LEGAL PROFESSION AND CLIMATE CHANGE IN NIGERIA

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ABSTRACT

That Climate Change is real and that its effects are exceedingly deleterious on man are no longer news. Researchers have equally showed that most of the changes in the climate are the natural consequences of certain selfish exploitative activities of man and that for the effects of climate change to be mitigated, man should be ready to limit its selfish exploitation of the earth's resources. Yet to be adequately publicized and examined however are the doors of opportunities that are likely to he open to a legal practitioner as a result of climate change. This paper examines some of these opportunities, looks into what climate change is; causes of climate change; its effects, among others.

I. INTRODUCTION

The importance of climate change is underscored by the fact that problems associated with it are essentially global in both their causes and effects, and they respect no national boundaries. This being the case, they require a significant element of global cooperation to be properly tackled. The solution lies in guidelines provided under International law as well as national measures to be undertaken by countries.

One of the principal challenges of the twenty-first century is providing the energy essential for development while minimizing environmental hazards. Environmental concerns such as climate change are now influencing government policies, business priorities and consumer choices. For organizations with the right approach and advice, these changes can represent an opportunity most especially for legal practitioners. Expertise is however needed in the field of energy, environment and business law.

This paper seeks to examine the opportunities that are available for lawyers practicing in Nigeria and how they can turn the avenue of climate change to bolster their practice and profession.

Nigeria is the most populous nation in Africa and contributes to climate change through its oil exploration activities and impact from extractive and manufacturing industries. It has thus become necessary to examine the legal framework with the hope of addressing the effects of climate change and how it affects the legal profession. This paper seeks to examine also the legal challenges and opportunities that will become manifest with the reality of climate change in Nigeria. The issue of climate change litigation is related in some way to important constitutional issues, as it relates to right to life, right to property, rights of indigenous people because global warming can trigger poverty, famine, and mass migration, public and administrative law issues. This is indeed a novel

area in our jurisprudence and it is hoped that lawyers will make use of the potential gold mine inherent in this field.

In addition, climate change may have other implications for other areas of legal practice such as accountancy and taxation, corporate social responsibility (CSR) and corporate transactions[489] .

II. DEFINITION

According to the Nigerian Climate Reports 490, climate change is any long-term change in the statistics of weather over durations ranging from decades to millions of years. It can be manifest in changes to averages, extremes, or other statistical measures, and may occur in a specific region or the Earth as a whole. Climate change refers to a change in climate that is attributable directly or indirectly to human activities, that alters the atmospheric composition of the earth which leads to global warming. Climate change has the potential of affecting all natural and human systems and may be a threat to human development and survival socially, politically and economically.

Nigeria has a variety of ecosystems, from mangroves and rainforests on the Atlantic coast in the south, to the savannah in the north, bordering the Sahara and they are not immune from the damaging effects of climate change. While excessive flooding during the past decade has hurt farming in coastal communities, desertification is ravaging the Sahel. Rainfall in the Sahel has been declining steadily since the 1960's. The result has been the loss of farmlands and conflicts between farmers and herdsmen over ever-decreasing arable land. People in different communities, including fishermen, farmers and herdsmen, are now confronted with difficulties arising from climatic change. Peoples' livelihoods are being harmed, and people who are already poor are becoming even more impoverished. Climate refugees are being created, as the changes make some land unliveable and affect living conditions.

Climate change or global warming has become a new reality, with deleterious effects: seasonal cycles are disrupted, as are ecosystems; and agriculture, water needs and supply, and food production are all adversely affected. Global warming (climate change) also leads to sea-level rise with its attendant consequences, and includes fiercer weather, increased frequency and intensity of storms, floods, hurricanes, droughts, increased frequency of fires, poverty, malnutrition and series of health1 and socio-economic consequences. It has a cumulative effect on natural resources and the balance of nature[491].

III. CAUSES

There are a number of factors responsible for climate change. There are natural and man-made causes. Natural factors include continental drift, volcanoes, ocean currents, the earth's tilt, comets and meteorites. These include such processes as variations in solar radiation, deviation in the' earth's orbit, mountain building and continental drift and changes in green house gas concentrations. And the climate system can take centuries or longer to fully respond to new external forces[492]. Human causes have been influenced by the industrial revolution of the 19th century, which saw the large scale use of fossil fuels for industrial activities. Natural resources are being used extensively for construction, industries, transport, and consumption. Consumerism (our increasing want for material things) has increased by leaps and bounds, creating mountains of waste. Human factors have contributed to climate change and presently, the scientific consensus on climate change

is that human activity is very likely the cause for the rapid increase in global average temperature over the past several decades[493].

All these have contributed to a rise in greenhouse gases in the atmosphere. Fossil fuels such as oil, coal and natural gas supply most of the energy needed to run vehicles, and generate electricity for industries, households, etc. The energy sector is responsible for about ¾ of the carbon dioxide emissions, 1/5 of the methane emissions and a large quantity of nitrous oxide. It also produces nitrogen oxides (NOx) and carbon monoxide (CO) which are not greenhouse gases but do have an influence on the chemical cycles in the atmosphere that produce or destroy greenhouse gases.

IV. INTERNATIONAL OUTLOOK THE BEGINNING

The Stockholm conference on Human Environment in 1972 acted as a catalyst for the need for collective action on climate change. It established the principle that the use of the Earth's resources has to be regulated in line with the aim of maintaining development opportunities, primarily to enhance and preserve the human environment. The Rio conference was held some 20 years after the Stockholm Conference. It had 176 participating states. It set out the basis on which states and people were to cooperate and further develop "international law in the field of sustainable development". Its provisions are much more specific than the 1972 Conference[494].

INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE

The Intergovernmental Panel on Climate Change (IPCC) is a scientific intergovernmental body tasked with evaluating the risk of climate change caused by human activity. The Panel was established in 1988 by the World Meteorological Organization and the United Nations Environmental Programme[495]

UNITED NATIONS FRAMEWORK CONCENTRATION ON CLIMATE CHANGE (UNFCCC)

UNFCCC is an International Agreement on Climate Change, It was opened for signature at Rio de Janeiro in 1992 at the United Nations Conference on environment and development. The agreement recognizes that developed and developing countries have 'common but differentiated responsibilities and respective capabilities'. Its principal .objective is 'stabilization of green houses gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system.

UNFCCC established a Conference of Parties (COP), a law making body that meets annually and charged with devising ways to implement UNFCCC goals. At the COP meeting in Kyoto, Japan in 1997, the Kyoto Protocol was negotiated and came into force in 2005. It sets binding emissions limitations on developed countries that have signed it. The limitations must be met between 2008 and 2012. In summary, the Protocol aimed to reduce emissions to about 30% below what would have occurred under business as usual. The main types of GHGs covered are carbon-dioxide, methane, nitrous oxide, hydro-fluoro-carbons, per-fluoro-carbons and sulphur hexafluoride. The Protocol provides for flexibility by allowing each country to make its own’ decisions on how to reduce emissions. America ratified the UNFCCC in 1994.

COPENHAGEN CLIMATE CHANGE SUMMIT2009

Between December 7 and December 18, 2009, world leaders met in Copenhagen, Denmark, for the 15th Conference of the Parties (COP 15) to the United Nations Framework on Climate Change and the 5th Meeting of the Parties (COP/MOP 5) to the Kyoto Protocol. A framework for international climate change mitigation as a successor to the Kyoto Protocol after 2012 was to be agreed upon there.

The document recognized that climate change is one of the greatest challenges of the present and that actions should be taken to keep any temperature increases to below 2°C. Among other commitments, the Copenhagen Accord endorses the succession of the Kyoto protocol.[496]

There were debates about the role of behavioural change versus technological change, about the role of religions in mitigation and adaptation, and about the forms of governance most likely to deliver carbon reductions[497].

IV. CLIMATE CHANGE IN NIGERIA

The impact of climate change can be vast. In Nigeria, this means that some stable ecosystems such as the Sahel Savannah may become vulnerable because warming will reinforce existing patterns of water scarcity and increase the risk of drought in Nigeria and indeed most countries in West Africa. As well, the country's aquatic ecosystems, wetlands and other habitats will create overwhelming problems for an already impoverished populace. The result of a study conducted by a non-governmental organization, Nigerian Environmental Study/Action Team (NEST) [498] shows that some sectors have been affected already by climate change;

Human settlements and health;

Water resources, wetlands, and freshwater ecosystems;

Energy, industry, commerce, and financial services;

Agriculture, food security, land degradation, forestry, and biodiversity; and

Coastal zone and marine ecosystems.

The study determined that virtually all of the sectors listed above manifested some evidence of vulnerability to climate change. None were unaffected, nor will remain unaffected in future by changes to climatic conditions. Indications are that the climate system is more sensitive than originally thought.

V. EFFECT OF CLIMATE CHANGE IN NIGERIA

In Nigeria, inundation is the primary threat for at least 96% of the land at risk499. With a 1 -m rise in sea level, up to 600 Ian2 of land would be at risk. This area includes parts of Lagos and other smaller towns along the coast. For the Mud Coast, a 1 -m rise will place as much as 2,016 km^2 of land at risk. Even with no acceleration in sea-level rise, current rates of landless through edge erosion alone could cause losses of as much as 250 km^2 by the year 2100. This land loss is equivalent to an average shoreline recession of 3 km. Erosion threatens a higher percentage of the land on the Strand Coast

than in the delta (4.6-20.7% for the Strand Coast, versus 0.8-3.5% for the delta). Without consideration of oil wells in the Niger delta, the greatest value at risk is along the Barrier Coast-ranging from just over US$1.3 billion with a 0.2-m sea-level rise to almost US$ 14 billion with a 2-m rise. In the event of an "environmental refugee", the estimated number of people that would be displaced ranges from 740,000 for a 0.2-m rise to 3.7 million for a 1 -m rise and 10 million for a 2-m rise[500].

Energy efficiency offers perhaps the greatest potential to greatly reduce the amount of polluting energy needed to achieve current and future development targets. Hydropower generation is the energy source most likely to be affected by climate change. This is because of the potential for rainfall events, greater probability of flood and less precipitation which will lead to less hydroelectric capacity at powerhouses501. Alternative sources of energy apart from hydroelectricity would include photovoltaic (energy from the sun), biomass (agriculture and wood waste) and geothermal energy from the heat of the earth.

VI. EXISTING LEGISLATIONS IN NIGERIA

NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS ENFORCEMENT AGENCY

Nigeria witnessed the most drastic and systematic development 6f environmental laws in Nigeria between 1980 and 1990s, the most recent legislation is the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act[502]. It became operational in 2007 and established the National Environmental Standards and Regulations Agency.

For NESREA to enforce compliance with the provisions of such treaties to which Nigeria is a party, the relevant treaty would have to be domesticated before it could be said to have come into force[503]. Section 7 of the Act mandates the Agency to enforce compliance with the provisions of International agreements, protocols, conventions and treaties on the environment. The Act is also concerned with the enforcement of the guidelines and legislations on sustainable management of the ecosystem, biodiversity, conservation and the development of Nigeria's natural resources[503].

CLIMATE CHANGE BILL

The Climate Change Commission Bill before both Houses of the National Assembly will address salient issues connected with climate change and provide an institutional and legal framework for climate change governance in the country. It is to provide appropriate policies and institutional structures to combat ecological and environmental problems in Nigeria when-passed into law[505]. It is the legal document Nigeria needs to ensure commitment to International Agreement on Climate Change. The draft bill makes provision for the implementation of the rules, institutions and procedures governing the national and international regimes on climate change as outlined in the UNFCCC, Kyoto Protocol and Marrakesh Accords, which have all been ratified by Nigeria. They are however, yet to be domesticated and there is no legal mechanism by which a global agreement such as the UNFCCC can be given adequate teeth for compliance or a system to penalize those flouting such agreements[506].

It is hoped that the bill before both Houses of Legislature will be harmonized for the assent of Mr. President.

VII. OPPORTUNITIES FOR THE LEGAL PROFESSION IN CLIMATE CHANGE

Climate Change, Energy and Sustainability are rapidly developing areas of law. There has been significant activity at the national and international levels to design and implement specific legal tools to address climate change and renewable energy concerns. The coming ye.ars will see increased attention to a broad range of climate and renewable energy issues at all levels of government. Almost all business sectors and industries will be affected, including public entities, non-profit institutions, lenders, developers, investors, landowners, and companies in the engineering and construction, chemical, industrial and manufacturing, transportation, and waste management sectors.

It is time the legal profession turns its attention to the global dimensions of this serious challenge and motivate decision-makers to bring about a transformation of institutions and agreements to protect the lives of those who would be worst affected by the impact of climate change. There are a number of opportunities that exist for lawyers from the emergent regulatory and corporate responses to climate change. Most importantly, the emerging Climate Change Bill (the significant local legislation on Climate Change) in Nigeria and International Treaties will generate new business opportunities and additional regulatory risks. It is imperative for lawyers to be able to recognize and analyze them for developmental gains. There is also prospect for International lawyers and room for alliance between local and international lawyers. This is because firms in developed countries have developed an expertise in this field, for example firms like Hunchton and Williams, Davies Wright Tremaine LLP among a host of others in the United States.

SOME AREAS WHERE LAWYERS EXPERTISE ARE REQUIRED CARBON PROJECTS, FINANCE AND TRADING

The international frameworks that regulate the emission of GHGs, together with the emerging voluntary markets for carbon offsets, have created a suite of carbon instruments that include emission permits, offsets and allowances, which are referred to as carbon credits. This branch of law extends beyond environmental law, to property rights and ownership issues, taxation and financial services, project financing and other contracting issues. This new field requires lawyers to examine both public international law and other domestic laws to determine how carbon credits will be treated in existing regulatory frameworks: Carbon credit refers to any instrument that represents a tradable right in GHG emissions reductions[507]. The ability to generate and trade carbon credits is an innovation of the Kyoto Protocol. It provides that countries can trade in carbon projects. Advising clients on the potential impact of future Green House Gas (GHG) regulation, on their electric generation assets, and proffering recommendations regarding mitigation of the risks is one of the ways lawyers can come in.

The legal status of a particular carbon credit will generally hinge on the particular domestic law operating in Nigeria. Under some jurisdictions, it can be seen as personal property or public property. It is important that contracts for the purchase and sale of carbon credits clearly define the credit asset for sale in a manner that is consistent with the characteristics of a freely tradable property right. There are also other salient taxation and financial services regulation issues surrounding the generation and purchase of carbon credits, trading of carbon credits, offsets, and investments in new carbon markets. Rendering legal advice on voluntary offsetting, carbon neutrality, reputational issues and quasi-regulation is a promising line of legal practice. Many carbon

offset projects create viable, diversified investment opportunities, particularly for energy and electric generating companies.

Renewable energy is emerging as a significant component of energy companies' portfolios and lawyers with experience in this field are few, including structuring and financing power projects, and advising on renewable energy certificate (REC) trading and ownership. Lawyers will have to improve on their energy practice to complement the challenges of climate change practice.

REGULATORY COMPLIANCE

Governments at all levels increasingly are seeking to regulate the emission of greenhouse gases and enforce compliance with climate-related disclosure requirements under environmental laws. Carbon neutrality aspirations, methodologies for achieving it and drafting offset contracts are new areas that lawyers should delve into.

Conducting environmental due diligence and reviewing environmental management systems and incident response procedures are also areas yet to be explored in this part of the world. Law Firms should help clients prepare for and efficiently manage compliance with the emerging laws and regulations dealing with greenhouse gas emission reductions. Lawyers recognize the growing corporate trend to disclose climate risks, help clients design and implement environmental management systems that capture the information necessary to allow them to determine whether and how to disclose climate-related information and to respond to shareholder concerns about climate change.

In addition, new or expanded regulatory programs to promote low-carbon energy technologies, carbon capture and storage, and other climate-related technologies are to be introduced in the future. Lawyers with requisite knowledge can also advice state governmental agencies on the impact of GHG legislation on their contracting for power supply.

LITIGATION

Climate change litigation can be loosely described as litigation arising from a cause of action where climate change is the alleged causal factor in the context of a civil wrong, tort or delict such as negligence or nuisance, which has led to an alleged liability[508]. Climate change litigation may result from the law of nuisance, law of negligence, infringement of human rights, making of false statements as to good, climate change practices by companies during adverts. Liability for emissions charges in contracts, claims relating to breach of relevant Laws resulting in various forms of damages, defending prosecutions and responding to Environmental Agencies enforcement notices (pollution abatement and clean-up notices), give room for dispute resolutions.

Climate change impact in some countries is addressed through lobbying to influence policy and legislative measures while others make use of litigations as a tool for reform to influence climate change policy. It is seen more as a tool to increase pressure on governments to respond and implement suitable policies and legislations in addressing global warming. A lawyer seeking to advise on issues surrounding climate change litigation requires an understanding and awareness of the sources of potential claims, the various legal bases on which they may be made and the risk-management measures that may need to be implemented in order to mitigate costly claims. The potential for many claims worldwide arising out of damage to properties and communities as a

result of floods, severe weather conditions resulting from climate change is imminent. There is opportunity for legal firms to represent clients in disputes involving governmental authority to regulate greenhouse gas emissions and in tort suits seeking monetary and injunctive damages for past emissions of greenhouse gases.

In Australia, climate change litigation has focused upon planning disputes. While these cases have used public law mechanisms, they indicate that Australians may also think that the judiciary has a role to play in developing climate change law. Indeed, there have been suggestions that private law actions could be brought in Australia against local councils and company directors who fail to take steps to address climate change[509]. Whether this develops into claims against fossil fuel users for past damage remains to be seen. The American Court of Appeal in the case of *Connecticut v. America Electric Power Company*[510] held that the judiciary can be an appropriate forum for resolving issues surrounding the harm caused by global warming. As these cases demonstrate, the law relating to climate change litigation continues to be a developing area. While the US courts are leading the way in the area of common law nuisance claims, and Australian courts have entertained claims involving planning and the appropriate exercise of authority, it appears that courts in most common law nations may be available for nuisance claims of various types as this area, and the science surrounding it, develops.

POLICY MONITORING AND LOBBYING

Lawyers have an active role to play in monitoring international, regional, national, state, and local climate change policy developments and advocating on behalf of clients. Lawyers who have experience working with the United Nations Framework Convention on Climate Change and the Kyoto Protocol as well as programs to develop alternatives to those international agreements will excel. Lawyers with previous experience on climate change negotiations possess an edge over lawyers without the know-how. It is thus imperative that the body responsible for continuing legal education should conduct seminars and workshops, like this to equip its members. In addition to tracking international policy and regulatory developments, clients will need lawyers to advise them on Nigeria's domestic legal and regulatory response to climate change concerns and energy and security issues. Law firms should be actively involved in the development of emerging greenhouse gas regulatory regimes in Nigeria and the rest of Africa as a whole.

The application of climatic science to legal questions is called forensic climatology. Nigerian lawyers should enhance their skill in this field. This is just one specialty of the robust field in the study of climate change.

There are several other areas where lawyers can immensely benefit from, such as corporate governance and environmental policy, environmental audit among others.

VIII. THE JUDICIARY

There is a growing realization that courts have an important role to play in addressing climate change along side of legislatures and international bodies. Courts have emerged as a crucial battleground in efforts to regulate climate change in developed countries. In Nigeria the reverse is the case. It is however hoped that the passing into law of the Climate Change Commission Bill will hasten development in this area of the profession. Over the past several years, courts and tribunals

in and around the world have seen claims regarding greenhouse gas emissions and impacts[511]. These cases rely on diverse legal theories, but all focus on government regulation of climate change or the actions of major corporate emitters.

IX. CONCLUSION

There is scarcity of regulation dealing specifically with the legal nature of carbon credits in Nigeria. However, it is possible to analyze existing legal frameworks including property laws, financial service regulation, tax laws, insurance law and foreign investment laws in Nigeria and elsewhere to determine how the creation and transaction of carbon credits will be treated in a specific transaction and the full impact of climate change on the lives of Nigerians. The key legal themes arising out of climate change litigation introduces hurdles for claimants and defendants to properly understand the dispute process to ensure successful claims or defence. This also places emphasis on the need for companies to adopt mitigating measures to avoid litigation that will arise from climate change.

It is of great importance that lawyers and the legal profession as a whole undertake an active role in tackling climate change considering the hazards it poses to our social and economic well-being.

Notes

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491 'Building Nigeria's Response to Climate Change' <http://www.nigeriaclimatechange.org/ccinfo.php>

492 <http://en.wikipedia.org/wiki/Climate_change>

493 Watchman, op. cit.

494 Watchman, ibid, p. 27.

495 Both are organs of the United Nation

496 See <www.carbonnews.com>

497 Mike Hulme is a professor of environmental science at the University of East Anglia. This article is co-published with the University of Colorado's Centre for Science and Technology Policy Research, Prometheus.

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501 Muhammed Tawfiq Ladah, Law, Cases And Policies On Energy, Mineral Resources, Climate Change, Environment, Water, Maritime And Human Rights In Nigeria. (Ahmadu Bella University Press Ltd, Zaria 2009) p. 53

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503 S. 12 of the 1999 Constitution.

504 S. 7(e)

505 Mrs. Grace Folashade Bent, Senate Committee Chairman on Environment and ecology at the round table organised on 16 March, 2010.

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507 Beatty A. and Williams E., 'Trends in Carbon Trading: Practical Lessons', a paper presented at Asia-Pacifica Center for Environmental Law Conference On Crucial Issues in Climate Change and the Kyoto Mechanisms in Asia, Singapore, 2 007, p. 1.

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