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AN EXAMINATION OF THE CRIMINAL PROVISIONS FOR ENVIRONMENTAL PROTECTION IN NIGERIA: A BIRD'S EYE VIEW OF THE NESREA ACT 2007

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Abstract

The paper examined "Criminal Liability for Environmental Protection in Nigeria". The best practices for prosecuting environmental cases through criminal approach. Also, the doctrinal method of research was adopted with primary sources of information derived from statutes and secondary sources derived from textbooks, journal articles and online materials. While evaluating the challenges in adopting litigious criminal cases, it explained their inadequacies in curbing or mitigating environmental violations in Nigeria. The paper found that criminal approaches alone are not adequate given the new majors of environmental challenges and the dynamics of environmental violators and there are enough regulatory frameworks on the environment but poorly captured and unwelcomed in ensuring compliance with environmental regulations .The need to protect our environment has never been this urgent and our lukewarm attitude towards environmental concerns has resulted to massive environmental degradation leading to poor health development, and unaccountable deaths of human beings, plants and animals. Today, environmental challenges have assumed a new dimension and this requires not only new legal framework and mechanism but adequate enforcement and prosecutorial powers. The existing legal and traditional regimes of law of tort for tackling myriad environmental crimes have become obsolete and unattainable in dealing with even the established environmental cases and emerging environmental concerns such as soot, gas flaring, and air pollution, hazardous and nuclear waste management. Most countries had employed criminal laws as weapon for dealing with environmental violation while some other countries still rely on both criminal and civil law approach, with their attendant regulatory setbacks. Nigeria falls within this latter trajectory and this approach poses great hindrances for our environmental legislation. The paper concluded that there is an urgent need to expand the needed regulatory and enforcement tools beyond criminal prosecution of offenders, drawing from best practices and the recommendations made herein from other developed countries and ensuring its application in Nigeria.

Keywords: Criminal Prosecution, Environmental Protection and NESREA ACT 2007.

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1. Introduction

The importance of a good environment can never be over-emphasized. The independency of man with or within the ecosystem is really fundamental to human existence. According to the Holy Bible, God ensured that a good environment was created for mankind even before the creation of man[2]. The environment constitutes a rudimentary necessity which was put in a good condition for mankind to explore, maintain and use for sustenance. Things can be done in excess where there are no rules and regulations that is why environmental laws are put in place to alleviate the threatening environmental problems which ensue from human activities in the pursuit of economic growth and development. However, the major environmental problems in Nigeria which include oil spillage, deforestation and associated soil erosion, ozone layer depletion, desertification, acid deposition, global warming, oil pollution amongst others arise as a result of the inadequate enforcement of environmental laws**.**[3]
According to Yingiji and Emmons[4]. We and our environment are at risk. Air water, and soil pollution; hazardous wastes disposal; global warming, acid rain; and reduction of the ozone layer threaten the natural environment and endanger people's health. This is the reason the trend of events in the environmental sector shows that activities which are harmful to the environment are carried out consciously and inadvertently by man, grow daily and man is gradually destroying the very means by which life is sustained. It is in a bid to reduce these excesses that environmental harm has been criminalized over the years notwithstanding the differences in opinion as to which environmental issues should be criminalized.[5] However, environmental protection has since been at the forefront of legislative and administrative measures in Nigeria, and notable among this statutory law that try to comply with international treaty obligations are the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, the National Environmental Protection (Pollution and Abatement in Industries and Facilities Generating Wastes) Regulations, the Endangered Species Act[6]. The Nigeria Radioactive Waste Management Regulation, the National Oil Spill Detection and Response Agency (NOSDRA) Act, the Nigerian Maritime Administration and Safety Agency (NIMASA) Act, the National Biosafety Management Agency (NBMA) Act, Associated Gas Re-injection Act[7]. Oil in Navigable Waters Act[8]. Sea Fisheries Act[9], Territorial Waters Act[10], Environmental Impact Assessment Act (EIA)[11], Nuclear Safety and Radiation Protection Act[12]and the Petroleum Act[13].

All these legislations, except the first, were enacted before the emergence of the 21st century but have now been amalgamated into the 2010 laws of the Federation of Nigeria. Most of these laws mentioned, brought about copious of criminal provisions with a bunch of minimal sanctions, this is because the Nigerian State mostly utilizes the economic approach to environmental regulations, while Federal and State Agencies like the National Environmental Standards and Regulation Enforcement Agency (NESREA), National Oil Spill Detection and Response Agency (NOSDRA), the National Biosafety Management Agency (NBMA) alongside the Nigeria police, have been established and empowered to see to the implementation of these laws and also regulate the activities of individuals and companies that have devastating effect on man and the environment. The oil and gas sector is said to be a significant part of the Nigerian economy, authorities believe that crude oil production has become very important in contemporary times as there are no cheaper alternative to it yet as a form of

[2]Genesis 1 verses 24, the Holy Bible.
[3] P. C. Egbon & M. Behrooz, *Environmental Policy Planning* (National Centre for Economic Management and Administration, 1996)
[4]Yisitu and D. Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment (*SAGE Publication, 2000) 218
[5] H.B. Spence, 'Paradox Lost; Logic, Morality and the Foundations of Environmental Law in the 21st Century'(20)(1995), *Colum J. Env. L.L.*, 145-172.
[6] Laws of the Federation of Nigeria 2004, Cap. E9
[7]*Ibid*, Cap. A25
[8]*Ibid*, Cap 06
[9]*Ibid*, Cap. S4
[10]*Ibid*, Cap. T5
[11]*Ibid*, Cap. E12
[12]*Ibid*, Cap. 142
[13]*Ibid*, Cap. P10

energy. Intriguingly, the sector has furthermore been asserted to cause the most significant chunk of the Nigerian environmental pollution.

2. Conceptual Clarification

For proper understanding of the context in question, there is need to elucidate some of the important key terms.

Environment

There is no specific definition as to the term environment**;** legal definitions of environment reflect scientific categorization, as well as political acts that include cultural and economic considerations. Basic scientific focus on the definition of the environment categories it[14] into the atmosphere, atmospheric deposition, soils and sediments, water quality, biology and humans; and this is changed by political process into legal definitions found in treaties and other legal instruments[15]. Environment describes the external surrounding where plants, or animals live, which influences its development and behaviour[16] and a media of air, land and water.

Crime

Crime is defined as an act capable of being followed by criminal proceedings having a criminal outcome and its proceeding is criminal if it has some certain characteristics which make it criminal. Crime signifies different meaning to different sectors and a crime is seen as an act prohibited under criminal law of a State and codified as such, but not all state punishments are part of a criminal law. Simply put, a crime is what the Criminal Code says it is, a character that is forbidden by the criminal code and criminals are persons who have behaved in way banned by the criminal law.[17] Crime is explained as a violation of law, punishable as described in the laws upon a trial and conviction. It is furthermore an act of serious moral wrong doing[18]. It is always aimed at contravening existing laws of a given community or society. The word **"**offence**"** in Nigeria has been defined in section 2 of the Criminal Code**[19]** offence as "An act or omission which causes the person doing the act or making the omission liable to punishment under the Code or any Act of law". The Penal Code provides where by any provision of any law of the state, the doing of an act or the making of an omission is made an offence, then such acts or omission becomes crimes.[20]

Environmental Crime

Environmental Crime circumscribes targeted acts in violation of any law for protection of the Environment which includes, the air, land and water and which are punishable within the law as an offence. Environmental crime is harmful to the natural environment and its population; it is punishable with criminal sanctions according to the nature of the protected species, type, the level of present and future damage. Looking at environmental crime from the legal perspective, it is a crime against the environment or the violation of environmental law[21]. An act is not an environmental crime unless it violates an already existing law as an authorized act or omission that breaks the law and is therefore subject to cardinal prosecution and sanction. However, like most crimes, environmental crimes must be outrightly prohibited under existing environmental law and codified as such; but for an act to qualify as an environmental crime, it must violate or break the existing laws, harm multiple victims and the environment as well, and must be perpetrated by corporations, organization and including individuals as well. In Nigeria, inefficient penalties are supplied for under environmental and petroleum sector laws as the punishment for violation of the provision, and it argued that since the main culprits of these violations are the corporate bodies, then such fines are mostly easy for the corporate bodies to pay and removing any hint of deterrence that may have been intended by the laws.

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[14] D Olawuji, *Principles of Nigerian Environmental Law* (2nd edn, Afe Babalola University Press, 2015) 2-15.
[15] P. Sands and Others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press, 2012) 926.
[16] J.M. Sindair, *Collins Concise Dictionary* (4thedn, Harper Collins Publishers 1999) 470- 477
[17]Yisitu and D. Emmons(n3) 2
[18] 1 Brookes, *The Chambers Dictionary*, (India, Harrap Publishers Ltd 2006) 358
[19] Criminal Code, Cap 38 LFN, 2004. S.2
[20] Cap 89 Laws of Northern Nigeria 1963, Law No. 4 of Kaduna State, 2002.
[21] M. Clifford and T.D. Edwards; Defining Environmental Crime, in: Clifford M(ed) Environmental Crime; enforcement Policy and Social Responsibility (Aspen Publishers, Gaithersburg, 2015) 121-145.

Therefore, it can be said that environmental crimes result in environmental harm but not all environmental harm result in environmental crimes.

3. The Concept of Environmental Protection in Law

Generally, human activities cause so much damage to the environment which amount to crimes, yet human beings are part and parcel of the environment and such activities of human beings have severe effects on the environment either positively or negatively. But the duty to improve and also protect the environment by adoption of an environmentally friendly attitude by humans will not only safeguard the present generation but also future generations. Therefore, it is highly important and of noble mandate that human beings and nature must work together for the development of any society. This is to say that the relationship of all the components of the environment can be totalized by the facts that human beings breathes in oxygen for their survival which is a by-product of plants, likewise plants, take in carbon-dioxide for their growth and development which is also a by-product of human respiration. In order to realize or attain positive transformation of the environment, environmental rules, strategies, standards, guidelines and remedies are simply made to tackle pollution of the environment and maintain balance between the activities of the human beings and ecosystems[22].

The aforementioned is simply referred to as environmental protection and one of the objectives is to examine the relationship between environmental harm and crime prevention by making sure that the adequacy of the law for protection of the environment and stipulated punishments to curb environmental crimes. It is not a question of uncertainty that some laws in Nigeria which criminalized some acts and omissions are however obviously insufficient bearing in mind the ineffectiveness as the crimes goes on abated that is why the need to make stiffer laws and punishments to protect the environment from crimes must come in play. This is why environmental crime prevention is focused on restraining its consequences on the society against the balance of personal and business liability in order to assure continuous development[23].

4. Brief Analysis of Criminal Liability Provisions for Environmental Protection in Nigeria under the NESREA Act 2007

Criminal Prosecution of Environmental Violator in Nigeria

As a general rule, the duty to enforce and prosecute environmental offenders in Nigeria resides with the National Environmental Standards and Regulation Enforcement Agency (NESREA) established in 2007 and empowered by the Act of the National Assembly and as amended in 2018, which took over the function of the Federal Environmental Protection Agency 1988 (FEPA) as amended in 1992[24]. By Section 2 of the Act, that the National Enforcement Agency as a legal entity was created to deal with environmental violation in Nigeria. The Agency shall have responsibility for the protection and development of environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulation, rules, policies and guidelines.

According to the organogram of the Agency, the duty to enforce environmental violation fell on the Directorate of Inspection and Enforcement.[25] For the purpose of ensuring environmental regulation and compliance the agency shall through the Directorate of Inspection and Enforcement carry out the function stipulated expressly in Section 7 of the Act which summarily include the enforcement, permitting, licensing, punishment of environmental regulations, standards, guidelines, policies and rules. It also includes collaboration with Sister agencies locally and internationally in carrying out these outlined duties. The powers of the Agency and Directorate of Inspection to prosecute environmental violation by employing criminal sanction in order to bring culprits to justice is derived from Section 8 of the Act and it specifically include powers to impose criminal sanctions as captured hereunder; For oil and gas related environmental violation the former Department of petroleum

[22] L. Atesgbua and others, Environmental Law in Nigeria, Theory and Practice, (Benin, Ambik Press, 2009) 4

[23] A. Sulton, A. Cheinrey & R. White, Crime Prevention; Principle, Perspectives and Practices, (Cambridge University Press Melbourne, 2008) 192.

[24] NESREA Act, FEPA has been repealed and replaced with NESREA 2007, S1

[25] *Ibid*, S. 10 Part III

Resources now Upstream Petroleum Regulatory Commission and Downstream Petroleum Regulatory Authority deal with the function of instituting proceedings against environmental criminals.
Furthermore, the following provisions are apt;

a) The Agency shall make regulation setting specifications and standards for minimum air quality, and in controlling emissions that undermines nation's air quality. Therefore, a person who violates any regulations made under Section 20 (1) commits an offence and shall, on conviction, be liable to a fine of N200,000 and imprisonment for a term not exceeding one year or both and additional N20,000 for each day. In the case of body corporate, a fine of N2000,000 and additional fine of 50,000 per day the offence subsists. It is argued that this amount, with great honesty is too small given the dangers posed by atmospheric air pollution in various parts of Nigeria, especially in Port Harcourt, Rivers State capital and its environs.[26] Air pollution caused by incomplete combustion of hydrocarbon has contributed to the hospitalization of many residents and indigenes of major LGA in Rivers State and air quality standards adjudged below the international practices. Thus, one would suggest no option of fine for serial offenders of this Section 20 (1), as sufficient deterrent to the pollution of the air with injurious and hazardous emission called soot. It is also posited, that punitive term of imprisonment be imposed on any corporation and its directors for endangering our lives through air pollution, arguing that if individual can be brought to face terms of imprisonment, the individual directing the minds and spirit of these corporations should equal be made to do so.
b) In the case of acts that endangering the stratosphere and ozone contrary to section 21 (1) the individual is liable to a fine not exceeding N200,000 or daily fine of N50,000 if the act subsists.

c) On minimum noise standard, contrary to Section 22 (3), a person who violates the regulation on minimum noise standard is a liable to a fine of N50,000 or imprisonment not exceeding one year or both and the sum of N5000, for each day the noise activity persists. In the case of body corporate, a fine not exceeding N500,000 and additional fine of N10,000 per day is imposed on the body corporate as a disciplinary action.
d) In the case of violation relating to public health contrary to section 23 (1), the offender shall be liable to fine of N50,000 or to imprisonment not exceeding one year or both and the fine of N5,000 daily for continuing act. In the case of body corporate, the offender is liable to a fine not exceeding N50,000 and additional fine of N10,000 for every day the offence subsist. The parity between individual liability regime for offender and corporate offender for endangering public health is unjustified.
e) In the case of effluent discharge by industries for existing point source contrary to section 24(i), best practicable technology shall attract a fine of N200,000 or to imprisonment for a term not exceeding 2 years or both and additional fine of N5000 per day. Where it is an offence committed by a body corporate, the body shall be liable to pay fine not exceeding N1000,000 and additional N50,000 per day for continuing offence.
f) In relation to offences concerning quality of land resources, natural watershed and coastal zone including flood and erosion management, this is contrary to Section 26 (1), the offender if individual, is liable to a fine not exceeding N200,000 or to imprisonment for a term not exceeding one year or both and additional sum of N10,000 per day. In the case of body corporate, the sum of N1,000,000 Million Naira upon conviction and additional fine of 50,000 per day, if it subsists.
g) The discharge of harmful waste contrary to Section 27 (2) (3)(4) and (5) on the environment in Nigeria attract a fine not exceeding N 1,000,000 or term of imprisonment for 5years or both. Where the discharge is carried out by body corporate, it shall pay a fine not exceeding N100,000 upon conviction and additional sum of N50,000 per day. In the case of body corporate all Directors and Staff are equally to be liable unless they prove lack of knowledge of the existence or commission of the offence, or that the Directors or officers exercised due diligence.
h) By virtue of Section 29 of the Act, the Agency shall cooperate with relevant bodies for removal of pollutants other that oil and gas by adopting Best Remediation Mechanism currently available and

[26]S. C. Dike, Curbing the Menace of soot in Port Harcourt from Rhetoric's to Action Being a Paper Delivered by Prof. S. C. Dike to at the Annual Dinner of the NBA Branch Port Harcourt in Dec. 2021, NBA House, Rivers State.

implementation of Best Global Practices. This cooperation should enable the Agency take over oil and gas related environmental pollution. However, the reality is totally different in Nigera

i) By virtue of Section 30 Part (Vii), the officer of the Agency can conduct search warrant on anything or place, examine any article capable of being used to the detriment of the environment, take sample or specimen, open examine any container or package or document, seize or detain for such time as may be reasonably necessary based on the contravention of the provision of this regulation. The agency can equally obtain order of court to suspend activities pursuant to its civil jurisdiction.

j) A person who obstructs the officer of the an agency for performing any of this stated functions is liable contrary to Section 31(2) to a fine not exceeding N200,000 for an individual or imprisonment for one year or both with additional sum of N20,000 per day for a continuing act and if it is a body corporate, the sum of N2000,000 on conviction with payment of the sum of 200,000 per day so long as the offence persist.

k) By virtue of section 32 (1), no suit can be commenced against the agency until after one moth notice had been given by the proposed plaintiff and subject to the powers of the Federal Attorney General to commence criminal prosecution, an officer of the agency may with the consent of the Attorney General, conduct criminal proceedings in respect of breach of any of the provisions of the Act and regulations. However, the consent of the AG is required to institute the offense, which means that there must be cooperation between the Agency and Federal Ministry of Justice. Further, in prosecution of criminal offences, the provision of the Criminal Procedure Act and Criminal Procedure Code Laws of the Federation of Nigeria LFN 2004 shall, apply mutatis mutandis to Section 32(4) to the same extent as they apply to trial offences generally.[27] That means in all cases the burden of proof for every criminal trial in this Act lies with the prosecution and in this case the Agency.[28]

5. FACTORS MILITATING AGAINST THE EFFICACY OF IMPLEMENTING THE CRIMINAL PROVISIONS UNDER THE NESREA ACT 2007

Poor punishment provisions not commensurate with the magnitude of environmental crime. Just imagine A fine of an amount of 50,000 to 2,000,000 for grave public health and environmental degradation is of course too meagre to serve as deterrent to others. This is a even when the culprit has option of payment of fine than serving on terms. A prison term of One year is also unbelievable given that the action of culprit is in the realm of manslaughter causing death and environmental violation regarding identified challenges on punishment provision in the extant legislation is to elevate the amount payable and increase the prison terms for all serial environmental violation to 10 years or more [29]. If this suggestion is implemented, there will be a great changein compliance mode by persons and corporations violating environmental legislation and regulation. For instance, in the UK, efforts is made to bring Directors and Managers of environmental violation to face criminal trial as in *Shanks and MC Ewan (Teesside) Limited v Environmental Agency*.[30]Again, in the UK *Woodhouse v. Walsall Metropolis,* Borough Council 1994, Environmental Law Review 30, the General Manager of a waste disposal site (along with his employers) were convicted of illegal storage of waste at a waste disposal site. Also in the UK, a custodial sentence of 30 months for environmental crime has been imposed whereas in Nigeria, correctional terms do not exceed two years for individual offenders, which is bad and unreasonable.[31]

a) Exclusion of the Corporate Bodies from Serving Correctional Terms

Sadly, exclusion of corporate bodies from serving term of imprisonment for environmental violation in the extant legislation and regulation is not the best practice, given their capacity to pay any amount as fine, it is for this reason that the compliance by corporate Multinational Oil Companies with all the legislation in Nigeria, which prohibit gas flaring, had been observed in breach than in performance.[32]

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[27] Ani v. State (2000) 6 SCNJ 98 at 107; Ike VsOyagbola (1990) 4NWLR Pt. 147 723.

[28] Evidence Act LFN 2004, Section 135(3)

[29]NESREA 2009 Regulation tend to increase the amount payable but still retain the expression not exceeding One year.

[30](1977) J Env LR 3005

[31]*R v Sissen* (2000) Env LR 156 and R V O Brien &Enkel (2001) 7 WLR 902

[32]NESREA Act 207 section 7(h) through registration, licensing and permitting system order than the oil and gas.

Besides, there are directing minds and spirits behind these corporate bodies that when the veil is lifted, could be charged for environmental violation as can be seen with the practice in the UK.

b) Removal of Oil and Gas from the Criminal Jurisdiction of NESREA

Surely, It is not a best practice to create an in built barrier to an efficient enforcement and NESREA Act and its regulation.[33] Oil and Gas activities are carried out in an environment which is regulated by NEREA Agency.[34] The petroleum sector and its chains of activities, from drilling, exploration, production distribution and transportation constitute more health hazards than the rest of other sectors comparatively.[35] It is suggested that the removal of the oil and gas sector from the jurisdictional and regulatory duties of NESREA can be compared to bringing a child to the world and refusing to educate or making a law and disempowering the regulators of the law from effectively functioning and enforcing the laws made. There is therefore the urgent need to remove all the clogs on NESREA wheel, which prohibit the Agency from regulating this major environmental violator.[36] This view could be supported by the provision in the NESREA Act that makes for collaborating of NESREA with other regulatory agencies, including Department of Petroleum Resources (DPR)[37] and National Oil Spill Detection and Response Agency (NOSDRA) in regulating the environment.[38] It is submitted that the best practice is for an application of criminal prosecution to expand the regulatory and enforcement scope, powers and functions of NESREA to include the oil and gas sector. The current practice with the exclusionary clause, to my mind, is generating regulatory conflict within the regulatory bodies and was so ably pointed out as a sad development and serious regulatory setback by the United Nations Environment Programme Report on Ogoni.[39]

c) The Clause that Prohibits NESREA from Instituting Offence/Charge

The clause that provides that the Agency can conduct proceeding, but can only institute charges with the consent of the Federal Attorney General (FAG) pursuant to Section 32 (1) (3), is not a good practice. This provision, creates unnecessary bottleneck as the Agency must wait for the office of the Attorney General to give a nod before instituting a charge. A busy Attorney General, will not bother until it is convenient even if the environmental violation is imminent and there is need to bring culprit to face criminal prosecution immediately. The best practice is to permit the agency, as an independent body established by the National Assembly to institute conduct and continue any proceeding regarding environment violation, given that some of the environmental breaches require urgency and immediacy of action. For instance, in the United States, Environmental Agency has a prosecutorial office within the office of District Attorney, this way, prosecution of environmental violation become seamless and interesting.[40]

Again, where the FAG refuses to give his consent, but, in the opinion of the Agency an environmental violation or offence has been committed, it is difficult to see how the violator can be charged since no charge would be preferred if the FAG refuses to give consent and this is obviously a regulatory conflict.

d) Paucity of accurate data on criminal prosecution and fine collected so far of the offenders.

Keeping data of criminal offenders, number of prosecution and periodic publication of names of offenders with fines paid, would serve as serious deterrent to the commission of further violation or breaches. A situation where fine imposed and paid and the names of defendants accused persons are

[33] NESREA Act Section (h), Section 8 XIV
[34] *Ibid* Section 1(2); Section 7, Section 20
[35] Yinka Omorogbe, *The Oil and Gas Industry: Exploration and Port Harcourt Contracts* (Florence and Lambard, Lagos, 1997) 20
[36] S. C. Dike, Energy Security: *The Case of Nigeria and Lessons from Brazil, Norway and the UK*, (Pearle Publishers, 2015) 58
[37] DPR was the sole regulatory agency for oil and gas before the emergence of petroleum Industry Act wherein this regulatory functions now to be performed by the Up Stream Regulatory Commission and Down Stream Re regulatory authority.
[38] NESREA Act Section 7(b); Section 7 XVII
[39] UNEP – Assessment of the Ogoni Land Report (UNEP 2009) 139-140
[40] United States Department of Justice, Environmental Crime Section – https://wwwjustice.gov JULY 2, 2021 <ACCESSED 6 Feb, 2022>

held in the dark will not promote best practice. It is the availability of this data to the regulators and the British public that it was able to promote" naming and shaming" of environmental violators.[41]

e) Lack of adequate training of Inspectorate and Enforcement Staff of the Agency

Majority of the staff of this agency are non-lawyers. A lot of authors have linked inadequate trained personnel of the Inspectorate and Enforcement Division of NESREA to be partly responsible for the low civil and criminal prosecution of offenders.[42] Most of the staff of the EI division are not knowledgeable in basic environmental laws, rights and regulation, and are seldom trained to acquire skills needed to effectively function in this regard. The result is low compliance rate of environmental regulation and increase in environmental violation. The best practice thus is to adequately ensure that all Inspectorate Staff are lawyers or persons knowledgeable in law and that these staff are continuously trained to fit for the task of dealing with both traditional environmental breaches and the emerging environmental violation.[43]

f) Most Breaches of Environmental Legislation and Regulation

This arises from acts which are originally lawful and permitted by Government but later declared unlawful due to their end result- making *mens-rea* difficult to prove for criminal prosecution. One of the problems of criminal prosecution of environmental violation is the absence of *mensrea* which is one ingredients of a crime in Nigeria.[44] This is due to the fact that prior to the violation, these activities were licensed and permit granted by relevant authority in line with the existing law. These permits and licenses do not specify what range of activity is lawful and unlawful hence determining the threshold of liability or criminal violation becomes a difficult task not only for the regulators but also to the Inspectorate and Enforcement Division of NESREA. Therefore, in order to make these ordinarily lawful activities to be punishable by Law, there is the need to specify in various permits and licenses what range of activity is lawful and the activity that is unlawful which should be penalized.[45] Thus, the way to go is to determine the threshold of environmental violation, *mensrea* and enforce compliance and prosecute the offender for exceeding the thresh hold of lawful activities.[46] Another way is to state in the regulation that liability is strict hence no proof of *mensrea* (guilty mind) is required but actus rues.[47]

g) The Relationship with the Agency State Officers with State Attorney General

In prosecution of offence against the act and regulation which are committed within the state should be made clear. The relationship, between the Agency and the Federal Attorney General may be smooth in States controlled by the Federal Government in terms of political affiliation, hence speedy dispensation of justice would prevail, but, not where the state is controlled by an opposition party as noticed in River's state where the Governor has lamented that the federal controlled police shield offenders liable to face prosecution for myriad criminal and environmental offences. The best practice here is to provide and legislate that the Agency shall have powers to institute and conduct criminal cases involving breaches of environmental offences without the express consent of the Federal or State Attorney General. Further, that the trained personnel of the Agency have the responsibility to prosecute cases of environment violation with or independent of the Nigerian police.

[41]*R v Camex* (2007) EWCA Crim 1759

[42]Taiwo Osipitan, Problem of Proof in Environmental litigation in J. A Omotola (ed.) Environmental Laws in Nigeria including Compensation (University of Lagos Press, 1990)

[43]Such as Soot in Port Harcourt, Rivers State

[44]Sections 4 and 24 of Criminal Code Law of the Federation 1990

[45]Greg Gordon, Petroleum Licensing in G Gordon et al., Oil and Gas Law- Current Practice and Emerging Trends (2nd Edinburgh University Press, 2011) A License is an administrative authority to give by a competent authority to do an act which ordinary is unlawful. E.g. permit to import chemical to produce fertilizer can cause problem is the chemical is recklessly and negligently allowed to escape to residential or agricultural lands.

[46]Criminal Code and Administration of Justice Act 2015

[47]*Ibid*

h) Multiple defences for Body Corporate in Criminal Prosecution

One of the major challenges to the prosecution of corporate bodies under the NESREA Act is the numerous defenses and escape routes that avail the world- be offenders.[48] Offense provided in Section 27(1) of NESREA Act,' on the discharge of harmful and hazardous waste are permitted, if authorized by law, and in the case of a body corporate, if it can prove that, the offence was committed without its knowledge, or that it exercised due diligence to prevent the commission.[49] The same problem applies in the enforcement of the provision of Harmful Waste (Special Criminal Provision) Act 1988, in relation to hazardous chemical. This is so because, industries discharging harmful waste are originally granted license by government, and these defenses of due diligence or lack of knowledge of the discharges also avail these companies.[50]

i) Determination of the Extent of Liability without Fault Especially for Corporate Bodies

In a criminal trial, proof of conviction would be unsuccessful without fault on the part of the accused. However, Environmental violations may occur without fault of the person or operator of the activity under evaluation. This scenario makes it a herculean task for accused persons to be successfully charged to court since most escape of chemicals and other waste, were previously authorized waste. This is so because; in criminal prosecution there must be proof of guilt or blame worthiness of the accused.[51] Since most environmental violation stemmed from previously legitimate acts, it is submitted, that the best practice is to treat these environmental violation as strict liability offence, which require no proof of guilt.[52] However, section 24 of the Criminal Code provides for offence negligently or willfully committed, thus raising the case for *mensrea* to be proved. The best practice thus is to obviate the challenged posed by Section 24 of the criminal code is to declare major environmental breaches as strict offences.[53]

j) The Criminal Liability Regime does not focus on the Restoration of the Environment

It is obvious that the criminal liability regime does not focus on the restoration of the environment, but rather more on payment of fine and imprisonment or compensation or damages, thus leaving government and the regulator to bear the burden of restoring the environment. Since government resources are evenly distributed, more to critical sectors (electricity and roads), there is little or no budget for the restoration of damaged environment by environmental violators. The best practice is to ensure whether by the application of criminals sanction a clause for the restoration and remediation of the environment through the polluter pays principles.

Similarly, criminal sanctions and imposition of terms of imprisonment do not benefit the victim of polluted lands as the fine goes to government coffers. Thus, the best practice, is to legislate that in addition to the payment of fines and or serving the prison terms, the accused should restore the environment or in alternative part of the fine paid should go to the victims of polluted land for the restoration of their loss. The Ogoni 'land in Rivers State clean up as ordered by UNEP which mess was caused by one of the oil majors, s coming many years after the impacted' land had diminished in value and the victims are always at the receiving end. We submit that all of these issues are set back on the effective criminal prosecution of fenders under the act

5. Best Practices for Environmental Criminal liability from other jurisdictions

In the UK, majority of criminal prosecutions with regard to environmental offences in England are Environmental Agency (EA) which has a published Enforcement and Sanctions policy and the remainder are dealt with by local authorities and smaller other regulatory bodies such as Natural England. The enforcement of environmental legislation in Wales is the responsibility of Natural

[48]NESREA Act, S. 27(4)
[49]*Ibid*, Section 27 4 and 5; Harmful Waste (Special Criminal) Provision Act LFN
[50]*Ibid*, Section 27(5)
[51]S. I. Orji, Nigerian Criminal Law in Perspective (Zubic, 2018) 61
[52]Pharmaceutical Society of Great Britain Vs Storkwain 1962 NZLR, R Vs Adjei cited in Okonkwo and Nash, Criminal Law in Nigeria (London: Sweet and Maxwell, 1980).
[53] Orji (n50)126-130

Resources Wales (NRW). The regulation has a broad range of enforcement options available to them which include: issuing warnings, statutory enforcement notices and works notices, suspension or revocation of environmental permits, issuing a formal caution and prosecution. In determining whether to prosecute all, environmental regulators must consider the code for crown prosecutors, which sets down a two-stage test. First, is there sufficient available evidence to raise a realistic prospect of conviction? In Nigeria, the reverse is the case due to accusatorial system of criminal jurisprudence and this does not augur well for criminal prosecution of environmental offences.

Second, is it in the public interest to bring the prosecution. Noteworthy to state that the Environment Act 1995[54] grants the Environment regulators specific powers to investigate and prosecute environmental crime in England. In the UK, there exist certain factors which are taken into due consideration before commencement of prosecution. There are as follows; Incidents or breaches with significant environmental consequences. Operating without the required license, consent or authorization, persistent or excessive breaches of statutory requirements, failure to comply with formal requirement to remedy environmental harm, reckless disregard of environmental management or quality standards and obstructing regulator staff in gathering information.

In UK, sentencing organization for environmental offences which covers specific guidelines for use in the magistrates' courts and crowns courts in England Wales and which apply to all adult offenders.' This is in line with Section 33 of the Environmental I Protection Act 1990, UK and the Environmental Permitting (England and Wales) Regulations Si 2016/1154. In the UK case of R v. Thames Water, the Court of Appeal had taken this into due consideration by the court in sentencing and the starting point for fines imposed on large corporation offenders once determined.

Conclusion/Recommendations

In environmental breaches, it is not easy to separate wrongs from lawful environmental activities. Most of the polluting industries are desirable for economic and social wellbeing of our society, but how much of their polluting activity could be tolerated by law and the society require a balancing and trade-offs.

Therefore, there is need to balance the cost benefits analysis of having these polluting companies, for instance (cement production companies and oil and gas industries) and living up with their mess. Certain cost must be borne by the society and others by the polluters themselves. This is why any legal regime must stress on preventing pollution more than demanding sanction and punishing polluters after environmental violation. In some developed countries, government tries to adopt economic and market- based mechanism such as subsidy in favour of potential polluting activities. This is aimed at reducing pollution or mitigating the impact, while also promoting voluntary compliance by these corporations. But in Nigeria, voluntary agreements and support schemes, are seldom available due to the economic benefits of the major polluting sector -Oil and Gas- to the economy which sector will never reciprocate government gesture by voluntary compliance with Health, Safety and Environmental regulations. Although, some will parade conspicuously their Health, Safety and Environmental policies, a proper lifting of the veil, will reveal that this is, but, a window dressing and a smokescreen agenda as pollution arising from their activities are almost a daily occurrence.

In order to achieve the status of effective crime enforcement, the independent prosecutors should be attached to the office of the Director General of NESREA and they, in addition to the Director general, should be appointed and also removed based on the constitutional provisions. NESREA should be made independent and the government should not interfere with her affairs. The state and federal government should be able to disburse proper funds to the environmental sector where the agencies can buy reliable equipment to measure and ascertain the level of polluting substances released into the environment, assess them and punish any person whose activity is not in line with the regulating legislation. In order to avoid the problem of environmental enforcement, some certain changes need to be made. Firstly, it is preferred that the NOSDRA Act should be repealed and its

[54](EA 1995)

functions should be merged with that of NIMASA, also its powers expanded to include prosecution. Secondly, the NESREA Act should be in charge of the implementation of the provisions of the Environmental Impact Act and the Harmful Waste (special Criminal Provisions) Act, instead of the current situation where such functions are being carried out by the Federal Ministry of Environment.