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A Critical Review Of The Legal Regime For The Maintenance Of Environmental Standards In Nigeria: Bio And Hydro Energy Sectors In Focus

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ABSTRACT
The study analyzed the legal framework for environmental protection within the context of bio and hydro energy development activities in Nigeria. The study also did a critique of the existing law and made relevant recommendations. Several laws exist for the mitigation of these adverse impacts of bio and hydro energy development in Nigeria. However, in the enforcement of these laws, particularly through litigation, several hurdles such as statute of limitations, *locus standi,* etc pose serious impediments. There is therefore the need to review the relevant Nigerian laws to be able to surmount the loopholes therein and ensure the enthronement of best practice for a robust, effective and eco-friendly power sector in Nigeria.
Keywords: Maintenance of environmental standards, Bio Energy, Hydro Energy, Critique, Nigeria

1. INTRODUCTION

Bio and hydro sources of energy hold great potentials for Nigeria's future energy sustainability and a cleaner environment. As the country's population continues to increase with its associated rapid development, it is expected that the energy needs of the country will become unprecedented in the near future. This occasions the need for increased exploitation of these sources for power production. Be that as it may, the truth remains that the use of bio and hydro energy as sources of power are not without their environmental impacts. Large areas of land that would have otherwise been available for agricultural or other uses may be lost; dams may fail resulting in loss of lives and property; and the use of some conversion technologies that involve combustion of biomass may yet result in air pollution and climate change, and so on. Since the use of any source of energy has some environmental opportunity cost, regulation and enforcement of best practices remains the key to a sustainable environment. Put differently, the drive towards the realization of sustainable development in the Nigerian energy sector particularly through the development of bio and hydro energy must be matched with the articulation and enforcement of such policies, administrative and legal principles that enhance the environment. This study does a critical review of the legal framework for the enforcement of environmental standards in Nigeria. The work focuses on the statutory and common law provisions on the protection of the environment.

2. Statutory Control

Statutes that have bearing on enforcement of environmental standards in Nigeria may be classified into two categories. The first comprises of general statutes expressed in broad terms to cover a multitude of subjects including environmental protection. The second category includes legislative measures adopted specifically to protect the environment.[1] Despite the above classification, it is pertinent to point out that

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currently in Nigeria, there is no statute exclusively providing for the protection of the environment in so far as the generation of power from bio and hydro sources is concerned. However, an x-ray of available pieces of legislation in Nigeria throws up some statutory provisions which can be applied to issues of environmental protection associated with bio and hydro energy. While some of these statutory measures spell out civil liability in the event of breach others provide for penal sanctions.[2]

Constitution of the Federal Republic of Nigeria 1999 (as amended)

The 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), in section 20 thereof provides that the state shall protect and improve the environment, and safeguard the water, air, land, forest and wild life in Nigeria. This means that it is the duty of the state to protect lives, properties and the environment against any adverse effects from bio and hydro energy activities. Indeed, in the case of *Jonah Gbemre v Shell Petroleum Development Co. Nig. Ltd & Ors,*[3] the Federal High Court per C.V. Nwokorie, J. held that the fundamental rights to life and dignity of the human person as provided in sections 33(1) and 34(1) of the 1999 Constitution of Nigeria inevitably include the right to a clean and pollution-free environment. Further, the Constitution grants the National and State Houses of Assembly concurrent powers to legislate on matters relating to the generation, transmission and distribution of electricity.[4] Accordingly, both the National Assembly and the State Houses of Assembly are constitutionally empowered to make laws regulating all matters relating to bio and hydro energy generation, transmission and distribution and this power extends even to environmental and other issues arising from or connected with such matters. However, by virtue of the doctrine of covering the field, if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency be void.[5]

Environmental Impact Assessment Act[6]

The Act mandates any person or body intending to undertake any project likely to affect the environment to consider at an early state, the impact of such project on the environment.[7] Put differently, where the extent, nature or location of a proposed project or activity is such that it is likely to significantly affect the environment, environmental impact assessment is required in accordance with the dictates of the Act.[8] Before execution, the proponent of the proposed project must apply in writing to the National Environment Standards and Regulations Enforcement Agency (NESREA).[9] Originally, the defunct Federal Environmental Protection Agency (FEPA) was the institution authorized to receive application for environmental impact assessment pursuant to section 2(4) of the Environmental Impact Assessment Act.[10] Upon application, NESREA determines whether or not the proposed activity is likely to have

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[1]AA Adedeji, 'Legal Response to the Control and Management of Oil Pollution in Nigeria' (2007) *Current Perspective in Law, Justice and Development,* p. 915-949.

[2]See for instance the Criminal Code Act, Cap. C38 *Laws of the Federation of Nigeria* 2004, ss. 245 & 247; Harmful Wastes (Special Criminal Provisions, Etc) Act, Cap. H1 *Laws of the Federation of Nigeria* 2004, ss. 6 & 12; National Environmental Standards and Regulation Enforcement Agency (Establishment) Act, 2007, ss. 27 & 31.

[3](Unreported) judgment in Suit No. FHC/B/CS/53/2005 delivered by the Federal High Court, Benin Judicial Division.

[4]1999 Constitution of the Federal Republic of Nigeria (as amended 2011), ss. 2(2), 4, and Item 13 & 14 of Part II of the Second Schedule.

[5]1999 Constitution of the Federal Republic of Nigeria (as amended 2011), s. 4(5); *A-G Abia State v A-G Federation* [2002]6 NWLR (pt. 763) 264 SC.

[6] Cap. E12 *Laws of the Federation of Nigeria* 2004.

[7] *Ibid,* s. 2(1).

[8] *Ibid,* s. 2(2).

[9]*Ibid,* s. 2(4); National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, ss. 35 & 36.

[10]The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, s. 36 repealed the Federal Environment Protection Agency Act, Cap. F10 *Laws of the Federation of Nigeria* 2004.

adverse impact on the environment and whether or not such impacts can be mitigated, in which case it prescribes measures to prevent or mitigate the effects.[11]
The Act placed 19 activities on the mandatory study list.[12] The said list is contained in the Schedule to the Act. While paragraph 13 of the said Schedule to the Act expressly places hydro energy activities on the mandatory list, paragraph 18 thereof impliedly puts bioenergy activities on the said list. Before any project connected to any of the items included on the mandatory list is executed, an environmental impact assessment must be undertaken by the proponent of such project. An environment impact assessment must include at least the following minimum matters, that is:-

a) a description of the proposed activities;
b) a description of the potential affected environment, including specific information necessary to identify and assess the environmental effect of the proposed activities;
c) a description of the practical activities, as appropriate;
d) an assessment of the likely or potential environmental impacts of the proposed activity and the alternatives, including the direct or indirect cumulative, short term and long term effects;
e) an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and assessment of those measures;
f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information.
g) an indication of whether the environment of any other state or local government area or areas outside Nigeria is likely to be affected by the proposed activity or its alternative;
h) a brief and non-technical summary of the information provided under paragraphs (a) to (g) above.[13]

The Act in section 4 listed the minimum content of an environmental impact assessment report. It is submitted that NESREA has the implied authority to request for additional information or study depending on the nature and location of the proposed project. For the purpose of facilitating public access to records relating to environmental assessments, the Act mandates NESREA to establish and maintain a public registry.[14] NESREA has powers to make an application to a court of competent jurisdiction for an order of injunction to restrain any person who has or is likely to contravene a prohibition under the Act from carrying out an activity which will adversely affect the environment.[15]Any person who contravenes the provisions of the Act is guilty of an offence and liable on conviction in the case of an individual to ₦100,000 fine or to five years imprisonment and in the case of a firm or corporation to a fine of not less than ₦50,000 and not more than ₦1,000,000.[16] While the significant contribution made by the Environmental Impact Assessment Act in tackling environmental challenges in Nigeria is acknowledged, there is need to amend the Act to include other projects or activities that affect the environment on the mandatory study list contained in the Schedule to the Act.

Harmful Waste (Special Criminal Provisions, Etc) Act[17]

The Harmful Waste (Special Criminal Provisions, etc) Act was promulgated in 1989 following the unfortunate incident of dumping of toxic hazardous waste at Koko Port in the Delta Area of Nigeria.[18] The Act prohibits dumping of harmful waste on any land, territorial waters, contiguous zone, exclusive economic zone or inland waterways of Nigeria.[19] Harmful waste is defined in the Act as any injurious,

[11] Environmental Impact Assessment Act, s. 21.
[12] *Ibid,* ss. 12 – 14 & 23. See also the Schedule to the Act.
[13] *Ibid,* s. 4.
[14] *Ibid,* s. 57.
[15] *Ibid,* s. 54.
[16] *Ibid,* s. 62.
[17] Cap. H1 *Laws of the Federation of Nigeria* 2004.
[18]CC Nwufo, 'Legal Framework for the Regulation of Waste in Nigeria', (2010) 4(2) *African Research Review,* 491 – 501, 492.
[19] Harmful Waste (Special Criminal Provisions, etc) Act, s. 1.

poisonous, toxic or noxious substance, nuclear waste, or radioactive substance of such quantity capable of subjecting a person to the risk of death, fatal injury or incurable impairment of physical or mental health.[20] Undoubtedly, bio and hydro energy activities may precipitate toxic or noxious substances and it is the aim of the Act to ensure that such substances are not handled such as to expose the environment to risk.

The Act provides for individual and corporate civil and penal sanctions for dumping of harmful waste in Nigeria.[21] The Act specifically criminalized dumping of harmful waste and prescribes the punishment of life imprisonment upon conviction.[22] An individual or body corporate is deemed to be liable under the Act if he or she actually does the act or omission prohibited under the Act, or aids, counsels or procures another to commit the act.[23] In addition to the penal sanction of life imprisonment, the individual may also be liable for damages in civil action.[24] Further, the carrier or land on which the harmful waste was dumped may as well be forfeited.[25] Under the Act, the Minister of Environment is vested with the powers to seal any area or site that is being used or may be used for dumping of harmful waste.[26] The Federal High Court of Nigeria has exclusive jurisdiction to try the crimes specified in the Act.[27]

National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. 25 of 2007

The Act established the National Environmental Standards and Regulations Enforcement Agency (NESREA) charged with the responsibility of protection and enforcement of environmental standards in Nigeria.[28] The Act also repealed the Federal Environmental Protection Agency Act.[29] By section 35 of the Act, the defunct Federal Environmental Protection Agency (FEPA) was replaced by NESREA. However, the same section provides that every authorization, consent or thing done under the replaced Federal Environmental Protection Agency Act will continue to be in force and have effect as if made, issued, given or done under the corresponding provisions National Environmental Standards Enforcement Agency (Establishment) Act.

The Act empowered NESREA to make and review regulations, specifications and standards on air and water quality, effluent limitations, control of harmful substances and other forms of environmental pollution and sanitation towards tackling environmental challenges in Nigeria.[30] This power extends to environmental issues arising from bio and hydro energy activities. The Act also criminalized violation of regulations made by NESREA. Any person who violates regulations made by NESREA, upon conviction, is liable to imprisonment for a term not exceeding one year or fine.[31]

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[20] *Ibid*, s. 15.
[21] *Ibid,* ss. 1, 2, 3, 4, 5 & 7.
[22] *Ibid,* s. 6.
[23] *Ibid*, ss. 2 - 5.
[24] *Ibid*, s. 12.
[25] *Ibid,* s. 6.
[26] *Ibid*, s. 11.
[27] *Ibid,* s. 13.
[28] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, ss. 1, 2 & 7.
[29] *Ibid,* s. 36.
[30] *Ibid*, ss. 8, 20 – 27. Note that several Regulations have been made under this Act. These include the National Environmental (Pollution Abatement in Mining and Processing of Coal, Ores and Industrial Minerals) Regulations, 2009; National Environmental (Sanitation and Wastes Control) Regulations, 2009; National Environmental (Pollution Abatement in Chemicals, Pharmaceuticals, Soaps and Detergent Manufacturing Industries) Regulations, 2009; National Environmental (Pollution Abatement in Food, Beverages and Tobacco Sector) Regulations, 2009; National Environmental (Pollution Abatement in Textiles, Wearing Apparel, Leather and Footwear Industry) Regulations, 2009; National Environmental (Wetlands, River Banks and Lake Shores Protection) Regulations, 2009; National Environmental (Watershed, Hilly, Mountainous and Catchment Areas) Regulations, 2009; National Environmental (Ozone Layer Protection) Regulations, 2009; Environmental (Noise Standards and Control) Regulations, 2009; National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations, 2009; National Environmental (Permitting and Licensing Systems) Regulations, 2009; and the National Environmental (Pollution Abatement in Industries and Facilities Generating Waste) Regulations.
[31] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, s. 31.

By sections 30 and 31 of the Act, an officer of NESREA armed with a warrant issued by a court of law may at any reasonable time enter and search premises he believes have contravened environmental standards or legislation. The officer may also seize and detain any article by means of, or in relation to which he reasonably believes a contravention of environmental standards or legislation has been committed. A person who obstructs an officer of NESREA in performance of his duties commits an offence and is liable on conviction to a fine of not less than ₦200,000 for an individual or to imprisonment for a term not exceeding one year or to both; and an additional fine of ₦20,000 for each day the offence subsist. In the case of a body corporate, the entity is liable for a fine of ₦2,000,000 on conviction and an additional fine of ₦200,000 for every day the offence subsist.[32]

Curiously, one of the radical innovations introduced by the Act establishing NESREA is the authority given to NESREA to enforce compliance with the provisions of international agreements, protocols, treaties and conventions as may from time to time come into force.[33] Under the Nigerian law it is now settled beyond argument that an undomesticated international instrument ratified by Nigeria is a mere executive act which confers no legal right unless it is enacted into law by the Nigerian parliament pursuant to Section 12(1) of the Constitution.[34] While section 12(1) of the Constitution expressly provides in plain terms that 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, section 1(1) and (3) declares the supremacy of the Constitution and the corresponding nullity of any law inconsistent with the Constitution.[35] The term 'any law' as used in section 1(3) of the Constitution was interpreted by the Supreme Court in the case of *Abacha v Fawehinmi*[36] to extend to treaties ratified by Nigeria. Section 12(1) of the Constitution reinforces the notion that Nigeria is a sovereign nation and as such foreign legislations and treaties do not have general application in Nigeria.[37] It is therefore manifest that no matter how beneficial to the country or its citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable if it is not enacted into law by the Nigerian legislature.[38] It follows that section 7(c) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act which gives NESREA authority to enforce undomesticated international instruments is an empty shell with no practical utility.

Nigeria Electricity Management Service Authority Act No. 6 of 2015

The Act established the Nigeria Electricity Management Service Authority (NEMSA), to carry out the functions of enforcement of technical standards, regulation, technical inspection, testing and certification of all categories of electrical installations, electricity meters and instruments etc; as well as to ensure the efficient production and delivery of safe, reliable and sustainable electricity power supply. This legislation therefore aims at guaranteeing safety of lives and property in relation to developments and activities in the Nigeria electricity industry.[39] The Act in Section 6 clearly enumerated the functions, objectives and responsibilities of NEMSA. One of the basic responsibilities of NEMSA is to specify safety requirements for construction, operation and maintenance of electrical power plants, transmission system, distribution network and electric lines.[40]

Where it appears to NEMSA that there has been a breach or likely breach of environmental standards, regulations or the interest it is mandated to protect, NEMSA is empowered to notify the person or

[32] *Ibid.*
[33] *Ibid,* s. 7(c).
[34] 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), s. 12; P Onyenweife, 'The Jurisdiction of the National Industrial Court of Nigeria over Domesticated Treaties Ratified by Nigeria: Another Look', (2012) 6(3) *Nigerian Journal of Labour and Industrial Relations,* pp. 38-42, 40.
[35] *Ibid,* p. 40.
[36] [2006]6 NWLR (pt. 660) 228 SC.
[37] P Onyenweife, *op. cit*.
[38] See *Abacha v Fawehinmi (supra)*; *Nnaji v NFA* [2010]11 NWLR (pt. 1206) 438; *MHWUN v Minister of Labour & Productivity* [2005]17 NWLR (pt. 953) 120.
[39] See the preamble to the Nigeria Electricity Management Service Authority Act.
[40] *Ibid,* s. 6(f).

establishment in actual or potential breach of its intention to issue an enforcement order if the contravention is not remedied within a time scale.[41] Failure to comply with an enforcement order constitutes an offence punishable upon conviction to a term of three-month imprisonment or five hundred thousand naira or both.[42]

Electric Power Sector Reform Act No. 6 of 2005

The Electric Power Sector Reform Act provides for the licensing and regulation of the generation, transmission, distribution and supply of electricity in Nigeria and matters incidental to it.[43] The Act established the Nigerian Electricity Regulatory Commission (NERC).[44] The Act mandates NERC among others to (a) ensure the safety, security, reliability, and quality of services in the production and delivery of electricity (b) establish or approve as the case may appropriate operating codes for safety, security, reliability and quality standards for licensees in the electricity sector in Nigeria.[45] By sections 62 and 98 of the Act, without a license issued or deemed to have been issued pursuant to the Act, it is unlawful for any person to construct, own or engage in the business of generation, transmission, operation, distribution or trading of electricity in Nigeria. While issuing such licenses, NERC is expected by the Act to impose such conditions that ensure that:

a) the physical environment is protected;
b) there is no greater damage to streets or interference with traffic than is reasonably necessary.[46]

NERC has obligation under the Act to develop standards, code and manual for licensees in the power sector and same is binding on the licensees.[47] In exercise of this power, NERC made the 2009 Grid Code for the Electricity Industry. The Grid Code stipulates the guidelines, standards and operating procedures for operators in the electricity industry in Nigeria. The regulation is designed to ensure that operators act within standards for public safety.[48] Contravention of any provision of the Act or any regulations made pursuant to it is an offence and upon conviction, where no specific penalty is prescribed, a first offender is liable to a fine not exceeding on hundred thousand naira or to imprisonment for a period not exceeding one year or both.[49] For subsequent convictions, the offender is liable to a fine not exceeding five hundred thousand naira or imprisonment for a period not exceeding three years or both.[50]

NERC has powers to cancel a license on the ground of fraud, misrepresentation, contravention of the law or license obligations.[51] Where NERC is satisfied that a licensee is contravening, has contravened or is likely to contravene any of the conditions of a license, it may serve upon the licensee an order requiring him to mitigate or remedy the contravention.[52] However, before the order on the licensee, NERC must serve a notice upon the licensee concerned specifying the alleged or potential breach and urge the licensee to take steps to rectify same. In the order served on the licensee, the commission may impose penalty not exceeding N10,000 each day that the licensee is in default of compliance with the order.[53]

[41] *Ibid,* s. 11(4).
[42] *Ibid,* s. 11(5).
[43] See the preamble to the Electric Power Sector Reform Act No. 6 of 2005. Also see Also see, HO Onyi-Ogelle, 'The Implications of Legal Reform in the Nigerian Power Sector', (2016) 10(3) *African Research Review,* 279 – 289.
[44] Electric Power Sector Reform Act, s. 31.
[45] *Ibid,* s. 32(1)(e) & (2)(b).
[46] *Ibid*, s. 77(7).
[47] *Ibid,* ss. 81 & 96.
[48] See Preamble to the Grid Code.
[49] Electric Power Sector Reform Act, s. 94(1)(a).
[50] *Ibid*, s. 94(1)(b).
[51] *Ibid,* s. 74.
[52] *Ibid,* s. 75.
[53] *Ibid,* s. 75 (4).

Hydroelectric Power Producing Area Development Commission (Establishment, Etc) Act No. 7 of 2010 (as Amended 2013)

The Act establishes the Hydroelectric Power Producing Area Development Commission (HPPADC) as the entity charged with the responsibility of managing the ecological menance due to operation of dams and related matters.[54] HPPADC is a body corporate with perpetual succession and common seal which can sue and be used in its corporate name.[55] The administrative body of HPPADC is its Governing Council which consists of a chairman, one person each from the states where hydroelectric power is generated, two persons representing non-hydroelectric power producing states, one person each from ministries of power, environment, water resources, finance and the Managing Director.[56] The members of the Governing Council except the representatives of the ministries aforementioned are appointed by the President subject to the confirmation by the senate.[57]

The functions and powers of HPPADC are set out in the part 2 of the Act and include:

a) carry out survey of hydroelectric power producing areas in order to ascertain measures which are necessary to promote the physical development of those areas;
b) prepare schemes designed to promote the physical developments of the hydroelectric power producing areas;
c) tackle ecological problems that arise from overloading of dams in the hydroelectricity power producing areas and advise federal and state governments on the prevention and control of floods and environmental hazards.[58]

Regrettably, HPPADC has no powers to enforce compliance with environmental standards in the event of contravention. It is advocated that the Act be amended to give HPPADC powers to enforce compliance with environmental standards in the hydropower sector.

Criminal Code Act[59]

The Criminal Code Act contains penal provisions for the protection of the environment from the adverse effects of human activities including bio and hydro energy activities. Thus, the Criminal Code in section 245 states that any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir or place so as to render it less fit for the purpose for which it is ordinarily used is guilty of a misdemeanor and is liable to imprisonment for six months. Surely, this provision extends to bio and hydro energy activities that adversely affect water quality. Further, the Criminal Code in section 247 provides as follows:

247) Any person who -
  a) vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way; or
  b) does any act which is, and which he knows or has reason to believe to be, likely to spread infection or any disease dangerous to life, whether human or animal;

is guilty of misdemeanour and is liable to imprisonment for six months.

Thus, the above criminal sanction applies where bio and hydro energy activities are carried out in a manner that adversely affects air quality or results in the spread of diseases.

[54] Preamble to the Hydroelectric Power Producing Areas Development Commission (Establishment, etc) Act No. 7 of 2010 (as amended 2013).
[55] *Ibid,* s. 1(a) & (b).
[56] *Ibid,* s. 3 & 5.
[57] *Ibid,* s. 3(2).
[58] *Ibid,* s. 8(1).
[59] Cap. C38 *Laws of the Federation of Nigeria* 2004.

African Charter on Human and Peoples Rights (Ratification and Enforcement Act[60]

This Act was made to domesticate the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January, 1981 and for purposes connected therewith. Thus, the Act prescribes that the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to the Act shall have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.[61] The said Charter provides, in article 24 thereof, that all peoples shall have the right to a general satisfactory environment favourable to their development. Clearly, this extends to the right to an environment, free from all adverse effects of bio and hydro energy activities. By virtue of the Fundamental Rights (Enforcement Procedure) Rules, the provisions of this Act are enforceable by way of an action for enforcement of fundamental rights, in the same manner as the provisions of Chapter IV of the Nigerian Constitution.[62]

3. Common Law

The statutory regime for enforcement of environmental standards in Nigeria is complemented by common law principles as exemplified in the law of tort.[63] In particular, the common law is useful where there is no statutory regulation at all or where the available statutory provisions afford inadequate remedies.[64]

Negligence

Negligence connotes the complex concept of duty of care, breach of duty of care and damage suffered by the person to whom the duty was owed.[65] To succeed in an action for negligence, the claimant must prove cumulatively by preponderance of evidence or on a balance of probability that: (a) the defendant owed him a duty of care; (b) the duty of care was breached; and (c) the plaintiff suffered damages arising from the breach.[66] The non-statutory protection of the environment through the application of the principle of negligence occurred in the case of *Shell Pet. Dev. Co. Ltd v Tiebo VII & Ors.*[67] In this case, the plaintiffs/respondents claimed damages for negligence from the defendant/appellant for oil spillage leading to the pollution of the plaintiffs/respondents' farmland, fish ponds, river and juju shrine. The trial court found in favour of the plaintiffs/respondents and awarded special and general damages. The Supreme Court upheld the general damages awarded by the trial. From the above, it follows that where bio and hydro energy activities occasion the pollution of any land or water, or cause damages to property, or even affect the health of a person, an action may lie in negligence to recover damages for such acts.

Nuisance

The tort of nuisance occurs when there is an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of: (a) a right belonging to him as a member of the public, i.e. where there is a conduct that interferes with the reasonable comfort and convenience of the public, or obstructs the public in the exercise of a common right, which is public nuisance, or (b) ownership or occupation of land or some easement, profit or other right used or enjoyed in connection

[60]African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A10 *Laws of the Federation of Nigeria* 2004.
[61] *Ibid,* s. 1. Also see the Preamble to the Act.
[62]Fundamental Rights (Enforcement Procedure) Rules of 2009*,* Order 1 Rule 2 & Order 2 Rule 1; *Chief Gani Fawehinmi v Gen. Sani Abacha* [1996]9 NWLR (pt 475) 710.
[63]UD Ikoni, 'The Role of Common Law in the Protection of the Environment and Sustainable Development in Nigeria' (2006)1 *Frontiers of Nigeria Law Journal,* p. 215.
[64] *Ibid*, p. 225.
[65] *Lochgelly Ivon & Coal Co v Mcmullan* (1934) AC 1.
[66]*Anyah v Imo Concorde Hotels Ltd* (2003) FWLR (pt 138) 1306 SC; *Agbonmagbe Bank Ltd v CFAO* (1966) All NLR 140; *Benson v Otubor* (1975)3 SC 9; *Koya v UBA* [1997]1 NWLR (pt. 481) 251; *Machine Umudje v Shell BP Pet. Dev. Co. Nig. Ltd* (1975) 9-11 SC 155; *AG Leventis (Nig) Plc v Akpu* [2007]17 NWLR (pt. 1063) 416.
[67] [2005]9 NWLR (pt. 931) 439 SC.

with land, which is private nuisance.[68] The focus of nuisance is therefore, on whether or not the defendant's activity has unreasonably interfered with the plaintiff's use and enjoyment of his or her property or any right in it. The major purpose of the law of nuisance is to maintain a balance between the right of a person to do what he likes on his property, and the right of his neighbours, or the general public to conduct their affairs, free from interference or incontinence.[69] How to determine the balance of right may not be precisely stated, but it may be broadly said that a useful test in this regard is as to what is reasonable according to the ordinary uses of mankind in the given community.[70] It is important to note the reason why nuisance is classified into public and private nuisance. This is because public nuisance is a crime and could also be a tort, especially where a particular damage is proved by a private individual, whereas private nuisance is a tort only. In public nuisance, only the Attorney General can sue, though in a private suit a plaintiff may succeed if he pleads and proves what damages he suffered over and above other members of the public.[71] In private nuisance, a person only needs to prove an interference with his right to the use and enjoyment of land. Where nuisance consist of an encroachment on the land of the plaintiff, the law will presume damages.[72]

In the case of *Oladehin v Continental Textile Mills Ltd*,[73] the court held that the defendant's industrial activities which produced poisonous, contaminated water causing serious damage to the plaintiff's building rendered the defendant liable for damages in tort of nuisance. From the above, it follows that where bio and hydro energy activities cause undue damage to the property of others, or contaminate the land, air, or water enjoyed by others, or unduly interfere or restrict the rights of others to the use and enjoyment of their land or a clean and healthy environment, an action in nuisance may lie against those engaged in such activities.

Trespass

The common law principle of trespass connotes an unjustifiable physical interference with another's right of possession over land.[74] Generally, trespass may be committed by entering upon a person's land, throwing something onto another's land, failing to leave when permission to enter upon the land has been revoked or had expired or wrongfully failing to remove an object from the land.[75]

To succeed in an action for trespass, the plaintiff must establish the following:

a) that the trespass was directly in connection with his land;
b) that the act was intentional or negligent; and
c) the occurrence of any particular consequences complained of.[76]

With regards to environmental matters, the principle of trespass applies not only to the unwelcome presence of a person on another's property but also to the direct and intentional deposit of substance onto another's property.[77] Thus, where in the course of bio and hydro energy activities, certain noxious or toxic or environmentally unfriendly substances are deposited on land belonging to another, or such activities lead to encroachment on land in possession of another, an action in trespass may lie. The law is that only a person who is in exclusive possession of the land can bring an action in trespass. That is, a person in

[68] *Ipadeola & Ors v Oshowole & Anor* (1987)5 SCNJ 200.
[69] *Abiola v Ijoma* (1970)2 All NLR 268; UD Ikoni, *op. cit,* p. 220.
[70] *Sedleigh-Denfield v O'Callaghan* (1940) AC 880.
[71] *Amos v Shell BP (Nig) Ltd* (1974) ECSLR 486.
[72] *St. Helens Smelting Company v Tippings* (1865)11 ER 1483.
[73] (1978)2 SC 23.
[74] *Wilkes v Wood* (1763)98 ER 489; OU Ndukwe, *Elements of Nigerian Environmental Law* (Calabar: University of Calabar Press, 2000) p. 125.
[75] *Alhaja Salamotu v Adamu Yola* (1976)1 NMLR 115; UD Ikoni, *op. cit,* p. 222.
[76] *Ibid*.
[77] *Ibid*.

occupation or physical control of the land.[78] Trespass is actionable *per se*, thus the party bringing the action does not have to prove that the trespass has caused actual damage.[79]

The Rule in *Rylands v Fletcher*[80]

By the principle in *Rylands v Fletcher,* an individual who for his own purpose bring on his land, collects and keeps therein anything likely to do mischief if it escapes is *prima facie* liable for all the damages which is the natural consequence of its escape. Before a defendant can be held liable under the rule in *Rylands v Fletcher,* it must be established that:

a) the defendant is the owner or occupier of the land and therefore in control of the thing on the land;
b) the defendant brought on his land and kept on the said land something which is dangerous to cause mischief if it escapes;
c) The defendant engaged in a non-natural use of land which caused the injury complained of.

However, it must be emphasized that certain circumstances negative liability under the rule in *Rylands v Fletcher* as they afford complete defences to any claim under the said rule, *viz*: (a) consent of the plaintiff; (b) default of the plaintiff;[81] (c) act of God;[82] and (d) act of a stranger.[83] In *Umudje v Shell BP Petroleum Dev. Co. (Nig) Ltd*,[84] crude oil waste in a pit escaped onto the property of the plaintiff, damaged his ponds and killed his fishes. The Supreme Court held that the defendant was liable under the rule in *Rylands v Fletcher*. From the above, it follows that where bio and hydro energy activities result in the dumping or storage of any substance on land and same escapes and causes damage to another person or his property, this may result in liability under the rule in *Rylands v Fletcher.*

4. A Critique of the Nigerian Regulatory Regime

Nigeria is a common law jurisdiction, and as such, the legal framework for the enforcement of environmental standards in the Nigerian bio and hydro energy sector includes the applicable statutory and common law provisions in that regard.[85] Similarly, the United States of America, South Africa, India and the United Kingdom are all common law countries.[86] In these foreign jurisdictions, just like the position in Nigeria, the common law principles as exemplified in the law of torts, e.g. nuisance, negligence, trespass and the rule in *Rylands v Fletcher*[87] are applicable to complement the statutory provisions on environmental protection.[88] Compared with these foreign jurisdictions, Nigeria has robust legislative provisions on environmental protection applicable to the bio and hydro energy industry.

The Nigerian constitution provides for the protection of the environment and for the enactment of laws to protect both lives, properties and the environment against any adverse effects of bio and hydro energy activities.[89] The Constitution of the Republic of South Africa and that of India makes similar provisions.[90]

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[78] *Akinwale v Iliasu* (2005) All FWLR (pt. 289) 1294 CA.

[79] *Eliochin (Nig) Ltd & Ors v Mbadiwe* (1986)1 SC 99; *Soleh Boneh Overseas (Nig) Ltd v Ayodele & Anor* [1989]1 NWLR (pt. 99) 549.

[80] (1868) LR 3 HL 330.

[81] *Dunn v Birmingham Canal Co.* (1872) LR 7 QB 244.

[82] *Nichols v Marshland* (1876)2 Ex D 1.

[83] *Perry v Kendricks Transport Ltd* (1956)1 WLR 85*; Box v Jubb* (179)4 Ex D 76.

[84] *Supra.*

[85] UD Ikoni, 'The Role of Common Law in the Protection of the Environment and Sustainable Development in Nigeria', (2006) Vol. 1 *Frontiers of Nigeria Law Journal,* p. 215.

[86] P Syam, 'What is the Difference between Common Law and Civil Law?' <https://onlinelaw.wustl.edu/blog/ common-law-vs-civil-law/> Last accessed on 17th January, 2018.

[87] (1868) LR 3 HL 330.

[88] CE Carpenter, 'Court Decisions and the Common Law', (1917) 17(7) *Columbia Law Review,* 593–607; K Llewellyn, *The Common Law Tradition* (Massachusetts: Little Brown, 1960) pp. 77 – 87.

[89] 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), ss. 2(2) & 20.

[90] See Constitution of the Republic of South Africa, 1996 (as Amended 2013), s. 24; Constitution of India, 1949 (as Amended 2017), s. 48A.

However, unlike the case in Nigeria and India where this constitutional guarantee is non-justiceable,[91] the South African constitution recognizes the justiceability of environmental rights as part of fundamental rights.[92] Though the Nigerian Federal High Court, in the case of *Jonah Gbemre v Shell Petroleum Development Co. Nig. Ltd & Ors,*[93] interpreted the fundamental rights to life and dignity of the human person as provided in sections 33(1) and 34(1) of the Nigerian constitution to include the right to a clean and pollution-free environment, it is submitted that the extent to which such provisions can be adopted towards enforcement of environmental norms remains unclear.[94]

In the United States of America, the National Environmental Protection Act sets out the country's environmental policy and same is justiceable. [95] There is no similar statutory enactment in Nigeria. Further, Nigerian statutes make detailed provisions on the determination of emission standards, as well as licensing, permitting, authorization and EIA requirements, as applicable to the bio and hydro energy sector. These statutes also establish several public authorities vested with the powers of enforcing their provisions.[96] Such provisions are also contained in the statutes of the selected foreign jurisdictions.

Similar to the position in the said foreign jurisdictions, Nigerian law recognizes the right of private individuals to maintain actions for breach of environmental standards, including those occasioned by bio and hydro energy activities.[97] However, no Nigerian statute expressly provides for the *locus standi* necessary for a person to exercise this right. This provides the impetus for the continued application of the overtly restrictive common law rules on *locus standi*. In South Africa, civil litigations in that regard may be brought by any person or group of persons provided such action is in that person's or group of persons' own interest; or is on behalf of a person who is for practical reasons unable to sue; or is on behalf of a group or class of persons whose interests are affected; or is in the public interest.[98] With respect to criminal proceedings for breach of environmental standards, South African law allows same to be instituted by any person acting in the public interest or in the interest of the protection of the environment.[99] The only limitation is that such a private prosecutor must initiate the proceedings through a qualified lawyer; cannot maintain criminal proceedings against any organ of government; and can only maintain the criminal action after a written notice of such intention has been given to the appropriate public prosecutor and within 28 days of receipt of such notice, the public prosecutor fails to issue a written statement of an intention to prosecute the alleged offence.[100] In India, such criminal proceedings may be brought by any private person who has given notice of not less than sixty days to the Central Government, or its authorized agencies or officers.[101] There is a need to review the Nigerian law to bring it at par with the laudable statutory provisions in these foreign jurisdictions.

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[91] 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), s. 6(6)(c); Constitution of India, 1949 (as Amended 2017), s. 37.

[92] Constitution of the Republic of South Africa, 1996 (as Amended 2013), s. 24.

[93] (Unreported) judgment in Suit No. FHC/B/CS/53/2005 delivered by the Federal High Court, Benin Judicial Division.

[94] AB Abdulkadir, 'The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria', (2014) 3(1) *Afe Babalola University Journal of Sustainable Development Law and Policy*, 118 – 131, 120.

[95] National Environmental Policy Act of 1969 (as amended 1982), ss. 2 & 102.

[96] See the Environmental Impact Assessment Act Cap. E12 *Laws of the Federation of Nigeria* 2004; National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. 25 of 2007; Nigeria Electricity Management Service Authority Act No. No. 6 of 2015; Electric Power Sector Reform Act No. 6 of 2005; and the Hydroelectric Power Producing Area Development Commission (Establishment, Etc) Act No. 7 of 2010 (as Amended 2013).

[97] See the Harmful Wastes (Special Criminal Provisions, etc) Act, Cap. H1 *Laws of the Federation of Nigeria* 2004, s. 12. Also see the USA's Clean Water Act, ss. 309, 505; Safe Drinking Water Act, s. 300; and the Comprehensive Environmental Response, Compensation and Liability Act, s. 107. Further see the United Kingdom Electricity Act, s. 29(3); Environmental Protection Act, s. 34.

[98] National Environmental Management Act, s. 32(1). The Indian National Environment Tribunal Act, s. 4 provides that such claim may be brought by the person who sustained the injuries or his agent, the owner of the property that was damaged or his agent, all or any of the legal representatives of a deceased victim or their agent, any organization on environmental rights recognized by the Central Government, the Central Government, a State Government, or a local authority.

[99] *Ibid,* s. 33(1) & (2).

[100] *Ibid.*

[101] Environment (Protection) Act, s. 19.

In India, criminal proceedings may be brought against government departments and agents for breach of environmental standards, including breaches occasioned by their involvement in bio and hydro energy processes. In such a case, the head of the department is deemed guilty unless he or she proves that offence was committed without their knowledge or that they exercised due diligence to prevent it. Any other person other than the head of the department, who consented to the offence or was in connivance, or neglected their duties in preventing the offence, is also liable.[102] These provisions finds no equivalent in Nigerian law as well as in the laws of the other select foreign jurisdictions and will definitely be useful for preventing breach of environmental norms by officers of the Nigerian government.

Nigerian statutes on environmental protection as applicable in the bio and hydro energy sectors do not expressly provide for the liability of defaulters to restore or rehabilitate the environment, or pay all costs incurred in that regard. In the select foreign jurisdictions, several statutes contain such provisions.[103] Such provisions surely are necessary in Nigeria to further enhance the quality of the environment. In the United States of America, the law establishes a special trust fund, otherwise called the superfund, which is dedicated solely to the restoration and rehabilitation of the environment in the event that those primarily responsible for the pollution are not found.[104] This fund can be applied even in cases where the damage to the environment is occasioned by bio and hydro energy processes. In Nigeria, there is the Ecological Fund dedicated to the amelioration of general ecological problems in any part of the country.[105]

South African law makes unique provisions for the protection of workers refusing to do environmentally hazardous work, including works associated with bio and hydro energy undertakings.[106] There are no similar provisions in the laws of other selected foreign jurisdictions considered above. No such provision exists under Nigerian law and clearly, its introduction will go a long way to enhance the push for protection of the environment in Nigeria.

In Nigeria, the National Environmental Standards and Regulations Enforcement Agency (NESREA) has power to enforce compliance with the provisions of international agreements, protocol, treaties and conventions on environmental standards.[107] This appears to conflict with the provisions of the Nigerian constitution which bars the municipal enforcement of undomesticated international instruments.[108] In South Africa however, the National Environmental Management Act provides for the domestic application of international instruments on the environment provided that the Minister first satisfies the constitutional requirements of domestication.[109] Nigeria surely needs to take a cue from the South African position and resolve, through appropriate legislative action, the seeming conflict between the constitution and NESREA's statutory powers to enforce undomesticated international instruments.

Nigerian law does not provide for special courts or tribunals exercising jurisdiction over environmental litigations. A different position obtains in India where special courts exist for the speedy trial of environmental litigations.[110] These special courts established in India are unique in that they are not bound by rigid codes of civil procedure but are rather guided by the principles of natural justice. These provisions, if imported into Nigerian law, will surely eliminate most of the bottlenecks that impeded environmental litigation such as frivolous adjournments and interlocutory applications, knowledge gap amongst the judges, etc.

In India, the law ousts the jurisdiction of the courts from entertaining legal proceedings against government or its agents where the subject matter relates to the *bona fide* exercise of any statutory powers

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[102] *Ibid,* s. 17; Electricity Act, s. 148; Air (Prevention and Control of Pollution) Act, s. 41.

[103] CERCLA, s. 107. Also see the South African National Environmental Management Act, s. 28; Indian Electricity Act, ss. 128 & 129; Indian Environment (Protection) Act, s. 9; Indian Air (Prevention and Control of Pollution) Act, s. 23.

[104] CERCLA, ss. 111 – 112.

[105] Allocation of Revenue (Federation Account, etc) Act, Cap. A15 *Laws of the Federation of Nigeria* 2004, s. 5(4).

[106] National Environmental Management Act, s. 29(1).

[107] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, s. 7(c).

[108] 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), s. 12(1).

[109] National Environmental Management Act, s. 25. For the constitutional requirements for domestication, see the 1996 Constitution of the Republic of South Africa (as amended 2013), s. 231.

[110] Electricity Act, s. 153; National Environment Appellate Authority Act, ss. 1 – 12; NETA, s. 8.

conferred by law for the protection of the environment.[111] In Nigeria, there is no similar statutory provision, although the limitation statutes may operate to bar such claims if not brought within the prescribed period of 3 months.[112] Considering the impunitous disposition of public officers in Nigeria, it is most undesirable to shield their actions from judicial scrutiny using the garb of statutory immunity.

Nigerian law makes mandatory provisions for EIA requirement before any development that is likely to affect the environment, including bio and hydro energy developments, can be proceeded with.[113] Though the law requires NESREA to consider comments by interested persons including experts in the relevant field in deciding whether or not to approve any project for which an EIA has been undertaken, the law does not prescribe the qualification required of the person undertaking the EIA and drawing up the report to be submitted to NESREA in the first place. In the United Kingdom, the law requires that the EIA must be done by an expert in the relevant field, who must also include details of his qualifications and expertise in the EIA Statement.[114] The law further requires the Secretary of State or relevant planning authority in the United Kingdom to procure sufficient expertise to examine the environmental statement. [115] Thus, whereas the law of the United Kingdom makes it mandatory for experts to be utilised in the conduct of the EIA, as well as in the preparation and examination of the environmental statement, Nigerian law only requires that if any expert opinion is made available to NESREA, then it must consider same. Ostensibly the position in the United Kingdom makes for maximum optimization of the benefits of the EIA regulations and should be welcomed into Nigeria.

5. CONCLUSION

Though the country has huge potentials in terms of bio and hydro energy, same is yet to be optimally developed. While increased attention is being paid to the development of these energy sources, serious environmental concerns such as land use change, greenhouse gasses emissions, loss of biodiversity, flooding, and pollution of both ground and surface water sources remain inevitable. Several laws exist for the mitigation of these adverse impacts of bio and hydro energy development in Nigeria. However, in the enforcement of these laws, particularly through litigation, several hurdles such as statute of limitations, *locus standi,* etc pose serious impediments. There is therefore the need to review Nigerian laws to be able to surmount the loopholes therein and ensure the enthronement of best practice for a robust, effective and eco-friendly power sector in Nigeria.

[111] Environmental (Protection) Act, ss. 18 & 22; Air (Prevention and Control of Pollution) Act, ss. 42 & 46.
[112] Public Officers Protection Act, Cap. P41 *Laws of the Federation of Nigeria* 2004, s. 2.
[113] Environmental Impact Assessment Act, s. 2(1).
[114] Town and Country Planning (Environmental Impact Assessment) Regulations, reg. 18.
[115] *Ibid,* reg. 4(5).