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Realization of the Right to Health-Care in Nigeria: Need for a Paradigm Shift

AISHA HARUNA

Human Dignity and the Right to Work: Seeking Protection for Commercial Sex Workers

ALOY OJILERE

A Juristic Overview of the Constitutional Law Doctrine of Double Jeopardy in Nigeria

BENJAMIN O. IGWENYI, IRUKA NWAKPU & ONYEKACHI ENI

From Prisons to Correctional Centres: Wherein Lies the Treatment of The Inmates Of Nigerian Correctional Services Facilities

IGWE ONYEBUCHI IGWE & AUSTINE K. MGBOLU

A Legal Examination of Migration and Gender Dynamics In Nigeria

NWAMAKA IGUH & ANITA NWOTITE

Socio-Legal Issues of Surrogacy in Nigeria: A Quagmire

OMOLABAKE OGUNWANDE & GLORY OZURU

Lawyers as Taxable Persons under the Value Added Tax Act: An Appraisal

KACHIDOBELU JOHN BIELU

Right To Clean and Unpolluted Air in Nigeria

SUNDAY AKINLOLU FAGBEMI

A Constitutional Framework to Assure Gender Parity in Nigerian Politics: Uganda in Perspective

GLORIA D SHAJOBI-IBIKUNLE, ABDULKAREEM AZEEZ & ESTHER APIO

Grant of Amnesty upon Cessation of Hostilities in Internal Armed Conflicts: Implications for Constitutionality in Nigeria

UFUOMA V. AWHEFEADA

Regulating Clinical Trials in Developing Countries: Towards Immunization Compliance

MUHAMMAD RABIU MUSA

A Comparative Disclosure of the Collective Rights Of Prisoners in Nigeria, South Africa, India and New Zealand

OBIOMA HELEN ONYI-OGELLE & COLLINS NWOBODO

Protecting Women's Rights in Nigeria in the 21st Century: Challenges and Prospects

TOMI GRACE OBAGBOYE

A Review of Socio-Cultural Factors Affecting Patients' Right to Inform Consent and Autonomy in Medical Practice in Nigeria

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DANIEL IDIBIA OBIDA

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Negligence and Malpractice: The Siamese Harbingers of Grief in Contemporary Nigerian Medical Practice

P. E. O. OGUNO & IFEANYI E. ANIGBOGU

Fair Hearing and the Finality of the Orders of the Court of Appeal of Nigeria Under Order 19 Rule 10, Court Of Appeal Rules 2016

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International Centre for Human Rights and Peace Studies
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TABLE OF CONTENTS

<i>Realization of the Right to Health-Care in Nigeria: Need for a Paradigm Shift</i> AISHA HARUNA	1
<i>Human Dignity and the Right to Work: Seeking Protection for Commercial Sex Workers</i> ALOY OJILERE	11
<i>A Juristic Overview of the Constitutional Law Doctrine of Double Jeopardy in Nigeria</i> BENJAMIN O. IGWENYI, IRUKA NWAKPU & ONYEKACHI ENI	22
<i>From Prisons to Correctional Centres: Wherein Lies the Treatment Of The Inmates Of Nigerian Correctional Services Facilities</i> GWE ONYEBUCHI IGWE & AUSTINE K. MGBOLU	28
<i>A Legal Examination of Migration and Gender Dynamics In Nigeria</i> NWAMAKA IGUH & ANITA NWOTITE	37
<i>Socio-Legal Issues of Surrogacy in Nigeria: A Quagmire</i> OMOLABAKE OGUNWANDE & GLORY OZURU	40
<i>Lawyers as Taxable Persons under the Value Added Tax Act: An Appraisal</i> KACHIDOBELU JOHN BIELU	53
<i>Right To Clean and Unpolluted Air in Nigeria</i> SUNDAY AKINLOLU FAGBEMI	61
<i>A Constitutional Framework to Assure Gender Parity in Nigerian Politics: Uganda in Perspective</i> GLORIA D SHAJOBI-IBIKUNLE, ABDULKAREEM AZEEZ & ESTHER APIO	72
<i>Grant of Amnesty upon Cessation of Hostilities in Internal Armed Conflicts: Implications for Constitutionality in Nigeria</i> UFUOMA V. AWHEFEADA	82
<i>Regulating Clinical Trials in Developing Countries: Towards Immunization Compliance</i> MUHAMMAD RABIU MUSA	94
<i>A Comparative Disclosure of the Collective Rights Of Prisoners in Nigeria, South Africa, India and New Zealand</i> OBIDIOMA HELEN ONYI-OGELLE & COLLINS NWOBODO	101
<i>Protecting Women's Rights in Nigeria in the 21st Century: Challenges and Prospects</i> TOMI GRACE OBAGBOYE	112

<i>A Review of Socio-Cultural Factors Affecting Patients' Right to Inform Consent and Autonomy in Medical Practice in Nigeria</i> CHINEMELUM NELSON ARINZE-UMOBI & GODWIN N OKEKE	125
<i>Early Child Birth as the Leading Cause of Obstetric Fistula in Nigeria: A Legal Perspective</i> OYEBANKE APARA, ISEOLUWA AINA & OMOMEN MUSA-AGBONENI	137
<i>Masculinity in Gender Equality: Implications for Development and Rights Of Women in Legal Advocacy</i> DANIEL IDIBIA OBIDA	149
<i>Federalism and Unified Police System: A Product of Political Exigency in Nigeria</i> L.O. TAIWO & O.A.ORIFOWOMO	159
<i>Negligence and Malpractice: The Siamese Harbingers of Grief in Contemporary Nigerian Medical Practice</i> P. E. O. OGUNO & IFEANYI E. ANIGBOGU	172
<i>Fair Hearing and the Finality of the Orders of the Court of Appeal of Nigeria Under Order 19 Rule 10, Court Of Appeal Rules 2016</i> MUSA Y. SULEIMAN	182

RIGHT TO CLEAN AND UNPOLLUTED AIR IN NIGERIA*

Abstract

Right to clean and unpolluted air is a right recognised worldwide as part of human rights. The right has been incorporated into several countries' constitutions and legislations apart from its recognition in the United Nations Conventions and other treaties. Although, the right to clean air is not expressly codified in Nigeria save legislations for the control of pollution generally. This paper therefore examines the status of right to clean air in Nigeria. The objective of the paper is to stir up government to enact separate law for the enforcement of right to clean air. The paper adopts doctrinal approach to legal research as sources of its information. The paper finds that institutional constraints have rendered ineffective laws and regulations for the control of air pollution in Nigeria. The paper observes that right to clean air is universal right and argues for the enactment of Clean Air Act in Nigeria has done in other climes to create platform for the enforcement of right to clean air. The paper concludes with recommendation among others for stiffer penalty against Polluters of air and their collaborators in and outside government in Nigeria.

Keywords: Right, Clean, Pollution and Air

1. Introduction

Environment is the totality of the places and surroundings in which we live, work, and interact with other people in our cultural, religious, political and socio economic activities for self-fulfillment and advancement of our communities, societies and nation.¹ Due to the importance of an healthy environment to human health and total well-being, clean environment free from all form of pollution is indispensable. Unsafe environment is one of the factors responsible for human ill-health, animal and even death globally due to pollution and indeed air pollution. Air pollution is the introduction of contaminants into a natural environment that causes instability, disorder, harm or discomfort to the ecosystem that is physical system or living organisms.² According to Urhieet *al*,³ air pollution is the prevalent of harmful substance in the atmosphere which is detrimental to health and wellbeing of people, animal and the environment.⁴

The effects of air pollution are felt more in developing countries due to poverty, ignorance and exposure to all manners of environmental hazards, which include growing population, urbanization problems, weak enforcement of environmental laws and regulations and pollutions resulting from economic pursuit and developmental activities incompatible with the available natural and human resources. It is a fact that majority of the world's population lives in places where they are exposed to poor air quality, with estimated 6.5 million deaths associated with exposure to air pollution in 2012 alone.⁵ According to Okhumode,⁶ air pollution constitutes the largest

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¹A Akinbode, *Introductory Environmental Resources Management*, (Ibadan: Daybis Limited, 2002) 8

²JM Akande, EO Ajaka, FM Omosogbe and AI Lawal, 'Environmental Effects of Processing Marine Clay in Olotu, Ondo State, Nigeria (2013) 3 (2) *Civil and Environmental Research*, 82-86.

³E Urhie, J Odebiyi and R Popoola, 'Economic Growth, Air Pollution Standards Enforcement and Employment Generation Nexus in the Nigerian Context (2017) 6 (5), *International Journal Of Innovative Research & Development*, 20

⁴ PN Ndoke and OD Jimoh, 'Impact of Traffic Emission on Air Quality in a Developing City of Nigeria' (2005) 4 (8) *AssumptUniv J Technol*, 222-227 and CC Tawari and JFN Aboweri, 'Air Pollution in the Niger Delta Region Area of Nigeria' (2012) 1 (2) *International Journal of Fisheries and Aquatic Sciences*, 94-117: 94.

⁵Allan, A, 'The Right To Breathe Clean Air' <<https://www.ueviromental.org/news-and-stories/story-right-breathe-clean-air>> accessed 23 October, 2019.

⁶HY Okhumode, 'Particle (Soot) Pollution in Port Harcourt Rivers State, Nigeria—Double Air Pollution Burden?

among all of the environmental risks with the following analysis: 3 million annual deaths due to outdoor air pollution exposure. In 2012 alone, 11.6 percent of global deaths equivalent to 6.5 million deaths were from outdoor air pollution-related problem. 94% of the approximately 90% of air pollution-related deaths occurring in low and middle-income countries are as a result of non-communicable diseases, including cardiovascular diseases (CVDs), chronic obstructive pulmonary disease (COPD), and lung cancer.⁷

The global concern for clean environment led to the United Nations Conference on the Human Environment held in Stockholm in 1972. The Conference drew global attention to environmental degradation with move to intensify committed actions on the matter. One of the achievements of the Conference was the declaration of 26 principles on the environment. The conference also recognised air pollution as major factor affecting the environment once it is accumulated beyond environmental carrying capacity.⁸ According to Allan,⁹ air pollution is one of the biggest global environmental and health challenges requiring global response. However, at the heart of the low response to air pollution is lack of political will, which is a major factor in Nigeria where some of the activities causing air pollution is coming from exploration of oil and other legitimate activities, and thus difficult to handle in Nigeria for economic reasons.

This paper examines the right to clean and unpolluted air in Nigeria. The salient issues which the paper seeks to address are: What are the sources and effects of air pollution in Nigeria? Is there any legal framework for right to clean air in Nigeria? What are the institutional constraints to the enforcement of air pollution control laws and regulations in Nigeria? To resolve these issues, the paper is divided into six sections. Section one is this introduction, while section two addresses sources and effects of air pollution. In section three, the paper examines legal framework for right to clean air in Nigeria and other jurisdictions. Section four highlights the institutional constraints to the enforcement of air pollution control in Nigeria. Section five discuss right to clean air as universal right. Section six concludes with recommendation among others for the enactment of separate Clean Air Act as done in advance climes in Nigeria with stiffer penalty against Polluters and their collaborator in and outside government.

2. Sources and Effects of Air Pollution

According to Dimitriou and Christidou,¹⁰ air pollution is responsible for major harmful effects on human health, animal lives, natural ecosystems and the man-made environment. Air pollution occurs both outdoors and indoors and is caused by human activities and natural mechanisms.¹¹ Natural cause of pollution comes from pollen, dust particle from volcanic disturbance, gases from decaying animals and plants even salt spray from the oceans.¹² In Nigeria, there are primary and second causes of air pollution. While the primary causes represent the direct emission from the pollution sources to the environment, the secondary causes are caused by chemical reaction in

Understanding and Tackling Potential Environmental Public Health Impacts (2018) 5 (2)
www.mdpi.com/journal/environments accessed on 18 October, 2019

⁷ *Ibid*

⁸ E Desombre, 'Global Environmental Institutions' www.amazon.com/Global-Environmental-Institutions/dp/... accessed on 4 October, 2019

⁹ A Allan, (n 5)

¹⁰ A Dimitriou and V Christidou (2011) 'Causes and Consequences of Air Pollution and Environmental Injustice as Critical Issues for Science and Environmental Education, The Impact of Air Pollution on Health, Economy, Environment and Agricultural Sources' <http://www.intechopen.com/books/the-impact-of-air-pollution-on-health-economy-environment-and-agricultural-sources/causes-and-consequences-of-air-pollution-and-environmental-injustice-as-critical-issues-for-science> accessed 24 November, 2019

¹¹ *Ibid*

¹² SJ Callan and JM Thomas, *Environmental Economics and Management Theory, Policy and Applications*. (5th Edition. South-Western Cengage Learning, 2015), 54

the atmosphere. The main anthropogenic sources of air pollutants include activities such as transportation, burning coal or other fossil fuels for energy demands, industrial processes, or use of chemicals in agriculture, and facilities like power plants, incinerators, landfills for waste deposition.¹³ Other primary sources of air pollution in Nigeria range from biomass combustion, bush burning, refuse burning and gas flaring, pipelines explosion burning and pollution from energy sources like generators.¹⁴ Outdoor air pollution is a major problem mainly in urban areas because of overpopulation. Increasing population in urban areas increased demands in transportation, industrial production and energy, which constitute the main sources of outdoor air pollution.¹⁵ Moreover, this problem is intensified due to inadequate green open spaces in towns and cities and their restricted possibility to improve air quality and reduce air pollution.¹⁶ Other sources of air pollution are fumes from paint, hair spray, varnish, aerosol sprays and other solvents, Military resources such as nuclear weapons, toxic gases, germ warfare and rocketry. Methane emitted by the digestion of food by animals, for instance, cattle, radon gas from radioactive decay within the earth's crust. Vegetation, in some regions, emits environmentally significant amounts of VOCs on warmer days. These VOCs react with primary anthropogenic pollutants and anthropogenic organic carbon compounds to produce a seasonal haze of secondary pollutants, volcanic activity which produces sulfur, chlorine and ash particulates. Air pollutants associated with traffic-related emissions such as nitrogen oxides (NOx), carbon monoxide (CO) and particulates (PM10) have been recognized to have significant impact on human health with evidence suggesting causal associations between elevated PM10 and mortality.¹⁷

The problem with air pollution is that sometimes you do not see it but you are breathing polluted air all the same. Sometimes it is not easily noticeable until great harm is already caused.¹⁸ The effects of air pollution on human health are numerous.¹⁹ WHO's statistics revealed that nine out of every ten people globally are exposed to air pollution, meaning that these people are breathing polluted air.²⁰ Studies further revealed that air pollution increase the incidence of cancer, birth defects, brain and nerve damage, and long-term injury to the lungs and even death.²¹ Air pollution also causes chronic respiratory diseases especially asthma, chronic bronchitis and

¹³ F Valent, D Little, G Tamburlini, and F Barbone, 'Burden of disease attributable to selected environmental factors and injuries among Europe's children and adolescents' (2004)

¹⁴ GR Ana 'Air Pollution in the Niger Delta Area: Scope, Challenges and Remedies' <https://www.intechopen.com/books/the-impact-of-air-pollution-on-health> accessed 19 September, 2019 and S Ladan, 'Examining Air Pollution and Control Measures in Urban Centers of Nigeria' (2013) 4 (6) *International Journal of Environmental Engineering and Management*, pp. 621-628

¹⁵ United Nations. (2004). World population to 2300 United Nations Department of Economic and Social Affairs, Population Division

¹⁶ B Givoni, 'Impact of planted areas on urban environmental quality: A review' (1991) 25 (3) *Atmospheric Environment, Part B, Urban Atmosphere*, pp. 289-299,

¹⁷ OOS Ojo, and OS Awokola, 'Investigation of Air Pollution from Automobiles at Intersections on Some Selected Major Roads in Ogbomoso, South Western, Nigeria (2012) 1 (4) *Journal of Mechanical and Civil Engineering (IOSRJMCE)*, pp. 31-35

¹⁸ L Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Lagos: Ababa Press, 2003) 85

¹⁹ Urhie et al (n 3) 21. See also JY Magaji, and SM Hassan, 'An Assessment of Air Quality in and around Gwagwalada Abattoir, Gwagwalada, Abuja, FCT' (2015) 5 (1) *Journal of Environment and Earth Science*, 87-92.

²⁰ World Health Organisation, '9 out of 10 people Worldwide breathe Polluted Air, but more Countries are taking Action' (2 May, 2018) <<http://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action>> accessed 23 October, 2019

²¹ PN Ndoke, and OD Jimoh. 'Impact of Traffic Emission on Air Quality In a Developing City of Nigeria. (2005) 4(8), *Assumpt Univ J Technol*, 222-227.

lung emphysema.²² Other effect of air pollution include low birth weight and nutritional deficiency in children; interstitial lung disease, chronic obstructive lung disease, tuberculosis, cardiovascular disease and cataract among others in adults.²³ According to Amokaye,²⁴ traditional air pollutants directly affect the respiratory and cardiovascular system. For instance, increased mortality, morbidity and impaired pulmonary function have been associated with elevated levels of SO₂ and SPM Nitrogen dioxide and O₃ also affect the respiratory system, acute exposure can cause inflammatory and permeability reactivity.²⁵ The recent WHO fact sheet on the effects of ambient air pollution on substances causing air pollution revealed that fine particulate air pollution is the single largest environmental risk to health worldwide. Consisting of tiny particles that are breathed into the lungs and then pass into the bloodstream, fine particulate matter contains a toxic mixture of soot, black carbon, sulphates, nitrates and heavy metals, varying from place to place depending on the sources.²⁶ Together, ambient and household air pollution contributes to 7 million premature deaths annually, including the deaths of approximately 600,000 children.²⁷

3. Legal Framework for Right to Clean Air

The primary object of law in a society is to regulate man's unwholesome activities by prohibiting certain conducts and actions and setting up institutions with the mandate to manage and regulate activities that cause air pollution. At present, there is no separate law on right to clean air in Nigeria. However, there are laws and regulations for the control of air pollution. In view of closeness of air pollution with clean air, this section addresses the available laws and regulations for air pollution as a prelude to making recommendation for the enactment of separate legislation on Right to Clean Air in Nigeria. The sources of law for the regulation of air pollution are found in common laws, the Nigerian Statutes, State Laws, judicial decisions, international treaties and conventions and major subsidiary legislations in the form of regulations. Air quality management and control in Nigeria has taken roots right from the passage of the repealed Federal Environmental Protection Act Decree of 1999 (FEPA). While the Act was in operation, it established the Federal Ministry of Environment with the mandate to tackle issues of industrial and urban pollution. The Ministry also adopted variety of measures and initiatives for clean energy, which was one of the measures to ensure that the renewable energy sector develops sustainably. The major extant laws and regulations for the control of air pollution in Nigeria are highlighted hereunder.

Constitution of the Federal Republic of Nigeria 1999

Right to a clean environment is recognised in most of the Constitutions and International Instruments. The reason is that right to a clean air is a fundamental right of every person and worth codification in the Constitution for easy identification and enforcement in case of breaches. Atsegbua *et al.*,²⁸ opined that environmental pollution is a breach of man's right to live in a clean and healthy environment that is suitable for his well-being and life sustainability. However, despite the stipulation in the 1999 Constitution compelling state to protect and improve

²²VI Otti, and FU Ogbuagu, 'Environmental Health Effects of Exposure to Air Pollution in Industrialized Areas' (2014). 6 (5) *Civil and Environmental Research*, 80-84.

²³O Ukemenam 'Causes and Consequences of Air Pollution in Nigeria' (2014) 2 (2) *South American journal of Public Health*, 54

²⁴GO Amokaye, *Environmental Law and Practice in Nigeria* (Lagos: University of Lagos Press, 2004) 384

²⁵SA Fagbemi, 'Reflections on the Causes, Effects and Legal Mechanisms for the Control of Environmental Pollution in Nigeria' (2010) 1 *University of Ibadan Journal of Public and International Law*, 147-179.

²⁶See also WHO, "Ambient (outdoor) air quality and health", fact sheet, May 2018. See also WHO, *Air Pollution and Child Health: Prescribing Clean Air*, advance copy, 2018.

²⁷WHO, "Burden of disease from the joint effects of household and ambient air pollution for 2016", May 2018.

²⁸L Atsegbua, V Akpotaire and F Dimowo, (n 18) 107

the environment and safeguard the water, air and land, forest and wildlife of Nigeria²⁹ and in spite of the adoption and ratification of the African Charter on Human and Peoples Right in 1981, which recognises peoples' right to a generally satisfactory environment favourable to their development,³⁰ the right to clean air is yet to be codified in the Nigerian Constitution or as separate legal instrument. For instance, Principle 1 of the Stockholm Declaration recognises the right to a healthy environment. Similarly, the Ugandan Constitutions in Article 39 of its Fundamental Rights includes the right to a Clean and Healthy Environment. Almost in the same manner, the South African Constitution provides for a right to an environment that is not detrimental to health and well-being. Hence, Nigeria is called upon to follow suit to protect Nigerians right to clean air.

National Environmental Standards and Regulation Enforcement (Establishment) Agency Act (NESREA)

NESREA is the major federal agency charged with the responsibility for the protection and development of the environment in Nigeria. The Act was enacted in 2007 to replace the FEPA. The Act establishes a Federal Agency and empowers the Minister in charge of the environment in Nigeria to make regulations for the purpose of giving full effect to the functions of the Agency. Although, NESREA is a Federal law, state can also legislate on matter affecting the environment since the environmental matter is not listed in the exclusive legislative list in Nigeria.³¹ By virtue of section 7 of NESREA, the Agency enforces compliance with laws, standards, policies and regulations on environmental matters. Importantly, NESREA is empowered by its Act to enforce compliance with international agreements, treaties, conventions and protocols on environmental matters including climate change, ozone depletion, oil and gas among others. In carrying out its functions, NESREA can partner with other environmental institutions both nationally and internationally. While section 7(c) empowers NESREA to enforce environmental standards in the oil and gas industry, the subsequent subsections (g), (h) and (k) exclude the oil and gas sector from the purview of NESREA thereby restricting the bounds of its power.³² The exclusion of the oil and gas sector from the powers of NESREA by section 7 (g), (h) and (k) is a major drawback on the Act. Thus, many authors have called for either outright striking out of the phrase oil and gas from section 7 (c) NESREA Act to bring it in conformity with the provisions of subsections (g) (h) and (k).³³ Abraham³⁴ called for the amendment of the section to include oil and gas sector. In a bid to curb air pollution, the Agency has made several regulations aimed at reducing air pollution in Nigeria.³⁵ These regulations include the following among others.

National Environmental (Ozone Layer Protection) Regulations 2009

The regulation was made in 2009 to prohibit the importation and manufacturing of any ozone depleting substance. By the regulation, no one is expected to offer for sale or even buy new or refurbished facilities that are

²⁹1999 Constitution s 20. Note that the provision is contained in the Fundamental Objectives and Directive Principle of State Policy, which is not justiciable in Nigeria. See the case of *Morebishe V Lagos State House of Assembly* (2000) 3 WRN 134

³⁰ See African Charter on Human and Peoples Right art. 24

³¹ BY Ibrahim, 'The Framework of Environmental Law in Nigeria: A Critical Analysis' (2006) 1 (2) *Ahmadu Bello University Journal of Private and Comparative Law*, 212-224.

³² EE Abraham, 'A Comparative Analysis of the Legal Framework for the Regulations of Gas Flaring in Nigeria and Norway' <<https://www.academic.edu>>A_Comparative_Analysis_of_the_Legal_Framework_for_the_Regulations_of_Gas_Flaring_in_Nigeria_and_Norway> (2018) accessed 9 October, 2019

³³ See for example, MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) *Law, Environment and Development Journal*, 116

³⁴ EE Abraham (n 32). See also KK Ezigbe, 'The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria' (2011) 2 (1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 54

³⁵ NESREAA s 2 (2)

intended to be used for the production of ozone depleting substances.³⁶ The regulation also prohibit the release into the atmosphere any ozone depleting substance from fire extinguishing equipment, except it is from an air purge device or a system for purging non-condensable gases from a centrifugal chiller. The regulation however empowers NESREA to enforce compliance with the provision of the regulation and to issue permits to import ODS subject to conditions in regulation 12. It is therefore an offence for anyone to poses ODS refrigerant or halons except he is a holder of a valid permit. Any person that violates any of the provisions of the regulations commit an offence and on conviction be liable to a fine not exceeding N200,000.00 and an additional N10,000.00 for every day the offence subsists. Where the offender is a corporate body, the fine shall not exceed N1,000,000.00 and an additional N50,000.00 for every day the offence subsists.³⁷

National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations 2011

This regulation came into force on April 28, 2011. The purpose of the regulations is to prevent and reduce the destruction of the ecosystem through fire outbreaks and burning of materials that can affect health and the ecosystem through emissions of dangerous air pollutants.³⁸ The regulations apply to both persons and corporate persons who engage in open burning for purposes that relates to hunting, clearing farm land, seized goods and exhibits by regulatory agencies, municipal wastes, dead animals and tyres etc.³⁹The regulation specifically forbid the burning of bush/forest or any combustive material except with a permit from the Agency.⁴⁰The regulation also creates offences for non-compliance with its provisions. The punishment for individual is N50,000.00 or a term of imprisonment not exceeding 3 months. For corporate entity, it shall on conviction be liable to a fine of not less than N1,000,000.00 and additional fine of N20,000.00 for every day the offence subsists.⁴¹

National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations 2011

The regulation was made in 2011. The objective of the regulation is to improve and restore the quality of air by setting standards for the protection of air from pollutants as well as ensure citizens right to access to clean air, improving the quality of automobiles that operate on the road and improve the health of Nigerians in the urban are especially that have high incidence of air pollution due to the number of automobiles that ply the road.⁴² Part 1 of the regulations applies to new motor vehicle registered after 28th April, 2011. A person shall not install or replace the engine of a motor vehicle with petrol engine that permits pollutants in excess of the standard set in schedule 1 of the regulation. Any new model motor vehicle shall comply with the emission standards of pollutants as shown in schedule 3 to the regulation. All motor whether idling or in motion shall not emit gaseous pollutants exceeding the emission standards set out in schedule 1 and 3 of the regulation. also by regulation 8 (2) of the regulation no petrol engine should emit visible black smoke from the exhaust pipe and for the reason emission test is to be carried out on motor vehicle in line with regulation 9 and certificate issue for this purpose. The agency is empowered to issue a prohibition order on a vehicle that fails an emission test or that has contravened acceptable conditions, Regulation 30 of the regulation provides that any person that violates any of the provisions of the regulations shall be liable to a fine not exceeding N50,000.00 or imprisonment for a term not exceeding one year or to both. An additional N1,000.00 fine impose for each day the offence subsists. In the case of corporate body, it shall on conviction pay a fine of not exceeding N500,000 and an additional N20,000.00 for each day the offence subsists.⁴³

³⁶ National Environmental (Ozone Layer Protection) Regulations 2009 r.1

³⁷ Regulation 22

³⁸ Regulation 1

³⁹ Regulation 2

⁴⁰ Regulation 3 (1) and (2)

⁴¹ Regulation 21

⁴² National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations 2011, r 1

⁴³ Regulations 30

National Environmental (Air Quality Control) Regulation 2014

The regulation was made pursuant to sections 20 (1) and 34 of NESREA Act. The purpose of this regulation is to provide for and ensure the protection and improvement of the nation's air quality with a view to ensure the right to breathe clean air, use and benefit from natural resources according to the principle of sustainable development and most importantly to create awareness for potential activities or project that may lead to significant rise in the level of pollution and where it is accidentally release to have the same cleaned up.⁴⁴ The regulation seeks to prohibit the installation of new equipment within residential area which are not given prior approval by the agency. Such equipment is listed in the schedule 1 to the regulation as any equipment, plant or facility used for the purpose of heating or generating power that is rated to consume – pulverised fuel, any solid fuel at 20Kg or more per hour, or any liquid or gaseous matter at 10kg or more per hour etc. a residential area by virtue of the regulation means a distance of at least 100 metres to the nearest dwelling house within a housing estate. Part 3 of the regulation deals with pollution from mobile sources. It requires that emissions from vehicle shall be in accordance with the National Environmental (Control of Vehicular Emissions from petrol and Diesel Engines) Regulations 2011. Part 4 of the regulations deal with control of indoor air pollution in offices, public places and homes. To deal with ambient air quality, all operators of industrial plants and facilities must submit to the agency any information the agency requires regarding its operations. A person whose business or activity releases emissions into ambient air must comply with the standards set in schedules 3 of the regulation. Such a person must comply with best practices as contained in schedule 13. Part 10 of the regulation creates offences for non-compliance with the regulations. Thus a person who violates any of the provisions of the regulation shall on conviction liable to a fine of not less than N100,000.00 or to imprisonment for a term of not less than 6 months or to both and an additional fine of not less than N10,000,00 for every day the offence subsists. Where the offence is committed by corporate entity, it shall on conviction be liable to a fine of not less than N1,000,000.00 and additional fine of N50,000.00 for every day the offence subsists.⁴⁵ It is sad to note that despite the existence of this regulation since 2014, the reality is that ambient air quality continues to be bad and is always beyond the recommended air quality standards set by the Ministry of Environment on consultation with NESREA Agency as follows:

Air Pollutants	Emission Limits
Particulates	250 (ug/m3)
SO ₂	0.1 (ppm)
Non-methane Hydrocarbon	160 (ug/m3)
CO	11-4 (ug/m3)or 10 (ppm)
NOX	0.04-0.06 (ppm)
Photochemical Oxidant	0.06 (ppm)

Nigerian Ambient Air Quality Standard

Associated Gas Re-Injection Act⁴⁶

The Act was enacted to regulate the incessant flaring of associated gas by multinational oil corporations.⁴⁷ The Act required oil and gas companies operating in Nigeria to mandatorily submit a preliminary gas re-injection programme and implementation plan in their various oil fields.⁴⁸ Under the Act, no oil or gas company was

⁴⁴ National Environmental (Air Quality Control) Regulation 2014 r. 1

⁴⁵ Regulations 40 (1) and (2)

⁴⁶ Cap A25 LFN 2004

⁴⁷ K Ekwere, 'Sustainable Development of Oil & Gas in the Niger Delta' (PhD Thesis, University of Hamburg, 2010)

90

⁴⁸ Associated Gas Re-Injection Act s.3

allowed to flare gas after 1 January 1984. However, a major drawback of the Act is the fact that it gives the Minister the power to issue certificate to oil companies who are unable to meet up with the target deadline of 1 January 1984, to continue flaring, subject to payment of minimal penalty. The failure of the Act was mainly due to the inability of the oil companies to submit their re-injection schemes. Hence, the Act was amended in 1985 basically to extend the deadline to 1990 and to also increase the penalty for flaring.⁴⁹ This date has also expired without any result till date.

4. Institutional Constraints to Right to Clean Air in Nigeria

Environmental pollution and indeed air pollution occasion by oil and gas exploration and other anthropogenic and natural causes are major challenge in Nigeria. The laws and regulations highlighted above are some of efforts made to tackle the problem. Unfortunately, few successes have been recorded due to institutional constraint, lack of political will as well as weak law. A review of literatures is therefore necessary to showcase the institutional constraints to the enforcement of environmental laws and regulations in Nigeria. Jones⁵⁰ appraises the constraints to effective implementation of environmental laws in Nigeria and identified lack of effective political will and poor moral obligations, poor prioritisation of environmental issues and lack of advanced development of effective environmental laws and policies to negotiations, excess bureaucracy in government, corruptions and poor environmental governance as some of the factors responsible for weak enforcement of environmental laws in Nigeria. Idehen,⁵¹ observed that there has been no initiation of environmental crimes against the oil companies by the institutions saddled with environmental protection. He therefore recommended properly enforcement and adequate penalties for breach environmental pollution control laws. Akpan,⁵² also advocated for criminal and civil sanctions as a way of curbing environmental pollution. Ladan,⁵³ traced the development of environmental law from colonial period to the passage of NESREA Act. He observed that at colonial period, environmental law was not a priority and as such treated as private law affairs in nuisance. Ladan highlighted the drawbacks of FEPA to lack of or weak enforcement, to weak and outdated mechanisms for checking verifications and enforcement.⁵⁴ Ekhaton,⁵⁵ noted that the Koko incident of 1988 changed the dynamic of environmental protection in Nigeria. He identified the National Policy on Environment and the FEPA Act as the immediate outcomes of the incident. He however, observed that the oil and gas section of the policy was not part of the 1989 original policy but found its way in the subsequent enactment. It is his position that the multinational firms in the oil and gas sector breaches the policy and that the policy has no force of law and sanctions are not meted out to those who breach it. He therefore concluded that the policy is more advisory than regulatory. While reviewing the activities of various institutional agencies in Nigeria, Ezigbe,⁵⁶ admitted that the oil and gas sector is a tertiary producer of environmental hazards both at production, storage, treatment, refining, transportation, distribution and sale stages. He identified NOSDRA, Maritime Administrative

⁴⁹ D Otiotio, 'Gas Flaring Regulation in the Oil and Gas Industry: A Comparative Analysis of Nigeria and Texas Regulations' (LLM Thesis, University of Tulsa, 2013) 27 and NII Nelson, 'National Energy Policy and Gas Flaring in Nigeria' (2015) *JE&ES* vol. 5 no. 14

⁵⁰ KR Jones, 'Multilateral Environmental Agreements in Africa: Efforts and problems in Implementation of International Environmental Agreements' (2003) *American Journal of Environmental Protection*, 4

⁵¹ SO Idehen, 'Examination of Legal Regimes and Institutional Frameworks for Oil Pollution Management in Nigeria: How Effective?' (2013) 1 (1) *BIU Law Series*, 114-140

⁵² AE Akpan, 'Civil Liabilities and Criminal Sanctions in International Environmental Law: A General Appraisal' (2006) 3 *Fountain Quarterly Law Journal*, 65-82

⁵³ MT Ladan, 'Appraisal of Recent Trends in Environmental Regulations to Industrial Pollution, Energy Sector and Air Quality Control in Nigeria: 2015-2016 (2016) <<http://ssrn.com/abstract=2984266>> accessed 8 October, 2019

⁵⁴ *Ibid* 4

⁵⁵ EO Ekhaton, 'Environmental Protection in the Oil and Gas Industry in Nigeria: The Role of Governmental Agencies, (2013) 5 *International Energy Law Review*, 196-203

⁵⁶ KK Ezigbe, (n 35)65

and Safety Agency, NNPC, Nigerian Port Authority (NPA) and Nigerian Security and Civil Defence Corps among the agencies involved in environmental protection in these sector. He also identified NOSDRA as the major agency that is saddle with the responsibility of conducting and implementing the NOSCP. He concluded that there are copious legislations and regulations on the environment but the problem is that of enforceability. He identified the defence embedded in the law and exclusion of oil and gas sector in principal laws as factors militating against the enforcement of pollution control law in Nigeria. He cited the exclusion from NESREA oil and gas sector despite the power of the agency to regulate the environment in Nigeria. He called for the harmonization of NOSDRA and NESREA in view of their overlapping functions and advocated statutory absolute liability offence in oil pollution laws as done in India. Recently, Mustapha and Ali,⁵⁷ also identified NOSDRA and NESREA and various states environmental protection agencies as institutions saddled with environmental protection. They enumerated the challenges of environmental regulations enforcement in Nigeria and concluded that lack of national database on environmental quality, lack of technical capacity among the staff as factors militating against environment laws in Nigeria. Premised on the above review, the issue of air pollution in Nigeria require radical approach in order to achieve right to clean air in Nigeria in view of its universality, which is discussed in the next section.

5. Right to Clean Air as Universal Right

Air pollution affects everyone, causing widespread violations of the right to breathe clean air. For instance, poor air quality has implications for a wide range of human rights, including the rights to life, health, water, food, housing and an adequate standard of living.⁵⁸ Due to the importance of right to clean air to life, health, dignity and wellbeing of human being, steps taken at international level among others include. The United Nations High Commissioner for Human Rights held its first Global Conference on Air Pollution and Health in 2018 and affirmed that “there can be no doubt that all human beings are entitled to breathe clean air”. Earlier in 2000, the Committee on Economic, Social and Cultural Rights called on States to formulate national policies with the objective of reducing and eliminating air pollution.⁵⁹ The High Commissioner for Human Rights⁶⁰ and the Human Rights Council⁶¹ have also stressed the importance of addressing air pollution. The impacts of air pollution on human rights have been acknowledged repeatedly as part of the universal periodic review process.⁶² The New Urban Agenda developed at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) and endorsed by the General Assembly⁶³ contains extensive references to the interrelated imperatives of respecting human rights and improving both ambient and household air quality.⁶⁴ Apart from the above efforts at curbing air pollution, other Conventions at international level on air pollution among others are.

Geneva Convention on Long-Range Transboundary Air Pollution 1979 (LRTAP)

The efforts to seek cooperation towards sustaining the earth and combating pollution started in 1972 vide the Stockholm Conference on the human environment. The Conference was an offshoot of the United Nations Economics for Europe (UNECE) and it was held in Geneva. The Conference midwived the birth of the

⁵⁷ NA Mustapha and N Alli, ‘Environmental Regulations in Nigeria: A Mini Review’ (2017) 1 (5) *International Journal of Environmental Sciences and Natural Resources*, 1

⁵⁸ Human Right Council

⁵⁹ General comment No. 14 (2000) on the right to the highest attainable standard of health. General comment No. 14 (2000) on the right to the highest attainable standard of health.

⁶⁰ A/HRC/19/34 and Corr.1

⁶¹ Resolution 35/24

⁶² See, for example, Kuwait (A/HRC/29/17, para. 157.257) and the former Yugoslavian Republic of Macedonia (A/HRC/26/10, para. 101.104).

⁶³ Resolution 71/256, annex

⁶⁴ Human Right Council (n)

Convention on the Long-Range Transboundary Air Pollution. The convention which entered into force in 1983 has 49 parties that include the United States. The focus of this convention is to curb the dangers to human health by reducing transboundary air pollution. Article 1 of the Convention defines long range transboundary air pollution as air pollution which origin is wholly situated within the domestic national jurisdiction of one country but whose effects are felt in the national jurisdiction of another country. The underlying objective of this convention is for international cooperation in line with the general principle of environmental law for the purpose of abating air pollution. The preamble to the convention therefore take note of the United Nations Conference on the human environment and emphasise Principle 21 the UN, which expresses the common conviction that States have, the sovereign right to exploit their own resources pursuant to their own environmental policies, but with the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or area beyond the limits of national jurisdiction. The convention amongst other enjoins state members to develop national policies, research, information and monitoring to combat and coordinate air pollution as national level. Contracting parties to the convention are to adopt the best policies that include air quality management systems and other control measures by adopting the best available technology that is economically feasible and low and waste technology.⁶⁵ Other protocol in furtherance of the Convention on Long-Range Transboundary Air Pollution are Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes⁶⁶ and Protocol to the 1979 Long-Range Transboundary Air on further Reduction of Sulphur Emissions, which was adopted in 1994 and entered into force in 1998 and called the second Sulphur Protocol. The overall objective of this protocol is to reduce Sulphur emissions below levels that will cause damage.⁶⁷ This convention is yet to be in force in Nigeria since it has not been ratified as stipulate in section 12 of the 1999 constitution.

Japan

In Japan, the Air Pollution Act⁶⁸ is the overriding legislation that regulates air pollution. The Act sets the maximum permissible limits for automobile exhaust as well as promotes the enforcement of measure against any hazardous air pollutants.⁶⁹ The Act established the Ministry of Environment in Japan with the office of Minister, who is empowered to prescribe the maximum permissible standards for automobiles emission. The Act also regulates emission from industries and factories and other work places such as soot, smoke, particulates and volatile organic compounds. For instance, whenever a person intends to set up a factory that generates particulates, he must submit a notification to the Prefectural Governor before operating the factory. Otherwise, the Governor has power to suspend the activities of the operation if the person fails to comply with Governor's directive.

United Kingdom.

The great smog event of 1953 in the United Kingdom, which resulted into the death of so many people led to the early passage of legislation for clean air in the UK. The Clean Air Act of 1956 was such early legislation. The provision of the Act requires the relocation of power stations outside cities. Increasing stack heights and switching to cleaner fuel. It also banned the emission of black smoke and this greatly decrease the smoke that was about to accumulate during fog inversion caps, making London's 'killer smog' a thing of the past. At present, most of the UK environmental laws that ensure clean air are from the European Union (EU) directives.⁷⁰ The standards on air quality are set by the EU by the directive on ambient Air Quality which provides maximum

⁶⁵Convention on Long-Range Transboundary Air Pollution art. 6

⁶⁶Called Sofia Protocol. The protocol was adopted in 1988 but entered into force 1999.

⁶⁷ See articles 392 and 392 of the Protocol

⁶⁸ Air Pollution Act No 97 1968. It was amended in 2015.

⁶⁹ Air Pollution Act No 97 1968 art. 1

⁷⁰ Air Quality Existing Legislation, EUROPEAN UNION <<http://ec.europa.eu/environment/air/quality/existing-leg.htm>> accessed 1 November, 2019

limit on outdoor air.⁷¹The England's Clean Air Act of 1995 prohibits industries from emitting pollutants into the air. Under the Act, it is an offence punishable with imprisonment for industries to emit black smoke from their premises.⁷² In order to reduce greenhouse gasses to levels that are below 1900 levels the Climate Change Act was enacted in 2008. The UK has also tightened measures on penalties and criminal charges on anybody that install 'defeat devices' to manipulate emission test. As noted earlier, the UK laws regulating air pollution are anchored on the UE directives and regulations. What is of concern is how will UK legislate their own laws on the wake of the Brexit exit. It is possible that UK law may not keep pace with fresh Directives concerning the environment which come into force after the UK has exited the EU.

United States of America

In the United States of America, the decades of strict control have witnessed the decline of major air pollutants. The Clean Air Act of 1970 (CAA), which is the current framework legislation in the United States sets out a comprehensive set of national standards for controlling air pollutants. The CAA directs the American Environmental Protection Agency to establish National Ambient Air Quality Standards (NAAQS) to limit major air pollutants to levels that will protect public health. The interesting thing about this is that the feat was achieved at the time when the country witnessed growing industrialization and higher fuel consumption. The laws and the regulations passed by the US government tightened control over allowable pollution levels. There has been substantial reduction in the major air pollutants which are also considered primary air pollutants. That is carbon monoxide, nitrogen oxide and Sulphur oxide. While the US was busy having improved air quality and having reductions in air pollutants, other cities like Beijing, Jarkata, Cairo and Nigeria were having worsening air quality. The factors that have been responsible to this worsening situation in Nigeria have been addressed in the preceding sections in order to take concrete steps toward the realisation of right to clean air in Nigeria.

6. Conclusion

This paper has significantly revealed the universality of right to clean air. The paper also revealed that there is no separate legislation in Nigeria for Clean Air as done in advanced climes, which creates offence for air pollution except few regulations for the control of environmental pollution including air pollution. The paper further revealed institutional constraints rendering ineffective available laws and regulations for the control of air pollution in Nigeria. The paper also observed that the enactment of Clean Air Act in developed nations has created right enforceable with legal sanction and most importantly serving as a catalyst for accelerated action to achieve clean air, empower those working to improve air quality and serve as guide of actions towards a healthy and sustainable future. Premised on the above findings, the paper hereby recommends the enactment of a separate Clean Air Act in Nigeria as oppose to relying on mere regulations that are honoured more in breach rather than observation. Stiffer penalty is also recommended, as done in the US, against air Polluters and their collaborators to reduce air pollution in Nigeria.

⁷¹ *ibid*

⁷² Clean Air Act art. 2