any book, documents or record.[88] The Officer may also seize and detain any article, and can obtain a court order to suspend activities. The officer also has the power to seal and close down premises including land, vehicles, tents, vessels, floating craft or any inland waterway.[89]

Obstruction of an Officer under the Act carries a stiff penalty.[90] Any obstruction caused by an individual is punishable by a a minimum fine of ₦ 200,000 or a maximum sentence to one year's imprisonment. There is an additional fine of ₦20, 000 for each day the offense continues.[91] Obstruction by a corporate body a fine of ₦2m, and an additional fine of ₦200, 000 for each day the offence continues.[92]

2) Police Officers

Nigeria Police Officers are empowered to enforce the laws on environmental degradation, particularly with the respect to the Harmful Waste Act.[93] The Act places a total ban on the purchase, sale, transportation, deposit or storage of harmful waste. Violators of the Act

81. S. 10 (1)(c), *ibid.*
82. S. 10 (1)(d), *ibid.*
83. S. 3 (1)(a), *ibid*
84. S. 8 (d), *ibid.*
85. S. 8 (f), *ibid.*
86. S. 8 (g), *ibid.*
87. S. 30 (1)(a).
88. S. 30 (1)(b)(c)(d)(2), *ibid*
89. S. 30 (f)(g), *ibid.*
90. S. 31, *ibid.*
91. *Ibid.*
92. *Ibid.*
93. See S. 10 of the Harmful Waste (Special Criminal Provisions) Act, 1990.

are held strictly liable and their punishment can range from a fine, to restoration of the polluted environment, to life imprisonment.

Section 10 of the NESREA empowers a police officer to conduct a warrantless search on any land, building, or carrier, including aircraft, vehicle, container or any other thing whatsoever which he has reasons to believe is related to the commission of a crime under this Act. Similarly, the Act empowers an officer to perform test and take samples of any substances related to the commission of the crime[94] and seize the item or substance.[95] The officer is equally empowered to arrest of any culprit in the commission of the crime.[96]

3) State Governments/Local Governments

It is noteworthy that these federating units constitute the environmental theatre where the "substantial degree of activities" are conducted.[97] Consequently, the States and Local governments play critical roles in the enforcement of environmental laws in Nigeria.[98]

4) Private Citizens

Private citizens can enforce the environmental protection laws that affect private environmental rights under the common laws applicable in Nigeria. Such rights under the common law of the tort include actions in nuisance, negligence, strict liability under the Rule in *Rylands v Fletcher*, and trespass to land.

The justification for resorting to civil actions is premised on the inadequacy of the provisions in the available statutes. Yet, a critical appraisal of the limitations inherent in the application of the respective common law remedies reveals a hopelessly frustrating dilemma for victims of environmental pollution in Nigeria. In essence, environmental victims in Nigeria are faced with the unenviable option of choosing between a deep sea and a deep valley in the wilderness of environmental redress in Nigeria.

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94. *Ibid.*
95. *Ibid.*
96. *Ibid.*
97. Fagbohun, O., *supra* note 44.
98. *Ibid.*

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V. RECOMMENDATIONS

In order to adequately combat the extreme dangers posed by toxic waste to the Nigeria environment, a comprehensive approach must be employed by the government agencies charged with environmental protection. We shall compartmentalize our recommendations into three broad categories: legislative issues, statutory issues and enforcement issues.

A. LEGISLATIVE ISSUES

Under this segment, we shall focus our recommendations on the sources of environmental protection law with particular emphasis on the Nigerian Constitution being the supreme law in the country.

The Nigerian Constitution, as the chief source of the laws of the country, lacks the requisite constitutional efficacy desperately needed in environmental protection. As we have stated, the only section[99] dealing with the environment falls under the non-justiciable umbrella of the Fundamental Objectives and Directive Principles. In light of this limitation, other persons and groups that are in the vanguard of environmental protection are denied the critical constitutional weapon in their armory.

We also assert (or contend) that the limited competence of the federating units in the country to legislate on the environment effectively limits a critical segment in the protection of the Nigerian environment.[100] Since most of the toxic waste exposure in the country occurs in the rural areas,[101] these federating units are, therefore, the main theatres where the environmental consequences of toxic exposures are most felt.[102] They must, consequentially, be equipped to react legislatively swiftly in order to protect the environmental sphere under their control.

B. STATUTORY ISSUES

Here, we shall focus on the content of the statutes in place with a view to complementing their adequacy. The three principal legislations[103] dealing

99. Section 20, 1999 Constitution.
100. *Supra*, note 50.
101. Fagbohun, O, *supra*, note 44.
102. *Ibid.*
103. These are the NESREA Act, the Harmful Wastes (Special Criminal Provisions,) Act, and the EIA Act.

with toxic waste in Nigeria are complemented by other laws, inclusive of international[104] treaties[105] as well as the local laws.[106]

Of the three principal laws, both the NESREA Act and the Harmful Waste (Special Criminal Provisions) Act serve as deterrent laws; the latter imposes a strict liability for the offence under the Act. In contrast, the EIA Act, serves as an ameliorative law with particular emphasis on the mitigative precautions against toxic waste exposure.

It is commendable that the Nigerian government enacted these laws, to deal with the consequences of toxic waste exposure, and modest accomplishments under these laws have been realized. However, there have been instances of various toxic waste exposures that are ignored and much more is yet to be done to control Nigeria's increasing exposure to toxic waste.[107] After two decades, these laws are definitely due for renewal and reinvigoration.

The NESREA Act[108] should be reviewed in the light of the United Kingdom's EPA Act[109] to introduce the duty of care concept in assessing the liability of all producers and handlers of waste.[110] The common law principle, introduced in the case of *Donoghue v Stevenson*,[111] developed the liability concept that a person owes a duty to take care not to injure others by his acts or omissions. In the environmental law context, it is aimed at reinforcing the environmental law principle that the polluter pays.[112] This concept was incorporated in the EPA Act, in which the duty of care serves the following purposes:[113]

1) to prevent the commission of one of the statutory offences;

2) to prevent the escape of waste;

3) to ensure any transfer of waste is transferred to an authorized person;

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104. For example, the Convention on the Prevention of Marine Pollution by Dumping of Waste and other Matters, 1972.
105. For example, the Bamako Convention on Trans-boundary Movement of Toxic Waste, 1991; The African Charter on Human and People's Rights, 1986.
106. For example, the Enugu State Waste Management Authority Law, 2004.
107. Fagbohun, O., *supra* note 44.
108. 2007, *supra*.
109. Environmental Protection Act, 1990, which came into force from April, 1992.
110. Producers and handlers of waste are all those operating in the stream of waste i.e., those who import, produce, carry, keep, treat or dispose of controlled waste, (S. 34, E.P.A 1990)
111. (1932) A. C. 562, cited in Atsegbua, L., *et al.*, *supra*, note 2.
112. Malcolm, R., *supra*, note 24
113. *Ibid.*

4) to ensure that a written description goes with the waste so that others can comply with the duty.

The only groups excepted under this duty standard are homeowners with respect to household waste. If charged for a breach of the duty of care a producer or handler of waste can seek to defend by the application of the six steps under the Code of Practice. Such a provision will add the needed teeth to the NESREA Act.[114]

In addition, a strengthening of the NESREA Act must include the establishment of a special program similar to the U.S. superfund program dedicated solely to the restitution and rehabilitation of communities devastated by toxic waste exposures.

C. ENFORCEMENT ISSUES

The dangerous nature of toxic waste demands that extra measures be put in place in the administration and enforcement mechanisms. The strict liability nature of the provisions of the Harmful Wastes Act should facilitate the enforcement powers under the Act. Enforcement agencies empowered under the Act should employ the provisions aggressively in their enforcement roles.

Under the EIA Act, the ameliorative provisions[115] should be more aggressively enforced. Experience had shown that most producers and handlers of toxic waste are slow to comply with the impact assessment provisions unless extreme measures of enforcement are applied.[116] The NESREA Act should distinguish functions of waste regulation, waste collection, and waste disposal in line with United Kingdom's EP Act.[117] Undoubtedly, such delineation of functions with their respective agencies will further facilitate the enforcement of the complex issues relative to toxic waste management.

Inherent in the need for ability of the federating units to legislate on the environment is the concomitant right to enforcement in order to achieve maximum environment protection at all levels of the federation. Our argument in support of the federating units to legislate on the

114. This duty was implemented under the EPA 1990 by the Environmental Protection (Duty of Care) Regulations 1991 and supported by a Code of Practice, "Waste Management: The Duty of Care," and a circular issued jointly by the Department of the Environment, the Scottish office and the Welsh office, "The Duty of Care." See Malcolm, R., *Supra*, note 24, p. 205.

115. Such provisions are mainly administrative in nature, e.g., license withdrawal, imposition of fines and plant closures.

116. Ilegbune, T., *Supra*, note 59.

117. EPA Act 1990 was amended by the Environment Act 1995.

environment, therefore, applies with equal force to their enforcement ability.[118]

With respect to the right of individuals and the environment Non Governmental Organizations (NGOs) to join in environment enforcement, we hereby re-iterate our earlier position that the Chapter II provision of the Constitution on environment protection should be interpreted by the courts as justiciable. Success in this case depends on whether Nigerian courts will follow the current trends in India, Ghana and South Africa, where their courts have applied their interpretative jurisdictions to inject justiciable life into their Fundamental Objectives and Directive Principles.[119] Justice C. C. Nweze of the Nigerian Court of Appeals has indicated a glimmer of hope that the Nigerian courts may be inclined to follow this progressive judicial path.[120]

VI. CONCLUSION

The Koko incident of two decades ago was a rude awakening to the Nigerian government as to the environmental consequences of toxic waste exposure and the imperative need to safeguard against such exposure.

As a result of that incident, local legislation was enacted while international treaties were adopted or ratified. We have analyzed these laws and their efficacy in the light of the increasing exposure of the Nigerian environment to toxic waste exposure, and have come to the conclusion that these legislative efforts need some fine-tuning in order to meet the challenges posed two decades after Koko. In furtherance to the exercise, we have made recommendations to enhance the success of these efforts, these existing laws, borrowing heavily from the trends in developed states. Since toxic waste threatens the long-term sustenance of man and the surrounding environment, protection against toxic waste exposure, development efforts must take into account these considerations protections against toxic waste exposure.

Hopefully, the Nigerian government, the judiciary, the citizens, the environmental NGOs, and indeed, all stakeholders will appreciate the importance of these efforts and work in concert for their collective protection.

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118. *Supra*, note 52.
119. See Nweze, C. C., Book review of selected essays of the Justice A. G. Karibi – Whyte on Jurisprudence, Nigerian Bar Journal, Vol. 2, No. 3, 2004, 370.
120. *Ibid.*