

JURISDICTIONAL PROBLEM IN ENVIRONMENTAL LITIGATION IN NIGERIA: LESSONS FROM NEW SOUTH WALES

Taofeeq N. Alatise*

ABSTRACT

An increase in industrial activities, especially in the oil and gas sector in Nigeria comes with the attendant rise in environmental abuses by multinational companies. Income from oil exploration is the major source of revenue for the Nigerian government. However, over the years, the activities of major oil companies in the oil-rich Niger Delta region have caused and continue to cause monumental damage to the local communities and indeed, the environment. Efforts by successive administrations to address this issue have yielded few results. This development means that victims of environmental abuse and indeed environmental activists have only the court to approach for any remedy. In Nigeria, it is only the Federal High Court that has exclusive jurisdiction to entertain any dispute arising from mines and minerals, including oil and gas exploration. Apart from the significant delay occasioned by congestion of cases, the composition of the Federal High Court has no regard for expert personnel in environmental science who are capable of giving informed decisions that would improve access to environmental justice. This article examines the jurisdiction of the Federal High Court in relation to environmental matters and argues that the court as presently constituted is not better placed to ensure access to environmental justice. This article employs doctrinal legal research methodology and content analysis of both primary and secondary legal sources relating to the practice of the Federal High Court of Nigeria, and Land and Environment Court of New South Wales of Australia. The article argues in favour of establishing a specialised environmental court in Nigeria as a superior court with a comprehensive jurisdiction to dispose of environmental-related matters.

Keywords: Jurisdiction, environment, climate change litigation, Special Court.

*Law Lecturer (Crescent University, Nigeria);Email: taofeeqnasir@gmail.com, taofeeq.alatise@bacolaw.edu.ng
(Corresponding Author)

PERMASALAHAN BIDANG KUASA DALAM LITIGASI ALAM SEKITA DI NIGERIA: PENGAJARAN DARI NEW SOUTH WALES

ABSTRAK

Peningkatan aktiviti perindustrian, terutamanya dalam sektor minyak dan gas di Nigeria, datang bersama peningkatan kerosakan alam sekitar oleh syarikat-syarikat multinasional. Pendapatan dari penerokaan minyak adalah sumber hasil terbesar kerajaan Nigeria. Akan tetapi, selama bertahun, aktiviti-aktiviti kebanyakan syarikat-syarikat minyak di kawasan Delta Niger yang kaya dengan minyak telah mengakibatkan, dan berterusan menyebabkan kerosakan besar kepada penduduk setempat dan juga alam sekitar. Usaha berterusan dari pentadbiran untuk menyelesaikan isu in telah membuahkan sedikit hasil. Perkembangan ini bermakna mangsa-mangsa kerosakan alam sekitar dan juga aktivis alam sekitar hanya mempunyai pendekatan mahkamah untuk mendapatkan remedi. Di Nigeria, hanya Mahkamah Tinggi Persekutuan mempunyai bidang kuasa yang eksklusif untuk mendengar pertikaian yang timbul dari lombong dan minerals, termasuklah penerokaan minyak dan gas. Selain daripada kelewatan yang ketara disebabkan oleh lambakan kes, komposisi Mahkamah Tinggi Persekutuan tidak mengambil kira pakar sains alam sekitar yang mampu memberikan keputusan termaklum yang boleh meningkatkan akses kepada keadilan alam sekitar. Makalah ini meneliti bidang kuasa Mahkamah Tinggi Persekutuan dalam hal alam sekitar dan menghujahkan bahawa mahkamah sedia ada yang ditubuhkan bukanlah tempat yang terbaik untuk memastikan akses kepada keadilan alam sekitar. Makalah ini menggunakan metodologi kajian undang-undang doktrinal dan kandungan analisis dari sumber pertama dan kedua perundangan berkaitan dengan amalan Mahkamah Tinggi Persekutuan di Nigeria, dan Mahkamah Tanah dan Alam Sekitar New South Wales di Australia. Makalah ini menghujahkan untuk menubuhkan satu mahkamah alam sekitar yang khusus di Nigeria, sebagai mahkamah atasan dengan bidang kuasa menyeluruh untuk menyelesaikan hal yang berkaitan alam sekitar.

Kata kunci: Bidang kuasa, alam sekitar, perubahan iklim, litigasi, mahkamah khas.

1. INTRODUCTION

Principle 10 of the *Rio Declaration* of 1992 enjoins nations to ensure effective access to judicial and administrative proceedings, including providing redress and remedy through the court.¹ According to the recent Global Climate Change Litigation Report released by the United Nations Environment Programme, “litigation remains a central feature of ongoing efforts to promote climate change mitigation and adaptation efforts”.² This has led to the exponential rise in the number of climate change-related cases filed in various courts across the world.³ In Nigeria, there are many barriers to access to justice in environmental litigation, and one of them is the problem of jurisdiction.⁴ Nigeria is a common law jurisdiction, and as such, courts in Nigeria adopt the adversarial system of adjudication, which explains why issues relating to jurisdictional questions are fundamental to the courts in exercising their judicial power. The impact is even more profound in environmental disputes arising from oil and gas exploration. Nigeria operates a federal system of government, with a court system that is constitutionally regulated. The Federal High Court (FHC) is one of the superior courts⁵ established by the Nigerian 1999 Constitution, while

¹ Rio Declaration of 1992; Environmental Courts & Tribunals: A Guide for Policy Makers. A study by George Pring and Catherine Pring for United Nations Environment Programme (2016); Michael Ukpou, “Environmental Law and Access to Justice in Nigeria: A case for a Specialised National Environment and Planning Tribunal” (2019) 1(1) *NAU Law Review*: 20-53; Tun Lin et al, ‘Green Benches: What can the People’s Republic of China Learn from Environmental Courts of other Countries?’ (Asian Development Bank, Philippines 2009).

² United Nations Environment Programme: Global Climate Change Report: 2020 Status Review. Available at UNEP website.

³ *Ibid.*

⁴ Uzuazo Etimere, “The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight”, (2021) 2 *CCLR*, 158-170; Muhammed T. Ladan, “Access to Environmental Justice in Oil pollution and Gas Flaring Cases as a Human Right Issue in Nigeria” (paper present at a Training Workshop for Federal Ministry of Justice Lawyers by the Institute for Oil and Gas law, Abuja 2011), Ikhide Ehiguelua, *Environmental Protection Law*, (News Pages Law Publishing Co., Effurn/Warri, 2007) 221.

⁵ Section 6(5) 1999 Constitution (as amended).

section 251 of the same law enumerates the matters for which the FHC has exclusive jurisdiction to entertain and determine. One such issue is environmental and climate change disputes relating to oil and gas exploration.

The legal framework regulating oil and gas exploration in Nigeria grants exclusive jurisdiction to the Federal High Court in matters relating to oil and gas exploration, including disputes arising from environmental degradations such as oil and air pollution.⁶ Disputes bordering on environmental abuse and degradations resulting from oil and gas exploration are, by law, required to be instituted exclusively at the FHC. The rationale for this is that oil and gas exploration is within the exclusive purview of the Central (Federal) Government of Nigeria, and therefore only a federal court can dispose of any matter relating to their exploration. This development has led to the dismissal of cases instituted in other fora by victims of environmental abuse for want of jurisdiction.

The problem with the present regime is that the FHC is not better placed to dispose of environmental disputes in a fair, timely, and effective way. The composition of the court fails to consider the scientific and technical knowledge required to dispose of most environmental disputes. Not only that, but the failure also to have a court with a comprehensive jurisdiction to determine all environmental-related disputes, including oil and gas, has continued to deny victims of environmental abuse access to justice.⁷ Apart from the significant delay that cases usually suffer at the FHC, the court's composition has not shown enough appreciation of the unique nature of environmental litigation. This contrasts very well with the practice in New South Wales, Australia. The Land and Environment Court (LEC) of New South Wales is a specialised court with exclusive jurisdiction to dispose of all environmental and planning disputes, including mining matters, within a single court. LEC is a superior court of record on the same hierarchy as the Supreme Court of New South Wales, and it was established to resolve the jurisdictional problems associated with environmental litigations in New South Wales, which were hitherto scattered across different fora. Unlike The FHC, the

⁶ Section 251 (1) (n) of the Nigerian 1999 Constitution (as amended).

⁷ Michael Ukponu, "Environmental Law and Access to Justice in Nigeria: A case for a Specialised National Environment and Planning Tribunal" (2019) 1(1) NAU Law Review: 20-53.

composition of the LEC takes cognisance of the unique nature of environmental disputes by ensuring that expert judges styled “Commissioners” are appointed to decide environmental disputes. Not only that, LEC has, over the years, been able to dispense justice in a fair, timely, and effective manner.

The paper examines the legal and institutional framework of both the FHC and the Land and LEC regarding the problems of jurisdiction and expert evidence. To achieve this, the article employs doctrinal legal research methodology and content analysis of both primary and secondary legal sources relating to the practice of the Nigerian FHC and Land and LEC of New South Wales, Australia, on the subject matter of jurisdiction. The provisions of the Nigerian Constitution and the decided cases of the courts show clearly that jurisdiction is a fundamental requirement that defines the competence of any court in Nigeria, and that only the FHC has the jurisdiction to entertain disputes on oil and gas related matters. The article argues that the FHC as presently constituted is not better placed to deliver environmental justice because it is not equipped to do so. The article examines the jurisdiction of the LEC of New South Wales, Australia, and argues that the special status of the court with its integrated jurisdiction makes the court arguably the best environmental court in the world. Thereafter, the article considers the differences and similarities between the FHC and the LEC. The article recommends the creation of a special court as a superior court in Nigeria that would entertain all environmental disputes; conferring comprehensive and integrated jurisdiction of the court; and ensuring that the expert personnel are appointed as judges to provide technical and scientific knowledge.

2. CONCEPT OF JURISDICTION IN NIGERIA

The legal system in Nigeria is rooted in common law tradition, and this explains why courts’ decisions are based on common law principles. Deciding a question of jurisdiction is considered a fundamental issue and takes precedent over other issues before the court. Jurisdiction has been defined as the court’s power to decide a case or issue a decree.⁸ It has also been considered as the limit imposed on the power of a validly constituted court to hear and determine issues between persons seeking

⁸ Bryan Garner, *Black’s Law Dictionary* (United States: 8th ed., West Group, 2004) 867.

to avail themselves of its process by reference to the subject matter of the issue or the persons between whom the issues are joined or the kind of relief sought.⁹ In most countries with common law traditions, there are laid down or settled criteria that constitute the elements or ingredients of jurisdiction. In Nigeria, a court is said to have a jurisdiction when¹⁰:

- a) It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or the other;
- b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- c) The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Many judicial authorities have stressed the fundamental nature of jurisdiction. It is the life-wire of a court as no court can entertain a matter where it lacks jurisdiction. No court is permitted to grant itself the power to hear a matter where it is not so endowed and if it does, the entire proceedings and the judgment are nullities, no matter how well conducted.¹¹ In deciding whether a court has jurisdiction, the court looks at the claims of the plaintiff. The plaintiff's case through its claims, determines whether a court has jurisdiction over the matter.¹²

The type of jurisdiction of a court over a matter is dictated by the law establishing that court. There are different types of jurisdictions, depending on the nature of the plaintiff's claim before the court. However, the issue of jurisdiction can be approached from three dimensions: territorial, subject matter, and jurisdiction on persons.¹³ Subject matter jurisdiction appears to be the most complex and complicated among the kinds of jurisdiction. This can be seen in most of the cases decided by the court where the issue of jurisdiction is

⁹ APGA V. Anyamon (2014) 7 NWLR (PT. 1407) 541 at 582.

¹⁰ Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Jev v. Iyertyom (2014) 14 NWLR (Pt. 1428) 575 at 631.

¹¹ Jev (n 10) 611.

¹² Salik v. Idris (2014) 15 NWLR (PT. 1429) 36.

¹³ NBCI v. Dauphin (Nig.) Ltd. (2014) 16 NWLR (Pt. 1432) 90 at 122.

challenged. The issue has always been whether a particular court is a proper forum for determining a particular subject matter. This is the gist of the subject matter on jurisdiction.¹⁴

In most jurisdictions, states define the procedure and the proper forum where environmental matters can be litigated. They do this through legislative enactments on environmental protection, defining the proper courts with requisite jurisdiction. However, in Nigeria, the absence of a comprehensive legislative framework means that the government approaches environmental protection haphazardly. With a legal regime that is still stuck in the old common law approach, the Nigerian courts are yet to significantly embrace the growing global judicial revolution spurred by the principle of sustainable development.

However, in New South Wales, Australia, the LEC represents a conventional appreciation of the need to have a dedicated court to dispose of environmental disputes without any conscription of limitation. The Court is a superior court of record with special but comprehensive jurisdiction to determine land and environmental-related matters.¹⁵

2.1 JURISDICTIONAL ISSUE IN ENVIRONMENTAL LITIGATION IN NIGERIA

Most environmental disputes are adjudicated under the common law principles in Nigeria, mainly because such disputes were not viewed as a public matter requiring state intervention.¹⁶ They are mostly litigated under the law of negligence, nuisance, trespass, and strict liability.¹⁷ Most of the environmental actions in Nigeria are brought by victims of environmental abuse in the form of a private claim for damages arising from the tort of nuisance or negligence. These cases are decided by the regular State High Courts, being courts of unlimited jurisdiction, like every other civil matter. The only exceptions to these are

¹⁴ Garner, (n 8) 870.

¹⁵ George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Colorado: The Access Initiative, 2009), 1-119.

¹⁶ Muhammad Taofiq Ladan, "A Review of the NESREA Act and Regulations 2007- 2009: A New Dawn in Environmental Protection in Nigeria" *Nigeria Bar Journal* 6, no.1 (2010): 176-200.

¹⁷ *Ibid.*

environmental disputes that are connected with or pertaining to mines and minerals, including oil fields, oil mining geological surveys, and natural gas, which are within the exclusive jurisdiction of the FHC.¹⁸ Virtually all environmental cases arising from oil and gas exploration have been dismissed on the grounds that they were not instituted at the FHC.¹⁹

A jurisdictional problem was raised in the case of *Shell Pet. Dev. Co. v. H. B. Fishermen*.²⁰ The facts of this case were that the respondent sued the appellant in the High Court of Rivers State, claiming the sum of N162,800,000.00 (One hundred and sixty-two million, eight hundred thousand naira) representing special damages suffered by the respondent as a result of crude oil spillage from the appellant's crude oil well near Bukuma in the Degema Local Government Area of Rivers State, which extensively polluted the respondent's fish ponds, fishing nets, and the creeks and rivers. The issue that came up for determination at the Court of Appeal was whether the trial court was right in holding that it is the State High Court and not the FHC that has the jurisdiction to try and determine the claims before it, particularly having regard to the provisions of the 1999 Constitution.

Disposing of this matter, the Court of Appeal, relying on the Supreme Court decision,²¹ held that by virtue of the combined reading of Sections 251 (1) (n) of the 1999 Constitution and 7 (5) of the Federal High Court Act, the FHC has and exercises jurisdiction to the exclusion of any other court in civil causes and matters arising from mines and minerals (including oil fields, oil mining, geological surveys, and natural gas), and that any power conferred on a State High Court or any other court shall not extend to any matter or proceedings in respect of which jurisdiction is conferred on the FHC. The claims of the respondent were dismissed for want of jurisdiction. The same thing occurred in other similar environmental disputes regarding oil mining activities. In *Barry v. Eric*²² the Court of Appeal held that it is only the FHC that could entertain disputes arising from the seismic activities of

¹⁸ Section 251(1) (n) of the 1999 Constitution (as amended).

¹⁹ *Shell Pet. Dev. Co. v. Abel Isiah* (2001) 5 S.C (PT. II) 1; *Shell Pet. Dev. Co. v. H.B. Fishermen* (2002) 4 NWLR (PT. 758) 505; *Shell Pet. Dev. Co. v. Tiebo VII* (2005) 3-4 S.C. 137.

²⁰ (2002) 4 NWLR (Pt. 758) 505 at 518-519.

²¹ *Shell Pet. Dev. Co. v. Abel Isiah* (2001) 5 S.C (PT. II) 1.

²² (1998) 8 NWLR (Pt. 562) 404.

the oil prospecting defendant, which caused the migration of bees in the plaintiff's bee farm.²³

Another interesting scenario was also raised in the recent case of *Emejuru and Josiah v. Abraham, Monday and Nigerian Liquefied Natural Gas Limited (LNG)*.²⁴ This case was originally filed in 1992 at the State High Court of Rivers State, Nigeria, but was decided by the Supreme Court in 2018. The facts of this case were that the appellant instituted an action against the 1st and 2nd respondents at the State High Court of Rivers State, Nigeria, claiming a declaration of title to land situated at Ubarama in the Ekpeye District of the Ahoada Local Government Area of Rivers State. They also claimed injunctive relief and the sum of N13,380,000.00 as damages for trespass by the 1st and 2nd respondents. However, before the case was heard by the court, the appellants sought and were granted an order to join the 3rd respondent. This was because the 3rd respondent, whose trade was the commercial distribution of liquefied natural gas, had entered the land in dispute and laid its gas pipelines which caused massive destruction of cash crops, buildings, and other valuables during the pendency of the suit. Upon being joined as a party by the trial court, the 3rd respondent filed a preliminary objection, contending that the trial court, being a State High Court, lacked the requisite jurisdiction to entertain the suit on the ground that the appellants' case was no longer a dispute over a land matter but now included oil and gas related issues since the 3rd respondent has been alleged of laying gas pipelines on the land, and as such only the FHC has the exclusive jurisdiction over the subject matter.

On the 6th May 2002, the trial court upheld the preliminary objection and dismissed the matter. Aggrieved, the appellants appealed to the Court of Appeal, which also, in its ruling on the 15th January 2007, affirmed the trial court's decision and dismissed the appellants' appeal. The Court of Appeal, relying on the provisions of Section 251(1)(n) of the Nigerian 1999 Constitution (as amended) and Section 7(1)(n) of the Federal High Court Act, held that the appellant's claims pertained to or arose from the laying of gas pipelines and were within the exclusive jurisdiction of the FHC, and therefore the state trial court

²³ See also *Shell Pet. Dev. Co. (Nig.) Ltd. v. Maxon* (2001) 9 NWLR (Pt. 719) 541 at 555. *Nigeria Agip Oil Co. Ltd. v. Ogini & Ors* (2017) LPELR – 42663 (CA) 17 - 23.

²⁴ (2019) 4 NWLR (Pt. 1663) 541.

was right for dismissing the appellants' case. Still aggrieved, the appellants appeal to the Nigerian Apex Court. The Supreme Court delivered its judgment on 14th December 2018, holding that both the trial court and the Court of Appeal were wrong in law to dismiss the appellants' case on the ground that the State trial court had no jurisdiction. The Apex Court held that the State High Court had jurisdiction to try the matter since the main claim of the appellants was a declaration of title over a disputed land, and the fact that the 3rd respondent was alleged of laying gas pipelines on the disputed land did not bring the case within the exclusive jurisdiction of the FHC. Therefore, the Supreme Court ordered that the case be remitted to the River State High Court and tried on merit. The interesting thing about this case is that the 3rd respondent tried unsuccessfully to stall the hearing by dragging the suit for nearly twenty-six (26) years just on the issue of jurisdiction. This again shows just how the issue of jurisdiction can be a potent factor in denying access to justice in environmental matters.²⁵

Another scenario was played out in the case of *N.N.P.C v. Orhiowasele*.²⁶ The facts of the case were that the respondents sued the appellants at the High Court of Delta State claiming the sum of twenty million naira as special and general damages for the negligence of the appellants allowing crude oil to spill from its burst oil wells onto the land, swamps, creeks, ponds and shrines of the respondents. The respondents sued on behalf of themselves and as representatives of the Ogbe-Udu Community in Okpe Local Government Area of Delta State.

At the conclusion of the trial, the High Court delivered the judgment in favour of the respondents and awarded them the sum of N 18,329,350.00. Dissatisfied, the Appellants appealed to the Court of Appeal. The appellate court affirmed the trial court's decision, but reduced by N 2,000,000.00. Still aggrieved, the appellants appealed to the apex court of the land, the Supreme Court. For the first time, the appellants raised the issue of jurisdiction at the Supreme Court, contending that the High Court of Delta State, being a State High Court,

²⁵ See also the case *Mobil Pro. (Nig.) Unltd. v. Suffolk Pet. Serv. Ltd. (2020) NWLR (Pt.1728) 1*, where the Supreme Court held that from the contract documents, the case of the respondent pertained to mines and minerals, including oil fields mining, geological surveys, and as such only the Federal High Court has exclusive jurisdiction.

²⁶ (2013) 13 NWLR (Pt. 1371) 211 SC.

does not have jurisdiction to determine the matter. The issue for the determination is whether the State High Court had the jurisdiction to entertain the claims of the respondents.

The appellants argued that the High Court of Delta State no longer had jurisdiction to try the matter at the time it did because of the coming into force of the Constitution (Suspension and Modification) Decree No. 107 of 1993, which has conferred exclusive jurisdiction on the FHC on matters connected with or on mines and minerals, including oil fields, oil mining geological surveys and natural gas. Disposing of the matter, the Supreme Court held that the issue of jurisdiction can be raised at any time.²⁷ The apex court, relying on the case of *Shell Petroleum Development Co. Nig. Ltd. v. Isiah*²⁸, subsequently held that since the trial commenced after the coming into force of Constitution (Suspension and Modification) Decree No. 107 of 1993, the High Court of Delta State no longer has the jurisdiction to try the matter, as it had been transferred to the FHC, and therefore allowed the appeal and set aside the judgments of the trial court and the Court of Appeal.

One interesting point about this case is that before the coming into force of Constitution (Suspension and Modification) Decree No. 107 of 1993, a State High Court like the High Court of Delta State had jurisdiction to entertain disputes arising from mines and minerals, including oil fields, oil mining, geological surveys, and natural gas. But with the enactment of Decree No. 107 of 1993, that jurisdiction was transferred to the FHC to exercise exclusively. Even though the trial was commenced at the High Court of Delta State on the 1st December 1993, the Constitution (Suspension and Modification) Decree No. 107 of 1993 came into force on the 17th November 1993, a period before the commencement of trial.²⁹ Though the matter was instituted before

²⁷ Ibid. at 224.

²⁸ (2001) 11 NWLR (Pt. 723) 168.

²⁹ However, in the case of *SPDCN. v. Anaro* (2015) 12 NWLR (Pt. 1472) 122 SC, the Supreme Court dismissed an application challenging the jurisdiction of the High Court of Bendel State to entertain claims for liability incurred for oil pollution damages. The Supreme Court held that trial commenced in the suit in October, 1989 before the coming into force of Decree 107, 1993 on 17th November, 1993, and that the Decree 107, 1993 being a substantive law, cannot have a retrospective effect. The Supreme Court affirmed the judgment of the High Court and the Court of

the coming into force of Decree 107, 1993, the trial had commenced at the trial court after the coming into force of the Decree, and none of the parties raised the issue of jurisdiction before the trial court and the Court of Appeal.

The implication of this is that both the High Court and the Court of Appeal laboured in vain. The respondents who were the victims of the oil pollution and who had suffered environmental degradation were left with nothing because of this jurisdictional quagmire. Not only that, but the undue delay also that characterised the case means that the administration of justice in the country is still at a snail's speed. The victims of oil pollution instituted the matter in 1993 but was finally disposed of by the Supreme Court in 2013, a period of 20 years that was actually wasted because nothing came out of it. This case shows just how the problem of jurisdiction can deny victims of environmental degradation access to justice. It is also why the victims of environmental degradation have become disillusioned with the country's judicial system and prefer to outsource justice to foreign countries where access to justice is guaranteed.

It has been observed that another problem associated with the granting of exclusive jurisdiction to the FHC is the remoteness of the court from the victims of environmental abuse.³⁰ According to the OECD report, the geography and the physical location of the court can either improve or reduce access to justice in a fair, cost-efficient, timely, and effective manner.³¹ In Nigeria and some developing countries, victims of environmental abuse are usually poor rural dwellers, and their abilities to access courts, mostly located in urban cities, is limited and constrained. It is even worse where the matter is related to environmental abuse from oil, mines, and mining operations because the law grants exclusive jurisdiction to FHC which are situated in the state capitals and are non-existent in some states.³² Costs of travel and poor road conditions would create an additional cost of transport and infrastructural challenges to the poor victims.

Appeal which had earlier held the appellant liable for Negligence for oil spillage pollution.

³⁰ S. A. Fagbemi and A. R. Akpanke, *Environmental Litigation in Nigeria: The Role of the Judiciary*. (2019) NAUJILJ 10 (2). 29.

³¹ *Leveraging The SDGs For Inclusive Growth: Delivering Access to Justice For All*: OECD & Open Society Foundations. 2016. 7.

³² S. A. Fagbemi and A. R. Akpanke, (n30) 30.

2.2 THE REAL ISSUE

It has been observed that granting exclusive jurisdiction to the FHC in oil-related environmental disputes has not improved access to justice for victims of environmental degradation. The effect of such exclusive jurisdiction is that the FHC cannot cope with the volume of environmental litigation that accumulates on a daily basis.³³ This has also been said to result in a lack of easy and affordable access to environmental justice.³⁴ While it is agreed that granting exclusive jurisdiction to the FHC has slowed down access to justice in environmental matters, it is of the view that this is not the real issue. The real issue appears to be whether the court, as presently constituted, is competent to decide environmental matters, given its complexities and the expertise that such an assignment requires. Before this issue is addressed, it is important to understand the rationale for the establishment of the FHC.

The FHC was established as a revenue court with the mandate to decide disputes between the Federal Government or its agencies and other persons or institutions on issues mainly on government revenue. The Supreme Court of Nigeria underscored this important point in the case of *Jammal Steel Structures v. A.C.B.*³⁵ where the Court observed that, "The true object and purpose of the Federal Revenue Court Act ... is the more expeditious disposal of Revenue Cases particularly those relating to Personal Income Tax, Customs and Excise duties, illegal currency, exchange control measures and the like, which the High Courts had been too tardy to dispose of especially in the recent years."

Though the jurisdiction of the FHC has expanded in the recent times,³⁶ there is nothing to suggest that the FHC was created to decide issues that are purely scientific/technical in nature like environmental disputes. The qualifications or requirements for the appointment as a Federal judge are clearly provided under Section 250 (3) of the Nigerian Constitution. The Section provides that "A person shall not

³³ Olanrewaju Fagbongbe, "Problems of Compensation for Oil Pollution is Complex" *Guardian*, June 21, 2005, 77.

³⁴ *Ibid.*

³⁵ (1973) *All N.L.R. (Pt. 1)* 222.

³⁶ See Sections 230(1) of the 1979 Constitution and 251(1) of the 1999 Constitution (as amended).

be qualified to hold the office of Chief Judge or Judge of the Federal High Court unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten years". The qualifications appear to be generic, without any specific requirement that reflects the types of disputes the court will adjudicate or matters within its jurisdiction. It is expected that a law establishing a court to determine a particular issue will ensure that only persons with requisite knowledge or experience in such issue are appointed; there ought to be a link between the purpose for which a court is created and the people appointed to achieve such purpose. This is not the situation under the Nigerian Constitution with respect to environmental disputes. Therefore, it is not surprising that the law establishing the FHC did not factor in the important issue of scientific and technical knowledge as part of the requirements and qualifications for the composition of the court, which will significantly affect the ability of the court to dispense justice in environmental litigation.

The fact is that judges of the FHC are legal generalists, lacking a comprehensive understanding of highly scientific/technical issues as environmental disputes demand. Deciding on environmental disputes requires technical and scientific knowledge of the environment to enable the court to make informed decisions. The point has been stressed that resolving environmental disputes will invariably turn on complex scientific evidence in areas such as causation, damages, and the resultant environmental harm.³⁷ This explains why many successful environmental courts have addressed the issue of access to scientific and technical expertise through the appointment of technical and scientific experts as judges to hear and dispose of complex environmental disputes.³⁸

2.3 EXPERT EVIDENCE IS CRUCIAL IN ENVIRONMENTAL LITIGATION

By their nature, environmental disputes are matters beyond the mere application of laws by courts; it challenges the scientific competence of the adjudicator. Indeed, expert evidence is fundamental to many environmental litigations regarding establishing causation, damages,

³⁷ Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (Eco Forum Global Annual Conference, Guiyang, July 2013).

³⁸ *Ibid.*

and future impact. Access to scientific and technical expertise has become a common feature of many specialised environmental courts and tribunals. Many scholars have stressed the importance of scientific and technical expertise.³⁹ Commenting on this, Preston noted as follows:

“Expert evidence is today fundamental to adjudication in the courts and in the Land and Environment Court in particular. Science and technology have grown exponentially and permeate all aspects of our lives. Matters which previously might have been left to the common sense of the trier of fact, now need to be illuminated by specialized knowledge. Yesterday’s common sense may be today’s nonsense. The uninformed opinions of the trier of fact may be idiosyncratic or just plain wrong. Expert opinion evidence is needed to assist the trier of fact to draw correct inferences in decision-making”.⁴⁰

Indeed, expert evidence is fundamental to many environmental litigations regarding establishing causation, damages, and future impact. Specifically, under the Nigerian law of evidence, courts attach much importance to expert opinion when forming an opinion on a point of science. Section 68 of the Evidence Act provides:

When the court has to form an opinion upon a point of foreign law, customary law or custom, or science or art, or as to the identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to the identity of handwriting or finger impressions, are admissible.

This provision of the law requires a victim of environmental abuse to call an expert witness against the violators because the burden

³⁹ Environmental Courts & Tribunals: A Guide for Policy Makers. A study by George Pring and Catherine Pring for United Nations Environment Programme (2016). Michael Ukponu, Environmental Law and Access to Justice in Nigeria: A case for a Specialised National Environment and Planning Tribunal. 2019, NAU Law Review 1(1). Tun Lin et al, ‘Green Benches: What can the People’s Republic of China Learn from Environmental Courts of other Countries?’ (Asian Development Bank, Philippines 2009).

⁴⁰ Preston (n37).

of proof is on that person who will lose if no evidence is called, and in this case, it is on the victim.⁴¹ Where the victim fails to provide expert evidence, whereas the violators were able to produce one, the court will likely dismiss the victim's case in line with section 68 of the Evidence Act. In a legion of decided cases, the courts defined an expert as 'a person who is especially skilled in the field in which he is giving evidence'.⁴² Concerning problems of proof in environmental litigation, the following cases are instructive:

1. *Seismograph Services Ltd. v. Ogbeni*⁴³: The court in this case stressed the importance of expert evidence in environmental cases and as such dismissed the plaintiff's case because he was unable to call an expert to prove damages;
2. *Ogiade v. Shell Pet. Dev. Co. (Nig.) Ltd*⁴⁴: the case of the plaintiffs was dismissed not because they could not call expert witnesses to prove their case; rather it was due to the fact that the experts called were not specially skilled in the particular field in question.; and
3. *Shell Pet. Dev. Co. Ltd. v. Tiebo VII*⁴⁵: the plaintiff (now respondents) sued the defendant (now appellant) at the Yenegoa High Court, claiming damages for negligence as a result of oil spills on the lands, creeks, and shrines of the plaintiffs from the defendant's mining activities. The Supreme Court while setting aside the judgment of the trial court and the Court of Appeal, held that anyone making a claim for special damages must prove strictly that he did suffer such special damages claimed.

Presently, the FHC has not been able to adequately dispense justice in environmental matters because it was not created for that purpose and due to its lack of capacity. The present regime has led to the court imposing a standard on litigants that is excessively difficult to establish, not minding that in environmental litigation, there may not

⁴¹ Section 133 (1) of the Evidence Act, 2011.

⁴² *Ogiade v. Shel Petroleum Development Company (Nig.) Ltd. (1997) 1 NWLR (Pt. 480) 148 at 165; S.P.D.C. Ltd. v. Adamkue (2003) 11 NWLR (Pt. 832) 533 at 598.*

⁴³ (1976) All NLR 163.

⁴⁴ (1997) 1 NWLR (Pt. 480) 148.

⁴⁵ (2005) 4 FWLR (Pt. 283) 674.

be a line of direct evidence from the perpetrator to the harm caused. The situation is even more worrisome because most of the victims of environmental abuse are poor rural dwellers who do not have the means to retain the service of an expert in proof of their cases. Many of the cases instituted by the victims have been dismissed because the courts attach so much weight to expert evidence. This difficulty has led to an unfortunate development in which Nigerian victims of environmental abuse have resulted in outsourcing justice through extraterritorial suits in foreign courts. The cases of *Akpan v. Royal Dutch Shell Co*⁴⁶; *Dooh v. Royal Dutch Shell plc*⁴⁷; and *Oguru v. Royal Dutch plc*⁴⁸ were all instituted by Nigerian farmers against Royal Dutch Shell in The Hague, the Netherlands. The Court of Appeal of The Hague ruled that Dutch courts have jurisdiction to consider the farmers' claims and held that Shell was liable due to the leakage of pipelines and an oil well.⁴⁹ This development constitutes an indictment of the Nigerian judicial system, and it also calls for a reform of the country's judicial approach to environmental litigation.

Only a court which is established through its in-house technical and scientific personnel with a clear understanding of the issue that would be better placed to resolve the disputes. As noted by scholars, a court that is constituted with judges that are knowledgeable in environmental law and science would most likely show a better appreciation and understanding of the issues in disputes between the parties, and this would also obviate, to some degree, the 'cast-in-stone' requirement of expert evidence to prove damages, as always is the case

⁴⁶ The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:134.

⁴⁷ The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:133.

⁴⁸ The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:132. The Judgment in these cases were delivered by the Court of Appeal in Hague on 29th January, 2021. <https://www.google.com/amp/s/www.nytimes.com/2021/01/29/world/europe/shell-nigeria-oil-spills.amp.html>.

⁴⁹ See also the case of *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013). This was also a case instituted by Nigerian citizens in the United States against Shell for acts of violation of customary international law in the 1990s. The case was decided by the United States Supreme Court.

in environmental litigation in Nigerian courts.⁵⁰ It is suggested that a holistic reform should be done to establish a specialised environmental court with complete power of a superior court with comprehensive jurisdiction to dispose of environmental-related matters.

3.0 THE JURISDICTION OF LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Australia is one of the most advanced countries with a highly developed system of adjudicating disputes arising from environmental claims. With a profound structure of the federal arrangement, the court's system in Australia ensures that each state of the federation has a comprehensive judicial arrangement with powers to determine a deluge of issues. There are numerous environmental courts in various states in Australia. What makes these courts unique is their specialised nature in adjudicating environmental disputes. Some of these specialised environmental courts are established as superior court of record, while others are in the form of administrative tribunals. The Land and Environment Court of New South Wales; Planning and Environment Court of Queensland; Resource Management and Planning Appeal Tribunal of Tasmania; and Lands and Mining Tribunal of the Northern Territory are some of the specialised environmental courts and tribunals in some States in Australia.

The Land and Environment Court (LEC) of New South Wales is one of the most specialised environmental courts in the world. It was established in 1979 as a one-stop shop for all environmental and planning disputes. It is a specialist court that enjoys the benefit of a combined but comprehensive jurisdiction within a single court. The court has a merits review function, reviewing decisions of government bodies and officials in a wide range of planning, building, environmental and other matters.⁵¹

⁵⁰ Pring G and Pring C, 'Twenty-first Century Environmental Dispute Resolution – Is there an 'ECT' in your Future' (2015) 33 (1) *Journal of Energy & Natural Resources Law*. 10-33; Tun Lin et al, 'Green Benches: What can the People's Republic of China Learn from Environmental Courts of other Countries?' (Asian Development Bank, Philippines 2009).

⁵¹ Section 17, 18 and 19 of the Land and Environment Act 1979.

The LEC is a freestanding specialised environmental court in the judicial branch of New South Wales (NSW), with legally trained, expert judges. One remarkable feature of LEC is the court's composition, which helps it attain greater specialisation in environmental matters. Apart from the regular judges, expert personnel styled as Commissioners are a fundamental component of the LEC. By law, the Commissioners are required to have experience or knowledge in environmental science or matters relating to the protection of the environment and environmental protection.⁵² According to the Chief Justice of the LEC, Preston, 'these "internal" experts may either advise and assist judges in the hearing of environmental cases or hear and determine cases themselves. Either way, they bring to bear their expert knowledge and experience in the determination of the proceedings. In this way, they improve the availability of expert assistance to parties in resolving complex environmental disputes and improve the quality of decision-making on environmental matters.'⁵³ These contrasts very well with the composition of the Nigerian FHC, which makes no specific requirement for expert personnel.

The LEC is a superior court of record in the sense that it enjoys a higher status than either inferior court or tribunal. The court has the same powers as the Supreme Court of NSW regarding judicial review, granting equitable remedies for civil enforcement, appellate review of administrative decisions, and criminal decisions.⁵⁴ The benefit of establishing an environmental court as a superior court of record is that it enlarges the court's jurisdiction to include those powers only a superior court of record possesses. It has been said that such status represents a public acknowledgment of the importance of environmental issues and a public pronouncement of the importance of

⁵² Section 12 (2) Land and Environment Act, 1979.

⁵³ Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (Eco Forum Global Annual Conference, Guiyang, July 2013). Tun Lin et al, 'Green Benches: What can the People's Republic of China Learn from Environmental Courts of other Countries?' (Asian Development Bank, Philippines 2009), Pring G and Pring C, 'Twenty-first Century Environmental Dispute Resolution – Is there an 'ECT' in your Future' (2015) 33 (1) Journal of Energy & Natural Resources Law. 10-33.

⁵⁴ Section 17, 18 and 19 of the Land Environment Court Act, 1979 (NSW).

the court and its decisions.⁵⁵ A superior court is better able to attract and keep high calibre persons for judicial appointments.⁵⁶

The LEC is the most effective environmental court that has integrated environmental and land use planning competence with civil, administrative, and criminal jurisdiction and enforcement powers.⁵⁷ Its jurisdiction is very comprehensive, and it covers administrative or merits review of governmental decisions; civil jurisdiction; civil enforcement; judicial review of governmental action; criminal enforcement (prosecutions); appeals against criminal convictions and sentences of the Local Court; and appeals against decisions of Commissioners of the Court. The LEC is a ‘one-stop-shop for adjudicating disputes arising from environmental, planning and land matters.’⁵⁸

The comprehensive jurisdiction of the court is due mainly to its broad coverage of disputes and matters arising under all the environmental and planning laws⁵⁹ to the exclusion of other courts in NSW. The jurisdiction of the court is divided into eight (8) classes of

⁵⁵ Brian Preston, “Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study” *Pace Environmental Law Review* 29 (2012): 427.

⁵⁶ Ulf Bjällås, ‘Experiences of Sweden’s Environmental Courts’ (2010) 3 *Journal of Court Innovation* 178.

⁵⁷ Pring and Pring, (n 9) 28.

⁵⁸ Brian Preston, ‘Operating an environment court: the experience of the Land and Environment Court of New South Wales and 12 benefits of judicial specialisation in environmental law’ (Environmental Law Centre, University of Victoria, Conference for Environmental Law Practitioners, Canada, February 2011).

⁵⁹ Environmental Planning & Assessment Act 1979 (NSW), Local Government Act 1993 (NSW), Protection of the Environment Operations Act 1997 (NSW), Heritage Act 1977 (NSW), Threatened Species Conservation Act 1995 (NSW), Native Vegetation Act 2003 (NSW), Contaminated Land Management Act 1997 (NSW), Roads Act 1993 (NSW), Land Acquisition (Just Terms Compensation) Act 1991 (NSW), Trees (Disputes Between Neighbours) Act 2006 (NSW), Noxious Weeds Act 1993 (NSW), Water Management Act 2000 (NSW), Environmentally Hazardous Chemicals Act 1985 (NSW), Fisheries Management Act 1994 (NSW), Pesticides Act 1999 (NSW), Forestry and National Park Estate Act 1998 (NSW), Pipelines Act 1967 (NSW), National Parks and Wildlife Act 1974 (NSW), Aboriginal Land Rights Act 1983 (NSW).

proceedings, covering both environmental and planning laws, as provided under Part 3 of the Land and Environment Act of 1979 (the Act):

Class 1⁶⁰

Environmental planning and protection appeals. Includes appeals on the merits only against refusals, or deemed refusals, of development consents or conditions of development consents, third party appeals against designated development, and appeals against Council order.

Class 2⁶¹

Local government and miscellaneous appeals and applications. Includes appeals against building and other such approvals under the LG Act, tree disputes between neighbours, and other miscellaneous environment and planning legislation.

Class 3⁶²

Land tenure, valuation, rating and compensation matters. Includes appeals involving compensation for compulsory acquisition, valuation of land, the determination of property boundaries, encroachment matters and Aboriginal land claims.

Class 4⁶³

Environmental planning protection and civil enforcement. Includes proceedings for breaches of planning law (e.g. carrying out a development without consent), or breaches of conditions of development consent, and proceedings which question the legal validity of consents or refusals of consent by consent authorities.

⁶⁰ Section 17 of the Act.

⁶¹ Section 18 of the Act.

⁶² Section 19 of the Act.

⁶³ Section 20 of the Act.

Class 5⁶⁴

Environmental planning and protection summary criminal enforcement. Includes prosecutions for environmental offences, for example prosecutions by the Department of Environment and Climate Change (which incorporates the Environmental Protection Authority) for pollution offences and prosecutions by local Councils for carrying out development without development consent.

Class 6⁶⁵

Appeals by defendants from convictions relating to environmental offences imposed by magistrates in the Local Court.

Class 7⁶⁶

Appeals from magistrates in respect of environmental prosecutions which previously would have been heard by the Supreme Court.

Class 8⁶⁷

Mining matters.

The cases decided by the court fall under any of the classes of jurisdiction above.⁶⁸ The law gives the Commissioner power to

⁶⁴ Section 21 of the Act.

⁶⁵ Section 21A of the Act.

⁶⁶ Section 21B of the Act.

⁶⁷ Section 21C of the Act.

⁶⁸ See *Haughton v. Minister for Planning and Maquarie Generation* (2011) NSWLEC 217 decided under Class 4; *Maloney v. Roads & Maritime Services (No.2)* (2017) NSWLEC 68 decided under Class 3; *MGT 6 Pty v. The Council of the City of Sydney* (2017) NSWLEC 1211 decided under Class 1.

hear proceedings in Classes 1 and 2 and some in Class 3.⁶⁹ A judge always hears proceedings in Classes 4, 5, 6, and 7. Sometimes judges and Commissioners sit together, typically when a hearing involves questions of both fact and law.⁷⁰ In Classes 1, 2 and 3 the Court exercises original jurisdiction. The Court places itself in the position of the original decision-maker and determines the matter on its merits. The Court can enforce environmental laws, both civilly and criminally. Proceedings in Class 4 of the Court's jurisdiction can be of two types: civil enforcement, usually by government authorities, of planning or environmental laws to remedy or restrain breaches of those laws and judicial review of administrative decisions and action under planning or environmental laws.⁷¹ Proceedings in Class 5 involve summary criminal enforcement proceedings, usually by government authorities prosecuting for offences under planning or environmental laws.⁷²

Classes 6 and 7 are the appellate jurisdiction of the Court.⁷³ In its appellate function, the Court determines appeals against conviction or sentence by the Local Court for environmental offences. The Court's decisions have improved the quality and consistency of sentencing by the Local Court. However, proceedings in Class 8 can only be exercised by judges or Commissioners who are Australian lawyers. Class 8 jurisdiction does not extend to offences under the Mining Act and Petroleum Act.⁷⁴ Appeals against decisions of Commissioners of the Court in Classes 1-3 and 8 on questions of law lie upon the judges of the Court. This appellate function was transferred from the Court of Appeal of NSW.⁷⁵

The practice of the LEC has shown its proclivity for the protection of the environment. It is important to note that in the LEC there are no issues as to the extent of the jurisdiction of the Court, as

⁶⁹ *A Practitioner's Guide to the Land and Environment Court of NSW* (3rd edn, A Project of the NSW Young Lawyers Environmental Committees 2009).

⁷⁰ *Ibid.*

⁷¹ Section 20(1) and (2) of the *Land and Environment Court Act* 1979.

⁷² Section 21 of the *Land and Environment Court Act* 1979.

⁷³ Section 21 and 21A of the Act.

⁷⁴ section 21C of the Act

⁷⁵ Preston, (n 38) 29.

this has been comprehensively spelled out in the law establishing the court.⁷⁶ The jurisdiction of the LEC covers land and environment-related disputes and parties are not in doubt as to which court has the jurisdiction. In *Kepeco Bylong Australia v. Independent Planning Commission and Bylong Valley Protection Alliance*⁷⁷, the issue for determination was whether a planning commission's rejection of a coal mine on sustainability and climate grounds was unlawful. KEPCO had appealed against the decision of the planning commission to reject its application to build a coal mine to the LEC. The LEC in its judgment, rejected KEPCO's appeal, upholding the Independent Planning Commission's finding that the mine was contrary to the principles of ecologically sustainable development and would have problematic climate impacts. Also, in *Gloucester Resources Limited v. Minister of Planning*⁷⁸, the issue for determination was whether the government could decline a coal mine project application upon consideration of climate change impacts and other factors. The Applicant appealed the decision of the Minister of Planning to refuse its application to construct an open-cut coal mine to the LEC. The court held that the project was not in the public interest after weighing the costs and benefits of the project, including the climate change impacts of the mine's direct and indirect greenhouse gas emissions. The court, therefore, upheld the government's denial of the application. In *Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority*⁷⁹, the plaintiffs, who claimed to have been harmed by bush fires made intense by climate change, brought a civil enforcement proceeding to LEC to compel the New South Wales Environmental Protection Authority to regulate greenhouse gas emissions. The court on 26 August 2021 ordered the Authority to "develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change."

From the above-decided cases, it is clear that the LEC is primarily driven by the desire to protect the environment against activities that could lead to climate change. Coal power is the primary source of fossil fuel energy in Australia and the major contributor to

⁷⁶ Class 1 to 8, Section 17, 18, 19, 20 and 21 of Land and Environment Act, 1979.

⁷⁷ (2020) NSWLEC 179.

⁷⁸ (2019) NSWLEC 7.

⁷⁹ (2021) NSWLEC 92.

greenhouse gas emissions.⁸⁰ A report has shown that Australia has the highest greenhouse gas emissions from coal power in the world on a per capital basis, nearly doubling those in China.⁸¹ The LEC has been able to use its judicial powers to stop building more coal mines because of their climate change impacts on the people and the environment. This has been achieved largely due to the comprehensive jurisdiction of the LEC and the composition of the court by the judges and expert commissioners who can dispose of environment and climate change related matters without conscription as to jurisdiction and scientific expertise.⁸²

It has been said that the comprehensive jurisdiction of the LEC is a function of its being a superior court of record, and its ability to exercise jurisdiction formerly exercised by the Supreme Court of NSW in relation to environmental matters.⁸³ This enables the court to impose civil, administrative, and criminal penalties, which is the hallmark of many powerful specialised environmental courts. It also enables the court to deal with multiple facets of environmental disputes without the constriction of jurisdiction limitations.

More importantly, it helps to ensure stability that would facilitate the development of environmental jurisprudence over time. The practice of the court has, over the years, distinguished it as one of the world's most highly successful specialised environmental court. Therefore, it is not surprising that the court has become a reference point for many countries that intend to improve access to justice in environmental litigation.

⁸⁰ Adam Morton, Australian shown to have highest greenhouse gas emissions from coal in world on per capital basis, *The Guardian*, available at:

<https://google.com/amp/s/amp.theguardian.com/environment/2021/nov/12/Australia-shown-to-have-highest-greenhouse-gas-emissions-from-coal-in-world-on-per-capita-basis>.

⁸¹ *ibid.*

⁸² *Environmental Courts & Tribunals: A Guide for Policy Makers*. A study by George Pring and Catherine Pring for United Nations Environment Programme (2016).

⁸³ Preston (n38).

4.0 DRAWING THE THREADS TOGETHER

The examination of the practices in Nigeria and Australia, particularly NSW, underscores the point that both jurisdictions have some similarities and differences in their approaches to jurisdiction. Both Nigeria and Australia are Commonwealth countries with a profound history of common law tradition as part of their legal systems. The analysis of the practices of the courts in the two jurisdictions showed some level of resemblance and difference in the attitude of courts to jurisdiction. While the old common law principle on jurisdiction featured prominently in the application of jurisdiction in the two jurisdictions, relaxation of the rule through statutory enactment is a common feature of the Australian court, particularly the LEC of NSW. The Nigerian courts' attitude towards jurisdiction has been hostile, with the courts using the doctrine to limit access to court.

Another common feature of the two courts is that they both have exclusive jurisdiction to dispose of environmental matters. However, the snag is that while the Nigerian FHC has an exclusive jurisdiction to dispose only oil and gas environmental-related disputes, the LEC has an exclusive jurisdiction to determine any environmental and planning disputes, including mining matters (oil and gas exploration), without any conscription in NSW. The FHC is not a dedicated environmental court like its counterpart in NSW. The only justification for granting the FHC power to decide environmental disputes relating to oil and gas is essentially because oil and gas are within the exclusive legislative competence of the federal government. This is not the situation in NSW, as the LEC's jurisdiction extends beyond oil and gas disputes to virtually any environmental or planning-related disputes.⁸⁴

The composition of the two courts tells a different story. While law-trained judges are common features of the FHC and the LEC, some expert judges are knowledgeable in environmental science and act as Commissioners in the LEC. The inclusion of the Commissioners appreciates the fact that environmental disputes require expert evidence to establish causation, damages, and future impact. Access to scientific and technical expertise has increasingly become a common feature of the LEC. The presence of expert judges in the LEC has

⁸⁴ See for example Environment and Planning Law 1979 new South Wales.

helped ease the burden of proof, especially for the litigants who cannot afford to retain the services of expert witnesses to prove their cases.

5.0 RECOMMENDATION

The lack of environmental justice in Nigeria is traceable to the absence of both legal and institutional frameworks. The present regime of environmental litigation in Nigeria lacks a comprehensive framework, both legal and institutional. This is because access to justice in environmental litigation is emasculated. A well-structured system of environmental litigation will improve access to justice. Going forward, the following suggestions are made:

TOWARDS A SPECIALISED COURT IN NIGERIA

Environmental disputes are different from other civil actions and therefore require a separate legal regime that would appreciate its distinction. The regular courts are incapacitated by unduly restrictive substantive and procedural laws that constrain access to environmental justice. It is suggested that there is the need to enact a law establishing a specialised court for the environment, a law that would take into cognisance the special nature of environmental disputes. It is very imperative that such a court is established as a superior court of record with powers to determine every dispute relating to the environment. In view of this, it is also suggested that the Constitution of Nigeria be amended to accommodate such a specialised court as a superior court of record.

A specialised environmental court with an integrated jurisdiction to decide all disputes bordering on criminal, civil and administrative issues is a common feature of many successful environmental courts, and the practice of the LEC presents a fascinating experience of how establishing a specialised court with integrated jurisdiction and expert judges can help improve access to environmental justice. The jurisdiction is expected to cover administrative or merits review of governmental decisions; civil jurisdiction; civil enforcement; judicial review of governmental action; criminal enforcement (prosecutions); appeals against criminal convictions and by lower courts, and any environmental disputes, either instituted by victims or public interest litigants. The environmental court being advocated for is the one that

should have a comprehensive jurisdiction such that it would have the capacity to dispose of every facet of environmental disputes or violations, without distinction as to whether it is oil and gas related.

A specialised court with a comprehensive jurisdiction will likely attract more cases. It is suggested that the court should have integrated jurisdiction, covering criminal, civil, and administrative matters. This would help the court develop environmental jurisprudence that would be consistent with its mandate. The specialised court should have exclusive jurisdiction on all environmental-related disputes, without any conscription as to limitation. In order to achieve this, it is suggested that the laws regulating the environment be revised to empower the court to dispose of any matters arising from the interpretation of any part of the Act.

The comprehensive jurisdiction of such courts should be made to have a broad coverage of disputes and matters arising under all the environmental and planning laws⁸⁵ in Nigeria to the exclusion of other courts. In order to achieve this, it is important to amend all the environmental laws in Nigeria, including those regulating oil and gas exploitation, to grant exclusive jurisdiction to the proposed special environmental court.

The present regime of appointing judges should be done away with; expert judges with knowledge in environmental science should be a fundamental requirement. As noted above, a specialised court that is constituted of expert judges is most likely to appreciate the significance of protecting the environment from the perspective of science and environmental jurisprudence. The requirement for appointing a judge should include having knowledge and expertise of environmental laws, science and related principles. The court should also have the power to invite experts in a particular field of science that would assist in the determination of issues that requires scientific/technical knowledge. This would assist the court in making an informed decision on complex issues. Having in-house expert judges as assessors would enable the court to evaluate parties' conflicting and sometimes partisan expert evidence.

⁸⁵ NESREA Act, Environmental Impact Assessment Act, Harmful Waste (Criminal Provisions) Act, Petroleum Act, Pipeline Act, Criminal Code and other laws regulating the environment.

6.0 CONCLUSION

The problem of the jurisdiction in environmental matters has become a profound predicament in achieving access to justice. The present regime of environmental litigation in Nigeria lacks a comprehensive legal and institutional framework, which has resulted in many genuine cases being struck out, leaving victims with nothing but agonies of environmental degradation. It has been shown that the panacea lies in establishing a specialised environmental court with an exclusive jurisdiction to determine environmental disputes because the FHC is not established for that purpose and more so that it lacks the capacity to do so. A special environmental court would improve access to environmental justice. Two types of judges are to be considered to preside over the court: a skilled and knowledgeable judge in interpreting environmental laws; and a judge who has scientific and technical knowledge of environmental abuse. This would enable the court to address all the issues in environmental disputes that show a clear appreciation of their function and develop environmental jurisprudence for the country and the outside world.